MARK WINSTON KENNEDY, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3967, Respondent

LRB File No. 096-15; September 24, 2015
Vice-Chairperson, Steven D. Schiefner (sitting alone pursuant to Section 6-95(3) of *The Saskatchewan Employment Act*)

For the Applicant: Self-Represented
For Respondent Union: Mr. Robert Logue

Reconsideration – Applicant asks Board to reconsider its decision to dismiss his application alleging trade union breached the principles of natural justice in administer discipline – Board reviews criteria upon which it will review and reconsider a prior decision – Substance of Applicant's application is that the Board misinterpreted the evidence – Board not satisfied that the Applicant's material raises an accepted ground for reconsideration – Application dismissed.

***Saskatchewan Employment Act*, s. 6-104(2)(f)**

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson**: In these proceedings, Mr. Mark Winston Kennedy (the "Applicant") asks the Saskatchewan Labour Relations Board (the "Board") to reconsider the decision and Order of this Board in *Mark Winston Kennedy v. Canadian Union of Public Employees, Local 3967*, [2015] CanLII 43765, LRB File No. 316-13 (the "original decision").

[2] The relevant facts as found by the Board are set forth in the original decision and need not be recounted again. Simply put, the Applicant alleged that the Canadian Union of Public Employees, Local 3967 (the "Union") had breached the principles of natural justice in administering discipline to which he became subject. In the original decision, released on June 18, 2015, the Board dismissed the Applicant's application for the reasons which were summarized in para. 44 of the original decision:

> *Firstly, the Applicant's application was barred by the terms of his voluntary settlement agreement and no evidentiary basis was tendered to justify setting aside that agreement. Secondly, by the time of the hearing, the issues in dispute between the parties were moot. The terms of the settlement agreement had expired and no live issues remained to be adjudicated by the Board. Furthermore, no compelling reason was tendered for the Board to exercise its discretion to decide matters that had become academic other than the Applicant's desire for vindication, which in my opinion, was not sufficient. In the alterative, having heard all of the evidence, it was my opinion that the Union had complied with the terms of its Constitution and all applicable rules of natural justice in prosecuting the Applicant for his conduct during the 2011 Election. The discipline to which the Applicant became subject was well within a reasonable range of possible outcomes in light of nature of the Applicant's conduct during the 2011 Election. Of particular significance, the discipline to which the Applicant became subject did not affect his eligibility for employment with his employer. Under the circumstances, the procedures employed by the Union well exceeded the protections required by the rules of natural justice.*

[3] In his application for reconsideration, the Applicant asserts that a number of errors and/or omissions occurred in the original decision. They are as follows:

> *Reasons for reconsideration*
>
> *In some respects I believe most of the criteria above apply. However I believe points 3, 4 and 6 are of particular interest.*
>
> *Unintended consequences. The Union (CUPE 3967) convinced the chair Mr. [Schiefner] that I (Mark Kennedy) had already served out the terms of the Memorandum of Agreement. However I believe he erred in his assertion that nothing would be gained by my request to abrogate the two trials and the MOA I was involved in. During the hearing the chair heard evidence that the Local membership had been harmed by a "chilling effect on the broader membership" the imposition of this penalty and the actions taken by the Local executive to ensure that outcome ie. Threats of further trials, misinformation, manipulation of witnesses, charges and facts, as well as the jury selection procedures and consideration of the trial panel members as "Agents" for Scott McDonald et al. In short the rampant corruption employed to achieve the result they sought. Most important by far is the fear instilled in the membership from becoming involved in the union.*
>
> *As a result of this the "chill" remains effectively deterring members from becoming involved in the union and challenging the leadership when they believe it is in error.*
>
> *2. I believe the Chair erred in the decision that the board had no jurisdiction as The MOA was signed during the second trial in which I was the accuser. In fact proceedings had been suspended in order to determine whether a settlement could be reached. As well my decision to accept the M.O.A. was based solely on two factors. First to be allowed to seek medical attention free from the threat of the verdict from McDonald vs Kennedy, May 15, 2015 and Second, to be free from the threat of losing my membership card, my job and being sued by the Local. Threats I had already received but were reiterated by counsel for Mr.*

> *McDonald, Mr. Tim Anderson. Even though I was not on trial this threat was again unchallenged by the Chair of the trial Panel Rose Rein for Kennedy vs McDonald on May 23rd, 2015.*
>
> *3. I believe insufficient weight was given in consideration of the effect of the unauthorized paid representation for the union while denying it to myself as it was a clear example of the bad faith and motivation for Scott McDonald's intentions in filing unnecessary and fraudulent charges against me.*
>
> *4. I believe insufficient weight was given to the fact that I was denied disclosure as an accused while forced to provide complete disclosure to Mr. McDonald.*
>
> *5. I believe inadequate consideration was given to the fact that I was not allowed to question Aina Kagis and only allowed to question Pauline Yung about matters outside of an affidavit submitted to and accepted by the trial panel before the trial began.*
>
> *6. The Chair in his Decision granted far too much weight to the union's assertions that I was simply a "disgruntled loser" who sought to "make life difficult for the union" and that I was acting out of my "humiliation". As well he suggested that my protest was about "wasteful spending" by the union. The only reference to wasteful spending was made in reference to the union's campaign of misdirection and manipulation of the jury. It was not in any case about wasteful spending. It was about rampant corruption in demonizing and eliminating a member they had come to consider a threat.*
>
> *7. The chair failed to consider the "chilling effect" charges of harassment brought against my witnesses from a 2nd VP based on evidence that could only have come from the Executive Table. This, at a crucial time within days of the hearing.*
>
> *8. One of the most important oversights on the part of the chair is that at no time did I ever say I was guilty of the charges against me. In fact as stated I believe I was not. Our Local under Scott McDonalds leadership I believe realized their mistake, their violation of the very rules they put in place. There was a remedy, a protocol in place. They chose to ignore it because they could not be objective with respect to me.*
>
> *9. Finally by hiring and paying Hugh Wagner without authorization from the membership, a member of the Labour Board who had to recuse himself from hearing this case, they brought the Board into a potential conflict of interest. The activities can obviously not be ignored by the board.*

[4] Upon the request of the Union, the Board agreed to only hear the first stage of the Applicant's reconsideration application; namely the determination as to whether or not the Applicant has demonstrated a solid ground for reconsideration. In doing so, the parties were granted leave to file additional material or argument prior to consideration by the Board. The Board heard the first stage of the Applicant's application *in camera* on September 18, 2015.

[5] Having considered the Applicant's application, together with his supplemental material, I find that the Applicant has not demonstrated grounds that satisfy any of the criteria

recognized by this Board to justify reconsideration of a prior decision. The following are my reasons for coming to this conclusion.

Relevant Statutory Authority:

[6] The Board's authority to reconsider its prior decision finds its home in the following provisions of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1:

> *6-104(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*
>
> . . .
>
> *(f) rescinding or amending an order or decision of the board made pursuant to clause (b), (c), (d) or (e) or subsection (3), or amending a certification order or collective bargaining order in the circumstances set out in clause (g) or (h), notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of the order or decision is pending in any court;:*

Analysis and Decision:

[7] This Board first articulated its approach to reconsideration applications in the decision of *Remai Investment Corporation (o/a Imperial 400 Motel) v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union & Sharon Ruff*, [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93. In this decision, Chairperson Bilson concluded that the Board had sufficient authority to review and, if necessary, to re-open and/or amend a decision it has already made. While this analysis took place under the provision of *The Trade Union Act*, R.S.S. 1978, c.T-17 (now repealed), I am satisfied that the same conclusions apply with respect to this Board's current authority pursuant to *The Saskatchewan Employment Act*.

[8] In the years since Chairperson Bilson's seminal decision, the Board's approach to reconsideration applications has become well established. First, an applicant must make out a case for reconsideration on one of the permissible grounds set out by the Board. If the applicant makes out a case for reconsideration, then the Board undertakes a review of that decision on those grounds.

[9] The Board's authority and willingness to reconsider its prior decisions is often confused with a right of appeal. However, as Chairperson Bilson noted in the *Remai Investment Corporation* decision and as this Board has confirmed in numerous decisions since then, the power to re-open a previous decision must be used sparingly and in a way that will not

undermine the coherence and stability of the relationships the Board seeks to foster. In other words, while the Board has authority to reconsider its own decisions, doing so is neither a right of appeal nor an opportunity for an unsuccessful applicant to re-argue and/or re-litigate a failed application before the Board. See: *Grain Services Union (ILWU – Canada) v. Saskatchewan Wheat Pool, Heartland Livestock Services (324007 Alberta Ltd.) and GVIC Communications Inc.*, [2003] Sask. L.R.B.R. 454, LRB File No. 003-02; and *Saskatchewan Government and General Employees' Union v. Government of Saskatchewan*, [2011] CanLII 100993 (SK LRB), LRB File No. 005-11. This Board's willingness to reconsider its prior decision is founded in the periodic need for the Board to address important policy issues arising out of our jurisprudence and/or to avoid injustices. However, the Board must balance the need for policy refinement and error correction with the overarching need for finality and certainty in our decision-making process. As a result, both our approach to reconsideration applications and the criteria upon which we rely establish a high threshold for any applicant seeking to persuade this Board to review a previous decision.

[10] As indicated, the Board has adopted specific critieria or grounds which an applicant must satisfy in a reconsideration application. Much of the original analysis into the circumstances when a labour board might re-open a previous decision was undertaken in other jurisdictions and this Board has relied upon that analysis. In *Remai Investment Corporation, supra,* this Board adopted the following criteria developed by the British Columbia Industrial Relations Council to be used in determining whether or not to reconsider a prior decision:

> 1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence.*
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> 2. *If a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons.*
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> 3. *If the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application.*
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> 4. *If the original decision turned on a conclusion of law of general policy under the code which law or policy was not properly interpreted by the original panel.*
>
> 5. *If the original decision is tainted by a breach of natural justice.*

> *6. If the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

[11] The above criteria has been relied upon by this Board in numerous decisions, including *United Brotherhood of Carpenters and Joiners of America, Local 1985, et al. v. Graham Construction and Engineering Ltd., et al*., [2002] Sask. L.R.B.R. 295, LRB File No. 227-00; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Gaming Corporation – Casino Moose Jaw, et. al.,* [2002] Sask. L.R.B.R. 641, LRB File No. 187-02; *Bethany Pioneer Village Inc. v. Service Employees International Union, Local* 333, [2008] Sask. L.R.B.R. 231, LRB File No. 036-06; United *Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp., et. al.*, [2009] CanLII 60425 (SK LRB), LRB File No. 194-04; and *Canadian Union of Public Employees, Local 4777 v. Bradley Teichreb,* [2013] CanLII 75209 (SK LRB), LRB File No. 161-13. While all of these decisions were made pursuant to *The Trade Union Act* (now repealed), in my opinion, these same criteria continue to be the appropriate lenses through which to examine applications for reconsideration under *The Saskatchewan Employment Act*.

[12] As noted, this Board utilizes a two (2) step approach when considering an application for reconsideration. The first step is to determine whether or not an applicant has demonstrated that one or more of the above grounds for reconsideration apply to an impugned decision or Order of the Board. Only if the applicant can demonstrate a strong ground basis for reconsideration arising out of the enumerated criteria will the Board re-examine a prior decision. In the second stage of the process, the Board undertakes a review of the original decision but confines its analysis to the particular ground or grounds identified. If the Board elects to re-open a prior decision, it has the option of clarifying, amending, or rescinding that decision and any concomitant Orders.

[13] In the present application, the Board is only considering the first step in the reconsideration process.

[14] In his application for reconsideration, the Applicant argues that the Board made a number of errors and omissions. In the supplemental material filed with the Board on July 15, 2015, the Applicant goes into considerable detail in recounting his view of the evidence and the areas where he asserts the Board gave insufficient weight to certain evidence and too much

weight to other evidence. The thrust of the Applicant's application for reconsideration is that the Board misunderstood or misinterpreted the evidence from the original hearing and, in so doing, came to the wrong conclusion. In the Applicant's own words "*I believe a substantially different narrative of events actually occurred from the one promulgated by the … Chair*".

[15] The Applicant asserts reliance upon the third, fourth, and sixth ground in asking this Board to reconsider the original decision. However, the Applicant's material does not attempt to correlate his alleged errors and/or omissions to the specific grounds for reconsideration recognized by this Board. Thus, the Applicant's application for reconsideration is a quagmire of ill-defined substance. Nonetheless, I will address each of the identified grounds in turn.

The original decision operates in an unanticipated way or has had an unintended effect**:**

[16] The third permissible ground for an application for reconsideration permits the Board to re-examine a prior decision if that decision, when applied to the real life circumstances of the parties, is not operating as originally anticipated by the Board or is causing unintended consequences for the parties. See: *International Brotherhood of Electrical Workers, Local 213 v. Western Cash Register (1955) Ltd.*, [1978] 2 Can. L.R.B.R. 532. See also: *Grain Services Union v. Saskatchewan Wheat Pool, et. al.*, [2003] Sask. L.R.B.R. 454, LRB File No. 003-02.

[17] In his application, the Applicant argues that this Board's decision of June 18, 2015 is having an unintended consequence; namely, it did not remove the "*chilling effect*" that he alleges was occurring in the workplace. By way of background, in his evidence before the Board in his original hearing, the Applicant asserted that the discipline to which he had become subject at the hands of the Union had sent a "*chilling*" effect on the general membership of the Union. The Applicant asserted that other members were reluctant to challenge the Union or its executive because of the discipline that the Applicant had received for his actions. The Applicant now asserts that the dismissal of his original application is operating in an unanticipated way or is having an unintended effect because (he asserts) the chilling effect remains. In other words, members continue to be deterred from becoming involved in the Union or challenging the leadership when they believe it is in error.

[18] In the original decision, the Board specifically dealt with the issue of the Applicant's allegation that the dismissal of his original application could have a chilling effect and came to the following conclusions:

> *[52] With respect to the second part of the Borowski test, the only basis suggested by the Applicant to justify intervention by the Board arose out of the Applicant's belief that the discipline to which he had become subject had sent a "chilling" effect through the membership of the Union and that other members were reluctant to challenge the Union and its executive because he had been disciplined. Firstly, there was no credible evidence of a chilling effect on the membership; nor could such effect by reasonable implied by the evidence. Secondly, a legitimate component of sentencing is deterrent so that others will not be inclined to commit the same offence. In my opinion, the penalty to which the Applicant became subject was entirely appropriate for the misconduct in which he engaged. As such, it was entirely reasonable for the Union to hope that other candidates in future election would learn from the Applicant's mistakes and comply with its election rules. This is not a "chilling" effect; it is learning through the mistakes of others.*

[19] With all due respect, the third ground does not assist the Applicant in his application for reconsideration because the so-called "*chilling"* effect is not an unintended consequence. This specific issue was argued by the Applicant during the original hearing and was within the consideration of the Board when it rendered the original decision. The Applicant is not now alleging anything new or unanticipated in his application for reconsideration.

The original decision turned on a conclusion of law of general policy which was not properly interpreted by the Board:

[20] The fourth permissible ground for an application for reconsideration permits the Board to re-examine a prior decision in circumstances where the original decision turned on a conclusion of law or general policy which was not properly interpreted by the Board in the first instance. See: *International Brotherhood of Electrical Workers, Local 213 v. Western Cash Register (1955) Ltd.*, [1978] 2 Can. L.R.B.R. 532. While it understandable why some applicants may see this ground as a general right of appeal on questions of law, a closer examination reveals that the scope of this particular ground is quite narrow. As Chairperson Bilson noted in the *Remai Investment Corporation* decision, this ground arose out of larger jurisdictions, where it is common for multiple panels to hear similar kinds of applications at the same time. These jurisdictions desire to maintain a uniform approach by their panels and, if divergence occurs on important issues of law and policy, this ground permits these boards to revisit its prior decisions if necessary to maintain uniformity. As a result, this ground is generally restricted to circumstances where there is an inconsistency between the decisions rendered by different panels on an important issue of law or policy. However, this ground has also been relied upon by the Board to re-examine a prior decision in circumstances where it is alleged the Board misapplied or misconstrued its enabling statute. See: *United Food and Commercial Workers, Local 1400 v.*

Wal-Mart Canada Corp., [2009] CanLII 13640 (SK LRB), 173 C.L.R.B.R. (2d) 171, LRB File No. 069-04; and *Saskatchewan Government and General Employees' Union v. Government of Saskatchewan, supra*.

[21] The essence of the Applicant's allegations under this ground is that the Board misinterpreted or misunderstood the evidence. Simply put, the Applicant argues that the Board gave insufficient weight to his evidence and too much weight to the Union's evidence. In virtually every decision of this Board, one or more parties will be dissatisfied with all or some of the result. However, in my opinion, a plea that the Board "*improperly interpreted the evidence*" is not the proper subject of the fourth ground for reconsideration. See: *Robinson Little and Co. Ltd. v. Retail Clerks Union, Local 1518*, [1975] 2 Can. L.R.B.R. 81.

[22] Findings of fact and evidentiary issues are dealt with under the first, second and, in some case, the third ground. In his application for reconsideration, the Applicant has not pled either of the first two (2) grounds; nor are they applicable. The first ground only applies where there was no hearing in the first instance. To qualify under the second ground, the Applicant must demonstrate that any new evidence he wishes to rely upon is "*crucial*" and was not introduced at the original hearing for reasons "*beyond his control*". As has already been noted, in my opinion, the third ground does not assist the Applicant in his application.

[23] Simply put, save in very limited circumstances (not plead by the Applicant nor arising out of his application), findings of fact and evidentiary issues are not the proper subject of an application for reconsideration. While I'm sure many unsuccessful applicants would appreciate the opportunity to present their evidence over again, adopt different strategies and amend their mistakes, the overarching need for finality and certainty in labour relations proceedings prevents this Board from permitting appeals *de novo*.

[24] In his application, the Applicant has not identified where the Board misapplied or misconstrued *The Saskatchewan Employment Act* or where there was any inconsistency in the original decision and any other decision of this Board on an important issue of law or policy. For the foregoing reasons, I find that the fourth ground does not assist the Applicant.

The original decision was precedential and amounted to a significant policy adjudication which the Board may wish to refine, expand upon or otherwise change:

[25] The final permissible ground for an application for reconsideration deals with circumstances where the original decision was precedential and amounted to a significant policy adjudication. Simply put, this ground permits the Board to take a "*second look*" when it makes major new policy adjudications or when it departures from past jurisprudence on a significant issue. However, in both cases, the matters in issue must have significant impact on the labour relations community in general. See: *Construction Labour Relations Association v. Canadian Association of Industrial Mechanical and Allied Workers, Local 17*, [1979] 3 Can. L.R.B.R. 153. See also: *Saskatchewan Government Employees' Union v. Mary Banga*, [1994] 1st Quarter Sask. Labour Rep. 291, LRB File No. 014-94.

[26] While the Applicant cites the sixth ground, he does not identify a significant policy adjudication having taken place in the original decision or any department from the past jurisprudence of this Board on any significant policy issue. Rather, the essence of the Applicant's allegations is that the Board misinterpreted or misunderstood the evidence. As such, the sixth ground does not assist the Applicant in his application for reconsideration.

Conclusion:

[27] While the Applicant disputes many of the findings and factual determinations in the original decisions, in my opinion, he advances no compelling reason for this Board to revisit its prior decision. As this Board has previously noted, an application for reconsideration is not an appeal; nor is it an opportunity to re-argue or re-litigate an unsuccessful application. In the absence of a sound basis being demonstrated for this Board to revisit the original decision, I decline to do so.

[28] The Applicant's application for reconsideration is dismissed.

DATED at Regina, Saskatchewan, this **24th** day of **September, 2015.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson