THE RETAIL, WHOLESALE and DEPARTMENT STORE UNION, LOCAL 568, Applicant v. SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS INC., HEALTH SHARE SERVICES SASKATCHEWAN, REGINA QU'APPELLE HEALTH AUTHORITY and K-BRO LINEN SYSTEMS INC., Respondents

LRB File No. 350-13; April 19, 2016
Chairperson, Kenneth G. Love, Q.C.; Members: John McCormick and Joan White

For the Applicant Union:	Mr. Larry Kowalchuk
For the Respondent Saskatchewan Association of Health Organizations et al:	Ms. Leah Schatz
For the Respondent K-Bro Linen Systems Inc.:	Mr. Larry Seiferling, Q.C.

Application to adduce fresh evidence or re-open case – Union applies to Board to allow introduction of fresh evidence or to re-open its case following a remittance by the Court of Queen's Bench on one issue that the Court found the Board had not provided sufficient reasons. Union argued that the fresh evidence was essential to ensure that proper justice was afforded employees impacted by decision.

Application to adduce fresh evidence or re-open case – Board considers arguments made and determines that the Court's remittance to the Board did not contemplate hearing of additional evidence, but rather the formulation of supplemental reasons for the Board's determinations.

Process and Procedure – Application to adduce fresh evidence – Board notes that where fresh evidence that is material arises after a decision, an application for reconsideration on the basis of such evidence would be available.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** The Retail, Wholesale and Department Store Union, (the "Union") was certified as the bargaining agent for a unit of employees working in the laundry of the Regina Qu'Appelle Health Authority ("RQHA"). After a lengthy process, with the assistance of the Respondent, Health Share Services Saskatchewan ("3S Health"), the laundry services, which were previously provided by the employees represented by the Union, were contracted out to the Respondent, K-Bro Linen Systems Inc. ("K-Bro").

[2] The Union applied to this Board for an order of successorship with respect to the former laundry business or, alternatively, for an order that some, or all, of the Respondents were common and/or related employers. The Board dealt with this application and rendered its decision[1] dismissing the application by the Union.

[3] The Union made an application for Judicial Review of the Board's decision to the Court of Queen's Bench for Saskatchewan. By its decision dated September 23, 2015, Mr. Justice Barrington-Foote remitted, in part, the decision for further consideration by the Board. At paragraphs [61] – [66], the Court says:

> *[61] In my view, and with one exception, the applicant's submissions as to the proper interpretation of s. 37.3, and as to whether the law was properly applied, constitute a request that I determine the correct interpretation of s. 37.3. To do so would be beyond my proper function is defined by the standard of review.*
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> *[62] I have the same view of the applicant's submission that the Board "misapplied the facts". In that portion of its brief, the applicant effectively asks that I reconsider the Board's conclusion in light of the lengthy list of facts which the applicant says demonstrate that all of the respondents are common and/or related employers. That list refers among other things, to matters relating to the organization and governance of the respondent, and their respective functions generally and in relation to laundry services, as well as various provisions of the MSA. The applicant says, among other things, that these factors demonstrate common management, interrelationship of operations, common control of labour relations, and that the four respondents are indistinguishable to the public.*

[1] [2014] CanLII 63989 (SKLRB)

[63] The difficulty with this submission, of course, is that this is very much at the heart of the Board's functions. It was for the Board to determine - subject to the reasonableness standard - the outcome of the fact-driven inquiry in relation to this issue, including the relevance and weight to be accorded to the lengthy list of matters identified by the applicant in its brief. I am, having reviewed the evidence, the Decision and the parties' submissions, satisfied that the Board considered the facts in the context of the law. I am also satisfied that the Board's conclusion as to the common employer issue is a possible, acceptable outcome which is defensible in respect of the facts and law. The question as to whether I would have made the same decision does not arise.

[64] There is, however, and with the greatest respect, one area where the Decision falls short. The Board was aware that the applicant took the position that K-Bro was a common and/or related employer with some or all of the other respondents, and of the basis for that position. That is confirmed by para. 56 of the Decision:

> *[56] At one point in its argument, the Union included K-Bro within the group that it suggested were jointly engaged in the operation of the laundry to be opened in mid 2015. It argued that all four (4) parties should be determined to be engaged in this common activity. It pointed as well to the Agreement requirements that K-Bro was required to comply with such as the power to control Key personnel, all 3sHealth security, safety, administrative and operational rules and policies that are applicable to the provision of the laundry services, implementation of a safety program, and retention of data, files, business records upon completion of the Agreement.*

[65] There is, however, nothing in the Decision that would enable me to conclude that the Board decided this issue, and if so, on what basis. With respect, I do not agree with the respondents that the Board's conclusion that none of the respondents other than K-Bro are common employers means that none of them could be common employers with K-Bro. Accordingly, and even if it is assumed that the Board considered this issue, the Decision does not meet the reasonableness standard, which calls for justification, transparency and intelligibility.

[66] The question of whether K-Bro is a common and/or related employer with RQHR, at least, is the core issue arising in the context of the s.37.3 application. This application is, after all, related to the contracting out of laundry services through the MSA. Although I strongly suspect, based on the Board's reasoning as a whole, that it either found or would have found that that K-Bro is not a common employer, that decision is for the Board. In the language of Komolafe, it is not my role to supply the reasons that the Board might have given, as to do so would turn the jurisprudence on its head. I cannot connect the dots, as there are no dots on the page.

[4] As a result of that analysis, the Court then referred the matter back to the Board for supplemental rationale at paragraphs [72] and [73] of the Decision:

> *[72] In the result, I find that the Board's conclusions in relation to the issues raised by the applicants – with one exception – were justified, transparent and intelligible, and were possible, acceptable outcomes which are defensible in respect of the facts and law.*
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> *[73] The one exception is the Board's failure to explain how it dealt with the issue of whether K-Bro was a common and/or related employer with any of the other respondents. Given that this was a central issue on the application, I am referring this matter back to the Board to enable it to make that decision. If the Board decides that K-Bro is a common and/or related employer with one or more of the other respondents, it will then be for the Board to decide what further relief should be granted to the applicant.*

[5] The parties attempted to resolve the issue without further reference to the Board, but were unsuccessful. The matter was then referred by the parties to the Board for determination in accordance with Mr. Justice Barrington-Foote's direction. The Union sought leave to adduce additional or fresh evidence or to re-open its case. This application was resisted by the Respondents. The matter came before the Board on April 11, 2016 by way of a conference call hearing. For the reasons that follow, the Union's application is denied.

Facts:

[6] There are no facts in dispute with respect to this matter. The only issue is the nature of the direction given by Mr. Justice Barrington-Foote in requiring the Board to provide further Reasons with respect to the issue of whether any of the parties are common and/or related employers.

Union's arguments:

[7] The Union filed two cases in support of its argument that it should be permitted to introduce fresh evidence or to re-open its case. Those were *Catholic Children's Aid Society of Toronto v. M.R.*[2] and *Virgil Day* and *Roneel Kumar and Shwastika Kumar*[3]. Those cases, the

[2] [2014] ONCJ 762 (CanLII)
[3] [2011] BCHRT 215 (CanLII)

Union argued, outlined the considerations which the Board should entertain in respect of its application.

[8] The Union argued that since the date of the hearing by the Board, the Privacy Commissioner had recommended that RQHA release the Master Services Agreement (the "MSA") which governed the relationship between 3S Health and K-Bro in respect to the laundry service provided by K-Bro. The Union argued that an unredacted MSA should be available to the Board for consideration and that it should be entitled to cross-examine with respect to that agreement.

[9] The Union says that it also requested certain information from the parties on April 8, 2016 which it wished to have placed in evidence. No copy of that correspondence was provided to the Board so we do not know (apart from what was referenced at the hearing of this matter) what particular information the Union sought from the Respondents.

[10] Apart from the MSA, another item that was referenced during the hearing was copies of pay stubs from employees currently working at the K-Bro facility in Regina. The Respondents resisted production of these documents.

[11] Finally, the Union sought comfort from the parties that the transcript of the Board's previous hearing could be used in the further hearing by the Board.

[12] In rebuttal, the Union denied that its application would constitute an abuse of process or that there would be significant prejudice to the other parties if additional evidence was introduced.

Respondent's arguments:

Respondents (other than K-Bro)

[13] These Respondents filed a written brief which we have reviewed and found helpful. These Respondents argued:

1. The Board's jurisdiction is derived from the direction of the Court, which did not direct the Board to consider fresh evidence;
2. The Union's case is closed and there is no reason to open it; and

3. Introducing fresh evidence would amount to an abuse of process.

[14] In support of its position, these Respondents cited *Bernard v. Canada (Attorney General)*[4].

K-Bro

[15] K-Bro also filed a written Brief which we have reviewed and found helpful. K-Bro argued that the determination of whether or not the Union "should be entitled to call new evidence is answerable based on the specific wording used in the Judicial Review Decision".

[16] In its arguments, K-Bro relied upon an excerpt from *Brown and Beatty*[5] and the Supreme Court of Canada decision in *Alberta (Information and Privacy Commissioner v. Alberta Teachers'* Association)[6]. K-Bro argued that there was no direction from the Court to hear new evidence and that a reasonable reading of the Court's direction supports that the Court referred the matter to the Board solely for the purpose of providing supplemental reasons and not for a re-hearing of the whole matter.

Analysis:

[17] With respect, we concur with the position of the Respondents regarding this matter. Our jurisdiction to reconsider this matter derives from the Order of Mr. Justice Barrington-Foote arising from his Reasons given on September 23, 2015. In his decision, it is clear, we believe, that he found that the Board had not sufficiently considered the issues surrounding the common and/or related employer. While he suspected that the Board concluded that there was no such relationship, he was unable, as he put it, "to connect the dots" to see that the conclusion reached was justified, transparent, or intelligent as required by *Dunsmuir v. New Brunswick*[7].

[18] Different and stronger words would, we submit, have been used by Mr. Justice Barrington-Foote if he wanted the Board to, as suggested by the Union, conduct a "do over" of

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[4] [2012] FCA 92, affirmed by [2014] SCC 13
[5] *Canadian Labour Arbitration 4th Ed.* Toronto: Thomson Reuters Canada at 1:5700
[6] [2011] 3 SCR 654, SCC 61 (CanLII)
[7] [2008] SCC 9 (CanLII), 1 S.C.R. 190

the hearing and determine the matter *de novo.* In his decision, he made it clear that the only issue that he found fault with was the reasoning applied by the Board to reach its conclusion.

[19] It is arguable that the Board would not be required to consult further with the parties with respect to its reasoning, as was suggested by K-bro during its arguments. However, the Board wished to provide the parties with an opportunity to bring forth arguments in support of their positions so that the Board's reasoning would be fully informed.

[20] The case authorities supplied by the Union are of little assistance to the Board. The *Catholic Children's Aid Society of Toronto* case dealt with two considerations, delay and prejudice. On analysis, it determined, based on the particular facts in that case that a re-opening of the case was not required "to prevent a miscarriage of justice". In this case, we have not been persuaded by the Union that a miscarriage of justice would be prevented if we did not permit it to reopen its case. In such circumstances, we believe that the proper course of action might have been to request that the Board reconsider its decision.

[21] Similarly, in the BC Human Rights Tribunal decision in *Virgil Day*, the Tribunal considered delay and "the interests of justice and fairness" required a re-opening of the case. In that case as well, the Tribunal dismissed the application based upon its analysis. That analysis as well was similar to the analysis used by this Board in determining whether or not to reconsider an earlier decision.

[22] As noted above, this application represents an indirect attack on the Board's Reasons which could have been the subject of a more direct approach. The Board has made provision for reconsideration of its decisions under specific criteria, one of which is: "*if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons."* Additionally, if the Union did not understand the Court's decision, if could have made application, to Mr. Justice Barrington-Foote, to clarify that aspect of the decision.

[23] We can find nothing in the directions given by Justice Barrington-Foote, or the arguments made, to support the application by the Union. It is therefore, dismissed. An appropriate order will accompany these reasons.

[24] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **19th** day of **April, 2016.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson