IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Moorley v. British Columbia (Labour Relations Board)*, 2023 BCSC 112

Date: 20230125
Docket: S214965
Registry: Vancouver

2023 BCSC 112 (CanLII)

Between:

Timothy Moorley

Petitioner

And

**The British Columbia Labour Relations Board;
Teamsters Local Union No. 31; and
Coast 2000 Terminals Ltd.**

Respondents

Before: The Honourable Justice Walkem

Reasons for Judgment

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Place and Date of Hearing:	Vancouver B.C. October 17–18, 2022
Place and Date of Judgment:	Vancouver, B.C. January 25, 2023

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Introduction

[1] This application is brought by Timothy Moorley, the Petitioner, pursuant to the *Labour Relations Code*, R.S.B.C. 1996, c. 244 [*LRC*]; the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*]; and, the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*].

[2] The Teamsters Local Union No. 31 (the "Union") is a trade union that is the exclusive bargaining agent for the employees of the Employer, certified pursuant to the *LRC*. The employer, Coast 2000 Terminals Ltd. (the "Employer"), is a logistics export provider which provides services to clients, including at a container storage and repair facility. The Union and Employer are part of the same collective agreement.

[3] The Labour Relations Board ("LRB") is an independent provincial administrative body constituted under the *LRC* to regulate and adjudicate regarding employment and labour relations matters in unionized workplaces within the province.

[4] Mr. Moorley challenged the decision of the Union not to pursue arbitration concerning his termination from his employment with the Employer, and argued that the Union acted in an arbitrary and bad faith manner.

[5] On February 14, 2020, the LRB found that the Union had not represented Mr. Moorley in an arbitrary or bad faith manner: *B.W. v. Coast 2000 Terminals Ltd.*, 2020 BCLRB 20 (the "Original Decision").

[6] Mr. Moorley then sought a reconsideration of the decision. Around March 24, 2020, the LRB released a decision in which it denied leave for reconsideration of the Original Decision: *B.W. v. Coast 2000 Terminals Ltd.,* 2020 BCLRB 39 (the "Reconsideration Decision").

[7] Mr. Moorley now brings this judicial review of the Reconsideration Decision.

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Mr. Moorley's Termination

[8] Mr. Moorley was employed by the Employer for eleven years. He was a shop steward, and had served as a warehouseman, checker, hostler, and container lift operator. He occasionally acted as a foreman.

[9] Mr. Moorley was terminated for theft of time on August 31, 2018. Mr. Moorley had been subject to a series of progressive disciplinary actions prior to that, including for two health and safety violations, attendance, insubordination, and two anti-bullying and harassment policy violations.

[10] Mr. Moorley claimed that, during the period where the theft of time was alleged to have occurred, he was helping another employee in his capacity as a shop steward. He introduced a letter from a fellow employee stating he had asked Mr. Moorley for assistance. The letter was not dated, but the LRB in the Original Decision, assumed it referred to the date of the alleged time theft.

[11] The Union grieved Mr. Moorley's termination. In its representation of Mr. Moorley, the Union sought particulars of the termination, provided the particulars to Mr. Moorley, and gave Mr. Moorley a chance to respond. The Union sought to negotiate a reinstatement of Mr. Moorley subject to conditions. Mr. Moorley did not agree with some of the proposed conditions that required him to seek substance abuse counselling and mental health treatment.

[12] The Employer did not agree to reinstate Mr. Moorley. The Employer gave these reasons for rejecting the Union's proposal:

> … After consideration of the union's request, the company remains firm on its position in the termination of [B.W.].
>
> The disciplinary record of [B.W.] is substantial and is one which demonstrates blatant disobedience and insubordination on numerous occasions. Further, we feel that the following tenets further support our position:
>
> 1. The refusal of coworkers to work with [B.W.].
> 2. Lack of trust between [B.W.] and the Employer.
> 3. Inability or refusal of [B.W.] to accept responsibility for any wrong doing.

> 4. The demeanour and attitude of [B.W.] during and after the termination.
> 5. Animosity on the part of [B.W.] towards management and coworkers.
> 6. The risk of a "poisoned" atmosphere in the work place.
>
> [Original Decision, at para. 24.]

[13] A grievance panel of the Union determined that they would not pursue the termination through arbitration. This decision was made on October 12, 2018, and communicated to Mr. Moorley on October 17, 2018.

The Original Decision

[14] In April 2019, Mr. Moorley filed a complaint with the LRB, alleging that the Union had breached its duty of fair representation under s. 12 of the *LRC*.

[15] Mr. Moorley argued the decision to not pursue the grievance through an oral hearing was arbitrary and in bad faith, evidenced by the fact that the Union did not provide adequate reasons for its decision. Mr. Moorley further alleged that the Union had failed to properly investigate and consider evidence that the termination was not justified because he was acting as shop steward when the theft of time was alleged to have occurred. Mr. Moorley's argument outlined a history of disagreements with the Union about what Mr. Moorley considered were targeted efforts by the Employer to discipline him.

[16] Mr. Moorley's complaint included allegations of Employer misconduct. The Original Decision addresses this at paras. 60–61, concluding that it did not consider the Employer's conduct as its s. 12 review was subject to review of the Union's representation of him.

[17] Considerations the Union gave for not advancing the grievance to arbitration were listed at para. 30 of the Original Decision:

> [30] The Grievance Panel considered whether to advance the Grievance to arbitration based on the following factors:
>
> a) [B.W.]'s 11 years of seniority,
>
> b) [B.W.]'s extensive disciplinary file with the Employer,

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c) [B.W.]'s hostile attitude towards both the Employer and the Union,

d) The Employer's inconsistency in applying the rules concerning break times and shift end times,

e) The policy review meetings conducted by the Employer in pre-shift meetings where the Employer specifically prohibited employees from returning to their own vehicles prior to the end of shift,

f) [B.W.]'s justification for stopping work early to attend to shop steward business,

g) Chris Harman's September 4, 2018 letter [the Harman Statement] confirming that he had asked [B.W.] to look into a policy issue relating to overtime for him,

h) The notes of shop steward Lance Matricardi of the August 30, 2018 interview between [B.W.] and the employer [the Matricardi Notes],

i) The Employer's letter of September 13, 2018 [the Termination Particulars], which included (among other things):

   i. a summary of [B.W.]'s disciplinary record,

   ii. a summary of the videographic evidence that the Employer had of [B.W.] stopping work early,

   iii. evidence that [B.W.] was publicly denigrating the Employer on social media; and

   iv. the Employer's assertion that it considered the employment relationship to have been irreparably damaged.

j) [B.W.]'s written statement of September 18, 2018 [the Complainant Response], expressing his justification for stopping work early.

[18] The Original Decision outlines a set of progressive disciplinary actions involving Mr. Moorley. The steps taken by the Union, and information considered in their decision not to advance the grievance to arbitration, are set out at paras. 9–37 of the Original Decision. Mr. Moorley’s s. 12 application was denied.

<u>The Reconsideration Decision</u>

[19] Mr. Moorley then brought an application for reconsideration to the LRB on the grounds that the original panel erred in finding that an oral hearing was not necessary to resolve issues material to the complaint. A secondary ground involved delay in rendering the Original Decision, but that issue was not before me.

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[20] In declining leave for reconsideration, the LRB considered a number of grounds for the Union's decision. These included that the Union had decided not to advance Mr. Moorley's grievance on the basis that he would make a poor witness. The LRB noted that the original panel did not themselves make a finding about Mr. Moorley's reliability or credibility as a witness, but instead found, at para. 18, that the Union had a basis for making that decision on the facts, and therefore the decision was not made in an arbitrary manner. The consideration of Mr. Moorley's potential to be a poor witness was only one of the factors the Union considered (as set out at para. 17 above).

[21] The LRB noted that the test for reconsideration is not whether the Union made the correct decision, but rather whether it acted in "an arbitrary, discriminatory or bad faith manner in its representation of a bargaining unit employee": Reconsideration Decision at para. 19.

[22] The LRB determined no oral hearing was required, as "the question was not whether the Union was correct in its assessment of the merits of the grievance, including its assessment that he would be a poor witness," but rather "whether the Union's decision was based on relevant considerations and was not arbitrary." The LRB found the original panel could make this determination based on written submissions.

[23] The LRB concluded, at para. 20: "We are satisfied the original panel was able to fairly determine, based on the written submissions, that the Union's representation of the Complainant was not contrary to Section 12 of the Code."

Positions of the Parties

Mr. Moorley

[24] Mr. Moorley argues that the LRB breached the principles of procedural fairness and natural justice by exercising its discretion to render its decisions in the absence of an oral hearing. In the Reconsideration Decision, the panel found that the original panel did not breach procedural fairness by declining to hold an oral

hearing, finding that the policy of the LRB is typically to only hold an oral hearing if the facts in dispute are material to the outcome. Mr. Moorley argues that the facts in dispute, including regarding whether he was engaged in Union duties when the time theft is alleged to have occurred, are material to the outcome as the conduct of the Employer is relevant to provide context to the Union's representation in his complaint.

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[25] Mr. Moorley alleges that in the Reconsideration Decision the LRB:

a) erred in accepting that Mr. Moorley would have made a poor witness based on interactions between Mr. Moorley and the Union in the immediate aftermath of the termination;

b) erred in failing to properly consider and/or apply the legal test for determining whether the Union acted in contravention of its duty of fair representation under s. 12; and in particular that the LRB,

c) erred by refusing to consider the Employer's conduct and how that conduct impacted the cause allegation against him; and,

d) erred in finding the Union had considered Mr. Moorley's role as shop steward despite "no substantive" mention of that role in the report to the Union Grievance Panel.

[26] Mr. Moorley submits the Reconsideration Decision should be set aside and the remedies sought in his original complaint that s. 12 had been breached, or, in the alternative, the Reconsideration Decision be set aside and remitted back to the LRB with a direction for an oral hearing so that differences in the parties' respective positions could be resolved.

LRB

[27] The LRB notes that only the Reconsideration Decision is under review, and that as per the *JRPA,* only the application that was before the reconsideration panel can be submitted for review—no new evidence is permitted. This would include

evidence of the Employer's Conduct. The LRB argues that the scope of judicial review of a reconsideration decision of the LRB under s. 12 is limited to a patent unreasonableness standard of review, and that a decision is not patently unreasonable unless it is "clearly irrational" or "so flawed that no amount of curial deference can justify letting it stand", citing *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109 (aff'd 2009 BCCA 229) at para. 65.

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[28] Both the Union and the Employer adopt the legal arguments of the LRB as their position.

Issues

[29] The issue to be addressed here is: Did the LRB err in its consideration of whether the Union acted in contravention of its duty of fair representation per s. 12 of the *LRC*? In particular,

a) Did the LRB fail to consider any aspect of the Employer's conduct as necessary context in assessing the Union's representation of Mr. Moorley, and how that conduct should have impacted consideration of the for-cause allegation made against Mr. Moorley?

b) Did the LRB breach principles of procedural fairness and natural justice by not holding an oral hearing?

Law

[30] Section 12(1)(a) of the *LRC* sets out the statutory duty of trade unions to fairly represent their members, and not act in a way that is arbitrary, discriminatory or in bad faith in that representation:

> 12(1) A trade union or council of trade unions must not act in a manner that is arbitrary, discriminatory or in bad faith
>
> (a) in representing any of the employees in an appropriate bargaining unit, or
>
> (b) in the referral of persons to employment

> whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.

[31] The *LRC* sets out the process for a consideration of a complaint alleging a union's arbitrary, discriminatory or bad faith representation of an employee made in s. 13:

> 13(1) If a written complaint is made to the board that a trade union, council of trade unions or employers' organization has contravened section 12, the following procedure must be followed:
>
> (a) a panel of the board must determine whether or not it considers that the complaint discloses a case that the contravention has apparently occurred;
>
> (b) if the panel considers that the complaint discloses sufficient evidence that the contravention has apparently occurred, it must
>
> (i) serve a notice of the complaint on the trade union, council of trade unions or employers' organization against which the complaint is made and invite a reply to the complaint from the trade union, council of trade unions or employers' organization, and
>
> (ii) dismiss the complaint or refer it to the board for a hearing.
>
> (2) If the board is satisfied that the trade union, council of trade unions or employers' organization contravened section 12, the board may make an order or direction referred to in section 14 (4) (a), (b) or (d).

[32] The LRB issued a decision in *Judd v. C.U.P.E., Local 2000,* [2003] B.C.L.R.B.D. No. 63; 2003 CanLII 62912 (BC LRB), which set out their interpretation of s. 12, including the limited scope of review allowed of union decisions.

[33] The sole question for review under s. 12, is whether the decision of the union is arbitrary, discriminatory, or made in bad faith: *Judd* at para. 41. In *Judd*, the LRB emphasized that a review under s. 12 is not an appeal of the merits of the union's decision, but rather a review of the way in which the decision was made:

> [42] When a union decides not to proceed with a grievance because of relevant workplace considerations – for instance, its interpretation of the collective agreement, the effect on other employees, or because in its assessment the grievance does not have sufficient merit – *it is doing its job of representing the employees*. The particular employee whose grievance was dropped may feel the union is not "representing" him or her. But deciding not to proceed with a grievance based on these kinds of factors is an essential part of the union's job of representing the employees as a whole. When a

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> union acts based on considerations that are relevant to the workplace, or to its job of representing employees, it is free to decide what is the best course of action and such a decision will not amount to a violation of Section 12.
>
> [43] The situation is different if a union's decision is not based on these kinds of relevant considerations. A union would breach Section 12 if it misused its exclusive bargaining agency by making decisions based on improper factors, or by making random or unreasoned decisions. For instance, if a union official dropped a termination grievance because the employee opposed his election, or decided the same issue by flipping a coin, the union would no longer be making decisions about the employee's representation based on considerations that are relevant to that task.
>
> [44] Section 12 is not an avenue of "appeal" of the merits of union decisions. Rather it is designed to ensure the union exercises its judgment and acts based on proper considerations. If it does, it has done what it is required to do by Section 12 and the Board has no jurisdiction to overturn or change the union's decision.

[34] The LRB decision in *Judd* outlines three factors that play into a consideration under s. 12. First, the union's conduct is considered "as a whole". The question is whether the union "represented the employee in a manner that is arbitrary, discriminatory, or in bad faith—not whether it has committed isolated acts that may fit one of those descriptions." (para. 45). Second, the focus of the examination is on the union's representation and conduct solely, not an employer's conduct. Third, determination of whether a union's representation has been arbitrary, discriminatory, or in bad faith will be determined on the individual circumstances of each case (para. 47).

[35] The LRB was created to perform a specialized adjudicative function in the area of labour relations and trade unions. Decisions of the LRB are entitled to deference unless it is shown that they were patently unreasonable. There are significant privative clauses within the *LRC* confirming the LRB's exclusive jurisdiction to decide matters within their jurisdiction.

[36] Section 136 of the *LRC* provides as follows:

> **Jurisdiction of board**
>
> 136 (1) Except as provided in this Code, the board has and must exercise exclusive jurisdiction to hear and determine an application or complaint under this Code and to make an order permitted to be made.

> (2) Without limiting subsection (1), the board has and must exercise exclusive jurisdiction in respect of
>
> > (a) a matter in respect of which the board has jurisdiction under this Code, and
> >
> > (b) an application for the regulation, restraint or prohibition of a person or group of persons from
> >
> > > (i) ceasing or refusing to perform work or to remain in a relationship of employment,
> > >
> > > (ii) picketing, striking or locking out, or
> > >
> > > (iii) communicating information or opinion in a labour dispute by speech, writing or other means.

[37] The *LRC* further contemplates a limited role for courts for matters within the jurisdiction of the LRB, and directly addresses this matter in ss. 137 and 138. Section 139(r) expressly lists the subject matter of this dispute (the question of whether a union is fulfilling a duty of fair representation) as falling within the exclusive jurisdiction of the LRB:

> **Jurisdiction of board to decide certain questions**
>
> <u>139 The board has exclusive jurisdiction to decide a question arising under this Code and on application by any person or on its own motion may decide for all purposes of this Code any question, including, without limitation, any question as to whether</u>
>
> …
>
> > <u>(r) a trade union, council of trade unions or employers' organization is fulfilling a duty of fair representation,</u>
> >
> > …
>
> [Emphasis added.]

[38] Section 115.1(m) of the *LRC* provides that ss. 58(1) and 58(2) of the *ATA* apply to decisions of the LRB. The gist of those provisions is to outline the protected jurisdiction of the LRB to determine matters assigned to it, as an “expert tribunal” in the *LRC*:

> 58(1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)

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> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
>
> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> …

[39] Section 58(3) is not specifically listed in the *LRC*, but provides definition of the standard to be used on examination under s. 58(3) as follows:

> 58(3) … a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

Analysis

[40] On a judicial review such as that before me in this case, the court does not engage in a reconsideration of the merits of the decision being appealed, seeking to substitute its own decision in place of the statutory decision maker. Instead, it is a review of how the decision maker exercised their authority.

[41] As stated by Justice Shergill in *O'Shea/Oceanmount Community Association v. Gibsons (Town)*, 2020 BCSC 698:

> [21] The function of judicial review is "to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes": *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28. It is not to substitute the court's decision for that of the decision maker: *Harrison v. British Columbia (Information and Privacy Commissioner)*, 2009 BCCA 203 at para. 68, leave to appeal ref'd [2009] S.C.C.A. No. 455.
>
> [22] The court's role in a judicial review proceeding is to ensure that the decision maker acted within the authority bestowed upon it by the legislature: *Dunsmuir* at para. 28; and *Lang v. British Columbia (Superintendent of Motor Vehicles),* 2005 BCCA 244 at paras. 22 and 24. A judge conducting a judicial review is not sitting in appeal. Hence, the reviewing judge is not to hear new

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> evidence or argument, or to decide or re-decide the case: *Actton Transport Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 272 at paras. 19-23.

[42] The standard of patent unreasonableness was discussed in *Speckling v. British Columbia (Worker's Compensation Board),* 2005 BCCA 80, at para. 37, as one a decision which is "openly, clearly, evidently unreasonable".

[43] On a review of the Reconsideration Decision, the LRB reviewed the information the Union had considered, and actions it took, and decided that the Union's representation of Mr. Moorley was not arbitrary, discriminatory or in bad faith. The LRB's task under s. 12 is to review the representation of the Union, not the actions of the Employer.

[44] On the issue of whether or not the LRB failed to consider any aspects of the Employer's conduct as necessary to considering the Union's conduct. Judicial review is not a forum to advance new arguments or evidence that could have been put before the tribunal but were not. Where an argument could have been pursued on reconsideration, absent exceptional circumstances, a petitioner is generally barred from raising that argument on judicial review: *British Columbia Nurses' Union v. Health Sciences Association of British Columbia*, 2017 BCSC 343 at paras. 48–49.

[45] Mr. Moorley did not plead any exceptional circumstances as to why arguments about the Employer's conduct were not put before the LRB on reconsideration. Accordingly, these new arguments can not be raised before this Court.

[46] In any event, I note that the Union's representation of Mr. Moorley was before the LRB. The record of evidence available to, and considered by, the LRB in making the Reconsideration Decision included evidence about the originating allegation of theft of time (the Employer's assertion of time theft, video footage, and the letter introduced by Mr. Moorley from a fellow employee saying he had requested the help of Mr. Moorley in his capacity as shop steward).

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[47] The LRB considered the Union's representation of Mr. Moorley—which included the extensive set of considerations set out at para. 17 above (para. 30 of the Original Decision) and determined it was not arbitrary, discriminatory or in bad faith.

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[48] I now turn to the question of whether the LRB breached the principles of procedural fairness and natural justice by not holding an oral hearing. It is within the exclusive jurisdiction of the LRB to determine an application under s. 12 of the *LRC*, as is the determination of whether a decision meets the test for reconsideration. It is within the jurisdiction of the LRB to determine their own practice and procedure. Principles of fairness do not require the LRB to hold an oral hearing, even if the facts are in dispute: *International Longshore and Warehouse Union–Canada, Local 400 v. Ledcor Resources & Transportation Limited Partnership*, 2021 BCSC 2077 at para. 59; *Jones v. Industrial Wood and Allied Workers of Canada, (Local 1-3567)*, 2011 BCSC 929 at paras. 74–75; *Casavant v. British Columbia (Labour Relations Board)*, 2019 BCSC 1422 at para. 97, rev'd on other grounds 2020 BCCA 159.

[49] The LRB, in the Reconsideration Decision, looked at evidence considered before the panel in the Original Decision and they decided that, taken in its totality, the decision of the of the panel was not arbitrary, nor was Mr. Moorley denied a fair hearing. They considered the statutory framework of Section 12, and basis for finding there was a contravention.

[50] The LRB was acting within their exclusive jurisdiction in determining their process and procedures. Accordingly, I do not find their decision not to hold an oral hearing breached the principles of natural justice or procedural fairness.

Conclusion

[51] For the reasons set out above, I cannot find that the Reconsideration Decision was made in a way that was patently unreasonable.

[52] Mr. Moorley's petition is dismissed.

[53] The LRB does not seek costs. As such no order for costs is made.

"A. Walkem J."

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