COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pereira v. British Columbia (Labour Relations Board),* 2023 BCCA 165

Date: 20230419
Dockets: CA48412; CA48687

Between:

Corinne Pereira

Appellant
(Petitioner)

And

**British Columbia Labour Relations Board, UNITE HERE Local 40,
Horizon North Camp & Catering Inc.,
Managing Partner of Horizon North Camp & Catering Partnership**

Respondents
(Respondents)

Before: The Honourable Mr. Justice Harris
The Honourable Justice Griffin
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated July 15, 2022 (*Pereira v. British Columbia Labour Relations Board*, 2022 BCSC 1205, Terrace Dockets 21167; 21180)

The Appellant, appearing in person: C. Pereira

Counsel for the Respondent, British Columbia Labour Relations Board: J.M. O'Rourke

Counsel for the Respondent, Horizon North Camp & Catering Inc., Managing Partner of Horizon North Camp & Catering Partnership: D.A. Crawford, K.C.

Place and Date of Hearing: Vancouver, British Columbia
March 28, 2023

Place and Date of Judgment: Vancouver, British Columbia
April 19, 2023

2023 BCCA 165 (CanLII)

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Justice Griffin

2023 BCCA 165 (CanLII)

Summary:

The appellant challenges two orders from the British Columbia Supreme Court dismissing petitions for judicial review. In those petitions, the appellant sought to set aside two decisions by the British Columbia Labour Relations Board denying leave to reconsider complaints filed against the appellant's union. Held: the appeals are dismissed. The petition judge identified the correct standards of review and correctly applied those standards. The appellant has not established reversible error. She has not shown that the Labour Relations Board conducted itself in a procedurally unfair manner; was biased; or rendered patently unreasonable decisions.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

2023 BCCA 165 (CanLII)

Introduction

[1] The appellant, Corinne Pereira, asks this Court to set aside two orders dismissing petitions that she filed challenging reconsideration decisions of the British Columbia Labour Relations Board (the "Board").

[2] In May and June 2020, the appellant was disciplined three times in her role as a guest services agent at a lodge operated by the respondent, Horizon North Camp & Catering Inc. ("Horizon North"). The discipline consisted of a verbal warning, a written warning, and a three-day suspension.

[3] The appellant was subject to a collective agreement and UNITE HERE, Local 40 (the "Union"), grieved all three disciplines. The grievance was eventually settled between the Union and Horizon North.

[4] In September 2020, the appellant was terminated from her employment.

[5] Horizon North wrote a letter to the appellant stating that her employment had been terminated for "exhausting the progressive discipline process". The letter stated that she had "received warnings in regard to [her] conduct and behaviour and ample opportunity [had] been given to correct [her] behaviour". Horizon North cited the verbal warning and the written warning, and noted that the appellant had been away from work effective June 28, 2020. The letter then stated that the appellant's "conduct and behaviour [had] not changed as [she] continued to violate the Respectful Workplace policy with harassing, disrespecting and threatening

behaviour towards employees of Horizon North even after [she was] requested not to have any further communication".

[6] By this time, the appellant had worked for Horizon North for approximately 16.5 months. The Union grieved the termination. This grievance was also settled between the Union and Horizon North.

[7] The appellant was dissatisfied with the way the Union managed her grievances. She filed two complaints with the Board alleging unfair representation. One of the complaints addressed the Union's representation in the discipline grievance ("Discipline Grievance"). The other addressed the Union's representation in the termination grievance ("Termination Grievance").

[8] The appellant alleged arbitrariness, discriminatory conduct and bad faith by the Union. Among other things, she claimed that the Union did not investigate allegedly false statements of misconduct made against her by co-workers. She also claimed that the Union colluded with Horizon North in settling the Grievances.

[9] The Board dismissed the appellant's complaints without requiring the Union to respond. Nor did the complaints proceed to a hearing. The appellant applied for internal reconsideration of both complaints. Leave to reconsider was denied. The Board's reconsideration decisions were rendered in May 2021 and December 2021, respectively.

[10] The appellant brought two petitions for judicial review in the British Columbia Supreme Court, asking that the reconsideration decisions be set aside. The petitions were heard together and dismissed in July 2022.

[11] The appellant appeals from the dismissal orders.

Petitions for Judicial Review

[12] The background to the petitions is set out at paras. 14–33 of the Supreme Court judge's published reasons, indexed as 2022 BCSC 1205. For the purpose of these appeals, it is not necessary to repeat the whole of the factual

2023 BCCA 165 (CanLII)

context. No one suggests that the judge misapprehended the chronology of relevant events.

[13] In the first petition (as amended on September 1, 2021), the appellant sought five orders specific to her complaint about the Union's conduct in the Discipline Grievance: (1) an order setting aside the Board's denial of leave to reconsider; (2) an order that the Board "make a new decision on [this] application to reconsider"; (3) an order that the appellant be allowed to file additional argument in that application; (4) an order that the Board "amend [its] original decision … to redact" certain "false allegations"; and (5) costs.

[14] The petition initially challenged the reconsideration decision on various bases. The appellant claimed that the Board: (1) failed to "consider argument relating to the subject matter of the grievance"; (2) failed to "recognize false accusations as a form of bullying and psychological abuse"; (3) failed to consider the Union's lack of investigation of allegations made against her as a "breach of its duty"; and (4) failed to consider case law relevant to the issues before it.

[15] The petition also claimed that the lawyer who assisted the appellant with her application for reconsideration was "incompetent" and that the appellant was therefore inadequately represented.

[16] Finally, the petition alleged that the timelines for filing an application for reconsideration caused the appellant prejudice. It stated that the appellant did not have sufficient time to seek a new lawyer or to "recover from the emotional distress to be able to represent [herself]".

[17] Before the judicial review hearing, the appellant amended her first petition to pursue only the allegations of ineffective representation by her lawyer and prejudice arising from the filing timelines.

[18] Once the review hearing commenced, the appellant abandoned these latter two grounds for judicial review. The only remaining issue she pursued was an allegation of bias against the Board—both in respect of individual Board members

2023 BCCA 165 (CanLII)

and systemically. This allegation was not articulated in the first petition; however, the appellant raised it prior to the judicial review hearing, Horizon North had notice of it, and bias was addressed in her written submissions filed in the Supreme Court.

[19] The second of the two petitions (dated January 10, 2022), challenged the Board's reconsideration decision specific to the Union's representation in the Termination Grievance.

[20] In this petition, the appellant sought nine orders. She asked that the Board's denial of leave to reconsider be set aside for procedural unfairness. She sought five declarations of bias, implicating four individual members of the Board and the Board, generally. She sought an order declaring that the Board had "lost jurisdiction" to deal with her matters, and an order that the court had jurisdiction "over any disputes arising out of [her] employment and union representation". Lastly, the appellant sought special costs against the Board.

[21] The appellant's second petition was more detailed than the first.

[22] It is not necessary to set out each of the reasons expressed in the petition for why the appellant considered reconsideration to be warranted. Instead, it will suffice to refer to the first two paragraphs of the second petition, under the heading "Legal Basis". These paragraphs contain a summary of the appellant's concerns, as framed by her:

> [The Board members] broke their oath to office when they didn't perform their duties faithfully and to the best of their abilities. They showed a marked departure from their roles and responsibilities as board members. They displayed actual bias when they blatantly breached procedural fairness and showed a flagrant disregard to the rule of law. They abused their positions of authority and called into question the integrity of the entire Labour Relations Board.
>
> There will be no denying that [the Board] bounced over matters of high importance to the administration of justice such as bias and consistency in decisions, they showed an outright disregard to the rules of procedural fairness, they skipped over central arguments, they severely lessoned the importance of confirmed errors, and they provided no logical line of reasoning for their conclusions. If this court finds this quality of decision making to be acceptable than it will be viewed as a declaration that the BCLRB is a true Kangaroo Court.

2023 BCCA 165 (CanLII)

2023 BCCA 165 (CanLII)

Supreme Court Reasons

[23] The judge began his reasons in the judicial review by addressing the standards of review he was obliged to apply, as informed by the relevant statutory framework.

[24] The appellant's complaints to the Board were filed under s. 12 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 [*Labour Code*]. Section 12(1)(a) stipulates that a union must not act "in a manner that is arbitrary, discriminatory or in bad faith" when representing any of the employees in "an appropriate bargaining unit".

[25] When the Board receives a written complaint that a union has contravened s. 12, a "panel of the board must determine whether or not it considers that the complaint discloses a case that the contravention has apparently occurred": s. 13(1)(a). If the Board considers that the "complaint discloses sufficient evidence that the contravention has apparently occurred", it must: (i) serve a notice of the complaint on the union and invite a reply; and (ii) either dismiss the complaint or refer it to the Board for a hearing: s. 13(1)(b).

[26] In *Budgell v. Canadian Union of Public Employees, Local 15*, 2003 BCCA 605 [*Budgell*], this Court held that in completing its task under ss. 13(1)(a) and (b) of the *Labour Code*, the Board assesses whether the written complaint discloses a "*prima facie* case" that the union violated its duty of fair representation: at paras. 2, 13. The Board asks itself:

> [18] … <u>whether the facts alleged in the complaint</u>, if assumed to be true, establish an apparent contravention of s. 12. Bald allegations of improper conduct are not helpful in satisfying the threshold. At best they are submissions as to inferences the applicant seeks to have the Board draw from the facts alleged.
>
> [Emphasis added.]

[27] The "facts alleged in the complaint" include the whole of the information and documents that accompany the written complaint: *Budgell* at paras 22, 29. This includes information that, if assumed to be true, would <u>not</u> support a finding that the union has contravened its duty of fair representation: *Budgell* at para. 29.

[28] Moreover, *Budgell* makes it clear that in conducting an assessment under ss. 13(1)(a) and (b), the Board is duty-bound to apply a contextual approach:

> [17] The Board's mandate does not require it to proscribe narrowly a union's conduct in any particular aspect of its exercise of that bargaining agency, nor to examine it microscopically. The Board must consider the union's conduct as a whole. And it must do so in the context of its mandate to exercise all its powers and perform its duties having regard to the purposes set out in s. 2(1) of the [*Labour Code*]. These purposes suggest an individual worker's interest is to be seen in the context of all the interests served by collective bargaining, and not to be placed in a paramount position.
>
> [Emphasis added.]

[29] The appellant's applications for reconsideration were filed with the Board pursuant to s. 141(1) of the *Labour Code*, which allows "any party affected by a decision of the board" to seek leave for "reconsideration of the decision". The granting of leave is discretionary. Leave "may be granted" if the applicant satisfies the Board that: (a) evidence not available at the time of its original decision has since become available; or (b) the original decision is "inconsistent with the principles expressed or implied in [the *Labour Code*] or in any other Act dealing with labour relations": s. 141(2).

[30] Section 136 of the *Labour Code* stipulates that the Board has "exclusive jurisdiction" to hear and determine a complaint made under its legislation. Section 139 grants the Board "exclusive jurisdiction" to decide a question that arises under the *Labour Code*, including whether a trade union "is fulfilling a duty of fair representation": s. 139(r). Section 138 stipulates that a "decision or order" for which the Board has jurisdiction is "final and conclusive".

[31] In light of s. 138, which the judge interpreted as a "full privative clause" (at para. 37 of his reasons), he found that s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*], applied. (See also s. 115.1 of the *Labour Code*, which explicitly invokes ss. 58(1)-(2) of the *ATA*.)

2023 BCCA 165 (CanLII)

[32] Section 58(2)(a) of the *ATA* provides that the Board's factual and legal findings in matters for which it has exclusive jurisdiction, as well as exercises of its discretion, are reviewable on a standard of patent unreasonableness.

[33] If procedural fairness is raised in an application for judicial review, the question for the reviewing court is whether the "[Board] acted fairly": *ATA*, s. 58(2)(b).

[34] After instructing himself on the standards of review, the judge turned to the parties' positions. He summarized the appellant's position this way:

> [48] The petitioner's submissions are verbose and lack clarity, but she appears to submit that her actions throughout have been justified and that the Union and Horizon North are aware of that. <u>In addition, she submits that the test under s. 13 of the *Code* is to be applied by accepting the assertions in the complaint are true and to ignore any evidence to the contrary</u>. She submits both [of] the reconsideration decisions regarding the Discipline Grievance and the Termination Grievance were based on other facts, not those asserted by her.
>
> [Emphasis added.]

[35] The underlined sentence in the above excerpt raises an issue that received considerable attention before us. It is the appellant's position that in deciding her s. 12 complaints, the original Board decision-maker exceeded her role under ss. 13(1)(a) and (b) of the *Labour Code*. The appellant argues that the Board was supposed to assume that the appellant's complaints about the Union (her assertions of wrongdoing), were true. She contends that, instead, the Board incorrectly assessed the merits of her complaints, and, based on non-existent evidence to the contrary, found as a fact that there was no contravention of s. 12. From the appellant's perspective, this was fundamentally wrong and justified leave to reconsider. I will say more about this later.

[36] After setting out the appellant's position, the judge turned to the merits.

[37] Specific to the first petition, the judge rejected any suggestion that: (a) the appellant received ineffective legal assistance in advancing the application for

2023 BCCA 165 (CanLII)

reconsideration (at paras. 65–73); and (b) was prejudiced by filing timelines (at paras. 74–78).

[38] The judge also rejected the arguments raised in the second petition. The appellant alleged procedural unfairness and that the reconsideration decision was patently unreasonable: at para. 84. The judge found no evidence of bias: at paras. 91–93. Nor was he persuaded that the Board failed to give the appellant's submissions meaningful consideration: at paras. 95–120. He found that the Board treated the appellant fairly in its second reconsideration decision and adequately explained the denial of leave. The judge concluded that the Board's reasons:

> [124] … provide a reasoned analysis of the potentially relevant arguments of the petitioner raised in her application to reconsider the Termination Section 12 Decision. The panel considered and summarized the relevant law, addressed the section 12 complaints raised by the petitioner and provided reasons that discussed, considered and analysed the relevant factors and explained the decisions made regarding each of the categories raised by the petitioner.

[39] The judge dismissed both petitions for judicial review.

Issues on Appeal

[40] The appellant represents herself in the appeals. The appeals were ordered to proceed together.

[41] The appellant's factum alleges three reversible errors by the Supreme Court judge. It states that the judge: (1) erred in finding the Board's reconsideration decisions were not patently unreasonable; (2) erred in concluding there was no evidence of "systemic bias, actual bias or perceived bias"; and (3) was "closed minded" by failing to look "at the broader picture in regards to workplace bullying and the impact [that the Board's] decisions could have on stakeholders in this province".

[42] The appellant's factum asks this Court to quash all four decisions of the Board: the original dismissals of the s. 12 complaints and both reconsiderations. It also seeks an order declaring that the Board members who denied leave to reconsider were "biased and broke their oaths to office". The factum requests that

2023 BCCA 165 (CanLII)

the Court declare the Board to be "systemically biased". Finally, it seeks an order that the decisions of the Board and the Supreme Court judge be "removed from the public domain".

Standard of Review

[43] Only the Board's denials of leave to reconsider were before the judge for judicial review. He dismissed the two petitions on the basis that the appellant did not establish procedural unfairness, bias or patent unreasonableness specific to those decisions and those processes.

[44] Consequently, this Court is also limited in its review to the reconsideration decisions. It is not our role to review the original decisions made pursuant to ss. 13(1)(a) and (b) of the *Labour Code* and assess their merits. In *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung,* 2011 BCCA 527, the Court held that:

> [61] … the Legislature has provided an internal review mechanism that provides a reconsideration if there is new material evidence or if an original decision has not conformed to the principles under the *Code* … Subject to judicial review of its decision, if a reconsideration panel concludes that there should not be a reconsideration, the original decision stands. If the reconsideration panel decides there should be a reconsideration, the results of that reconsideration are susceptible to judicial review because there is no further internal review pursuant to s. 141 (3) and (4).
>
> [62] … where the Board refuses leave to reconsider an original decision, generally the only decision to be reviewed judicially should be the refusal to grant leave.
>
> [Internal references omitted; emphasis added.]

[45] In these appeals, we must ask ourselves two questions. First, whether the Supreme Court judge applied the correct standards of review in deciding the petitions. Second, whether he correctly applied those standards: *Red Chris Development Company Ltd. v. United Steelworkers, Local 1-1937*, 2021 BCCA 152 at para. 27, leave to appeal to SCC ref'd, 39668 (29 September 2021).

2023 BCCA 165 (CanLII)

[46] The appellant takes no issue with the standards of review identified by the judge. She accepts that substantive decisions by the Board are reviewed on a standard of patent unreasonableness. She also accepts that in deciding whether the Board acted with procedural fairness, the judge was bound to ask himself whether the manner in which the process unfolded was “fair”.

[47] However, she contends that the judge did not correctly apply these standards. The appellant submits that on a proper consideration of the petitions, it is obvious that the Board acted unfairly (both at first instance and in denying leave to reconsider), that the Board members and the Board, generally, were biased or appeared biased, and that the Board’s decisions were patently unreasonable.

Fresh Evidence Applications

[48] Before addressing the merits of the appeals, there is a preliminary issue to resolve.

[49] The appellant has filed two fresh evidence applications in the appeals (dated December 13, 2022 and December 28, 2022, respectively).

[50] The first application seeks to introduce two affidavits sworn by the appellant: Affidavit #2 sworn on April 11, 2022, and Affidavit #3, sworn on April 19, 2022.

[51] The second application seeks to introduce a decision of the Supreme Court in *Pereira v. British Columbia (Workers’ Compensation Board)*, 2022 BCSC 1654, and a WorkSafeBC Review Decision (R0297276).

[52] These latter two decisions speak to complaints made by the appellant while still employed by Horizon North that she was being harassed and bullied in the workplace. The appellant brought her complaints to the attention of WorkSafeBC. The appellant alleged that Horizon North did not adequately investigate her allegations of bullying and harassment and failed to provide her with a safe workplace. WorkSafeBC concluded that Horizon North’s response was adequate. This conclusion was then confirmed in an internal review. The appellant sought

2023 BCCA 165 (CanLII)

judicial review of WorkSafeBC's determination in the Supreme Court. A judge set aside the internal review and directed that WorkSafeBC reconsider and redetermine the issue. WorkSafeBC did so, and, as I understand it, a workplace investigation is currently underway.

2023 BCCA 165 (CanLII)

[53] None of the material in the two fresh evidence applications was before the Board when it rendered its reconsideration decisions.

[54] The appellant applied to introduce Affidavits #2 and #3 in the Supreme Court. Affidavit #2 attached material that the appellant submitted confirmed the truth of things she alleged in her complaints against the Union. Affidavit #3 attached materials that were submitted to be relevant to the issue of bias.

[55] The judge ruled Affidavit #2 inadmissible on the basis that it represented an impermissible attempt to "shore up the record" that was before the Board at the time of its reconsideration decisions: at para. 13. He made no mention of Affidavit #3 in his reasons.

[56] Horizon North opposes the fresh evidence applications.

[57] It opposes the first application primarily on the basis that, in reviewing an administrative decision, a court generally concerns itself only with evidence that was before the impugned decision-maker: *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at paras. 32–34 [*Air Canada*]. There are limited exceptions to this rule, set out at paras. 35–43 of *Air Canada.*

[58] Horizon North says Affidavits #2 and #3 were not before the Board and do not fall within any of the allowable exceptions. As such, these Affidavits should not be considered in the appeals.

[59] The second fresh evidence application is opposed on the basis that the Supreme Court ruling and WorkSafeBC Review Decision are not relevant to issues raised on appeal.

2023 BCCA 165 (CanLII)

[60] In making this submission, Horizon North points out that in another appeal filed by the appellant and resolved on January 20, 2023, the Court considered the material that forms the basis for the second fresh evidence application. In that appeal, indexed as 2023 BCCA 31, the Court held that the Supreme Court ruling and WorkSafeBC Review Decision were focused on Horizon North's investigation of allegations of workplace harassment and bullying, not the Union's representation of the appellant in the Discipline and Termination Grievances: at paras. 27, 31–32. The appeals before us are focused on a different matter.

[61] I would not admit Affidavit #2 as fresh evidence. First, none of the material that forms part of that affidavit was before the Board at the material time. Second, and importantly, Affidavit #2 was ruled inadmissible by the judge in the Court below. The appellant has not challenged that ruling. I do not consider Affidavit #2 to be properly before us.

[62] I would admit Affidavit #3, which consists of material setting out various ethical principles that apply to decision-makers (judicial and administrative); speaks to the issue of bias in decision-making, generally; and provides background information specific to some of the Board members that participated in the appellant's *Labour Code* complaints. Although this affidavit was also tendered before the judge, it is not clear from his reasons that he ruled it inadmissible.

[63] In my view, although close to the line, this material reasonably falls within a recognized exception to the general rule that on appeal, the Court is limited to the record before the decision-maker. The appellant has tendered this evidence in support of her contention that the Board is biased and did not conduct itself fairly when assessing her s. 12 complaints. I accept that evidence of bias discovered after a tribunal's determination or a hearing would meet the threshold of admissibility. In so concluding, I am not saying that the evidence tendered by the appellant proves bias; rather, simply that it is admissible. I consider Affidavit #3 to fall within the exception identified in *Air Canada* as material that may be necessary to "fully consider the question of whether the proceedings of a tribunal met standards of

procedural fairness”: at para. 37. In this case, bias—both individual and systemic—formed an integral part of the appellant’s complaints at the judicial review hearing.

[64] Specific to the second fresh evidence application, I do not consider this material to constitute “evidence” for the purpose of these particular appeals. As such, I am satisfied it is open to the Court to consider the Supreme Court ruling and WorkSafeBC Review Decision if considered relevant to issues that require resolution in the appeals.

2023 BCCA 165 (CanLII)

Discussion

[65] I will set out the positions of the parties in the appeals, generally, and then turn to the merits.

[66] Although named as a respondent, the Union has not participated.

Positions of the Parties

Appellant

[67] The appellant’s factum does not contain argument specific to her grounds of appeal. Instead, she incorporates by reference the written submissions that she provided to the petition judge.

[68] As I read and interpret those submissions, the appellant advanced a number of arguments in support of her position that the Board’s decisions were procedurally unfair, biased and patently unreasonable. These arguments included that the Board:

- did not respond, in any meaningful way, to submissions made by the appellant;
- misunderstood her submissions or reconstituted them to be something else, resulting in decisions that were grounded in the Board’s own version of the appellant’s position, rather than what she actually meant;
- failed to appreciate that the original Board decision-maker did not conduct herself properly under ss. 13(1)(a) and (b) of the *Labour Code* by failing to

assume the truth of the appellant's assertions, and, instead, weighing those assertions against findings of fact improperly made in favour of the Union;

- did not adequately consider the fact that the Union was in a conflict of interest by representing the appellant while, at the same time, assisting other Union members with one or more complaints that were focused on the appellant's conduct;
- did not adequately consider the fact that the Union used the grievance process for an improper purpose, namely, to assist other members with advancing complaints or claims against the appellant;
- failed to consider the fact that the Union did not adequately investigate allegations made against the appellant;
- failed to appreciate that prior to the last complaint or grievance filed by other Union members in respect of the appellant's conduct, Horizon North had determined that previous complaints made about her were "false", unsubstantiated or insufficient to prevent her from returning to work;
- improperly applied the doctrine of *res judicata*;
- failed to appreciate that the Union cancelled one or more arbitration processes and reached settlements in respect of the appellant that were contrary to her interests. The settlement specific to her termination is described as "fraudulent". The appellant submitted that the Union and Horizon North engaged in collusion and that the Union tried to "defeat" the appellant's claims of unfair representation;
- incorrectly accused the appellant of attempting to re-argue issues or introduce new ones into the complaint process; and,
- lacked impartiality and was biased, both in respect of the individual members and the Board as a whole. The appellant alleged that individual bias

2023 BCCA 165 (CanLII)

manifested itself in the Board's reasons. The systemic bias was said to arise from the Board's structure, including (but not limited to) the ability of individual Board members to stand in review of each others' decisions.

Horizon North

[69] Horizon North says the judge correctly applied the relevant standards of review. He fully considered the arguments raised by the appellant in both petitions and, in resolving each petition, he applied the correct legal principles. Horizon North submits that the appellant has failed to establish procedural unfairness, bias or patently unreasonable decisions.

Board

[70] In its factum, the Board does not address the merits of the substantive issues raised by the appellant. Rather, it has focused on the reviewability of its decisions by the courts.

[71] The Board emphasizes that in applying the standard of patent unreasonableness, it was not the role of the judge to step into the shoes of the Board and decide the matters afresh. Rather, the judge's task was to decide "whether the Board's [decisions were] "clearly irrational" or "evidently not in accordance with reason"": Board's factum at para. 68.

[72] Specific to complaints about procedural fairness and bias, the Board emphasizes that when it renders a decision, it is not obliged to consider and comment on every issue raised by a complainant who seeks reconsideration. Moreover, the Board says it is presumed to act impartially and that this presumption cannot be displaced in the absence of evidence demonstrating a "real likelihood or probability of bias": Board's factum at para. 74.

Merits of the Appeals

[73] As noted, the appellant accepts that the judge identified the correct standards of review. It is his application of the standards that she takes issue with.

2023 BCCA 165 (CanLII)

[74] I agree that the judge correctly identified the standards of review governing the petitions.

[75] However, the appellant has not persuaded me that the judge erred in his application of those standards. As an appellant, she bore the onus of establishing reversible error on appeal.

[76] I also see no indication that the judge was “close minded” in his approach to the petitions or that he otherwise conducted himself non-judicially. Respectfully, this latter allegation by the appellant is unfounded.

[77] To the contrary, the judge thoroughly reviewed the chronology of events that led to the petitions; properly instructed himself on the relevant legal principles; made manifestly apparent efforts to understand the appellant’s position in support of judicial intervention; and gave that position meaningful consideration. Earlier, I listed the various contentions that I see as having emerged from the appellant’s written submissions in the Supreme Court. It is apparent from paras. 3, 26, 31, 48, 58, 79, 84, 89, 90, 94, 99, 107, 112, 113, 117, 118, 121 and 123 of the judge’s reasons that he was alive to the essence of those claims and meaningfully considered what he saw as the appellant’s “root complaint” (at para. 3):

> The petitioner raises a myriad of issues. Her root complaint is that the investigation of her complaint against her co-workers was flawed due to the arbitrary, discriminatory and bad faith actions of the Union including acting when in a conflict of interest. She also alleges conspiracy between the Employer and the complaining employee (“A.A.”). In addition, she raises allegations of bias against the Board.

In my view, it was reasonably open to the judge to view the petitions this way.

[78] On appeal, the appellant does not identify any procedural or legal error by the judge. Indeed, in her factum, she has taken the position that in light of this Court’s role in appeals from judicial review, it “serves no purpose in arguing where [the judge] went wrong in coming to his conclusions” (emphasis added). Consequently, at the hearing of the appeals, the appellant spent most of her time

2023 BCCA 165 (CanLII)

addressing the Board's handling of her s. 12 complaints, not the judge's reasons in dismissing her petitions for judicial review.

[79] The reconsideration decisions are indexed as 2021 BCLRB 89 and 2021 BCLRB 195, respectively.

2023 BCCA 165 (CanLII)

[80] Having reviewed them, in the context of the petition record and the fresh evidence admitted in the appeals, I do not see that the Board acted in a procedurally unfair way in either decision.

[81] At the petition hearing, the appellant abandoned any suggestion that the timelines associated with applications for reconsideration prejudiced her ability to adequately state her case.

[82] In the first reconsideration, the Board agreed to accept a "late-filed submission" from the appellant. In the second reconsideration, the appellant sent multiple submissions to the Board. Eventually, the Board told the appellant that it would no longer accept submissions as of a particular date. At the same time, the Board gave the appellant an opportunity to file "one final submission" containing "everything [she] would like the Board to consider" (emphasis added). The appellant sent a "Final Submission" and told the Board, after doing so, that she "[felt] much better".

[83] I am satisfied that in both reconsideration applications, the appellant received full opportunity to identify and advance her concerns about the dismissal of her s. 12 complaints.

[84] It is also apparent from the reconsideration decisions that the Board reviewed the circumstances surrounding the appellant's s. 12 complaints; the contents of the original decision-maker's rulings; the reasoning applied; and the materials submitted by the appellant in support of her complaints. These were not cursory assessments.

[85] In my view, the reconsideration decisions are also generally responsive to the issues raised by the appellant. I accept that the decisions do not address each and

every point that she advanced in her various submissions; however, the Board was not obliged at law to do so: *Newfoundland and Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 at para. 16. The fact that a decision does not track and respond to every submission that forms part of an application does not make the decision patently unreasonable.

[86] I also agree with the judge that the appellant did not prove bias on the part of the Board—individual or systemic, actual or perceived.

[87] Even considering the materials attached to Affidavit #3, I am satisfied that the bias allegation is conjectural and fails to account for the strong presumption of impartiality that applies to Board members and necessarily informs the bias analysis: *Miller v. The Union of British Columbia Performers*, 2022 BCCA 358 at para. 40 [*Miller*]. This presumption is relevant to an assessment of both actual and the appearance of bias. It is only displaced "where a real likelihood or probability of bias has been shown. The burden of proof is <u>high</u> and it lies with the party alleging bias": *Miller* at para. 40, emphasis added.

[88] In my view, the appellant has not met this onus.

[89] The allegation of individualized bias is predominantly grounded in disagreement between the appellant and the Board on issues that she advanced against the Union. The fact that a decision-maker may interpret an evidentiary record differently, or rule in a manner contrary to a complainant's view of the case, does not mean they are biased.

[90] The allegation of systemic bias is grounded in the Board's operational context, including collegiality in the Board's workplace and the fact that in reconsideration decisions, Board members stand in review of each other. This structure is not anomalous in the administrative context. The mere fact of collegiality, collaborative working relationships, or a structure that allows for internal review, is not sufficient to establish institutional or systemic bias. The appellant has drawn negative conclusions from the structure, but these conclusions are inferential and

2023 BCCA 165 (CanLII)

speculative. In my view, they are not supported with evidence of any substance, and, as mentioned earlier, they fail to account for the legal presumption of impartiality that attaches to Board decisions, Board conduct and its structure.

[91] The Board considered the appellant's allegation of bias in its second reconsideration decision (at paras. 38, 39). The judge also considered the allegation of bias: at paras. 87–93. The appellant had opportunity to raise this issue at both levels of review and she was heard on it. Both the Board and the judge concluded that the allegation of bias was not supported by the record. That conclusion was reasonably open to them and, in my view, there is no principled basis for appellate interference with the determination.

[92] Finally, consistent with the judge's conclusion, I see nothing patently unreasonable about the reconsideration decisions.

[93] As explained in *Team Transport Services Ltd. v. Unifor, Local No. VCTA*, 2021 BCCA 211 (at paras. 28–29), the patent unreasonableness standard is a deferential standard:

> Patent unreasonableness is the standard that is most highly deferential to the decision maker. There are many descriptions of the standard. The explanation found in *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109 (aff'd *Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 25-G*, 2009 BCCA 229) is useful:
>
> > [65] When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the *Ryan* [*Law Society of New Brunswick v. Ryan*, 2003 SCC 20] formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in *Ryan*, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.

2023 BCCA 165 (CanLII)

> In other words, the standard is at the most deferential end of the reasonableness standard …
>
> [Emphasis added.]

[94] A deferential standard means that even if this Court were to conclude that the Board's reconsideration decisions were incorrect, it would not allow us to interfere. Under a standard of patent unreasonableness, the Board "is entitled to be wrong in the eyes of a court if it acts within its jurisdiction": *Budgell* at para. 9, emphasis added.

[95] As noted, in her written submissions in the Supreme Court, the appellant raised a number of substantive concerns with the Board's decisions. The judge considered those concerns and found they did not render the Board's decisions patently unreasonable. For substantially the same reasons as the judge, I am satisfied the reconsideration decisions were not patently unreasonable (or clearly irrational), once considered in the context of the record as a whole, the Board's specialized expertise, and the test it was bound to apply in deciding whether to grant leave.

[96] For the purpose of these reasons, I do not consider it necessary to independently address each of the myriad issues raised by the appellant in her applications for judicial review. I do consider it appropriate, however, to address the issue that appears to have caused the appellant considerable concern, namely, her contention that the Union did not investigate allegations made by her co-workers that led to the verbal warning (part of the Discipline Grievance), informed Horizon North's decision to end her employment (the Termination Grievance), and are contended by the appellant to have rendered her workplace unsafe. She describes these allegations as "false".

[97] As I understand this submission, the appellant asserts that the Union had a positive obligation to investigate all allegations made against her, and, given the critical importance of this duty, at a minimum, the Board's original decision-maker should have required the Union to respond to the appellant's s. 12 complaints.

2023 BCCA 165 (CanLII)

Instead of doing that, the original Board member drew her own inferences about the Union's conduct in managing the Grievances and in its interaction with the appellant, and made findings of fact about the Union that were ultimately found to contradict or undermine the s. 12 complaints. The appellant submits that this approach to her complaints was palpably wrong, exceeded the original decision-maker's proper role under ss. 13(1)(a) and (b) of the *Labour Code*, and provided ample bases for the Board to grant leave to reconsider.

[98] In its first reconsideration decision, the Board explicitly acknowledged and considered the appellant's concern about a lack of investigation by the Union (at paras. 32, 33, 35, 36). The Board found that the original decision-maker "had regard to the evidence and arguments presented" by the appellant, and that she set out an "evidentiary basis" for finding that the appellant's material did not disclose an apparent contravention: at para. 33. The Board was of the view that the original decision-maker "fully and correctly" answered this issue, as well as others: at para. 34.

[99] The second reconsideration decision also considered and addressed the complaint about a lack of investigation (at paras. 12, 16, 29, 30, 31, 33, 34, 36). Indeed, in deciding whether to grant leave to reconsider, the Board gave the appellant the benefit of the doubt and assumed that the Union and Horizon North "did not investigate the co-workers' statements which underlay the verbal warning or the [appellant's] complaint of workplace mobbing": at paras. 29, 31. However, even with this assumption, the Board was satisfied that the appellant's complaint about the Union did not show an apparent contravention of s. 12. From the Board's perspective, the Union's decision to settle the Grievances rather than pursue investigations of the nature sought by the appellant properly lay within its discretion: at para. 31.

[100] In my view, the conclusions reached by the Board were open to it on the record and are entitled to deference. In *Budgell*, the Court held that the extent of the duty owed by a union to a member "is a question [that] the Board is uniquely

2023 BCCA 165 (CanLII)

qualified to determine”: at para. 14. Furthermore, in reaching this determination, the Board’s “mandate does not require it to proscribe narrowly a union’s conduct in any particular aspect of its exercise of [its] bargaining agency, nor to examine it microscopically”: *Budgell* at para. 17, emphasis added. The Board’s assessment of a complaint against a union properly recognizes that, at law, it is the union, not the employee, that has ultimate authority to “bring a grievance to arbitration, or to drop or settle it”: *Budgell* at para. 16.

2023 BCCA 165 (CanLII)

[101] Respectfully, the appellant’s challenge to the Board’s approach to ss. 13(1)(a) and (b) of the *Labour Code*, and the conclusions reached, misunderstands the Board’s role.

[102] In her factum’s Opening Statement, the appellant states the test under ss. 13(1)(a) and (b), this way:

> The complaint is to be looked at at face value and if everything is taken as true if it would constitute a breach [then] the union and employer are asked for a response and then the complaint is adjudicated on the merits …

[103] There are a few problems with this description.

[104] First, on the plain language of s. 13(1)(b)(ii) of the *Labour Code*, it appears that even if the Board invites a union to respond to a s. 12 complaint, it retains the authority to dismiss the complaint without the matter proceeding to a hearing.

[105] Second, the Board is only mandated to serve a notice of a s. 12 complaint and invite a reply if it “considers that the complaint discloses sufficient evidence that the contravention has apparently occurred” (emphasis added). In making this assessment, the Board is not restricted to the complainant’s version of events, the complainant’s interpretation of the evidence that was filed as part of the written complaint, or to evidence that offers support for the complainant’s narrative. As explained earlier, the Board is entitled to examine the whole of the materials filed as part of the complaint, including material that offers a view of the relevant circumstances different from the complainant’s, and to decide whether, assuming all

of the alleged facts are true, the complaint discloses a *prima facie* case that the union has violated the duty of fair representation.

[106] As such, to the extent that the appellant believes the Board was obliged to accept her characterization of the Union's conduct as unfair and ignore any information in the complaint package that had the capacity to call into question or undermine that characterization, or to present a different picture, she is mistaken.

[107] As helpfully explained by the Board in *Judd v. C.U.P.E., Local 2000*, [2003] B.C.L.R.B.D. No. 63, 2003 CarswellBC 2189 [*Judd*]:

> [73] … The word "complaint" [in s. 13 of the *Labour Code*] may … cause some misimpression. It may lead some to believe that they need only communicate the fact that they feel an injustice has been done to them. However, a "complaint" under the Code is the document that sets out the facts upon which the complainant intends to rely in proving his or her case that the Code has been violated.
>
> [74] The Board's written materials for Section 12 complainants emphasize that applicants must set out all the relevant facts concerning their complaint. A large proportion of complainants continue not to do so …
>
> …
>
> [76] When employees make a Section 12 complaint to the Board, they are asking the Board to adjudicate that complaint and to make a legal determination in their favour. The initial determination which the Board must make is whether the *facts alleged* establish a violation of Section 12. The Board cannot decide that a union violated Section 12 simply because the complainant says the union was "arbitrary" or "discriminatory", "did nothing for me", "disregarded my interests", or "acted in bad faith".
>
> [77] Rather, the complaint must show what happened, when it happened, how it happened, who said or did what and what aspects of the conduct are alleged to be arbitrary, discriminatory or in bad faith. If the facts set out in the complaint do not, by themselves, establish a violation of Section 12, the complaint should be dismissed: Section 13(1)(a) …
>
> [78] Consequently, the facts set out in a Section 12 complaint should include the relevant details, such as the dates each event occurred. For example, if the complaint alleges "three separate times I was told by the union my seniority did not entitle me to the job", for each separate occasion the complaint should say when and where this was said, who said it, and what was said as exactly as possible. If certain details are unknown, such as

2023 BCCA 165 (CanLII)

> dates, the complainant should do his or her best to specify. The more important the particular allegation is to the complaint, the more critical it is that details of it should be provided. The complainant must also attach copies of any documents that are relevant to the situation, including any letters from the union explaining its actions or its decision.
>
> [79] … if someone reasonably believes a decision has been made based on improper factors, there must be facts that form the basis for that belief. Those facts must be set out in the complaint. The Board will draw inferences from those facts where it is reasonable to do so.
>
> …
>
> [Italics in the original; emphasis added.]

2023 BCCA 165 (CanLII)

[108] In this case, the appellant put forward her version of events to the Board in support of both complaints. This included her interpretation of what occurred between herself and her co-workers, and between herself and the Union. She provided the Board with her views on whether the Union's conduct amounted to a violation of the duty of fair representation, including (but not limited to): failing to investigate the veracity of complaints made against her; a conflict of interest; improperly using the grievance process to obtain and share information to the benefit of other Union members; unfairly settling the Grievances; disregarding the appellant's view of things; and colluding with Horizon North. The appellant pointed to evidence that she said supported her position.

[109] However, as required under the *Labour Code*, also filed with the s. 12 complaints were various documents or pieces of information that set out the Union's actions in advancing and settling the Grievances, captured some of the Union's discussions with the appellant, explained its perspective on the appellant's prospects of success, and reflected the settlements reached. In deciding whether the "complaint [disclosed] sufficient evidence that the contravention [had] apparently occurred" for the purpose of ss. 13(1)(a) and (b), the original Board decision-maker was entitled to also assume that the facts alleged in the Union-related documentation were true. As such, the complainant's view of things was not determinative.

[110] It is apparent from the original decision-maker's reasons for both s. 12 complaints that the dismissals were grounded in a view of the complaint package, in its entirety. (See, for example, paras. 49, 51, 56, 57, 58 and 62 of 2021 BCLRB 44, and paras. 29, 33, 37 and 40 of 2021 BCLRB 150.) There is nothing improper about this approach.

2023 BCCA 165 (CanLII)

[111] The third difficulty with the appellant's description of the test under ss. 13(1)(a) and (b), is that it does not account for the contextual nature of the analysis. In addition to considering the whole of the material put forward, the Board asks itself whether the complaint discloses an apparent contravention in light of a union's considerable discretion to manage grievances filed on behalf of a member as it sees fit.

[112] As made clear by the Supreme Court of Canada in *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39 at para. 45, where there is a collective agreement in place, the general rule is that the grievance process, including the approach taken to the grievance and settlement, is controlled by the union, not the employee. The Board explained this principle in *Judd* with reference to a union's decision not to proceed with a grievance. I have found the discussion instructive:

> [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 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 [of the *Labour Code*].
>
> [Italics in the original.]

[113] Ultimately, the Board's original decision-maker determined that the material filed by the appellant under s. 12 of the *Labour Code* did not show an apparent contravention. The reconsideration panels found it was reasonably open to the original decision-maker to reach that conclusion. I cannot say that the reasoning

brought to bear in the reconsiderations, or the outcomes, are patently unreasonable. The material in the appellant's second fresh evidence application, which is focused on the conduct of Horizon North, as opposed to the Union, would not have made a difference. As noted, the Board accepted for the purpose of its second reconsideration decision that neither the Union nor Horizon North conducted the investigations sought by the appellant.

[114] I appreciate it is not easy for a self-represented litigant to navigate the appeal process and to make submissions that account for and are responsive to appellate standards of review. However, the Court is bound by these standards and we must apply them. We cannot decide the appellant's complaints against the Union afresh, make findings of fact about the Union's alleged misconduct, or determine whether the appellant was adequately and fairly represented by the Union.

[115] That is not the role of this Court. We can only interfere with the reconsideration decisions for patent unreasonableness if satisfied that the decisions were clearly irrational or otherwise flawed to an extreme degree. Respectfully, the appellant has not met that test, even with the benefit of her fresh evidence.

Disposition

[116] For the reasons provided, I would allow Affidavit #3 into evidence, but dismiss the remainder of the appellant's first fresh evidence application. In the context of these appeals, the second fresh evidence application was unnecessary.

2023 BCCA 165 (CanLII)

[117] I would also dismiss the appeals.

“The Honourable Madam Justice DeWitt-Van Oosten”

I AGREE:

“The Honourable Mr. Justice Harris”

I AGREE:

“The Honourable Justice Griffin”

2023 BCCA 165 (CanLII)