IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ferguson v. British Columbia (Labour Relations Board),* 2023 BCSC 2164

Date: 20231207
Docket: No. S38843
Registry: Chilliwack

Between:

Michelle Ferguson

Petitioner

And

British Columbia Labour Relations Board, Health Sciences Association of British Columbia, and Fraser Health Authority

Respondents

Before: The Honourable Justice Shergill

On judicial review from: An order of the British Columbia Labour Relations Board, dated April 29, 2021 (*K.T.*, 2021 BCLRB 65)

Reasons for Judgment

Counsel for Petitioner:	L.S. Smith
Counsel for Respondent, British Columbia Labour Relations Board	A.M. Vulimiri
Counsel for Respondent, Health Sciences Association of British Columbia:	S.A.E. Hyman S. Hutchison
Place and Date of Hearing:	New Westminster, B.C. July 28, 2023
Place and Date of Judgment:	Vancouver, B.C. December 7, 2023

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I. OVERVIEW

[1] This petition for judicial review is brought by the Petitioner, Michelle Ferguson, pursuant to the *Labour Relations Code*, R.S.B.C. 1996, c. 244 [*Code*], the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*], and the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

[2] Through it, Ms. Ferguson seeks judicial review of a decision made by the respondent, Labour Relations Board ("Board"), denying leave for reconsideration of its decision dismissing a complaint under s. 12 of the *Code* (the "*Reconsideration Decision*").

[3] The underlying decision ("*Original Decision*") related to a complaint made by Ms. Ferguson against the respondent, Health Sciences Association (the "Union"). Ms. Ferguson alleged that the Union breached its statutory duty of fair representation in its handling of her grievances. She asked the original panel of the Board (the "Original Panel"), to void a settlement reached through mediation with her employer, the Fraser Health Authority (the "Employer" or "Fraser Health"), and have the matter referred to arbitration. Her request was denied, as was her subsequent application for reconsideration of the Original Decision.

[4] The central issue for my determination is whether the Reconsideration Decision should be set aside and the matter remitted back to the Board with directions.

II. ISSUES

[5] The following issues are raised in this application:

a) Was the Reconsideration Decision patently unreasonable?

b) Was the Petitioner denied procedural fairness by the Board?

[6] I will begin with the background facts that underlie this dispute.

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III. FACTUAL BACKGROUND

[7] The following facts are not in dispute. They are largely taken from the decisions.

[8] Ms. Ferguson is an Occupational Therapist. She had been employed with Fraser Health for approximately 18 years prior to her employment being terminated for cause on October 1, 2018.

[9] The Union grieved the termination and notified Ms. Ferguson on January 29, 2019 that a labour arbitrator would conduct a “grievance mediation” on March 7, 2019 (the “Mediation”).

[10] On January 31, 2019, Ms. Ferguson e-mailed the Union to advise that she was “struggling with anxiety” and felt unsure whether she would be well enough to participate in the Mediation. Ms. Ferguson subsequently met with the Union, and exchanged e-mails with counsel to prepare.

[11] The Mediation proceeded on the scheduled date. The Union made an opening statement at the Mediation. Union counsel then conducted negotiations in a separate room, while Ms. Ferguson waited with a union representative. Counsel for the Union returned with a proposed settlement agreement (the “Agreement”), which Ms. Ferguson was asked to review and sign. There is a dispute as to whether (a) Ms. Ferguson was pressured into signing the Agreement, and (b) if she understood what was contained in the Agreement when she signed it.

[12] The Agreement provided Ms. Ferguson with a retiring allowance and reinstatement, but only for the purpose of applying for long-term disability (“LTD”) benefits. Under the terms of the Agreement, Ms. Ferguson could not apply for work at other locations of the Employer.

[13] The day after signing the Agreement, Ms. Ferguson contacted the Union and asked it to renegotiate aspects of the Agreement. The Union declined on the basis that the settlement had been finalized.

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[14] On August 21, 2020, Ms. Ferguson filed a complaint under s. 12 of the *Code* against the Union and the Health Authority.

[15] On January 20, 2021, the Original Panel dismissed the Petitioner's complaint. The *Original Decision* is indexed at *K.T.,* 2021 BCLRB 9.

[16] Ms. Ferguson applied for leave and reconsideration of the *Original Decision*, under s. 141 of the *Code.* (the "Leave Application").

[17] On April 29, 2021, a reconsideration panel of the Board (the "Reconsideration Panel") dismissed the application brought under s. 141. The *Reconsideration Decision* is indexed at *K. T.,* 2021 BCLRB 65.

[18] On June 25, 2021, Ms. Ferguson filed the Petition seeking judicial review of the Reconsideration Decision.

IV. LEGAL FRAMEWORK

[19] I begin first with the relevant provisions of the *Code* that govern the Board's complaint process.

A. The Complaint

[20] Ms. Ferguson brought her complaint to the Board under s. 12 of the *Code*, which describes a union's duty of fair representation as follows:

> **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…

[21] Under s. 12(1)(a), a union is prohibited from acting in a manner that is "arbitrary, discriminatory, or in bad faith" in representing employees in a bargaining unit.

[22] Section 13 of the *Code* sets out the procedure that must be followed where a member makes a complaint that a union has failed to comply with s. 12.

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[23] Pursuant to s. 13(1)(a) of the *Code*, a panel of the Board first makes a threshold determination as to whether "the complaint discloses a case that the contravention [of s. 12] has apparently occurred". At this stage, the union is not notified of the complaint; nor is the union asked to provide submissions in response to the complaint.

[24] Only if the panel concludes that the complaint discloses sufficient evidence that a contravention of s. 12 "has apparently occurred" does the panel take the next step. Under s. 13(1)(b)(i) the panel serves a notice of the complaint on the union, and invites it to make submissions on the complaint.

[25] After receiving any submissions, the panel must either dismiss the complaint under s. 13(1)(b)(ii) or refer it to the Board for a hearing. In this case, the complaint was dismissed by the Original Panel at the threshold stage, after finding that it did not disclose an apparent breach of s. 12 of the *Code*.

B. The Leave Application

[26] By her Leave Application, Ms. Ferguson applied for leave and reconsideration of the Original Decision pursuant to s. 141 of the *Code*.

[27] Section 141(2) of the *Code* permits the Board to grant leave for reconsideration, if the party seeking leave satisfies the Board that:

> a) evidence not available at the time of the original decision has become available, or
>
> b) the decision of the board is inconsistent with the principles expressed or implied in the *Code*, or in any other act dealing with labour relations.

[28] Ms. Ferguson advanced her Leave Application on both the above grounds.

[29] In dismissing the Leave Application, the Reconsideration Panel held that:

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a) The Original Decision was consistent with the principles expressed or implied in the *Code*, and that the Union's conduct was not arbitrary: *Reconsideration Decision*, at paras. 27–28.

b) While the new evidence met the first branch of the test under s. 141, it failed to meet the second branch of the test. Specifically, it found that "[t]here is not a strong probability the new evidence that the Applicant's LTD claim was rejected would have a material and determinative effect on the Original Decision": *Reconsideration Decision* at para 30.

[30] Ms. Ferguson takes issue with both these findings, and further submits that she was denied procedural fairness by the Board the Original Decision and the Reconsideration Decision.

[31] I now turn to the standard of review that is applicable in this case.

C. Standard of Review

[32] The parties agree that the applicable standard of review of the Reconsideration Decision is patent unreasonableness. This is supported by the strong privative clauses contained in the *Code*, at ss. 136 through 139:[1]

a) Section 136 confirms exclusive jurisdiction of the Board to hear and determine applications arising under the *Code*.

b) Section 137 states that a court "does not have and must not exercise any jurisdiction in respect of a matter that is, or may be, the subject of a complaint under section 133 or a matter referred to in section 136, and…a court must not make an order enjoining or prohibiting an act or thing in respect of them."

[1] This summary of the jurisprudence relating to the standard of review that applies in this case, is not in dispute. Much of it is taken from the filed Petition Response prepared by counsel for the Board.

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c) Section 138 provides that a decision of the board on a matter over which it has jurisdiction is “final and conclusive and is not open to question or review in a court on any grounds”.

d) Section 139(r) provides that the board has “exclusive jurisdiction” to decide whether a union is fulfilling its duty of fair representation.

[33] Section 115.1 of the *Code* stipulates that ss. 58(1) and (2) of the *ATA* apply to the Board. These set out the standard of review where there is a privative clause. Section 58(1) of the *ATA* relates to the expertise of the tribunal *vis à vis* the courts. It provides that where the *Code* contains a privative clause, the Board must be considered to be, relative to the courts, "an expert tribunal in relation to all matters over which it has exclusive jurisdiction".

[34] Section 58(2) of the *ATA* prescribes the standards of review applicable to decisions of such expert tribunals:

> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (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.

[35] The determination under s. 12 of the *Code* of whether a complaint made discloses an apparent case of a contravention, is subject to review on a standard of patent unreasonableness. The same standard also applies to the Board’s decision under s. 141 of the *Code* in declining to grant leave for reconsideration of a s. 12 decision: *Red Chris Development Company Ltd. v. United Steelworkers, Local 1-1937,* 2021 BCCA 152 (“*Red Chris”*) at para. 28; and *Brownjohn v. British Columbia (Labor Relations Board)*, 2011 BCSC 1482 at paras. 79, 81.

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[36] However, insofar as there are also issues raised in this judicial review of a denial of procedural fairness, that question must be decided having regard to whether the tribunal acted fairly in all the circumstances: *ATA*, s. 58(2)(b).

D. Decision Under Review

[37] At the hearing of this judicial review application, the parties (particularly the Petitioner) made extensive submissions related to the Original Decision. It therefore bears repeating that although the Court may review the record, including the Original Decision, the only decision under review in this proceeding is the Reconsideration Decision: *Pereira BCCA* infra at para. 44; and *British Columbia Nurses' Union v. Health Sciences Association of British Columbia*, 2017 BCSC 343 ("*BCNU*") at para. 44.

E. The Record

[38] A judicial review proceeding is not a forum for new evidence or argument that could have been presented to the Board, but was not. Rather, the reviewing court is to only consider the record that was before the Board: *BCNU* at paras. 48–50.

[39] Consistent with these principles, Justice Walkem pronounced an order on June 14, 2023, deeming the following affidavits inadmissible at the hearing of this judicial review:

a) Affidavit #1 of Michelle Ferguson filed June 25, 2021;
b) Affidavit# 1 of Adam Picotte filed August 21, 2021; and
c) Affidavit #2 of Michelle Ferguson filed February 13, 2023, save and except for Exhibit "M" to that affidavit, a statutory declaration dated February 2, 2021.

[40] Consequently, the full record that was before the Board, and which is before me in this judicial review proceeding, consists of the following:

a) all of the Exhibits attached to the Affidavit #1 of Adeline Maerz, made June 23, 2021 (“Maerz Affidavit”); and

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b) the Statutory Declaration of Michelle Ferguson, made February 2, 2021 (the "Statutory Declaration").

(the "Record")

[41] For greater specificity, the Maerz Affidavit attaches the following documents:

a) Exhibit A – the complaint filed by Ms. Ferguson (the "Complaint") and attached:

i. Appendices A to D which contain further details of the Complaint as well as comprehensive legal submissions in support thereof; and

ii. Appendix E which consists of 204 pages of documents relevant to the Complaint, including:

(1) a redacted copy of the Psychological Assessment Report obtained by the Union from Dr. Eveleigh, which is dated December 19, 2018 (the "Eveleigh Report"); and

(2) a Medical Legal Report obtained by the Petitioner from psychologist Dr. Nader, which is dated July 28, 2020 (the "Nader Report");

b) Exhibit B – the Original Decision;

c) Exhibit C – the Leave Application; and

d) Exhibit D – the Reconsideration Decision.

[42] The Record includes the Statutory Declaration produced by Ms. Ferguson. It contains the new evidence that she sought to rely on at the hearing of her Leave Application.

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V. WAS THE RECONSIDERATION DECISION PATENTLY UNREASONABLE?

[43] Patent unreasonableness is a highly deferential standard of review. It recognizes the specialized expertise of the Board in matters of labour relations.

[44] A "patently unreasonable" decision is one that is "clearly irrational", "evidently not in accordance with reason", or "so flawed that no amount of curial difference can justify letting it stand": see e.g. *Victoria Times Colonist v. Communications, Energy and Paperworkers,* 2008 BCSC 109 (affirmed 2009 BCCA 229) at para. 53.

[45] In *Victoria Times Colonist* at para. 65, the court held as follows:

> [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* 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.

[46] In *Red Chris* at para. 30, the Court of Appeal affirmed this description of the patent unreasonableness standard as it applies to the Labor Relations Board.

[47] When determining whether a decision of the Board is patently unreasonable, the court must defer to the Board's decision, even if the reviewing judge believes that the decision is wrong, provided that there is a tenable line of analysis supporting the decision: *Communications, Energy & Paperworkers' Union of Canada (Local 298) v. Eurocan Pulp & Paper Co.*, 2012 BCCA 354 at paras. 32–35, leave to appeal to SCC ref'd, 35029 (14 February 2013).

[48] Importantly, the reviewing court should not concern itself with the application or compliance by the Board with its own labour relations policies under the *Code*. The development and application of that policy engages the Board's considerable

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expertise and is a matter exclusively within the jurisdiction of the Board: *British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc*., 2013 BCCA 497 at para. 55, leave to appeal to SCC ref'd, 35692 (3 April 2014).

[49] The issue of whether a union has contravened s. 12 in its representation of a member, is "a determination quintessentially within the ambit of the Board's expertise": *Speckling v. British Columbia (Labor Relations Board)*, 2007 BCCA 153, at para. 19.

[50] In *Budgell v. Canadian Union of Public Employees, Local 15,* 2003 BCCA 605 at para. 30, the court held as follows:

> What a union may reasonably be asked to do in representing a worker will vary with the circumstances, and will always be a question for the Board, who has the exclusive mandate to decide the extent of the duty of a union under s. 12 and thus, the right to decide what facts may constitute a *prima facie* breach of that duty.

[51] A tribunal is not required to comment in its reasons, on every issue raised by the parties. The issue of the reviewing court is whether the decision as a whole is patently unreasonable: *Ma v. British Columbia (Employment Standards Tribunal),* 2016 BCSC 2097 at para. 35, citing *Construction Labour Relations v. Driver Iron Inc.,* 2012 SCC 65 at para. 3.

[52] With this framework in mind, I turn to the decision before me.

A. Reasons of the Original Panel

[53] As the Reconsideration Decision relates to the treatment of the Complaint in the Original Decision, it is necessary to have an understanding of the what both the Complaint and the Original Decision entail.

[54] The grounds advanced by Ms. Ferguson for her s. 12 complaint are set out in detail at paras. 28–33 of the *Original Decision*, and summarized at paras. 39–40. These include the following:

> a) The Union treated her like a non-disabled member in the time period leading up to the settlement, by proceeding to expedited arbitration; preventing her or advising her against bringing her husband to the

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Mediation for emotional support, and affording her less than 15 minutes to review the settlement agreement with her union representative prior to signing it.

b) The Union failed to inquire expressly if she was well enough to sign the Agreement.

c) She was owed a higher duty of representation because of her disability.

d) The terms of the Agreement were unreasonable.

e) The Union failed to conduct an adequate investigation as to whether the Employer had cause for her termination or failed to accommodate her disability.

f) The Union failed to advocate for what it knew were her primary interests, i.e. reinstatement and to resolve outstanding workplace issues with her manager.

g) The Union negotiated the settlement agreement on the premise that the investigation by the College of Occupational Therapists of British Columbia ("COTBC") would confirm she had breached patient privacy, and failed to adequately consider the potential impact of the COTBC investigation on the Agreement.

[55] The *Original Decision* considered the arguments advanced by Ms. Ferguson for setting aside the Agreement and held as follows:

a) The Board will not reopen a settlement agreement except in exceptional circumstances. The fact that an individual feels pressure to accept a settlement does not necessarily establish duress that would cause the Board to go behind the agreement, rather the question is whether the pressure was undue or improper in the circumstances: at paras. 35-38.

b) Despite Ms. Ferguson informing the Union that she was concerned she was unfit for Mediation due to her disability, it was reasonable for the Union to find she was not medically unfit to attend Mediation: at para. 40.

c) Ms. Ferguson did not provide the Union with information from a physician or other medical professional saying that she was not fit to attend the Mediation: at para. 41.

d) The Union's conduct leading up to, and during, the execution of the Agreement did not amount to undue or improper pressure in the circumstances or to arbitrary representation. Ms. Ferguson may have felt she had no choice but to sign the Agreement and "clearly regretted signing it almost immediately". However, this did not establish duress: at para. 44.

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e) An allegation that the Union's counsel made Ms. Ferguson promise not to seek a second opinion of the Agreement, even if true, would not amount to an apparent breach of s. 12: at para. 45.

f) The inclusion of a term precluding Ms. Ferguson from applying for future employment with the Employer did not establish a breach of s. 12: at para. 46.

g) Negotiating a term that restricts where Ms. Ferguson can apply for future employment does not establish an apparent breach of s. 12: at para. 46.

h) Any agreement by the Union with the Employer that Ms. Ferguson had breached patient privacy and confidentiality does not in itself establish an apparent breach of s. 12. Nor does the Union's decision to resolve the grievance without waiting for the outcome of the COTBC investigation: at para. 47.

i) The materials provided with the complaint revealed that the Union had a detailed understanding of Ms. Ferguson's circumstances, and did not simply adopt the Employer's views about the strength of the grievances without making its own inquiries: at para. 48.

j) The Union took reasonable steps to inform itself of the circumstances of Ms. Ferguson's termination, made a reasoned decision and did not carry out representation with blatant or reckless disregard. There is no apparent case of arbitrary representation by the Union: at para. 49.

k) Ms. Ferguson has not established an apparent case of discriminatory representation, as per *James W.D. Judd*, BCLRB No. B63/2003, 2003 CanLII 62912 ("*Judd*"). The Union turned its mind to the Petitioner's disability in approaching the grievances and mediation, including commissioning an independent psychological evaluation prior to the mediation: at para. 51.

[56] Accordingly, the Original Decision dismissed the application under s. 13 of the *Code*.

B. Reasons of the Reconsideration Panel

[57] In her Leave Application before the Reconsideration Panel, Ms. Ferguson argued that the Original Panel erred in: 1) applying the incorrect test for determining whether she had been subjected to undue or improper influence; 2) failing to consider the evidence before the Board in light of this test; 3) failing to void the settlement agreement she signed while under duress; and 4) in not finding the Union

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acted arbitrarily. Ms. Ferguson also sought reconsideration on the basis of new evidence.

[58] After summarizing the findings and conclusions in the *Original Decision*, the Reconsideration Panel set out Ms. Ferguson's position on the Leave Application, and noted as follows:

a) Ms. Ferguson "does not challenge any findings of fact" in the Original Decision; and submits that the cumulative effect of her circumstances leading up to the Mediation, as well as the stressors on the day of the Mediation, put her into a "traumatic state where her actions [were] guided by involuntary response": at para. 11.

b) When the Union showed her the proposed settlement agreement, Ms. Ferguson was placed under an unexpected time constraint, and experienced pressure to sign it quickly. Though she attempted to read it, she did not comprehend the Agreement due to the stress of the situation. Ms. Ferguson felt she had no choice but to sign it without knowing the content or consequences of the Agreement: at para. 12.

c) The Union failed to ensure that it had Ms. Ferguson's informed consent to the Agreement before she signed it. It was only after she was able to freely consider the settlement agreement outside of the pressurized environment of the Mediation that she realized she did not wish to sign the document: at para. 13.

d) Ms. Ferguson agrees that the original decision correctly cites *Jennifer MacDonald*, BCLRB No. B315/2002, 2002 CanLII 52987 ("*MacDonald*") for the propositions that: (a) the board will not reopen settlement agreements absent exceptional circumstances; and (b) feeling pressure to accept a settlement agreement does not necessarily establish undue or improper pressure to sign. However, she argues that in *MacDonald*, the Board adopted the test laid out in *Pao On v. Lau Yui,* [1979] 3 All E.R. 65 (H.K.P.C.), [1979] 3 W.L.R. 435 ("*Pao On*"), and that this test was not applied in the original decision: at paras. 14, 15.

e) Ms. Ferguson concedes the Original Decision was correct in concluding that the fact that she may have felt she had no choice but to sign the settlement agreement and regretted signing it almost immediately are not sufficient to establish duress. However, Ms. Ferguson submits the Original Decision "errs in its application of the *Pao On* test" when it goes on to find no undue or improper pressure in the circumstances "despite the lack of consideration of the proper factors to determine such": para. 15.

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f) Application of the four factors of the *Pao On* test for undue influence should have resulted in a finding that Ms. Ferguson was coerced into the Agreement, as evidenced by the facts that she: 1) had protested before signing the Agreement; 2) was pressured by the Union into feeling she had no alternative but to sign; 3) was urged by the Union not to get a second opinion about the Agreement; and 4) made numerous efforts to avoid the Agreement after the fact: at para. 16.

g) The Original Decision erred in finding the Union did not act arbitrarily. The Union was fully aware of the relevant information at the time of the Mediation, but did not include all of it in the opening statement at the Mediation. Consequently, the Union acted with blatant disregard for her interests: at para. 17.

h) Ms. Ferguson provided new evidence by way of a statutory declaration. In it, she averred that she learned in January 2021, that her LTD claim was denied by the insurer in November 2020. At the encouragement of the Union, she made approximately $2,000 in payments to maintain her LTD and employment status, after the Agreement was signed. This money has been lost. The Union urged her to pursue LTD benefits even though they knew that it was likely she would not receive them. In so doing, they showed a disregard for her needs, wishes, and circumstances: at para. 18.

[59] The Reconsideration Panel noted that to meet the test for granting an application for leave for reconsideration under s. 141, Ms. Ferguson needed to “raise a serious question as to the correctness or fairness of an original decision”: at para. 19, citing *Brinco Coal Mining Corporation*, BLCRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), 20 C.L.R.B.R. (2d) 44, ("*Brinco*").

[60] The Reconsideration Panel then went on to address the various issues raised by Ms. Ferguson, starting with the appropriate test that the Original Panel should have applied for determining if there was “true consent”. The Reconsideration Panel concluded that the Original Panel took the correct approach in deciding whether Ms. Ferguson had established a basis for setting aside the settlement agreement: *Reconsideration Decision,* at para. 27.

[61] The Reconsideration Panel found that the Union’s conduct must be assessed as a whole, and when viewed in that way, the Original Decision correctly concludes that the Union’s conduct was not arbitrary: *Reconsideration Decision,* at para. 28.

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[62] In terms of Ms. Ferguson's reliance on the new evidence, the Reconsideration Panel accepted that the first branch of the test under s. 141 had been met. Specifically, the new evidence was not available before the Original Decision was made. However, the new evidence failed to meet the second part of the *Brinco* test as there was "not a strong probability that the new evidence will have a material and determinative effect on the Original Decision": *Reconsideration Decision,* at para. 29, citing *Brinco* at p. 8.

[63] I now turn to considering the issues before me.

C. Erroneous Finding of Fact

[64] Ms. Ferguson submits that the Reconsideration Panel made an error by relying on erroneous findings of fact contained at paras. 40 and 41 of the *Original Decision*. Specifically, she takes issue with the following passages from the *Original Decision*:

> [40] The Applicant expressed concern to the Union in late January 2019 that she was not sure whether she was ready to attend the Mediation because of her disability. However, I am not persuaded the Union ought to have concluded based on that information, without more, that the Applicant was medically unfit to attend the Mediation or to consent to the Settlement Agreement. I am also not persuaded that in the circumstances of this case the Union was required to ensure that the Applicant had more time to review the Settlement Agreement and that her husband be present.
>
> [41] While the Applicant told the Union in January 2019 that she was going to see her physician, she did not provide the Union with information from a physician or other medical professional that said she was not fit to attend the Mediation. As noted in the Union's correspondence, the Union said the Applicant presented as thoughtful, articulate and that it believed she understood the terms of the Settlement Agreement.
>
> [emphasis added]

[65] Ms. Ferguson submits that the Original Panel misapprehended the evidence regarding her mental health and the information which was within the knowledge of the Union. It is submitted that there was in fact "more" information available to the Union which should have led the Original Panel to find that the Union ought to have concluded that she was medically unfit to attend the mediation. In particular, the Union knew that:

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a) she had been placed on medical leave by her doctor due to anxiety and stress arising from conflicts in the workplace which eventually led to her termination;

b) her workplace conflicts would be discussed at length at the Mediation, thereby creating a high stress situation that would likely trigger her anxiety and stress;

c) Dr. Eveleigh had found that she was suffering from generalized anxiety disorder and would struggle in situations where she feels stressed and harassed by others;

d) she had expressed concerns to Mr. Picotte in an e-mail on January 31, 2019, that she did not feel ready for the Mediation and experienced difficulty in hostile environments; and

e) she was experiencing difficulty at the Mediation, as evidenced by an e-mail from Mr. Picotte following the mediation on March 11, 2019, expressing his concerns for her mental well-being.

[66] Ms. Ferguson submits that the Nader Report further supports her position that she was suffering from significant psychological impairment at the time of the Mediation, due to a variety of mental health disorders.

[67] Consequently, she submits, the Original Panel's reasoning that the Union fulfilled its duty of representation towards the Petitioner is patently unreasonable. Further, the Reconsideration Panel's deference to the Original Decision on this issue is also patently unreasonable.

[68] Ms. Ferguson submits that despite the fact that she "reiterated" in her Leave Application that her mental disability was a significant factor to assess the duty of representation that was owed to her by the Union, the Reconsideration Decision was silent on the question of her mental health. It is argued that if the Reconsideration Panel adequately considered the Union's representation of her in light of Ms. Ferguson's mental disability, they would have concluded that the Original Decision was incorrect in its conclusions regarding the Petitioner's mental fitness prior to, during, and after the mediation.

[69] There are a number of problems with this argument. First, the allegation that the Original Panel made an erroneous finding of fact was not raised before the

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Reconsideration Panel. While Ms. Ferguson did refer in her Leave Application to the impact of her mental health on the events surrounding and including the Mediation, she expressly stated in the opening paragraph of her Leave Application that she was not taking issue with any of the findings of fact made by the Board:

> This Application does not challenge any findings of fact of the Board ln the original decision on this matter, but is merely restating these select facts for the convenience of the Board in making their decision on reconsideration and in determining whether the correct test was applied. The accumulated Impact of these facts speak to the Applicant's eroded mental state and relevant impacts to her mental health that affected her on the day in which she signed the mediation agreement, contributing to her "please and appease" trauma response which was not properly considered in the original decision.
>
> [Emphasis added]

[70] As noted in *Hudon v. British Columbia (Residential Tenancy Branch),* 2012 BCSC 253 at paras. 71, 74, a court should not embark on judicial review of an original decision on entirely different grounds.

[71] In this case, the findings of fact in the Original Decision were not before the board on reconsideration: *Reconsideration Decision,* at para. 11. Consequently, it is not appropriate for this issue to be considered on judicial review.

[72] Second, even if the factual finding regarding the Petitioner's mental health was properly before this Court, I am unable to find the Reconsideration Panel's handling of it was patently unreasonable. Even though the Original Panel's findings of fact regarding her mental illness were not directly challenged by Ms. Ferguson, the Reconsideration Panel did turn its mind to Ms. Ferguson's mental capacity at the time of the Mediation. This is reflected at paras. 9-10 of the *Reconsideration Decision*, which make reference to the undisputed findings of fact made by the Original Panel, including those at paras. 40-41; and at para. 11 of the *Reconsideration Decision*, which set out Ms. Ferguson's position that the "cumulative effect" of the circumstances leading up to and including the Mediation put her into "a traumatic state where her actions [were] guided by involuntary response".

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[73] Based on my review of the Record, it was open for the Original Panel to find that Ms. Ferguson did not offer medical evidence supporting her contention that she was psychologically unfit to attend the Mediation. The medical evidence contained in the Record either pre-dates or post-dates her Mediation by many months, and even if extrapolated to cover the period of the Mediation, it was not clearly irrational to conclude that sufficient evidence was lacking.

[74] I am unable to accede to this ground of judicial review. The Reconsideration Panel properly found that the Original Panel had considered the question of capacity, adopted the undisputed facts set out, and confirmed that there was no basis to interfere with the decision on the grounds raised by the Petitioner.

[75] After having regard to the decision as a whole, I conclude that the Reconsideration Panel's decision is rational and reasoned.

D. Undue Pressure

[76] The Petitioner also takes issue with the conclusions set out at paras. 23 to 27 of the *Reconsideration Decision*. She submits that the cumulative impact of this reasoning leads to be inference that "the Board decided that a union may pressure a mentally disabled grievor into accepting a settlement agreement by threatening to abandon a grievance and, for this reason, the Board would not set aside a settlement agreement".[2] This inference is not borne out in the *Reconsideration Decision*.

[77] It is clear from a review of the *Reconsideration Decision*, that the Reconsideration Panel was addressing the Petitioner's argument that the Original Decision did not properly apply the Labor Relations Board's jurisprudence with respect to settlement agreements.

[78] In rejecting Ms. Ferguson's position that the test in *Pao On* applied, the Reconsideration Panel held as follows:

[2] Written Submissions of the Petitioner, at para. 62.

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> [23] …We are not persuaded *MacDonald* establishes that the board has adopted the test in *Pao On*. In any event, we find a review of other Board jurisprudence makes clear the Board does not require the application of that test. Rather, the required approach is that set out in the Original Decision: the Board will not void a settlement agreement absent exceptional circumstances, and duress, or undue or improper influence, is not established merely because a person feels pressure to accept or sign a settlement agreement. As stated in *Sohan Moundhi*, BCLRB No. B103/2003, pressure to accept a settlement offer or agreement "may arise because of time constraints or a perception of a lack practical alternatives"; however, "that type of pressure has not been found to vitiate consent" (para. 74).
>
> [emphasis added]

[79] At para. 24 of the *Reconsideration Decision*, the Reconsideration Panel reiterated the principle enunciated in *Budgell* at paras. 16 and 17, such that simply because the Board refers to common law tests, does not mean that it is bound to apply those tests:

> [16] The Board is not bound to follow the common law with regard to the duty of fair representation. It is bound by s. 12. "Representation" in that provision refers to a union's exercise of its exclusive bargaining agency on behalf of employees in the bargaining unit when negotiating or enforcing a collective agreement. Because only the union may decide whether to bring a grievance to arbitration, or to drop or settle it, "representation" is not to be equated with legal advocacy on behalf of an individual worker, but rather to be seen as the union's exercise of its agency, of which advocacy on behalf of a worker is one aspect: *Rayonier Canada (B.C.) Ltd.*, BCLRB No. 40/75; *Donato Franco*, BCLRB No. 90/94.
>
> [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 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.

[80] The Reconsideration Panel concluded that the Original Decision took the correct approach in deciding whether the Petitioner had established a basis for setting aside the settlement agreement: *Reconsideration Decision,* at para. 27.

[81] The Reconsideration Panel arrived at this decision based on the following:

a) Consideration of the factors set out in *Pao On* is not required: at para. 27.

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b) The Union's duty of fair representation under s. 12 does not mean that it is duty bound to act as a legal advocate on behalf of the Petitioner. Rather, it is for the union, not the grievor, to decide whether to pursue, drop, or settle a grievance: at para. 25, citing *Budgell* (and *Judd* as cited at para. 36 of the *Original Decision*).

c) The Union had the right to settle the grievance regardless of whether or not it was signed by the Petitioner: at para. 26.

d) The fact that the Union may decide to abandon the grievance if the grievor refuses to sign, may mean that there is tremendous pressure on the grievor to endorse an agreement they may not want. However, "as the Board has consistently indicated in its decisions, this pressure does not constitute a basis on which the Board would set aside the agreement": at para. 26.

[82] The above principles articulated by the Reconsideration Panel are simply a restatement of well-established principles in labour law concerning the nature of the union/grievor relationship. I see no error in the reasoning of the Reconsideration Panel such that its decision in this respect could be considered patently unreasonable.

[83] Similarly, the Petitioner's argument against the Reconsideration Panel's comparison between her and the complainant in *C.B,* BCLRB No. B98/2013, 2013 CanLII 26951 (Leave for Reconsideration denied, BCLRB No. B110/2013), is simply unfounded. At para. 17 of *C.B.*, the Board notes the following:

> To the extent the Complainant suggests she was not medically fit to engage in the mediation process, and the Union should have known this, the Complainant does not provide a satisfactory basis for such a finding. She cites Dr. LePage's email indicating she was unfit to return to work, but this does not establish she was medically unfit to engage in mediation. …

[84] Bearing in mind that no two cases are identical, and each case must be determined on its own facts, it was not patently unreasonable for the Reconsideration Panel to find that the circumstances in this case are similar to those in *C.B*., and to consider the conclusions of the panel in *C.B*. Nor did the Reconsideration Panel error in referring to *Sohan Moundhi*, BCLRB No. B103/2003, 2003 CanLII 6300, from where it drew principles that were relevant to the facts at bar.

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[85] I am also unable to accede to this ground of judicial review. The Reconsideration Decision reveals a clear rational basis upon which the Reconsideration Panel addressed the issues raised by the Petitioner. It assessed the circumstances surrounding the Agreement, considered the undisputed findings of fact made by the Original Panel regarding the Petitioner's medical fitness, and applied the Labour Relations Board's own jurisprudence on the matter.

[86] The approach used by the Reconsideration Panel was legally sound and grounded in the evidence. I am unable to conclude that the *Reconsideration Decision* is patently unreasonable.

E. New Evidence

[87] Ms. Ferguson argues the Reconsideration Panel's conclusion that the new evidence submitted by her was insufficient for leave and reconsideration, was patently unreasonable.

[88] The relevant portions of the *Reconsideration Decision* are as follows:

> [29] Finally, with respect to the Applicant's new evidence that her LTD claim was denied in November 2020, we accept that it meets the first branch of the Board's "new evidence" test under Section 141: it was not available before the Original Decision was made. However, we find it fails the second branch of the Board's test: there is not a strong probability that the new evidence will have a material and determinative effect on the Original Decision (*Brinco*).
>
> [30] The Original Decision records that the settlement agreement provided the Applicant with a retiring allowance and reinstatement for the purpose of applying for LTD benefits (para. 21). At the time, the Union could not have known whether or not the application for LTD benefits would succeed. Even if the Union believed it was unlikely to succeed, it could still have concluded that the terms of the settlement agreement were as favourable as they could achieve in the circumstances (as it indicated in its August 2, 2019 email to the Applicant). We find the Applicant's new evidence does not establish the Union acted in bad faith, and it does not otherwise satisfy the second branch of the Board's new evidence test. There is not a strong probability the new evidence that the Applicant's LTD claim was rejected would have a material and determinative effect on the Original Decision.
>
> [emphasis added]

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[89] In raising this ground on judicial review, the Petitioner does not dispute that the Reconsideration Panel articulated the appropriate test for the admission of new evidence. Rather, the Petitioner takes issue with the manner in which the test was applied.

[90] The test for new evidence is evidence that has become available which was not available earlier through the exercise of reasonable diligence. To be admitted, there must be a strong probability that the new evidence will have a material and determinative effect on the decision: *Brinco* at p. 8.

[91] The Petitioner has failed to establish that the Board's articulation of this test, or its application of the test to the facts of the case at bar, was patently unreasonable.

[92] Ms. Ferguson argues, as established fact, the Union was aware that she was bound to lose in her future claim for LTD benefits. However, the documents that she refers to do not lead to the inevitable conclusion that the Union knew she would not succeed in her bid for LTD benefits. Those documents reveal, at best, that the Union thought it was unlikely that the application would succeed. It was open for the Reconsideration Panel to conclude on the evidence before it, that the Union still could have determined that the terms of the Agreement were as favourable as they could be in the circumstances, despite the poor odds of a successful LTD application. To that end, the Original Panel noted that the Agreement provided Ms. Ferguson with a retiring allowance and reinstatement to employment for the purpose of applying for LTD benefits. The Original Panel concluded that at the time that the settlement was arrived at, the Union could not have known whether or not the application for LTD benefits would succeed. This is not an absurd finding. The decision to approve or deny an application for LTD benefits is based upon an assessment made by an independent adjudicator, not the Union.

[93] This ground of judicial review is also without merit.

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VI. WAS THE PETITIONER DENIED PROCEDURAL FAIRNESS?

[94] Procedural fairness is concerned with the manner in which a decision was made, not the substance of the decision: *Health Sciences Association of British Columbia v. Interior Health Authority*, 2015 BCSC 98, paras. 37–39.

[95] The right to procedural fairness consists of both the right to be heard, and the right to an impartial hearing: *Crest Group Holdings Ltd. v. British Columbia (Attorney General)*, 2014 BCSC 1651 at para. 36.

[96] To assess what level of procedural fairness is required in a given process, the court must undertake a contextual approach. This requires the reviewing court to look at the decision within its statutory, institutional, and social context: *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, 1999 CanLII 699 at para. 22.

[97] Determining the content of the duty of fairness involves the consideration of a number of factors, such as: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the agency itself: *Baker* at paras. 23–27.

[98] The standard of review applicable to questions of natural justice and procedural fairness is whether, in all of the circumstances, the tribunal acted fairly. Nevertheless, in light of the privative clause contained in the *Code* and the Board's jurisdiction to determine its own procedure, some measure of deference is still owed to the Board regarding procedural fairness: *Pereira v. British Columbia (Labour Relations Board),* 2022 BCSC 1205 ("*Pereira BCSC"*), at paras. 46–47, aff'd on appeal 2023 BCCA 165 ("*Pereira BCCA"*).

[99] The Board is entitled to devise flexible procedures to adapt to its needs, in order to "achieve a certain balance between the need for fairness, efficiency and

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predictability of outcome": *James v. British Columbia (Labor Relations Board),* 2006 BCSC 784 at para. 70.

[100] The Petitioner alleges she has been denied procedural fairness based on the following two categories described in *Baker*:

a) the legitimate expectation of the person challenging the decision; and

b) the choices of procedure made by the agency itself.

[101] On the first ground, the Petitioner argues that she was denied procedural fairness or natural justice because the Reconsideration Panel was silent on the Petitioner's mental disability, including in its analysis of the Original Decision, which was at the heart of this s. 12 application and the Leave Application. She submits that she had a legitimate expectation that the Reconsideration Decision would consider the primary issues contained within the Original Decision.

[102] This concern as articulated by the Petitioner does not raise issues of procedural fairness. Rather, it raises concerns that the Reconsideration Panel failed to provide reasons: *Pereira BCSC*, at para 103.

[103] Concerns raised about the adequacy of a decision-maker's reasons do not invoke questions of procedural fairness. Nor do they constitute a standalone basis for quashing the decision. Rather these must be addressed as part of the determination of whether the decision is patently unreasonable: *Ma* at para. 35, citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62.

[104] The Board has no statutory obligation to give reasons for denying leave to reconsider: *Pereira BCSC*, at para. 105. Where reasons are provided, the Board does not have to comment on every issue, argument, piece of evidence, or caselaw raised or referred to by the parties: *Pereira BCSC*, at para. 106; *Pereira BCCA*, at para. 85. The issue for the reviewing court is whether the decision as a whole is patently unreasonable: *Ma* at para. 35, citing *Construction Labour Relations* at para. 3.

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[105] I have already addressed the Petitioner's concern with respect to the Reconsideration Panel not addressing the issue of her mental disability. in my view, the reasons of the Reconsideration Panel were sufficient, and are not patently unreasonable.

[106] The second ground raised by the Petitioner relates to the procedure by the Board wherein the Union was not required to submit any evidence in relation to its representation of the Petitioner, including its knowledge of the Petitioner's mental disability leading up to, during, and following Mediation. The Petitioner argues that if the Board had required the Union to provide evidence with respect to this issue, it would have become aware that the Union had access to the Eveleigh Report, which outlined some of the Petitioner's mental limitations around December 2018.

[107] The procedure utilized by the Board with respect to not requiring submissions from the Union is not a discretionary decision made by the Board. Rather, it is part of the statutory obligation of the Board pursuant to its enabling law.

[108] Section 13 of the *Code* provides as follows:

> **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.

[109] As recently confirmed by the Court of Appeal in *Pereira BCCA* at paras 104–107, the requirement to serve a complaint on the Union does not arise where the complaint is dismissed pursuant to s. 13(1)(a). Even where the complaint is required

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to be served, the Union is not obliged to provide submission. Rather, it is invited to do so. Further, 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": *Pereira BCCA,* at para. 104.

[110] Underlying the duty of procedural fairness is the principle that affected individuals are owed the opportunity to present their case fully and fairly, according to a fair, impartial, and open process, appropriate to the context: *Pereira BCSC*, at para. 45.

[111] This right is not compromised where the Board does not require the Union to submit all possibly relevant evidence. In *Pereira BCCA,* the Petitioner's claims included that the Board: (1) failed to consider argument relating to the grievance; and (2) failed to view the union's lack of investigation as a "breach of its duty": para 14. The Petitioner in that case was found to "[misunderstand] the Board's role": para. 101. The Court of Appeal emphasized that, by operation of s. 13, 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 in original]": para 105.

[112] Further, I note that this ground confuses the issue of which procedure is alleged to be unfair. Insofar as the Petitioner is challenging the Original Decision, and the failure of the Original Panel to request submissions from the Union, that matter is not properly before the court.

[113] Ms. Ferguson's dispute with the s. 13 decision-making process was not a ground advanced before the Reconsideration Panel. Even if this ground had been raised before the Reconsideration Panel, the alleged failure does not fall into the scope of procedural fairness before either panel. The Board was simply following the process mandated by the *Code*. The Board is required to apply its governing legislation. If the Petitioner takes issue with the legislation itself, then the appropriate process is to challenge the legality of the offending provisions. No legal challenge to

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s. 13 of the *Code* was advanced the Board, and the legality of s. 13 is not an issue raised in this judicial review.

[114] I find no merit to Ms. Ferguson's argument that she was denied procedural fairness at any stage of the proceedings.

VII. CONCLUSION

[115] I conclude that the Reconsideration Decision is not patently unreasonable. Nor do I find that there was a denial of procedural fairness to the Petitioner at any stage of the proceeding.

[116] Consequently, this Petition for judicial review is dismissed.

VIII. COSTS

[117] The Respondent union seeks costs as the successful party in this judicial review proceeding. I am not aware of any reason why this costs award should not be made. The Union is entitled to its costs of this proceeding, payable by the Petitioner, at scale B.

[118] In accordance with its usual practice on judicial review, the Board does not seek costs and asks that costs not be awarded against it. I see no reason not to accede to this request. As such, no order of costs is made in favour of the Respondent British Columbia Labor Relations Board.

[119] Subject to the parties bringing to my attention settlement offers or other relevant matters, this costs award shall stand.

"Shergill J."

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