Citation:	Budgell v. British Columbia Labour Relations Board et al. 2003 BCSC 119	Date:	20030124
		Docket:	L022677
		Registry:	Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA
In the Matter of Section 2 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;
And the Decision of the British Columbia Labour Relations Board

BETWEEN:

CHRISTOPHER JOHN BUDGELL

PETITIONER

AND:

THE BRITISH COLUMBIA LABOUR RELATIONS BOARD;
LISA HANSEN, in her capacity as Vice Chair and Registrar of the British Columbia Labour Relations Board;
the CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 15;
and the CITY OF VANCOUVER

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE GOEPEL

The Petitioner	Acting on his own behalf
Counsel for the Respondents, the British Columbia Labour Relations Board and Lisa Hansen	David W. Garner
Counsel for the Respondent, the Canadian Union of Public Employees, Local 15	David Tarasoff
Counsel for the Respondent, the City of Vancouver	Marylee A. Davies
Date and Place of Hearing:	December 5 and 6, 2002 Vancouver, B.C.

INTRODUCTION

[1] The Petitioner seeks an order in the nature of *certiorari* quashing two decisions of the British Columbia Labour Relations Board (the ”Board”) holding that the petitioner had failed to demonstrate that his union had violated its duty of fair representation under s. 12 of the ***Labour Relations Code*** R.S.B.C. 1996, c. 244 (the ***“Code”)***. If the plaintiff is successful on his application to quash the decisions, he then seeks certain consequential relief. It is the position of the petitioner that the decisions made by the Board were patently unreasonable. The petitioner further argues the decisions should be set aside on the grounds of a reasonable apprehension of bias or actual bias on the part of the members of the Board who adjudicated the case.

BACKGROUND

A. The Legislative Scheme

[2] The relevant legislative provisions are ss. 12(1) and 13 of the ***Code***. Those sections read 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, or
> (b) in the referral of persons to employment

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

[3] The petitioner filed a complaint to the Board under s. 12. Pursuant to s. 13 the Board must determine in the first instance whether a complaint has disclosed that a contravention of s. 12 has apparently occurred. If the panel considers that the complaint discloses sufficient evidence of an apparent contravention, it must then, pursuant to

s. 13(1)(b), invite a reply to the complaint from the union. Once in receipt of that reply, the Board then has the power under s. 13(b)(ii) to either dismiss the complaint or refer it to a panel of the Board for a hearing. The two decisions which the petitioner seeks to quash are determinations that the evidence in support of the complaint did not disclose that a contravention of s. 12 had apparently occurred.

B. History of Proceedings

[4] To put the petitioner’s position in context, it is necessary to review in some detail the history of events leading to the petitioner’s s. 12 application.

[5] On November 23, 1998, the petitioner commenced employment with the City of Vancouver (the “City”) based upon a written job offer that specified a six-month probationary period. The position was covered by a collective agreement between the City of Vancouver and the Canadian Union of Public Employees, Local 15 (“the Union”). The length of the probationary period set out in the offer of employment was contrary to the provisions of the collective agreement between the City and the Union which prescribed a 12-month probationary period for the petitioner’s position.

[6] On May 21, 1999, the last work day of the six-month probationary period the petitioner met with his manager. A Union representative was not present at the meeting. At the meeting the petitioner was verbally informed by his manager that the probationary period of six months set out in the written offer was in error and pursuant to the terms of the collective agreement the probationary period should have been 12 months. He was also verbally informed at this meeting that due to his unsatisfactory performance his probationary period would be extended for three months to August 23, 1999, and that it might be further extended at that time or he might face termination. On June 25, 1999, the Union filed a grievance regarding the extension of the probationary period.

[7] On August 19, 1999, the City provided the petitioner with written notice of termination. On August 20, 1999, the Union filed a second grievance, alleging wrongful dismissal.

[8] Mr. Chris Merrick, the Union national representative, took conduct of the grievance. By the end of November 1999, the grievance had advanced through steps one and two of the grievance procedure.

[9] On December 9, 1999, the petitioner wrote to Mr. Merrick indicating he was not satisfied with the manner in which the

Union was handling his case. He noted that almost six months had passed since the time of the filing of the initial grievance. The petitioner pointed out that he had suggested the grievance proceed in an expedited manner and Mr. Merrick had indicated he would not consider that option. The petitioner also indicated in his letter of December 9 that if the Union abandoned his case he intended to proceed on his own behalf.

[10] Mr. Merrick responded by way of a letter dated December 15, 1999. In that correspondence, Mr. Merrick indicated that he was in the process of gathering further information to properly assess the Union’s legal options so he could write a factual report to the Union’s grievance committee. He further indicated that it was the grievance committee that would make the determination as to whether or not the arbitration would go forward. He pointed out that it was his job, as a national representative, to attempt to resolve grievances in accordance with the avenues open in the collective agreement. He further noted that a member of the Union does not have the right to engage an outside party to deal with any issue unless the Union agrees to allow that course of action. Mr. Merrick wrote “I take exception to your statement the case has not been dealt with appropriately by

the Union.” He also wrote, “I wonder what your background is in labour relations is and when you became an expert.”

[11] By correspondence dated January 6, 2000, Mr. Merrick made his recommendations to the grievance committee. In his report, Mr. Merrick indicated that he believed that the Union had a 50/50 chance of success in arguing that the employer did not have the right to extend the probation period without the consent of the Union. He advised that if they were successful with the probation grievance, then the petitioner would be considered a full-time employee and the City would then have to prove just cause before it could dismiss the petitioner. Mr. Merrick indicated that the hearing would take about four days and cost the Local between $20,000 and $25,000. Although he indicated the chances of success were not extremely high, he recommended that the Local proceed to arbitration with both grievances.

[12] The grievance committee concurred in Mr. Merrick’s recommendation. The petitioner was so advised on January 24, 2000. In a letter dated February 4, 2000 to Brenda Coombs, the Union’s secretary-treasurer, the petitioner indicated he had not been given adequate opportunity to discuss the facts of his case with anyone. He pointed out that preparation for

the arbitration hearing was essential and that it should not be left to the last minute. The petitioner wrote that he believed it to be imperative that he be allowed to work with someone with whom he shared mutual respect and trust and that was currently not the case. He asked that serious consideration be given to providing him with new representation.

[13] On February 8, the petitioner was advised in correspondence by Mr. Merrick that the arbitration had been set for four days commencing March 22, 2000. The letter indicated that Mr. Merrick would be in contact with him to discuss his testimony and other aspects of the case.

[14] On February 24 and March 1, 2000, the petitioner met with the Union staff lawyer, a Ms. Kilfoil. The meetings lasted a total of seven hours. The petitioner apparently suggested a number of witnesses that might be called in support of his case, but Ms. Kilfoil rejected each of the proposed witnesses. The record before me does not indicate why the witnesses were rejected.

[15] Ms. Kilfoil also questioned the merits of the petitioner's case. According to the petitioner, Ms. Kilfoil, during the second meeting became progressively more

disrespectful and hostile to the petitioner. She made comments to him such as “You just don’t get it”, “You still don’t get it”, and “You should sit back and take a good look at yourself”. Such comments make clear that the necessary confidence between solicitor and client was lacking from this relationship.

[16] After a March 1 meeting between the petitioner, Mr. Merrick and Ms. Kilfoil, the Union, by letter dated March 1, 2000, made a settlement proposal to the City. The proposal would have led to the petitioner being reinstated for a further three-month probation period in exchange for the withdrawal of the grievances. The petitioner had indicated that that proposal was satisfactory to him. The proposal as forwarded also included a provision that the petitioner forfeit any claim for back pay, seniority or benefits. The petitioner says at no time during his meeting with Ms. Kilfoil or Mr. Merrick were those concessions discussed and such concessions were not acceptable to him.

[17] The proposal was, in any event, rejected by the City who advised that they were prepared to settle this matter if the petitioner tendered his resignation in consideration of the sum of $7,500. Ms. Kilfoil advised the petitioner that she

was going to recommend to the Union executive that they accept the City's offer. This matter was to be discussed at a Union meeting on March 15, 2000, one week prior to the scheduled start of the arbitration hearing.

[18] In a letter of March 10, 2000, to Ms. Coombs the petitioner advised that the City's offer was unacceptable to him. He also wrote that, "I am now convinced that any further representation of my case by CUPE national staff would be counterproductive. There being so little time left to bring someone else into the case, I'm not sure what practical options are left open to us."

[19] The Union did not accept Ms. Kilfoil's recommendation and decided to proceed with the grievance. On March 21, the day before the arbitration was scheduled to begin, Ms. Coombs telephoned the petitioner and left the following message:

> Hi Chris. This is Brenda at Local 15. The arbitration will not start till Thursday morning. We've hired an outside lawyer. His name is David Pidgeon and I'm sure he'll be contacting you. The materials are all being couriered to his office this morning. And he has your phone number and other related materials, so I'm sure you will hear from him shortly. And the arbitration starts Thursday morning as far as I know, because we could only put it off one day. If you want more than that give me a call.

[20] The phone message was the first notice to the petitioner that outside counsel would be hired. The petitioner did not know Mr. Pidgeon. On his own initiative he telephoned Mr. Pidgeon. They met briefly on the afternoon of March 21 and again the following day in an effort to prepare for the arbitration. The arbitration commenced on March 23 and concluded on March 24. The arbitrator's decision dated March 31, 2000, dismissed both grievances.

[21] It is clear from the reasons of the arbitrator that the arbitration was far from straightforward and raised several complex issues. In the first instance, the arbitrator had to determine whether the representation of a six-month probationary period raised an estoppel against the employer. Ultimately, the arbitrator found that it did. He held that conclusion was not, however, determinative of the arbitration. He indicated that, in his view, the question was the duration of the estoppel and whether it came to an end at the meeting of May 21. He ultimately concluded that the employer's decision to extend the probationary period was not detrimental to the petitioner. He held it was not inequitable for the employer to act inconsistently with its initial representation. The arbitrator does not appear to have given consideration to the question whether or not the employer had

the right to extend the probationary period without the consent of the Union.

[22] Having concluded that the employer had the right to extend the probationary period, the arbitrator found that the employer was entitled to terminate the employment in the manner it did. In reaching his decision, the arbitrator appears to have relied on evidence that the petitioner did not have a harmonious relationship with his co-workers and that his conduct towards his superior was sometimes manifestly inappropriate. No witnesses were called on behalf of the petitioner that may have refuted that evidence.

[23] The petitioner, on his own behalf, applied pursuant to s. 99 of the ***Code*** for a review of the arbitration award. The matter came before one of the Vice Chairs of the Board and is reported at B.C.L.R.B. No. B202/2000. In dismissing the application for review, Vice Chair Hall noted that it was not apparent from the award that it had been argued before the arbitrator that an employer could not discuss amendments to the probationary period with an individual union member. He held that the s. 99 review could not be used to raise arguments that were not advanced at the arbitration.

[24] On July 18, 2000, the petitioner, again acting on his own behalf, made a complaint to the Board against the Union alleging it breached its duty of fair representation. In reasons dated November 24, 2000, B.C.L.R.B. No. B448/2000, (the “original decision”) the Board held that the petitioner had failed to make out a case that a contravention of s. 12 had apparently occurred and the application under s. 12 was dismissed.

[25] On December 8, 2000, the petitioner pursuant to s. 141 of the ***Code*** filed an application seeking reconsideration of the Board’s decision. On March 23, 2001, the Board rendered its decision which is reported at B.C.L.R.B. No. B108/2001 (the ”reconsideration decision”). The reconsideration decision was signed by a panel of three Vice Chairs: Lisa Hansen, Jan O’Brien and Mark Brown. The panel concluded that the original decision failed to address the petitioner’s complaint concerning the process leading up to the arbitration. The panel set aside the original decision.

[26] Rather than referring the matter to a new original panel, the panel further concluded that it would be appropriate for it to decide whether the petitioner’s complaint disclosed an apparent violation of the Union’s duty of fair representation.

They considered the complaint afresh and concluded that the petitioner had not demonstrated that a violation of s. 12 had apparently occurred. The petitioner's complaint was again dismissed. In this proceeding, the petitioner seeks to quash both the original and reconsideration decisions.

STANDARD OF REVIEW

[27] The appropriate standard of review is "patent unreasonableness". See: ***Aujla v. British Columbia***, [2000] B.C.J. No. 2731 (S.C.); aff'd (2001), 94 B.C.L.R. (3d) 80 (C.A.); ***Speckling v. British Columbia (Labour Relations Board)***, [2002] B.C.J. No. 1676 (S.C.).

[28] The Supreme Court of Canada in ***Canada (Attorney General) v. Public Service Alliance of Canada***, [1993] 1 S.C.R. 941 defined "patently unreasonable" at pp. 963-964 as follows:

> Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidentally not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.
>
> ...
>
> It is not enough that the decision of the Board is wrong in the eyes of the Court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.

[29] As noted in ***Koopman v. Ostergaard,*** [1995] B.C.J. No. 1822 (S.C.) at para. 15:

> A patently unreasonable decision may result because the administrative decision maker failed to take into account a highly relevant consideration or improperly took into account an extraneous consideration.

ANALYSIS

[30] Although the petition seeks to quash both the original decision of November 24, 2000, and the reconsideration decision of March 23, 2001, it is clear that the Board, in the reconsideration decision, has already set aside the original decision of November 24, 2000. Accordingly, the issue for determination is whether or not the reconsideration decision, in failing to find that the petitioner had established that a violation of s. 12 had apparently occurred, is patently unreasonable.

[31] In its decision, the Board noted that the duty of fair representation is set out in ***Rayonier Canada (B.C.) Ltd.,*** B.C.L.R.B. No. 40/75, [1975] 2 Can. LRB 196 at pp. 201-202:

> [I]t is apparent that a Union is prohibited from engaging in any one of three distinct forms of misconduct in the representation of the employees. The Union must not be actuated by bad faith in the sense of personal hostility, political revenge, or dishonesty. There can be no discrimination,

> treatment of particular employees unequally whether on account of such factors as race and sex (which are illegal under the Human Rights Code) or simply personal favouritism. Finally, a Union cannot arbitrarily disregard the interests of one of its employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.

[32] In prior cases the Board has held that a union has an obligation to make itself aware of the circumstances and possible merits of a grievance and to come to a reasoned decision as to whether to proceed to arbitration. See: ***Donato Franco***, B.C.L.R.B. No. B90/94 (reconsideration of I.R.C. No. C244/92), (1994) 22 C.L.R.B.R. (2d) 281. There is no requirement that a union adopt or agree with the position of the griever. See: ***George Reid***, I.R.C. No. C199/89. The Board must consider the Union's conduct in the context of the particular circumstances of the case. See: ***Milos Tichy***, B.C.L.R.B. No. B154/96 (leave for reconsideration denied, B.C.L.R.B. No. B229/96). Where the issue is termination of employment, the Board has stated that the conduct of a union must be looked at more closely than in other circumstances. See: ***Gordon Peacock***, I.R.C. No. C20/90 (reconsideration dismissed); ***Richard Derksen*** B.C.L.R.B. No. B257/99.

[33] In the present case, the record indicates that the Union did conduct some investigation and was aware generally of the circumstances and possible merits of the grievance. It put its mind to the case and came to a reasoned decision to proceed to arbitration. If the Union had decided not to proceed to arbitration it is doubtful that the petitioner would have any grounds to complain.

[34] The reconsideration panel overturned the original decision because it failed to address the petitioner's complaint concerning the process leading up to the arbitration. With respect, the reconsideration panel appears to have done the same.

[35] The gist of the petitioner's complaint is that the Union failed to take proper steps to represent him at the arbitration hearing. His main complaint was the Union appointed counsel to act on his behalf but 48 hours prior to the commencement of the arbitration. Regardless of counsel's competence, the petitioner says that was simply too late in the day for counsel to be able to properly prepare for the arbitration hearing. He also complains about the failure of Ms. Kilfoil, during the time that she was acting for him, to

interview or prepare any of the witnesses that he had proposed.

[36] A review of the record of the arbitration hearing suggests that there may be some merit in the petitioner’s complaints and he may well have been prejudiced by the late appointment of counsel who was not familiar with the facts or issues involved. In Mr. Merrick’s report to the grievance committee of January 6, he indicated that one of the main issues for a determination before the arbitrator was the right of the City to extend the probation period without the consent of the Union. That matter does not appear to have been argued before the arbitrator and, when reconsideration of the arbitrator’s decision was sought by the petitioner acting in person, the Board refused to allow that issue to be raised. A lack of witnesses also appears to have worked to the petitioner’s detriment. The arbitrator in upholding the dismissal relied on the lack of a harmonious relationship between the petitioner and his co-workers. No witnesses were called on behalf of the petitioner to refute those allegations.

[37] In its decision the reconsideration panel notes that the appointment of outside counsel was made in response to the

petitioner’s request. The panel also notes that the Union obtained a 24 hour adjournment of the arbitration. The panel, however, does not consider whether the appointment of counsel on the eve of the hearing constituted a perfunctory disregard by the Union of the interests of its member. Nor does it consider whether the Union took a reasonable view of the problem or arrived at a thoughtful judgment after considering relevant and perhaps conflicting considerations.

[38] It is to be remembered that the issue before the reconsideration panel was not whether the Union had breached its duty of fair representation, but whether the petitioner had established a *prima facie* case that contravention had apparently occurred. Once the Union had decided to take this matter through to arbitration, it had a duty to the petitioner to ensure that his case was properly presented by a fully prepared advocate. As Mr. Merrick had advised the petitioner on December 15, three months prior to the arbitration, the petitioner did not have the right to engage an outside party to assist him, absent the agreement of the Union. The petitioner had no option but to rely on the Union to treat him fairly.

[39] Based on the record before the Board, the Union, arbitrarily, and without prior notice or consultation with the petitioner, appointed counsel, unknown to the petitioner, and unfamiliar with his case, some 24 hours prior to the date originally set for the arbitration. To appoint counsel at such late date, in the circumstances of this case, is the equivalent of providing no representation at all. No counsel, on such short notice, could properly and fully represent the petitioner’s interest. It was a clear breach of the Union’s duty to provide fair representation.

[40] As pointed out earlier, previous decisions of the Board place a higher onus on a union in cases of termination. It is difficult to think of any matter more important to a union member than the loss of his job. Under the collective agreement, the individual union member rights are left at the mercy of the union. A union has an obligation under s. 12 not to act in a matter that is arbitrary, discriminatory or shows bad faith. The appointment of counsel on the eve of the hearing was in the circumstances of this matter, at a minimum arbitrary, and might, given the apparent hostility between the petitioner, Ms. Kilfoil and Mr. Merrick also constitute bad faith. In my opinion, the Board’s conclusion that the petitioner had failed to meet the evidentiary burden was

patently unreasonable. On the record before the Board, the Board's determination that the petitioner had not established that a contravention of s. 12 had apparently occurred must be quashed.

[41] I should point out that this determination does not mean that the Union will be found to have violated s. 12. All that is established by this decision is that the Board's determination that the petitioner has failed to disclose a case that contravention has apparently occurred, is quashed. It may well be that once the Union has the opportunity to respond to the complaint, the Board may hold that the Union did not in fact violate s. 12. The Union, however, must be called upon to explain its conduct, and particularly, its decision to wait until the last minute to appoint counsel.

REMEDIES

[42] The petitioner, in addition to the quashing of the decisions, seeks the following further relief:

B. a declaration that the Union violated its duty of fair representation under Section 12 of the ***Labour Relations Code***;

C. an order granting a new arbitration to re-hear the matter of the Petitioner's wrongful dismissal claim against the City of Vancouver, with a new arbitration panel and counsel for the Petitioner to be selected by the

Petitioner, and that all associated costs are to be borne by the Canadian Union of Public Employees, Local 15;

D. an order that all wages and benefits plus interest lost by the Petitioner since his dismissal from the City of Vancouver and until a decision is rendered by the new arbitration panel are to be paid to the Petitioner by the Canadian Union of Public Employees, Local 15;

E. alternatively to paragraph C and D, an order that the BC Labour Relations Board re-hear the Petitioner's Section 12 application with a full oral hearing, to be adjudicated by a Vice Chair who has no previous affiliation with the Canadian Union of Public Employees, the BC Federation of Labour, the City of Vancouver or any of the individuals cited in the Petitioner's Section 12 application;

F. in the event that the BC Labour Relations Board is ordered to proceed with an oral hearing, an order that the Board also pay for legal counsel of the Petitioner's choice to prepare for and represent the Petitioner in that hearing;

[43] This court is not in a position to grant any of the consequential relief sought by the petitioner. Those matters fall under the exclusive jurisdiction of the Board. Whether the Union did in fact violate its duty of fair representation under s. 12 is a matter for the Board to decide once it receives the response from the Union to the complaint. It will be for the Board to decide whether it will order a hearing into the s. 12 complaint. Similarly, it will be up to the Board to determine the appropriate remedies if it

concludes that the Union did in fact violate its duty of fair representation. All I can do on this petition is quash the decision of March 23, 2001, on the ground that it was patently unreasonable. It will be up to the Board to determine how they now proceed.

BIAS

[44] Given the conclusion I have reached, it is not necessary for me to give consideration to the petitioner’s allegations that there was a substantial apprehension of bias or actual bias on the part of the Board and the specific Vice Chairs who adjudicated the case. I note that such allegations were not raised before the Board itself. I should say, however, I have reviewed those allegations and I find them to be without merit. I am satisfied, given the make-up of the reconsideration panel, that no reasonable apprehension of bias arose nor on the facts is there is any foundation for the allegation of actual bias.

COSTS

[45] The main dispute in this proceeding was between the petitioner and the Union. Although the Union was not a party to the Board hearing it elected to actively defend the petition and sought its dismissal. It failed. In the

circumstances the petitioner is entitled to his costs as against the Union.

[46] The Board's role in the hearing was to put the standard of review before the Court and to respond to the claims made in relation to bias. The Board did not seek costs and asked that costs not be granted against it. Given the position it took at the hearing, I would agree that the Board should not be subject to an order for costs.

[47] The City also appeared. Although in its submissions it sought dismissal of the petition, its main concern was the relief sought, in particular the request for a new arbitration on the merits of the dismissal. I have held, consistent with the position taken by the City, that I do not have the jurisdiction to make such an order. There will be no order for costs for or against the City.

SUMMARY

[48] In the result, therefore, I find that the decision of the reconsideration panel was patently unreasonable. The question of whether or not s. 12 of the ***Code*** was violated is referred

back to the Board for further consideration by a new panel. The petitioner is entitled to costs of the petition against the Union.

R.B.T. GOEPEL J.