Court of Queen's Bench of Alberta

Citation: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 488 v. Radke, 2012 ABQB 387

Date: 20120619
Docket: 1103 16140
Registry: Edmonton

Between:

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 488

Applicant

- and -

Dennis Radke

Respondent

**Judicial Review
of the
Honourable Mr. Justice W.V. Hembroff**

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[1] This is a Judicial Review of a Decision of the Alberta Labour Relations Board (ALRB). The Applicant is the Union to which the Respondent Radke belonged. The Applicant takes issue with the Board's Decision on two counts. Firstly, whether the Board erred in accepting the Applicant's Complaint because the complaint was made out of time. Secondly, whether or not the application was timely, had this Applicant been fairly represented.

[2] The relevant sections of the Alberta *Labour Relations Code* are as follows:

> 16(2) The Board may refuse to accept any complaint that is made more than 90 days after the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

153(1) No trade union or person acting on behalf of a trade union shall deny any employee or former employee who is or was in the bargaining unit the right to be fairly represented by the trade union with respect to the employee's rights under the collective agreement.

(2) Subsection (1) does not render a trade union liable to an employee for financial loss to the employee if

(a) the trade union acted in good faith in representing the employee, or

(b) the loss was as the result of the employee's own conduct.

(3) when a complaint is made in respect of an alleged denial of fair representation by a trade union under subsection (1), the Board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of that time, subject to any conditions that the Board may prescribe, if the Board is satisfied that

(a) the denial of fair representation has resulted in loss of employment or substantial amounts of work by the employee or former employee,

(b) there are reasonable grounds for the extension, and

(c) the employer will not be substantially prejudiced by the extension, either as a result of an order that the trade union compensate the employer for any financial loss or otherwise.

The Standard of Review

[3] It is agreed the standard of review to be applied here is one of reasonableness. The Courts have accepted the fact that in applications of this nature, it is virtually automatic that reasonableness is the standard.

[4] It is also recognized that this Court owes very significant deference to the decisions of Boards of this nature. I do not intend to set forth or quote that jurisprudence as it is well known.

[5] What does "reasonableness" require? The definition briefly set forth in the Applicant's Brief is as follows:

> The standard of reasonableness requires that a tribunal's decision must have "justification, transparency and intelligibility within the decision process" and must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."
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> > ***Dunsmuir v New Brunswick***, 2008 SCC 9.

Background

[6] Three members of the Union had filed a Duty of Fair Representation Complaint against the Applicant, the Union. This application was heard by the ALRB which found two of the applications untimely. For the Respondent, Radke, the Board found the complaint was timely and found the Union had breached its duty of fair representation.

[7] The application was initiated as a result of the three members being dismissed from their employment as welders on a pipeline job in Saskatchewan. Their dismissal was generally for poor workmanship.

[8] The factual background is set forth with some detail in the decision of the Board at Tab 1 of the Authorities of the Respondent, paragraphs 3 to 15.

[9] The Board has given care to reviewing all of the material before it. Keeping in mind my obligation to pay deference to the decision of this Board, I find the Board's view of the facts to be reasonable and not to be reviewable.

Timeliness of Application

[10] From a factual standpoint, the application of the Respondent Radke was clearly out of time. However the Board has the authority to expand this time and in this case has done so. There are reasons upon which the time line may be expanded and here, the Board has enunciated those rules, considered them and applied them as follows:

> ***Toppin v PPF Local 488***, [2006] Alta LRBR 31 sets out this Board's approach to the 90-day time period referred to in section 16(2). At para. 30, it states:
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> > Our purposes in writing these reasons are to pull together the strands of thinking in the Board's case law since *Gulerya*, to re-examine some of the principles behind the 90-day time limitation in s. 16(2) of the *Code*, and to attempt a concise restatement of the Board's current approach to that limitation. In our opinion, the correct approach to the 90-day time limit, and the approach that best reflects this Board's actual practice is as follows:
> >
> > 1. The 90-day time limit is a legislative recognition of the need for expedition in labour relations matters.

2. “Labour relations prejudice” is presumed to exist for all complaints filed later than the 90-day limit.
3. Late complaints should be dismissed unless countervailing considerations exist.
4. The longer the delay, the stronger must be the countervailing considerations before the complaint will be allowed to proceed. There is no separate category of “extreme” delay.
5. Without closing the categories of countervailing considerations that are relevant, the Board will consider the following questions:

(a) Who is seeking relief against the time limit? A sophisticated or unsophisticated applicant?

(b) Why did the delay occur? Are there extenuating circumstances? Aggravating circumstances?

(c) Has the delay caused actual litigation prejudice or labour relations prejudice to another party?

(d) And, in evenly balanced cases, what is the importance of the rights asserted? And what is the apparent strength of the complainant?

[11] The Board considered these guidelines at some length in its Judgment. In so doing, it dismisses as untimely the Complaints of the two other workers dismissed at the same time as Radke.

[12] In paragraph 24 of the Decision, the Board reviewed all of the correspondence between Radke and his Union, the steps he took to find a lawyer, and the problems with jurisdiction.

[13] The Board went on in paragraph 25 to consider the “countervailing considerations” as they applied to the specific question of the timeliness of Radke’s Complaint to the Board. Having done so, the Board applied those countervailing considerations to Radke’s application and found the application was in fact timely. I can find nothing in this reasoning that would cause me to disagree with the Labour Relations Board.

Fair Representation Complaint

[14] Again, the Board listed the principle elements of the duty of fair representation and referred to the Supreme Court of Canada case, ***Canadian Merchant Service Guild v Gagnon et al***, [1984] 1 SCR 509. Those elements are as follows:

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.

2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

[15] The Board then goes on to define arbitrary conduct as found in paragraph 34 of its decision as follows:

> The Canada Labour Relations Board in ***Rousseau and B.L.E.*** (1995), 28 C.L.R.B.R. (2d) 252 at p. 275 described what is meant by "arbitrary conduct" - in our view, the key concern with Local 488's representation in the case before us:
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>> Arbitrary conduct has been described as a failure to direct one's mind to the merits of the matter; or to inquire into or to act on available evidence; or to conduct any meaningful investigation to obtain the data to justify a decision. It has also been described as acting on the basis of irrelevant factors or principles; or displaying an indifferent and summary attitude. Superficial, cursory, implausible, flagrant, capricious, non-caring, or perfunctory are all terms that have also been used to define arbitrary conduct. It is important to note that intention is not a necessary ingredient for an arbitrary characterization.

[16] The Board then goes on to describe the material before it and upon which it relied to consider the treatment of Radke arbitrary. Paragraphs 36 and 37 of the Judgment state as follows:

> 36 York testified that his mind was made up on July 8 that Radke had no viable grievance. He was of the view there was a site ban and there was nothing Local 488 could do. As a result, Local 488 sent the Employer a letter saying it was not proceeding with Radke's grievance. York claims the last sentence of the July 8 letter was intended to indicate that if Radke could provide further information to support his grievance, the Local would look into it. We find York's evidence on this point difficult to understand. It is inconsistent with his evidence that his mind was made up that there was no viable grievance at the time he sent the July 8

> letter. And, because the grievance was abandoned, it is not clear to us what he could have done after July 8 in any event.
>
> 37 There is little to suggest Local 488 gave any serious consideration to Radke's grievance after sending out the July 8 letter. We know that Kinsey, on behalf of the International, looked into the matter in August 2009. We also know Radke had some discussions with Stephens in July 2009. But, in our view, nothing was done to consider or investigate in any meaningful way the additional information Radke later brought forward. The decision not to proceed with the grievance was already made.

[17] Further, the Board goes on in paragraph 40 in its Judgment to indicate what the Applicant should have done but didn't do. Paragraph 40 is as follows:

> 40 Had Local 488 given Radke an opportunity to respond to the information the Local received prior to making a decision on his grievance, the Local could have weighed any conflicting information, sought further information from the Employer or others if necessary, and helped Radke better understand the information the Employer relied on. If Radke's concerns persisted at that point, Local 488 would then have been in a position to make an informed decision regarding whether to proceed with the grievance. Instead, Local 488 accepted the assertions provided by the Employer and never provided Radke any opportunity to respond before it made the decision to abandon his grievance.

[18] As I find, the Board considered all of the facts before it as disclosed to the Court in the Record of Proceedings.

[19] In the result, I find the application of the Union fails and that the Board acted within its mandate. Thus, the decision of the Board to allow Radke's Complaint and order his grievance be sent directly to arbitration is confirmed.

[20] It is of interest that the Union applied under Section 12(4) of the *Labour Relations Code* for reconsideration by the Board of the decision issued September 20, 2011, the subject matter of this application. That application for review was made while this application was in process.

[21] After the review, which is not the subject matter of the application before the Court, that application was summarily dismissed on the basis that it had no reasonable prospect of success.

[22] In the result, the Respondent Radke is entitled to his costs of this application which if not agreed upon shall be taxed.

Heard on the 26th day of April, 2012.
Dated at the City of Lethbridge, Alberta this 14th day of June, 2012

W.V. Hembroff
J.C.Q.B.A.

Appearances:

Micah J. Field
Blakely & Dushenski
for the Applicant

Simon Renouf, Q.C.
Shasta Desbarats
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for the Respondent