

BRITISH COLUMBIA LABOUR RELATIONS BOARD

JOHN ROBERTSON

("Robertson")

-and-

SUMMIT LOGISTICS INC.

("Summit")

-and-

RETAIL WHOLESALE UNION, LOCAL 580

(the "Union")

PANEL: John B. Hall, Vice-Chair
Gregory Mullaly, Vice-Chair
Gord Van Dyck, Vice-Chair

COUNSEL: C. B. (Joe) Coutts, for Robertson
Andrew Wood, for the Employer
David K. Pidgeon, for the Union

CASE NO.: 41720

DATE OF HEARING: November 17, 2000

DATE OF DECISION: December 28, 2000

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The application before us is unusual for several reasons.

2 Mr. Robertson filed the application in January of this year under Section 140(I) of
the *Labour Relations Code*. He sought an extension of time in order to file an
application for leave and reconsideration of a Board decision published on December 4,
1998 (BCLRB No. B513/98; the "original decision"). The 15-day time limit in Section
141(5) for seeking leave had expired over a year earlier.

3 The original decision had dismissed Mr. Robertson's application under Section
99 of the Code for review of an arbitration award by Clive McKee dated December 30,
1996 (Ministry No. A368/96). The Arbitrator had denied Mr. Robertson's termination
grievance.

4 The extension application was made because of "new evidence recently made
available". Based on this evidence, Mr. Robertson asserted he had not received a fair
hearing before Arbitrator McKee.

5 Another panel of the Board issued a preliminary decision (BCLRB No.
B224/2000). It held a party seeking an extension of the time limit in Section 141(5)
must, at the same time, file "both its request for leave and the merits of its application"
(para. 5). The panel gave Mr. Robertson an opportunity to complete his Section 141
application.

6 Mr. Robertson filed a further application under both Sections 140(I) and 141 of
the Code. Written submissions were exchanged and, after various preliminary issues
were addressed, we held an oral hearing.

7 Thus, the initial application before us is for an extension of time under Section
140(I) in order to apply for leave and reconsideration. However, the merits of the
reconsideration application have been fully argued, and will be considered in
determining whether to extend the time limit in Section 141(5) of the Code.

II. ISSUE

8 The issue before us is whether "new evidence" has been brought forward which
should cause the Board to extend the time limit for seeking leave and reconsideration of
the original decision. In stating this issue, we have assumed Section 140(I) gives the
Board a discretion to extend the time limit in Section 141(5). The Board's jurisdiction to
extend the time limit is disputed by Summit based on *Upper Lakes Shipping v. Sheehan
et al.* (1979), 95 DLR (3d) 25 (SCC); cf. *White Spot Ltd. and CAW-Canada, Local 3000*,

BCLRB No. B437/93 (Reconsideration of BCLRB No. B120/93), (1993), 21 CLRBR (2d) 146.

III. BACKGROUND

9 Mr. Robertson says the new evidence became available to him in November 1999 through a separate Section 12 complaint against the Union. That complaint alleges in part that the Union did not properly represent him at the arbitration. Mr. Robertson requested production of documents. He says he then received, for the first time, notes made by Summit during interviews with other employees, as well as part of the notes which Summit made during a meeting with him. The meetings all took place on September 23, 1996 and formed part of Summit's investigation into the incident leading to Mr. Robertson's termination. The notes were made by Mr. Guy Langlais.

10 The previously undisclosed part of Mr. Langlais' notes from the meeting with Mr. Robertson reads as follows:

JR then appeared very sad, shook his head and appeared to be ready to cry. I asked him if there was anything at all that he might want to add and he told me he was on "Prozac" and trying to get help with his problem; mentions "he just can't help myself". When I said that this was the first time today that I believed what he was telling me he again became indignant, angry and shouted. A mtg. came to an end and Shop Steward Paul said that they wanted to grieve and I said I understood.

Mtg adjourned.

11 The original version of this verbatim quote was handwritten on the top half of a single page of paper. The passage follows other pages with notes from earlier in the meeting. The bottom half of the page has notes from a meeting on a later date. We will refer to the passage in issue as "the Concluding Notes".

12 Mr. Robertson maintains the Concluding Notes were critical to his defence. He says they show Summit was aware he had a medical condition when it terminated his employment. Mr. Robertson asserts the Concluding Notes were not placed before the Arbitrator. This contention is based in part on the undisputed fact that they were omitted from Summit's copy of the Book of Documents prepared for the arbitration. Mr. Robertson also maintains the notes from Summit's meetings with other employees should have been placed before the Arbitrator. There is no dispute these notes were not tendered at the arbitration. As a result, Mr. Robertson argues he was denied a fair hearing.

13 The unusual features of this case do not end with the foregoing. Just prior to the date the hearing before us was scheduled to begin, Summit advised that it had obtained the Union's copy of the Book of Documents prepared for the arbitration. The notes of Summit's interview with Mr. Robertson were complete. In fact, there were two copies of

the final page with the Concluding Notes. Summit surmised that the final page from its copy of the Book of Documents had been inadvertently placed in the Union's copy.

14 This and other developments resulted in the scheduled hearing date being converted into a case management meeting with counsel. The following points were clarified in a case management letter dated October 11, 2000:

- (a) A decision was made during the arbitration hearing to not introduce a letter regarding Mr. Robertson's medical condition, and he participated in the discussions leading to that decision.
 - (b) The arbitrator did not have copies of notes regarding Mr. Langlais' interviews with other employees.
 - (c) There is no dispute that the notes reproduced at page 6 of Mr. Robertson's submission dated June 12, 2000 reflect a portion of the evidence given by Mr. Langlais regarding his interview with Mr. Robertson.
- * * *
- (e) Mr. Robertson is unable to refute that the Union did not request the production of any notes either before or during the arbitration hearing.

15 The only factual dispute which remained after the case management meeting was whether the Arbitrator had been given a complete set of the notes from Summit's interview with Mr. Robertson; that is, whether the Arbitrator's copy of the Book of Documents contained the Concluding Notes. The parties could not ask Arbitrator McKee because he passed away earlier this year. Alternatives were pursued, but the hearing ultimately proceeded on the basis that the Arbitrator's copy of the Book of Documents could not be located.

16 The notes referred to in paragraph (c) of the Board's case management letter were made by an articling student who accompanied Summit's former legal counsel at the arbitration. The parties agree the notes reflect a portion of the testimony given by Mr. Langlais. We will refer to them as "the Arbitration Notes". The agreed portion reads:

He said he's on drugs and can't help himself.

I thought we'd get progress, But instead he got indignant and got up PC asked him to sit down. There was no progress.

(as written)
(Direct Testimony, page 17 of Summit Hearing Notes)

I said he might be part of equation. He was'nt [sic] forthcoming; he was defiant and flippant. At no time did he level w/me except regarding drugs. But that went nowhere.

(as written)

(Direct Testimony, page 18 of Summit Hearing Notes)

Drugs? I inquired whether there was anything else there was to add. It was a tough conversation to get info; I had to force conversation.

Prozac: Yes, that's what he told me.

No inquiry about whether was under care of Dr. No.

(as written)

(Cross-Examination of Langlais, pages 20 and 21 of Summit Hearing Notes)

17 All counsel relied on the Arbitration Notes during the hearing before us to support their respective positions.

18 Another relevant fact did not emerge until the Board hearing. The Union advised us that, before the arbitration, its counsel received a copy of all notes taken by Mr. Langlais. Thus, and regardless of what was in the Arbitrator's copy of the Book of Documents, the Union had a copy of the Concluding Notes, as well as notes from Summit's interviews with the other employees. Mr. Robertson maintains he never received these notes from the Union.

IV. ANALYSIS

19 Although the initial issue is whether an extension should be granted under Section 140(I), the parties' oral submissions largely addressed the merits of Mr. Robertson's reconsideration application.

20 The original decision dismissed Mr. Robertson's application for review of Arbitrator McKee's award. Thus, his application before us is an attempt to bring "an appeal of an appeal". The Board will only grant leave under Section 141 for reconsideration of a Section 99 decision in exceptional and infrequent circumstances. The focus of the Section 141 application must be the Board's decision, and not a continuing disenchantment with the arbitration award. See *West Kootenay Power Ltd.*, IRC No. C182/92, (1992), 16 CLRBR (2d) 75; and *Ben Speckling*, BCLRB No. B421/2000 (Leave for Reconsideration of BCLRB No. B27/2000).

21 In this case, Mr. Robertson does not assert any error on the part of the original panel. His submissions are focused entirely on the arbitration award. He is highly critical of the Arbitrator's analysis, and argues a grave injustice has been committed.

22 We do not intend to set out or address many of Mr. Robertson's arguments. Some of them take issue with the Arbitrator's findings of fact and do not constitute a proper basis for review under the Code. Other arguments are completely unrelated to the new evidence which came to Mr. Robertson's attention in November 1999. The reconsideration process cannot be used to advance arguments which could have been made to an original panel: *Deborah J. Weisberg*, BCLRB No. B112/2000 (Leave for Reconsideration of B471/99), at para. 22. Mr. Robertson was represented at the time of the original decision by different legal counsel. However, this does not allow his current counsel to argue the Section 99 application afresh.

23 The principal argument which falls within the last-mentioned category is Mr. Robertson's position that the Arbitrator failed to consider his medical condition. This issue could have been raised before the original panel. In fact, Mr. Robertson's then counsel attempted during the Section 99 review to introduce medical evidence in the form of a physician's letter. The evidence was properly rejected for reasons given by the original panel. See also *Michel Blais*, IRC No. C195/92 (Reconsideration of C215/91).

24 In our view, an extension should only be granted under Section 140(l) if Mr. Robertson can establish through new evidence that documents should have been placed before the Arbitrator which may have affected the result of the case: see, by analogy, *British Columbia's Women's Hospital*, BCLRB No. B365/95 (Reconsideration of B318/94), (1995), 29 CLRBR (2d) 72. In this regard, Mr. Robertson contends there was a denial of natural justice on two grounds. First, he submits the notes from Summit's interviews with the other employees should have been placed before the Arbitrator. He says the notes could have been used to challenge the credibility of their testimony against him. Second, Mr. Robertson submits the Concluding Notes should have been placed before the Arbitrator; alternatively, even if the last page was included in the Book of Documents, the critical issue of his medical condition was not considered in the award.

25 In our view, none of Mr. Langlais' notes are "new evidence" *per se*. The notes existed at the time of the arbitration and could have been obtained through the exercise of reasonable diligence (i.e., a request for production). Indeed, we now know the Union had *all* of the notes and could have used them at the arbitration. The "new evidence" which may exist in this case arises from Mr. Robertson's contention that the Concluding Notes were omitted from the Arbitrator's copy of the Book of Documents. We say the evidence "may exist" because there is a dispute over what the Arbitrator actually received. But it is only this possible omission (which came to Mr. Robertson's attention in November 1999) which can be characterized as "new evidence" for purposes of a Section 141 reconsideration.

26 The first ground on which Mr. Robertson contends he was denied natural justice can be succinctly addressed. As Summit points out, it is at least arguable that notes from the interviews with other employees would have been inadmissible on the basis that they tended to bolster their testimony: *The Board of School Trustees of School District No. 46 (Sunshine Coast)*, BCLRB No. B389/94 (Reconsideration of BCLRB No. B100/93), 26 CLRBR (2d) 69, at p. 90. Regardless, the complete answer is found in the fact that the Union's counsel had a copy of all the interview notes at the time of the arbitration. The Union's decision to not introduce the notes or use them to challenge the testimony of the witnesses cannot be seized upon at this stage to claim a denial of natural justice. A contrary conclusion would have far-reaching and obviously undesirable consequences for the arbitration process.

27 Simply put, the Union had conduct of Mr. Robertson's grievance. It decided not to use the notes of the other interviews at the arbitration. The fact that Mr. Robertson may not have been aware of the notes is not "new evidence" and did not result in a denial of natural justice. Thus, neither the original decision nor the arbitration award can be set aside on this ground.

28 Mr. Robertson's second ground turns mainly on whether the Concluding Notes were before the Arbitrator. He bears the onus of establishing that the Arbitrator did not have a complete set of Mr. Langlais' notes from his interview. Mr. Robertson relies on the fact that the Concluding Notes were missing from Summit's copy of the Book of Documents. However, we now know that two copies of the page with the Concluding Notes were placed in the Union's copy of the Book. We believe it more likely than not that the Concluding Notes were given to the Arbitrator. In any event, Mr. Robertson's assertion to the contrary has not been proven beyond the level of speculation.

29 Mr. Robertson additionally argues the Concluding Notes were not before the Arbitrator because there is no reference in the award to his medical condition. This argument might have greater force if the Concluding Notes were the only potential source for this evidence. However, Mr. Langlais testified about Mr. Robertson saying he was on drugs (see the Arbitration Notes reproduced above). These portions of Mr. Langlais' evidence are not referred to in the award. Thus, the absence of any discussion about Mr. Robertson's medical condition does not support the inference that the Arbitrator did not have a complete set of Mr. Langlais' notes.

30 We are therefore unable to conclude, on a balance of probabilities, that the Concluding Notes were omitted from the Arbitrator's copy of the Book of Documents. There is accordingly no "new evidence" to establish that Mr. Robertson may have been denied a fair hearing at the arbitration. Moreover, we are satisfied that the contents of the Concluding Notes were basically before the Arbitrator through Mr. Langlais' testimony. Mr. Robertson attempts to emphasize differences between the Concluding Notes and what is recorded of Mr. Langlais' testimony in the Arbitration Notes. However, we do not believe the differences would have affected the result of the case, particularly bearing in mind that the Arbitration Notes are not a verbatim record.

31 Additionally, as Summit points out, the Concluding Notes by themselves do not establish a link between Mr. Robertson's medical condition and the conduct which led to his termination. Expert evidence would be required for this purpose. There is no dispute a decision was made during the arbitration to not introduce a physician's letter regarding Mr. Robertson's medical condition. The Arbitrator was aware of this decision as it followed an objection by the Employer over admissibility of the letter. In our view, this is the most likely explanation for the lack of any reference to Mr. Robertson's medical condition in the award.

32 Mr. Robertson's remaining arguments reduce to a complaint over the lack of any reference to his medical condition in the award. For reasons already expressed, this does not provide a basis for setting aside the original panel's decision. Nothing prevented Mr. Robertson's then counsel from making the same arguments to the original panel.

V. DECISION

33 Assuming the Board has jurisdiction, this is not an appropriate case to extend the time limit in Section 141(5) for seeking leave and reconsideration. In any event, having regard to the merits of Mr. Robertson's reconsideration application, we would not grant leave. The application is therefore dismissed.

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