

No. C38/92
(Reconsideration of Letter Decision December 10, 1991)

INDUSTRIAL RELATIONS COUNCIL

BETWEEN:

MARIE A. ELLISON

("Ellison")

AND:

HOTEL, RESTAURANT & CULINARY EMPLOYEES & BARTENDERS
UNION, LOCAL 40

(the "Union")

AND:

338089 B.C. LIMITED DOING BUSINESS AS THE VILLAGE GREEN
INN

(the "Employer")

PANEL: Nora A. Paton, Vice-Chairman
Bryan Denton, Member
Peter Richardson, Member

COUNSEL: Marie Ellison for Herself
Robert Cook for the Union
J.R. Striegan for the Employer

DATE OF DECISION: March 5, 1992

CASE NO(S) .: 9342/92

DECISION OF THE COUNCIL

I

This is an application under Section 36 of the Industrial Relations Act (the Act") in which Marie Ellison ("Ellison") applies for reconsideration of the Industrial Relations Council's (the "Council") letter decision of December 10, 1991. That decision dismissed her complaint against the Union, which had been

brought under Section 7 of the Act, for the following reasons:

You accepted payment from the Employer in settlement of at least four grievances filed by yourself and further committed to not pursue any claims against the Union and/or Employer for anything that happened prior to November 8. You are bound by that commitment. To allow you to recant your written commitments would make a mockery of the settlement process which is recognized by all as an integral part of labour relations.

(at 2)

II

Ellison's Section 36 application essentially reiterates the circumstances outlined in her original Section 7 complaint, and she asks the Council to "take a closer look at some of the circumstances around the arbitration". The difficulty for the reconsideration panel is that it is not in a position to treat the complaint as a matter of first instance, or to conduct an investigation of the allegations. The Panel's powers of review are very limited; in Overwaitea Foods, IRC No. C86/90, the Council summarized the six conditions under which it may review applications for reconsideration, as follows:

1. If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or
2. if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,
3. if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect in its particular application; or,
4. if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,

5. if the original decision is tainted by a breach of natural justice; or,
6. if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.

(at 7)

While we appreciate that this application was not framed with these principles in mind, this Panel is bound by the policy the Council applies in reconsideration cases. In the Panel's view, none of these conditions apply to this particular case, even if we assume for the sake of argument that the facts are as Ellison alleges. Specifically, although no hearing was held at first instance, there is no allegation that the original decision turned on a controversial finding of fact on which the applicant wishes to adduce evidence. Second, we will consider below whether the original panel failed to interpret properly a conclusion of law or policy in reaching its conclusions.

As stated above, the original panel dismissed the Section 7 complaint because Ellison had agreed to the settlement of her grievances. While Ellison acknowledges that she signed the memorandum of agreement, she says that she did so under pressure from the Union and its lawyer. This she alleged in her original complaint as well as in her appeal application. In the latter she said that "the basis of her complaint" are the angry words exchanged between the Union representative, the Union's lawyer and herself.

III

A brief summary of the facts, as alleged by Ellison, is useful. On October 7, 1991, Ellison filed a grievance in regard to the Employer's failure to offer her a promotion to first cook in April 1990. It was not until she had a conversation with someone on September 28, 1991 that she realized she might have a grievance. That grievance, along with three others she had filed, was to proceed to arbitration on November 8, 1991. She met with Union representatives and the Union's lawyer the day before. She said that they "discussed in great lengths. All four of us." At the time the Union's lawyer told her that the promotion grievance was filed out of time, a view with which she disagreed because "you have 10 days to file a grievance [sic] once you have knowledge". She had also spoken to the Employer who apparently had said that she would get her promotion. At the opening of the

arbitration, the Union's lawyer discussed her other grievances and also advised the arbitrator that the promotion grievance was out of time. After the Employer's opening statement, the Union representatives and lawyer met with Ellison, at which time she said that there was much yelling; in the end she told them "to do whatever they wanted". Shortly after that a settlement was reached in which Ellison received \$1,030.78 and a promotion to first cook effective October 20, 1991 (as opposed to a backdated promotion); the agreement also provided that all claims were released and that no claims would be taken to other tribunals. All parties, including Ellison, signed the agreement, although she says she did so without reading it over.

IV

Section 7(1) of the Act defines the duty of fair representation as an obligation on a trade union not to "act in a manner that is arbitrary, discriminatory or in bad faith in representing any of the employees" in the bargaining unit. The Labour Relations Board described the scope of that duty in Rayonier Canada (B.C.) Ltd., BCLRB No. 40/75, [1975] 2 Can LRBR 196, at 201-202. Also in Rayonier, the Board expressed the view that:

[Section 7 confers] on the union bargaining agent considerable latitude in deciding whether to drop or to settle grievances brought under the standard collective agreement even though the individual employee wishes them pursued through to arbitration.

(at 204)

The rationale for that approach is that a union must protect the interests of its membership as a whole, and must be permitted to ration its scarce resources: see Richard Findlay, IRC No. C144/90, at 18. With respect to the conduct of the arbitration, the panel in Findlay said that:

[The union] is not bound to conduct the arbitration according to the grievor's directions....there is no requirement to conduct an arbitration in a manner which the union reasonably believes is inconsistent with the interests of the membership as a whole....it is not uncommon that a grievor questions the advisability of pursuing some aspects of his grievance, but not others....

(at 19)

See also Michel Blais, IRC No. C215/91, at 6-7; and Ed Cherak, IRC No. C202/90, 10 C.L.R.B.R. (2d) 59, at 65.

Similarly, as a general proposition, as a result of the union's right to control the grievance and arbitration procedure, the union may choose to settle or abandon a grievance with or without the approval of the grievor. Certainly, it is advisable for the union to consult with the grievor prior to settlement, but failure to do so does not necessarily result in a breach of Section 7, as long as the union takes a reasonable view of the problem and arrives at a thoughtful judgment about it: see Zarina Sajoo, IRC No. C190/91, at 5; Pritnam Singh Chauhan, IRC No. C131/91, at 7; Robert Munro, IRC No. C117/89, at 5; and Christopher B. Lee, IRC No. C2/92, at 3-4.

V

Before applying these principles to the case before us, we emphasize that we agree with the original panel's conclusion that the applicant must be bound by the terms of the settlement agreement she signed. She was not denied an opportunity to read the document; she simply chose not to do so. However, because Ellison has raised issues concerning the conduct of the arbitration, and the pressure she felt she was under to settle, it may be helpful for her to understand the parameters of Section 7.

First, in regard to the pursuit of the promotion grievance at the arbitration, the Union and its counsel were of the view that it was out of time. While Ellison disagreed with that view, it can hardly be said to be unreasonable in the circumstances: almost 18 months had passed between the missed promotion and the filing of the grievance. Further, Ellison acknowledged that she had a lengthy meeting with her union representatives and lawyer before the arbitration. There is no indication that the Union did not take a reasonable view of the matter. Finally, the settlement eventually reached did in fact give Ellison her promotion, although not backdated as she wished.

Second, in regard to the circumstances surrounding the settlement agreement, it is unfortunate that Ellison felt pressured to agree to the settlement. However, as already noted, Section 7 does not require a union to obtain the grievor's consent before settling a grievance, even though it may be preferable and advisable to do so. Where her consent was not required, the fact that she felt pressured is not particularly relevant. In her submissions Ellison did not express dissatisfaction with the settlement of the other three grievances and the money she

received. Her only concern was the promotion, which she did receive as part of the settlement. Given the time that had elapsed, as a practical matter, the promotion she received was likely the best result that could be achieved in any case.

In the result, the Section 36 application is dismissed, there being no error of law or policy by the original panel.

INDUSTRIAL RELATIONS COUNCIL

NORA A. PATON
VICE-CHAIRMAN

BRYAN DENTON
MEMBER

PETER RICHARDSON
MEMBER