PRINCE EDWARD ISLAND
LABOUR RELATIONS BOARD

File No.

Decision No. 09-005

IN THE MATTER OF

AN APPLICATION FOR RECONSIDERATION OF AN UNFAIR LABOUR PRACTICE COMPLAINT DECISION

BETWEEN:

THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES OF AMERICA AND CANADA LOCAL 721

APPLICANT

AND:

MR. PLUMBER BLAIR LAPIERRE INC.

RESPONDENT

DECISION

On December 30, 2008 the Labour Relations Board issued a decision concerning an Unfair Labour Practice Complaint which was filed by the Applicant on the 22nd day of April, 2008. In its Decision, the Board had made a finding of unfair labour practice and had awarded certain remedies with respect to same. In summary form the six point order of the Board follows:

1. *Chris Devens, Michael Doucette and Travis Outhouse will receive full back pay and benefits from the 7th day of April 2008 to the date of this Decision, excluding the period the 14th day of July, 2008 to the 8th day of September, 2008;*

2. *That the Estate of Paul Milligan be paid full back pay and benefits between the 7th day of April, 2008 and the 14th day of July, 2008;*

3. *That one-month's salary be deducted from any benefits due and payable to Chris Devens, Michael Doucette, Travis Outhouse and the Estate of Paul Milligan;*

4. *Any monies received by Chris Devens, Michael Doucette, Travis Outhouse, and Paul Milligan during the period of time noted above through either employment or employment insurance benefits be deducted from the amount ordered to be paid to any of them by the Respondent;*

5. *That should any questions arise in relation to the implementation of this Order, the parties are free to return to the Board for further direction and the Board remains seized of this matter.*

6. *All other requests for relief other than that noted above are dismissed.*

By letter dated March 2, 2009 addressed to the CEO of the Labour Relations Board, Counsel for the Applicants requested a reconsideration of the Board's decision issued December 30, 2008 pursuant to Section 4(1) of the *Labour Act* and Section 18 of the Regulations made pursuant to that *Act*. Counsel outlined five grounds for the request for reconsideration as follows:

1. That the Board erred in law in failing to consider precedent case law supporting automatic certification in cases of demonstrated anti union animous.

2. That the Board erred in law in applying the concept of working to rule to the issue of damages particularly in a non union shop fact situation.

3. That there was no evidence in which the Board could conclude that Leo Doucette was dismissed and was aware that he was dismissed by Blair LaPierre. On the contrary, the evidence clearly supports that he was deemed to have quit as were the other employees.

4. The Board's reduction of the period of July 14, 2008 to September, 2008 from full back paying benefits was in ignorance of a significant material fact, that being that Ms. Dorsey, counsel for the Respondent, was not going to be available for an earlier continuation of the hearing, a fact known by her on July 14, 2008 and withheld from the board and the applicant when she made her motion on that issue.

5. Direction to the parties:

By letter dated April 16, 2009, counsel for the Respondent, filed the Respondent's written response to the request for reconsideration.

The Board convened a hearing on July 20, 2009 to deal with this matter.

CASES CONSIDERED

1. United Food and Commercial Workers Union, Local 864, Linda Epping, Frank Bryant, John Perry, Tracy Benoit and Gerarlda Doucette v. Polar Foods International Inc., carrying on business under the firm name and style of Polar Fisheries, Christopher Ross, Jack Quinn and Barry Despres [October 24, 2005] PEILRB 04-019

2. Trigen Energy Canada Inc. v. The International Brotherhood of Electrical Works, Local 1432 [June 23, 1999] PEILRB 99-005;

3. United Association of Plumbers and Pipefitters, Local 721 v. Davis Plumbing and Heating Ltd. [December 12, 2007] PEILRB 07-002 ;

4. Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada et al and Marsil Mechanical Inc. (1997), 38 C.L.R.B.R. (2d) 161 (Ont. L.R.B.)

5. Common Ground Publishing Corp v. Communications, Energy and Paperworkers Union of Canada, Local 2000 (2003), 87 C.L.R.B.R. (2d) 244 (B.C.L.R.B.)

6. Perfection Foods Limited v. Retail Wholesale Dairy Workers Union, Local 1515 (1986) 57, Nfld. & PEIR 147 (P.E.I.S.C.) [22 February 1994] PEILRB 94-003

7. Royal Oak Mines Inc. v. Canada (Labour Relations Board) (1996), 133 DLR (4th) 129 (S.C.C.)

STATUTES CITED

1. *Labour Act*, R.S.P.E.I., 1988, Cap. L-1
2. *Labour Act Regulations*

TEXTS CONSIDERED

1. George W. Adams, Canadian Labour Law 2nd Edition, Canada Law Book, March 2009.

DECISION

Section 4.1 of the *Labour Act* empowers the Board to reconsider its decisions. Section 18 of the Regulations sets out a three-part threshold test which reads:

> *Where it appears that the Board has made a decision in ignorance of some material fact or by reason of some technical irregularity, or if there is good reason for the Board doing so, the Board may entertain an application to reconsider a decision or order made by it under the Act.*

The Board must first consider whether the Application for Reconsideration meets the "threshold" test.

Having carefully considered all of the materials and submissions placed before it in regard to this Application for Reconsideration, the Board concludes that none of the components of the threshold test have been met. There is no evidence that the Board decision was reached in ignorance of a material fact, nor does there appear to have been any technical irregularity. No other ground has been made out to reconsider and as such, there is no basis upon which to reconsider the previous decision of this Board.

However, in the event the Board is in error in this finding, the Board is prepared at this time to proceed with dealing with the issues referred to in the Application for Reconsideration.

Issue 1 **That the Board erred in law in failing to consider precedent case law supporting automatic certification in cases of demonstrated anti union animous.**

Counsel for the Applicant in his submissions has alleged that the Board has failed to consider certain cases prior to its reaching its decision with respect to the remedies to be imposed. The Applicant argues strenuously that an appropriate remedy in this case would be automatic certification of the bargaining unit. However he later agreed that remedial certification and not automatic could be available here.

The relevant statutory provisions are Sections 4 and 11(3) of the *Labour Act*. In particular, Section 11(3) of the *Labour Act* states in part:

.....the board, shall, by order, make such award, give such direction, or take such other action as the board considered just and necessary in the circumstances and, without restricting the generality of the foregoing, may by such other or subsequent order,

a) direct to the employer, employer's organization, trade union or other person to cease doing the act and to rectify in such manner as the board considers just any violation of this act,

b) direct an employer to pay to an employee a sum equal to the wages, salary or other remuneration loss by the employee by reason of the employer's violation of this act,

c) direct an employer to reinstate an employee in his employ at such date as in the opinion of the board is just and proper in the circumstances in the position that the employee would have held but for a suspension, transfer, refusal to transfer, lay off, discharge or change of status of the employee done or made by the employer contrary to this act,

d) direct an employer to employ a person at such date as in the opinion of the board is just and proper in the circumstances in the position that the person would have held but for the refusal of such employer to employ such person contrary to this act.

The PEI Supreme Court dealt with these particular provisions in the *Perfection Foods Limited case (Perfection Foods Limited* v. *Retail Wholesale Dairy Worker Union, Local 1515* (1986), 57 Nfld and PEIR 147). In that case, the Court held that the provisions of then Section 10 of the *Labour Act* (now Section 11) are very broad and so broad as to enable the Board to make an order, the effect of which was to impose a term in an agreement upon the parties.

Also in *Royal Oak Mines Inc.* v. *Canada Labour Relations Board* 1996, 133 DLR (4th)129 (S.C.C.), The Court held at paragraph 65 in part as follows:

The breadth of the remedial section gives a clear indication that it was the intention of parliament that the board should be given the necessary flexibility to fashion remedies which will best address the entire spectrum of problems and of factual situations which it must confront....This provision authorizes the board to make orders based on the principle of equity....The granting of such a broad discretion to the board demonstrates the Parliament wished the courts to defer to the board's experience and expertise in making remedial orders so long as they were not patently unreasonable.

The Court in the *Royal Oak* case went on to state at paragraph 58:

In my view remedies are a matter which fall directly within the specialized competence of labour boards. It is this aspect perhaps more than any other function which requires the board to call upon its expert knowledge and wide experience to fashion an appropriate remedy. No other body will have the requisite skill and experience in labour relations to construct a fair and workable solution which will enable the parties to arrive at a final resolution of their dispute....That is to say, there should be no judicial interference with remedial orders of the Board unless they are patently unreasonable.

The objective of remedial certification is to restore the injured party to the position it would have been in the absence of employer interference. A review of the case law was undertaken in *Polar Foods* (*United Food and Commercial Workers Union, Local 864, Linda Epping, Frank Bryant, John Perry, Tracy Benoit and Gerarlda Doucette* v. *Polar Foods International Inc., carrying on business under the firm name and style of Polar Fisheries, Christopher Ross, Jack Quinn and Barry Despres* [October 24, 2005] PEILRB 04-019) and at page 23 of that decision, the Board stated the following:

"Essentially, remedial certification is granted in those situations where the employer has so interfered with the statutory rights of the union and employees and so tainted the work place that employees would be unable to express their wishes...

There are generally two circumstances where the Board's preparedness to employ remedial certification increases significantly. These are when there is a discharge of employees who are active in the organizational campaign and where there are employer threats of lay-offs, shut downs or partial closures. See: *Re Cardinal Transportation BC Inc.* (1997), 34 C.L.R.B.R. (2nd) 1 (D.L.R.B.)

As was noted by the Board in the *Polar Foods* case and in its analysis of the relevant case law, the actions of the employers must be outrageous and pervasive in order for a Board to order remedial certification.

The Board is mandated under the *Labour Act* to promote harmonious industrial relations in the Province of Prince Edward Island. It has broad empowerment to effect remedies to meet and rectify results caused by violations of the *Labour Act*. There is no limitation on the type of remedy that the Board may grant if the Board considers it is just and necessary to do so.

In the *Polar Foods* case, the Board concluded that there was no other remedy available to it to repair the damage or injury that had occurred in that case other than ordering remedial certification. It should be noted that the facts that exist in the *Polar Foods* case do not exist in this case such that remedial certification would be warranted.

The original Application for Certification was filed under the Construction Industry provisions and was filed on Monday, April 7, 2008. The Application for Certification indicated that the employer, Mr. Plumber Blair LaPierre Inc. had 16 employees and that nine (9) of them had joined the Applicant, Local 721. Because the Application for Certification was filed under the Construction Industry provisions, employees who were on vacation or were sick are not counted as employees. That meant both Michael Doucette (on vacation) and Leo Doucette (sick) would not be counted as employees in the original Application for Certification and, thus, the Application for Certification filed with the Board did not demonstrate that there was a majority of support.

In relation to whether or not the Board should order a remedial certification in this instance, the Board reiterates its original decision that there are no grounds for such an award to be made in this case for a number of reasons. Firstly, the actions of the employer did not impact on the employees becoming members of the Applicant union and, thus, it cannot be said that the workplace was so tainted that the employees would be unable to express their wishes. Secondly, remedial certification is a discretionary remedy and the Board has chosen not to exercise its discretion.

Issue 2 **That the Board erred in law in applying the concept of working to rule to the issue of damages particularly in a non union shop fact situation.**

As stated previously, the Board has a broad remedial power to address damages as it deems appropriate.

The Board had found that the actions of Michael Doucette, Chris Devons, Travis Outhouse and Paul Milligan in walking off the job on Thursday and not reporting for work as directed on

Friday were worthy of disciplinary action. The Board used the phrase "work to rule" and made an adjustment to the damage award it ordered.

There have been no authorities submitted that would indicate the Board could not utilize that term or make the decision it did. As pointed out by Mr. MacLeod on behalf of the employer, instead of using the term "*working to rule*", the Board could have utilized the term "*illegal strike*".

The Board finds no reason to reconsider its damage award in relation to this issue.

Issue 3 **That there was no evidence in which the Board could conclude that Leo Doucette was dismissed and was aware that he was dismissed by Blair LaPierre. On the contrary, the evidence clearly supports that he was deemed to have quit as were the other employees.**

This ground relates to the Board's finding of fact and the allegation is that the Board has made its decision in ignorance of some material fact.

Reasonable inferences were drawn by the Board based on the evidence put before the Board. The fact that the Applicant is dissatisfied with those inferences drawn by the Board does not constitute a sufficient basis for the Board to exercise its discretionary power to reconsider its decision.

In the *Polar Foods* decision, the Board made the following comment:

> *While the applicants are dissatisfied with some of the inferences drawn by the board from the evidence presented in the course of the hearings of the matter by their own admission the board has most certainly drawn inferences in the course of its determination of the matters with which they were entirely satisfied. The allegations of failures of the board to draw inferences that the applicants preferred to have been drawn cannot form a basis upon which the board would be able to exercise nor be disposed to exercising its discretionary power to vary its decision.*

The Board notes that Paul Milligan was a witness that was called by the Applicant and thus the Applicant would be bound by his evidence. Mr. Milligan indicated that Leo Doucette was let go. Furthermore, the evidence of the employer was that Mr. Milligan's evidence could be correct on this point.

There was evidence before the Board such that the Board could conclude that Leo Doucette was dismissed. The Board will not reconsider its decision in this regard.

Issue 4 **The Board's reduction of the period of July 14, 2008 to September, 2008 from full back paying benefits was in ignorance of a significant material fact, that being that Ms. Dorsey, counsel for the Respondent, was not going to be available for an earlier continuation of the hearing, a fact known by her on July 14, 2008 and withheld from the board and the applicant when she made her motion on that issue.**

A request for adjournment was made by the Applicant and the Board granted the request for an adjournment. The request was made by the Applicant as a result of the Applicant intending to call three additional witnesses which it felt could provide additional information to the case. The adjournment was strenuously objected to by the counsel for the Respondent at the time. As stated by the Board when it granted the adjournment, the Applicant's counsel should have had knowledge of the potential for these additional three witnesses to provide information relevant to the case and should have contacted those witnesses previous to July 14, 2008, the date set for the hearing. Having not done so, it was necessary to adjourn the matter in order that subpoenas could be issued for the three individuals to appear before the Board.

The above-noted adjournment caused a delay in the proceedings and the matter was rescheduled for 2 months later. The adjournment of that length of time is not unusual considering the necessity to coordinate the calendars of the parties, both counsel, as well as members of the Board, to say nothing of the fact that it was the middle of summer.

The Board finds this ground to be without merit and will not reconsider its decision.

Issue 5 Direction to the parties:

In its decision of December 30, 2008, the Board left it to the parties to work out the matter; however, in the event the parties could not arrive at a decision, the parties were free to come back to the Board.

The parties were concerned about the implementation of the award and indicated that they needed some guidance in this regard.

The Board has considered this issue but believes it is premature for the parties to seek direction of the Board when they do not appear to have attempted to work out the award themselves.

In order to give some guidance to the parties, the Board believes that the following should occur:

a) the Respondent can calculate on its own, the gross sums it would have paid to each of the individuals for the period in question;

b) the Applicants need to compile proof of the sums that were earned by each of the individuals including earnings from EI during the relevant period. Since 2008 has since gone by, there should have been T4s or other income information that would be available;

c) The parties should exchange this information immediately through their respective solicitors and in any event not later than 60 days from the date of this order;

d) Following the exchange of information noted above, the parties should attempt through their respective solicitors to resolve and calculate all sums due to the individuals for the relevant period; and

e) If the parties are unable to arrive at a resolution within 90 days of the date of this Order, the parties shall contact the CEO to the Board who shall be instructed to bring the matter back on for hearing and final resolution.

For the foregoing reasons the Board is unanimous in its decision to decline to reconsider its decision of December 30, 2008 involving these parties. The Application for Reconsideration is dismissed.

This Decision made by the Labour Relations Board and issued under the hands of its Chief Executive Officer this 19th day of October, A.D. 2009.

Karen M. MacLeod
Vice Chair

Michael Lund
Member

Fraser MacDougall
Member

This Decision made by the Prince Edward Island Labour Relations Board on this 19th day of October, 2009 and issued under the hand of its Chief Executive Officer.

Shawn Shea
Chief Executive Officer