CITATION: *Thomas Fuller Construction Co. Limited v. Labourers' International Union of North America*, 2013 ONSC 2627
DIVISIONAL COURT FILE NO.: 12-1832
DATE: 2013/05/08

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT OF ONTARIO

MATLOW, SWINTON and WHITAKER JJ.

BETWEEN:	
THOMAS FULLER CONSTRUCTION CO. LIMITED, THOMAS FULLER CONSTRUCTION CO. (1958), 494545 ONTARIO INC., FULLERCON LIMITED AND THOMAS G. FULLER & SONS LTD.,	Paul Lalonde; Porter Heffernan, for the Applicants
Applicants	
– and –	
LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND THE ONTARIO LABOUR RELATIONS BOARD	Lorne A. Richmond, for the Respondents Labourers' International Union of North America and the Ontario Provincial District Council Voy T. Stelmaszynski, for the Respondent Ontario Labour Relations Board
Respondents	
	HEARD at Ottawa: April 8, 2013

REASONS FOR JUDGMENT (CORRECTION)

WHITAKER, J.:

Overview

[1] This is an application for judicial review of two decisions of the Ontario Labour Relations Board (the "Board"). Both decisions deal with the same issue in an application for certification in the construction industry.

[2] The applicant employer seeks to overturn the Board's decisions granting certification. The respondent union supports the Board's decisions.

[3] The employer argues that the Board made a mistake in accepting a union membership card from an employee who worked on the application date but signed the card later that day after being laid off.

[4] The union suggests the Board was entitled to consider this particular membership card despite the fact that the employee was no longer employed by the employer at the moment of signing the card.

[5] The Board in its first decision, rejected the employer's argument that the Board should not accept the union card as membership evidence.

[6] In its second decision, the Board denied the employer's request for reconsideration of the first decision.

[7] The employer claims the Board's decisions are unreasonable, inconsistent with the provisions of the *Labour Relations Act*, S.O. 1995 c. 1 (the "Act") and common sense.

[8] The employer argues the wishes of a laid off employee should play no role in the certification process in the construction industry.

[9] The union replies that the Board's decision to certify was in accordance with the Act, the Board's long standing practice in the construction industry and appropriate given the unique features of employment in that industry.

[10] In the union's view, an employee who worked in the bargaining unit on the date of application for certification and signed a card on the same day, is entitled to participate in the process. This is particularly so where the employer has included the laid off employee in its proposed bargaining unit, as happened here.

[11] The union takes the position that the process used by the Board supports two statutory goals, the facilitation of collective bargaining and the provision and maintenance of practical and expeditious dispute resolution.

[12] For the following reasons, I disagree with the employer and agree with the union that the decisions are reasonable. I would dismiss the application for judicial review.

The Facts

[13] The parties agree on the important facts.

[14] On June 22, 2011, the union applied for certification of a bargaining unit of labourers, employed by the employer in all sectors of the construction industry except industrial, commercial and institutional. The geographic scope of the application in eastern Ontario is known as Board Area 30.

[15] The union sought card based certification under the construction industry provisions of the Act.

[16] In the application for certification, the union claimed there were three employees in the bargaining unit on the date of application, two of whom signed membership cards. The union's request for card based certification was based on the union presenting two valid cards in a three person bargaining unit, indicating membership support from employees comprising over 66 per cent of the proposed bargaining unit.

[17] The employer agreed there were three employees in the bargaining unit on the date of application but challenged the validity of the two cards relied on by the union.

[18] The employer argued that one card was invalid because of misrepresentations made by a union organizer to the employee at the point of signing the card. This objection has been resolved and the Board has since concluded this card was validly counted. There are no remaining concerns with this card.

[19] The employee ("P") who signed the second card was told at the beginning of his shift on June 22, 2011, that he would be laid off at the end of his shift. After working for more than half of his shift P was told that he was laid off early. Later that same day after leaving the work site, P signed a membership card with the union.

[20] The following day on June 23, 2011, P worked for another construction industry employer certified by the union. P was referred to this other employer through the union hiring hall.

[21] Throughout, the employer and the union agree that P is properly included in the bargaining unit.

The Board's Decisions

[22] By decision dated July 6, 2011, a panel of the Board first dealt with the certification application. At this point, the employer had raised the objection to the membership card signed by P. In its decision, the Board indicated that under section 128.1 of the Act, the only

requirements for certification were that the membership card be signed on the date of application and further, that the signing employee had to have worked for most of the day in the bargaining unit on the date of application. In this case, both requirements had been met.

[23] The Board clarified that its long standing practice was to not subdivide or parse the date of application into units of time of less than a day.

[24] The Board referred to its decision in *Romac Heating Company Ltd*., [2002] OLRB Rep. Nov\Dec 1162 in support of the proposition that the Board does not concern itself with the time of signing a membership card on a particular day.

[25] The Board concluded that the union was entitled to be certified in keeping with the provisions of section 128.1 of the Act and the Board's practice. The only remaining issue was the proper name of the employer.

[26] On August 4, 2011 the employer asked the Board to reconsider its decision of July 6, 2011 as it related to the "time at which the membership evidence may have been signed issue". The Board provided the parties with the opportunity to make written submissions on these issues. Following a review of the written submissions and on September 26, 2011, the Board directed a hearing to deal with the employer's request for reconsideration.

[27] The employer's request for reconsideration was heard by a panel of the Board on December 20, 2011. By decision of January 25, 2012 the Board dismissed the request for reconsideration. The Board relied on its decision in *Amplifone Canada*, [1967] OLRB Rep. 840.

[28] Neither *Amplifone* nor *Romac* deal within an application for certification in the construction industry. The parties acknowledge that there is not a construction industry decision of the Board (or decision of the court) that deals squarely with the issue here.

[29] On April 30, 2012, the employer brought this application for judicial review challenging the July 6, 2011 and the January 25, 2012 decisions of the Board. At the time of hearing and as indicated earlier, the only remaining issue between the parties relates to the utility of the membership card signed by P.

Issues to be Decided

[30] There are two issues to be decided. Firstly, what is the standard of review. Secondly, what is the outcome given the appropriate standard of review?

What is the Standard of Review?

[31] The Supreme Court of Canada has determined in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, that there are two standards of review; correctness and reasonableness.

[32] In determining the appropriate standard of review, the court must look first to the statute to determine the tribunal's particular role and task. Secondly, the court must consider the nature of the dispute to be resolved in the context of the Board's role.

[33] I note the robust privative clause which applies here and that courts have routinely deferred to the Board's expertise. The consideration and treatment of membership evidence lies within the core of the Board's responsibilities under the Act.

[34] The parties agree the standard of review in this case is reasonableness. In light of the Board's role and the nature of the dispute, I agree.

Are the Board's Decisions Reasonable?

[35] Reasonableness is connected to justification, transparency and intelligibility (*Dunsmuir*).

[36] A reasonable decision falls within the range of possible acceptable outcomes, defensible in fact and law (*Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board*) , 2011 SCC 62, [2011] 3 S.C.R. 708.

[37] There is no issue here as to transparency or intelligibility. The question is whether the decisions may be justified in fact and law and fall within the range of possible acceptable outcomes.

Certification in the Construction Industry

[38] The union applied for card based certification which is only permitted in the construction industry. This process is governed by section 128.1 of the Act. A union may be certified in the construction industry without a representation vote where it can demonstrate through membership cards, that it represents more than 55 per cent of the employees in the bargaining unit.

[39] Section 128.1(4) of the Act describes what the Board must do on the receipt of such an application:

(4) On receiving an application for certification from a trade union that has elected to have its application dealt with under this section, the Board shall determine, as of the date the application is filed and on the basis of the information provided in or with the application and under subsection (3),

(a) the bargaining unit; and

(b) the percentage of employees in the bargaining unit who are members of the trade union. 2005, c. 15, s. 8.

[40] The Board must inquire into and determine two things; firstly, the bargaining unit and secondly, the percentage of employees in the bargaining unit who are members of the applicant trade union. Further, the Board is directed that this "shall" be done "as of the date the application is filed…".

[41] The employer agrees that P was an employee in the bargaining unit and signed a membership card on the date of application.

[42] The employer suggests however that section 128.1(4) must be read to require employment and membership to coexist in time.

Purposes of the Act

[43] Section 2 describes the purposes of the Act:

2. *The following are the purposes of the Act:*

1. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.

2. To recognize the importance of workplace parties adapting to change.

3. To promote flexibility, productivity and employee involvement in the workplace.

4. To encourage communication between employers and employees in the workplace.

5. To recognize the importance of economic growth as the foundation for mutually beneficial relations amongst employers, employees and trade unions.

6. To encourage co-operative participation of employers and trade unions in resolving workplace issues.

7. To promote the expeditious resolution of workplace disputes.

[44] The employer relies on section 2.1 of the Act. The employer suggests that the Board's use of P's membership card to determine membership support is inconsistent with these provisions. More particularly, the employer argues that P has no further interest in the workplace and should not be permitted to participate in a process that will bind future employees.

[45] The employer argues that the creation of a bargaining relationship by relying on the membership card of P would undermine the credibility of the union in dealing with the employer. This in turn is inconsistent with the Board's mandate to facilitate collective bargaining. The

employer relies on the Board's decision in *LIUNA v. Weathertech Restoration Services Inc*. [2008] OLRB Rep. 832 for the proposition that collective bargaining may be undermined if the union lacks sufficient membership support so as to be unable to convincingly assert that it speaks for employees in the bargaining unit.

[46] The employer argues that bargaining agent "legitimacy" is lacking where the union is supported by persons no longer employees and further, where those who remain as employees have played no role in selection of the bargaining agent. In the employer's view, collective bargaining on this basis would be inherently unstable and doomed to failure – again, thereby undermining section 2.1 of the Act.

[47] The reconsideration panel of the Board turned its attention to what it considered to be the realities of labour relations in the construction industry:

...employment relationships in the construction industry are transitory and can be extremely short in duration, the Board has determined that the focus in construction industry certifications applications should be on the level of support enjoyed by a trade union applicant on the application date, and only on the application date...

[48] Bargaining unit composition may change rapidly over short periods of time and employees are referred to work assignments by the union and through the hiring hall (see *Arlington Crane Service v. Ont. (Min. of Labour)* (1988), 67 O.R. (2d) 255).

[49] The legislature has chosen to direct the Board to take a "snap shot" of employee wishes and membership evidence as they exist over the course of the day of application.

[50] In the decisions under review, the Board provided a coherent analysis to explain the outcomes. With justification, the Board adverted to the many decades long practice not to "parse" the timing of events on the date of application – as this is not required by the statute or the Board in the exercise of its discretion as to how section 128.1(4) should be administered.

[51] The Board has answered the two questions put to it under section 128.1(4). It has not required P to be both a member and an employee in the bargaining unit at the same time on the date of application. The Board has also explained why it has chosen to interpret its home statute in this fashion – to the end of making quick, expeditious and reliable findings of membership support and employee wishes. In my view, the Board has completed both of these two statutorily mandated tasks.

Disposition

[52] In the substance of its reasons in both decisions, the Board has justified its interpretation of the Act in an intelligent and transparent fashion. The Board adopted the plain language meaning of section 124.1 and has in its practice, administered a protocol which satisfies two of the statutory purposes referred to in section 2 – the facilitation of collective bargaining and the promotion of expeditious resolution of workplace disputes.

[53] The Board's conclusions fall within a reasonable range of outcomes defensible in fact and law.

[54] The Board's decision is reasonable. Therefore, the application for judicial review is dismissed.

[55] By agreement of the parties, the union is entitled to costs of $10,000 inclusive of taxes and disbursements, payable forthwith. As is appropriate, the Board seeks no costs.

Whitaker, J.

Matlow, J.

Swinton, J.

Date: May 8, 2013

Appendix

Corrected Reasons for Judgment:

The Reasons for Judgment of the court dated May 8, 2013 are corrected on May 22, 2013 to reflect the names of the panel members in order of seniority (located on the top and back pages):

MATLOW, SWINTON and WHITAKER JJ.

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Whitaker J.

Released: May 8, 2013