

BRITISH COLUMBIA LABOUR RELATIONS BOARD

643972 B.C. LTD. (SHOPPERS DRUG MART NO. 219)

(the "Employer")

-and-

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 1518

(the "Union")

PANEL: Brent Mullin, Chair
Allison Matacheskie, Vice-Chair and
Registrar
Ken Saunders, Vice-Chair

APPEARANCES: Peter M. Archibald, Q.C., for the
Employer
Brett Matthews, for the Union

CASE NO.: 62834

DATE OF DECISION: December 13, 2011

DECISION OF THE BOARD

1 The Employer applies under Section 141 of the *Labour Relations Code* (the "Code") for leave and reconsideration of BCLRB No. B189/2011 (the "Original Decision"). The Original Decision found that two individuals, Lauren Cameron and Jean Freiburger, are not employees in the bargaining unit applied for by the Union. Accordingly, it was ordered that their ballots would not be counted in respect to that application.

2 In the leave and reconsideration application, the Employer says that it was inconsistent with the meaning of "employee" in the Code to exclude Cameron. Secondly, her exclusion is contrary to law because it conflicts with her right under the *Human Rights Code* to be a member of the Union.

3 In respect to Freiburger, the Employer says that it is inconsistent with the law and policy of the Code to exclude her on the basis of access to confidential information. The Employer says neither party argued that point and the Original Decision cites no authorities in support of its conclusion. Secondly, the Employer says it was denied a fair hearing in respect to the decision to exclude Freiburger.

4 An application under Section 141 must meet the Board's established test before leave for reconsideration will be granted. An applicant must establish a good, arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration: *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), 20 C.L.R.B.R. (2d) 44 ("*Brinco*").

5 We find for the following reasons that the Section 141 application does not present a good, arguable case for reconsideration and as a result leave is denied.

6 In respect to Cameron, we do not agree with the Employer's submission that the exclusion in *Emhay Holdings Inc.*, BCLRB No. B113/2011 approached the issue of familial exclusions on an axiomatic basis. Nor did the Original Decision. Cameron was excluded on a proper interpretation and application of the Board's approach to familial exclusions under the Code.

7 In respect to the Employer's human rights based argument regarding Cameron, we agree with the submission of the Union that this position inappropriately conflates the concept of membership in the Union with membership in the bargaining unit. As well, in respect to the merits of the limited human rights argument that was raised at first instance, we find that the conflict of interest basis for exclusions in the Code is an important distinction in labour relations which is not a form of discrimination under the *Human Rights Code*. Exclusion under the Code is in respect to bargaining unit constituency, as opposed to the issue of membership in a union which is addressed under the *Human Rights Code*. They are separate issues.

8 We are not willing to consider the Employer's expanded human rights argument in its reconsideration application reply submission. It is a fundamental requirement further to the Board's duty in subsection 2(e) of the Code to promote the orderly, constructive, and expeditious resolution of disputes that full arguments be brought forward at first instance: *David Canvin*, BCLRB No. B174/2010 (Leave for Reconsideration of BCLRB No. B106/2010); *Steven Rooke*, BCLRB No. B164/2011 (Leave for Reconsideration of BCLRB No. B130/2011); *Maganbhai L. Patel*, BCLRB No. B154/2011 (Leave for Reconsideration of BCLRB No. B97/2011); *Bradford C. Junkin*, BCLRB No. B159/2011 (Leave for Reconsideration of BCLRB No. B166/2009).

9 In respect to Freiburger, we find that if there was a denial of a fair hearing in the Original Decision, it has been cured before us by the Employer having full opportunity to argue the exclusionary basis for Freiburger determined in the Original Decision. We confirm that the facts found in the Original Decision properly lead to the exclusion of Freiburger on the basis of "a confidential capacity in matters relating to labour relations or personnel" in subsection (b) in the definition of "employee" in Section 1 of the Code.

10 Lastly, we do not find that the conflict of interest bases for the exclusion of Cameron and Freiburger would be resolved as the Employer submits by adopting a Rand Formula approach to their status. A Rand Formula order would continue the conflict of interest regarding these individuals in respect to the exercise of choice in respect to the certification application in the present matter, for instance.

11 In light of the above, leave is denied and the application for reconsideration dismissed.

LABOUR RELATIONS BOARD

"BRENT MULLIN"

BRENT MULLIN
CHAIR

"ALLISON MATACHESKIE"

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VICE-CHAIR AND REGISTRAR

"KEN SAUNDERS"

KEN SAUNDERS
VICE-CHAIR