BRITISH COLUMBIA LABOUR RELATIONS BOARD

TRADER CORPORATION/SOCIETE TRADER CORPORATION

(the "Employer")

-and-

LOCAL 213 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

(the "Union")

PANEL:	Leah Terai, Vice-Chair
APPEARANCES:	Gabrielle M. Scorer, for the Employer Leo McGrady, Q.C., for the Union
CASE NO.:	65416
DATE OF DECISION:	May 13, 2013

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 On March 28, 2013 the Union applied pursuant to Section 142 of the *Labour Relations Code* (the "Code") to vary its certification dated September 8, 2000 by including in the existing bargaining unit "account managers on the mainland of British Columbia". The Union initially objected to the eligibility of Julian Smallbone to vote and has since withdrawn its objection. This decision deals with the remaining objection by the Employer that Delmer Johnson is not entitled to participate in the representation vote on the basis that he does not have a sufficient continuing interest in the bargaining unit applied for. The Union disagrees.

II. BACKGROUND

2 Johnson is employed as an account manager and has been an employee for approximately nine years, since March 2004. The following facts are not disputed:

> Mr. Johnson is employed as an Account Manager.
>
> The Employer received a medical note from Mr. Johnson's physician Dr. Rachel Carver dated February 8, 2013 which stated that Mr. Johnson would be medically unable to work for the next month. ...
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> Mr. Johnson did not work during the remainder of February.
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> The Employer received a copy of a letter dated March 5, 2013 from Desjardins Financial Security to Mr. Johnson. The letter acknowledged receipt of Mr. Johnson's application for Short Term Disability benefits. The letter advised that Desjardins would recommend Mr. Johnson's claim be approved. ...
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> The Desjardins letter further advised that Mr. Johnson would receive benefits payments until March 29, 2013 and if he was unable to return to work at that date, he was required to acquire and submit additional medical information from his treating physician in order to be considered for continued short term disability benefits.
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> Mr. Johnson did not work during the month of March.
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> The Employer received a copy of a letter dated April 2, 2013 from Desjardins Financial Security to Mr. Johnson. Desjardins advised Mr. Johnson that his claim for continued Short Term Disability benefits had been accepted. ...

> The Desjardins letter further advised that Mr. Johnson would receive benefits payments until April 30, 2013 and if he was unable to return to work at that date, he was required to submit additional medical information in support of continuation of his claim.

3 The Union asserts it is Johnson's expectation to return to work on May 1, 2013. The Employer states as of the date of its submissions of April 15 and April 25, 2013 it has not received any information from Johnson's physician which states he would be fit to return to work on May 1, 2013 or any other date in any capacity.

III. POSITIONS OF THE PARTIES

4 The Employer submits the test to be applied is whether the employee has a sufficient continuing interest in the unit as of the date of the application for certification (*Naya Inc.*, BCLRB No. B294/98 ("*Naya Inc.*")). The Employer submits Johnson did not have a sufficient continuing interest in the unit as of the date of the Union's application, March 28, 2013.

5 It submits Johnson had been on sick leave since February 2013 and as of the date of the Union's application there was no asserted or expected date for Johnson's return to work. Johnson's short term disability benefits were extended by the insurer to at least April 30, 2013 with the direction if he was unable to return to work at that date he could submit additional medical information in support of the continuation of his claim. The Employer says it has received no medical information from Johnson asserting a date by which he will be expected to return to work. The Employer submits the facts support a conclusion that Johnson cannot be included in the constituency with respect to the application (*Spectra Restaurants Inc.*, BCLRB No. B55/97 (Leave for Reconsideration of BCLRB No. B194/96); *Intercon Security Limited*, BCLRB No. B199/2009, 172 C.L.R.B.R. (2d) 257 ("*Intercon Security*")).

6 The Employer submits the proper test to be applied is articulated in the original decision in *Spectra Restaurants Inc.*, BCLRB No. B194/96. It submits the reconsideration panel in *Spectra Restaurants* confirmed that where there was no asserted or expected date of return to work, an individual on medical leave does not meet the sufficient continuing interest test and should not be included in the employee constituency. The Employer submits *CKF Incorporated*, BCLRB No. B117/2012, 217 C.L.R.B.R. (2d) 290 ("*CKF*") established a new test.

7 The Employer says Johnson has provided no information to it regarding his ability to return to work on May 1, 2013 or any date and there is no evidence before the Board which would support a finding he has a reasonable likelihood of returning to active employment. It submits it is incumbent on the individual at issue to provide evidence to the Board which supports the assertion of returning to active employment. It submits where the individual employee fails to provide evidence on which the Board can rely, the Board should decline to make a finding of an expectation to return to work.

8 The Union submits Johnson is entitled to participate in the vote. He has been on short term medical leave and is expecting to return to work on May 1, 2013. It emphasizes Johnson is in receipt of short term disability benefits.

9 The Union submits in determining whether or not an individual has a sufficient continuing interest in the bargaining unit applied for the Board considers a variety of factors such as permanence of employment and the individual's particular employment circumstances (*Waldun Forest Products Ltd.*, BCLRB No. B158/93). It submits these factors apply regardless of whether or not the individual is on medical leave.

10 The Union submits in *CKF* the Board held that a definite return to employment date is only one factor among others that should be considered when determining whether an employee has a sufficient continuing interest. The Board in that case framed the test as whether or not an employee has a reasonable likelihood of returning to active employment. It submits the expected return to work date is but one factor in the determination of whether an individual has a sufficient continuing interest. It submits in the cases of *Spectra Restaurants* and *Intercon Security* the factual circumstances of the individuals at issue are not described. With respect to the case of *Naya Inc.* the Union submits the distinguishing factor in the case at hand is that it involves an employee on short term medical leave.

11 The Union submits as of the date of its application, there was a reasonable likelihood that Johnson would be returning to employment. It says Johnson's short term medical benefits were only extended to April 30, 2013. It submits as of April 30, 2013 Johnson would be expected to be able to return to work. The Union does not dispute Johnson has been on sick leave since February 2013. It says the fact the insurer directed if he was unable to return to work at the end of April 2013 he could submit additional medical information in support of an extension of his claim, does not establish Johnson does not have an expected return to work date. The Union submits this is not a situation where the leave is indefinite, rather it is a short term leave that is approved month to month with the expectation he would return to work unless he shows otherwise. The Union notes the circumstances of one of the employees in the case of *CKF* where the employee had been off work for more than a year and while having an intention of returning to work, it was inconclusive whether her medical condition improved to the extent she could return to work. In that case the Board concluded the employee had a reasonable likelihood of returning to work and held she had a sufficient continuing interest.

12 The Union says Johnson has served with the Employer for approximately nine years and when viewed in light of his length of service, Johnson's short term medical leave is insignificant and does not negate his sufficient continuing interest in the unit.

IV. ADDITIONAL SUBMISSIONS

13 After the Employer's final reply dated April 25, 2013, by letter dated April 30, 2013 the Union requested leave to submit a surreply and provided its submission in that regard.

14 On May 1, 2013 the Employer asked the Board to advise whether it intended to consider the Union's request for leave to file a surreply and if so, to provide it with an opportunity to make submissions regarding the request. On May 6, 2013 the Board invited the Employer to provide its submission by May 8, 2013.

15 Also on May 6, 2013 the Union wrote to seek leave to provide additional facts regarding Johnson's status. It stated that on April 26, 2013 Johnson provided a doctor's note to the Employer stating he was fit to return to work on May 1, 2013. It said the information about Johnson's return to work was acknowledged by the Employer and Johnson's immediate supervisor, and Johnson returned to work on May 1, 2013 without any conditions. It is noted in the Union's May 6, 2013 letter that it provided a copy of its letter to the Employer.

16 On May 8, 2013 the Employer provided its submission to the Board addressing the Union's letter of April 30, 2013. The Employer made no comment with respect to the Union's letter of May 6, 2013.

V. ANALYSIS AND DECISION

17 In *CKF* (at para. 6) the Board reviewed the reconsideration decision in *Spectra Restaurants* as follows:

> In *Spectra Restaurants Inc.*, BCLRB No. B55/97, (Leave for Reconsideration of BCLRB No. B194/96), a reconsideration panel of the Board said the proper test in assessing whether individuals on a leave of absence were to be included in the bargaining unit is the test of sufficient continuing interest. The reconsideration panel affirmed the following test in *Waldun Forest Products Ltd.*, BCLRB No. B158/93 ("*Waldun*") at p.13.
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> > There is no simple rule which determines the status of a part-time or casual employee. However, over the years the Board and the Council have enunciated a test; namely, do the challenged employees have a "sufficient, continuing interest" in the issue of union representation such that they are entitled to be included in calculating union support, see *Superior Contracting Ltd.,* IRC No. C313/88; *Custom Gaskets Ltd.; and Emergency Health Services Commission.*
> >
> > In deciding whether that test has been met the Board will consider a variety of factors, some of which were set out in *Edoco Healey* and *Superior Contracting*:
> >
> > - permanence of employment

- proportion of casual/temporary employees in the total work force

- nature and organization of the employer's business

- each individual's particular employment circumstances

18 In *CKF* the CEP argued none of the employees at issue in that case had a set return date therefore their votes should not be counted because they had no sufficient continuing interest citing the original decision in *Spectra Restaurants* and *Intercon Security*. The PPWC argued the question to be asked is whether, at the date of the application, the individual had a reasonable likelihood of returning to active employment. It also argued there is a presumption that individuals on medical leave will return to active employment.

19 The Board noted where an employee on leave has a specific date of return to work at the time of an application before the Board this was convincing evidence of a sufficient continuing interest. However, whether or not an employee on medical or disability leave has a definite return date to employment is only one factor among other employment factors which should be considered. The Board did not agree with the argument there is a presumption that workers on medical disability leave will return to the workplace, rather the Board should look at each individual's employment circumstances. The Board went on to review the employment circumstances of each of the employees at issue.

20 The approach taken in *CKF* is consistent with the approach taken by the reconsideration panel in *Spectra Restaurants*. In *Spectra Restaurants* the original panel held two people on medical leave were not included as there was no asserted or expected date of return to work. The employer applied for reconsideration with respect to one of the individuals on medical leave, Vandy Britton. The employer argued Britton should have been included in the unit and entitled to vote. It submitted she was on medical leave of absence from September 1995 due to a car accident (in addition, on the facts set out in the original decision Britton was in Australia) and subsequent to the employer's submission in the original application, she provided the employer with notification she was fit to return to work.

21 On reconsideration the Board held the original panel applied the correct sufficient continuing interest test based on information about Britton before it at the time (para. 30). The Board held the "new evidence" sought to be introduced by the employer on reconsideration simply confirmed the previous assertions of the employer. Further, the Board noted the new evidence showed the individual could have, but had not, confirmed an expected date of return with the employer during the original proceedings. The Board held the evidence would not have had an effect on the original panel's determination of her employment status at the time in question, therefore, did not fall within the ambit of new evidence as set out in *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), 20 C.L.R.B.R. (2d) 44.

22 I do not read the reconsideration decision in *Spectra Restaurants* as stating the only factor to be considered in assessing whether an individual on medical leave has a sufficient continuing interest is whether the individual has an expected date of return to work. It was addressing the employer's argument on reconsideration with respect to new evidence. The reconsideration decision states the proper test in assessing whether individuals on a leave of absence were to be included in the bargaining unit is the sufficient continuing interest test which was described in *Waldun Forest Products*, *supra* (para. 22).

23 The test to be applied in this case is as set out in *Spectra Restaurants* on reconsideration and applied in *CKF*, that is, whether the individual has a sufficient continuing interest in the issue of union representation such that they are entitled to be included in calculating union support. In the case at hand Johnson has been an employee for nine years. He has been absent from work since February 8, 2013. The doctor's note dated February 8, 2013 stated he would be medically unable to work for the following month. As of the date of application, March 28, 2013, Johnson had been absent from work for almost two months. Although no definite return to work date has been provided to the Employer, the benefits provider has granted benefits on roughly a monthly basis. These circumstances contrast with those set out in the cases cited by the parties where the length of the absence and in some instances the nature of the medical issue resulted in a conclusion the individual did not have a sufficient continuing interest in the question of union representation. In the circumstances of the case at hand, I find Johnson has a sufficient continuing interest in the bargaining unit applied for such that he should be eligible to cast a ballot.

24 In this case, the parties filed additional submissions. Although I have considered those submissions, they were unnecessary to my decision.

VI. CONCLUSION

25 For the reasons set out above, the Employer's objection to Johnson is dismissed. I order the ballots cast be counted.

LABOUR RELATIONS BOARD

LEAH TERAI
VICE-CHAIR