C.A. No. 130635

NOVA SCOTIA COURT OF APPEAL

Cite as: Nova Scotia v. Ottens, 1997 NSCA 13

Clarke, C.J.N.S.; Hallett and Flinn, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF NOVA SCOTIA	)	R. Ferguson Ford for the Appellant
Appellant	)	Randall P. H. Balcome
- and -	)	for the Respondent
RONALD OTTENS	)	
Respondent	)	Appeal Heard: December 5, 1996
	)	Judgment Delivered: January 10, 1997

THE COURT: Appeal allowed from decision and order of the Labour Standards Tribunal, per reasons for judgment of Clarke, C.J.N.S.; Hallett and Flinn, JJ.A. concurring

CLARKE, C.J.N.S.:

On August 6, 1996, the Labour Standards Tribunal of Nova Scotia decided that the respondent, Ronald Ottens, was a ten years employee of the province of Nova Scotia and that he had been discharged, without cause, from his employment as Chief Engineer on the Bluenose II. It determined that his discharge violated s. 71(1) of the **Labour Standards Code**, R.S.N.S. 1989, c. 246 and that he was entitled to be reinstated. The Tribunal retained jurisdiction in the event the parties were unable to agree on the amount to which Mr. Ottens was entitled to recover.

The Province appeals alleging that the Tribunal erred in law and jurisdiction. It contends that Mr. Ottens was not discharged without cause after ten years of continuous service, as the Tribunal found. Instead the Province argues that the employment of Mr. Ottens ended upon the expiration of a fixed term contract of employment and that it was an error in law for the Tribunal to apply s. 71(1) of the **Code**.

Section 71(1) provides:

> 71 (1) Where the period of employment of an employee with an employer is ten years or more, the employer shall not discharge or suspend that employee without just cause unless that employee is a person within the meaning of person as used in clause (d), (e), (f), (g), (h) or (i) of subsection (3) of Section 72.

Mr. Ottens began his employment with the Nova Scotia Department of Tourism as Chief Engineer on the vessel Bluenose II in late April or early May, 1983. He worked in that capacity for seven years. He had no written contract of employment. He was paid a salary. He received no benefits of any kind.

On April 1, 1990, Mr. Ottens entered a written contract of employment with the Province for a fixed term of "36 months, to be effective from the 8th day of April 1990, to

and including the 7th day of April 1993." He was called the "Contractor". It described the work he was to perform and the pay he was to receive. It provided him with benefits which were new to him. These included participation in group life, health and superannuation plans "as exist for Civil Service employees of the Province" and in addition sick leave benefits "of 1.5 days per month for each month of service completed".

The contract further provided:

> 5. Notwithstanding any other provision herein, this Agreement may be terminated at any time by the Province, without previous notice, if the Contractor fails to carry out the terms of the Agreement, and in the event of such termination, and subject to Section 6 hereof, the Contractor shall be paid the sum or sums which have accrued under Section 2, up to the date of termination and such sum or sums shall be received by the Employee in full satisfaction and discharge of all claims and demands whatsoever against the Province in respect of this Agreement.
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> 6. Notwithstanding Section 5 hereof, this Agreement may be terminated at any time by either of the parties hereto giving to the other party two months' written notice to that effect.
>
> 7. This Agreement shall be construed in accordance with the laws of the Province of Nova Scotia.
>
> 8. This Agreement supercedes and absolutely replaces all previous agreements and contracts between the parties hereto.

> 9. This Agreement is binding upon the parties hereto, their respective successors and assigns.

On March 10, 1993, Mr. Ottens was informed by Mr. McDonough of Tourism and Culture that his contract of employment was extended for one month to May 7, 1993. The memorandum addressed to Mr. Ottens stated in part:

> I wish to inform all contract crewmembers of Bluenose II that Management Board has approved a one month extension of the current employment contracts which were due to expire in the near future.

On April 21, 1993, Mr. McDonough wrote Mr. Ottens by registered mail in part as follows:

> Further to your discussion with Captain Don Barr on April 13, 1993, this confirms that your term contract of employment with the Department of Tourism, Culture and Recreation which was set to expire on April 7, 1993, and extended by one month to May 7, 1993 will not be renewed.

His employment ended on May 7, 1993.

He was never offered or provided any extension beyond that date. Later in May, 1993, the Province sent him a cheque for an additional two months salary. Although Mr. Ottens contends this payment was in recognition of a termination under paragraph (6) of the employment contract, it appears to have been more like a gratuity paid by the Province.

On September 8, 1993, Mr. Ottens filed a complaint with the Director of Labour Standards. Mr. A. Ross Mitchell, the Director, found that the **Labour**

Standards Code had been complied with and that he was not going to take any further proceedings with respect to the complaint. On March 15, 1994, he wrote Mr. Ottens, in part, as follows:

> This will serve to notify you of my intention not to proceed further with your complaint against **Her Majesty the Queen in the Right of the Nova Scotia Department of Tourism**. The Director of Labour Standards has exhausted all avenues of obtaining a settlement and finds that **Section 72** of the Labour Standards Code of Nova Scotia has been complied with in your circumstances.

The Labour Standards Tribunal

On March 22, 1994, Mr. Ottens appealed to the Labour Standards Tribunal from the decision of the Director of Labour Standards.

At the hearing convened by the Tribunal, evidence was received from Mr. Ottens and Ms. Janet Lee of the Province. Ms. Lee was in charge of staff records, some of which she produced. She had not participated in the negotiations surrounding the events involved in the employment of Mr. Ottens. Accordingly Mr. Ottens was the principal witness. The Tribunal rendered its decision and order on August 6, 1996.

The Tribunal concluded that Mr. Ottens' period of employment was "ten years or more". That is a finding of fact made by the Tribunal that is not in dispute.

When considering the impact of s. 71 on the issue before the Tribunal, it placed emphasis on what it described as the employer's discharge, without

cause, of an employee of ten years or more duration. It referred to s. 2(o) which defines "period of employment" in part as follows:

> "period of employment" means the period of time from the last hiring of an employee by an employer to his discharge by that employer ...

It also considered s. 2(c) which defines discharge:

> "discharge" means a termination of employment by an employer other than a lay-off or suspension;

The Tribunal concluded that there was no lay-off or suspension and in the words of its decision, "we are left to consider whether it was a 'termination of employment by an employer'."

The Tribunal summarized its understanding of that which the evidence of Mr. Ottens suggested to persuade it that the contract was not "a bargain freely entered into by the parties". Reference is made to paragraphs 33 and 35 of its decision:

> 33. The evidence suggests that the Complainant's status, and that of the other crew, changed in 1990 from permanent casual - receiving no benefits - to employees covered by a written contract of employment, receiving standard employment benefits. The Respondent has not argued that the Complainant was an independent contractor and not an employee. The Complainant's evidence, which is uncontradicted, is that he had received pay raises between 1983 and 1990, and he thought he got a raise, as well as benefits, when he changed to a contract employee. This raise in 1990 was consistent with his other salary increases. His work continued on the same as before; his job title and duties were the same.

> He was not dismissed from one job and hired for the other. He was not interviewed. There was no break in employment in 1990. His work continued through from 1983 to 1993, in the same position, and under the same rules. His evidence, again uncontradicted, was that he was advised by the government in 1990 that henceforth he and the other crew would be covered by contract, and that the crew argued unsuccessfully that the term should be five rather than three years. There is no evidence of any significant change between his position pre- and post-contract, other than receiving employment benefits. The evidence does not suggest that he was given any option of saying that he did **not** want an employment contract, or that he had the option of remaining in his job without a written contract.
>
> **...**
>
> 35. The evidence leads us to conclude that the 1990 employment contract was imposed on the Complainant as a term of his continuing employment, and that it does not represent a bilateral agreement freely entered into by the parties. Granted, its terms were explained to him, but the evidence suggests that there was no realistic option for him other than to accept it.

The Tribunal also considered s. 6 of the **Code** which states:

> This Act applies notwithstanding any other law or any custom, contract or arrangement, whether made before, on or after the first day of February, 1973, but nothing in this Act affects the rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to him than his rights or benefits under this Act.

In response the Tribunal wrote in its paragraph 38:

> There is no suggestion that the Respondent was attempting to interfere with the Complainant's prospective section 71 rights when it required the three year term contract in 1990. However, a decision to allow a written term contract imposed after

> a substantial period of employment to stand in the way of the rights in the **Code**, would have that effect. The implications of allowing such a situation to occur would allow unscrupulous employers a very easy route by which to frustrate section 71 rights. In our view, it was the intent of section 6 of the **Code** to avoid such situations.

As noted earlier, the Tribunal concluded Mr. Ottens' employment was a termination by the employer falling within the definition of discharge under the **Code**. It ordered his reinstatement.

The arguments addressed to this Court on appeal are similar to those which were made by counsel of the appellant and respondent to the Tribunal.

The Scope of Appeal

Relevant to the jurisdiction of this Court are sections 20(1) and (2) of the **Code**.

> 20 (1) If in any proceeding before the Tribunal a question arises under this Act as to whether
>
> (a) a person is an employer or employee;
>
> (b) an employer or other person is doing or has done anything prohibited by this Act,
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> the Tribunal shall decide the question and the decision or order of the Tribunal is final and conclusive and not open to question or review except as provided by subsection (2).
>
> (2) Any party to an order or decision of the Tribunal may, within thirty days of the mailing of the order or decision, appeal to the Appeal Division of the Supreme Court

on a question of law or jurisdiction.
[emphasis added]

[The Appeal Division of the Supreme Court is now the Nova Scotia Court of Appeal.]

This Court in several judgments has commented on the standard of review applicable to decisions of the Labour Standards Tribunal.

In **Ben's Ltd. v. Decker et al.** (1995), 142 (N.S.R.) (2d) 371, Justice Hallett stated at pp. 375-376:

> [20] It is clear from these statutory provisions that the decision of the tribunal is final and conclusive and not open to question or review unless it has erred on a question of law or jurisdiction.
>
> [21] **...** The law is clear the Tribunal must be correct in its interpretation of the relevant provisions of the **Code** and while deference is shown to decisions of specialized tribunals even on questions of law the degree of deference to be accorded a tribunal will vary.
>
> [22] In my opinion the Tribunal is not as specialized a Tribunal as the Securities Commission whose decision was subject to review in **Pezim v. British Columbia Securities Commission et al.**, [1994] 2 S.C.R. 557; 168 N.R. 321; 46 B.C.A.C. 1; 75 W.A.C. 1; 114 D.L.R. (4th) 385. That Commission was given by statute an important policy role and was clearly involved in a very specialized and technical field. It is for this reason that deference should be shown to the decisions of such a Commission. On the other hand the Tribunal is more specialized than a Human Rights Commission. The Tribunal's function is more analogous to that of a labour relations board. However, as a general rule, the decisions of Labour Relations Boards are protected by full privative clauses; that is the case in this Province (See **Trade Union Act**, R.S.N.S. 1989, c. 475, s. 19(1)). The Tribunal is not so protected. Its decisions are subject to appeal for errors of law or jurisdiction. It is clear that the Legislature intended that the Tribunal be

> subject to a much broader scope of review by an appellate court than the Labour Relations Board.
> [23] The Tribunal cannot incorrectly interpret the law when applying the law to a fact situation it has under consideration or incorrectly interpret the **Code** and have its decisions survive judicial review on appeal to this court.

In **Halifax Developments Ltd. v. Sutton** (1995), 142 N.S.R. (2d), 264, Justice Freeman wrote at p. 267:

> [11] Under s. 20(2) of the **Code** a decision by a Tribunal as to whether an employer or other person is doing or has done anything prohibited by the **Code** is "final and conclusive and not open to question or review" by this court except "on a question of law or jurisdiction." The standard of review which this court applies to decisions of the Labour Standards Tribunal on questions of law or jurisdiction, which are not protected by the partial privative clause, is that of correctness; this follows the reasoning of the Supreme Court of Canada in **Pezim v. British Columbia Securities Commission et al.**, [1994] 2 S.C.R. 557; 168 N.R. 321; 46 B.C.A.C. 1; 75 W.A.C. 1; 114 D.L.R. (4th) 385. **...**

Justice Chipman in **Conrad v. Scott Maritimes Ltd.** (1996), 151 N.S.R. (2d), 203, wrote at p. 211:

> [26] The Tribunal's findings at issue are, to the extent that they are findings of fact, largely insulated by the provisions of s. 20(1) of the **Code**. They can be set aside if there is no evidence to support them or if they are patently unreasonable. If the Tribunal erred in law in the process of reaching its ultimate conclusions, this court has a broad power of review. Even on a question of law, curial deference must be shown. In **Scott Maritimes Ltd. v. Labour Standards Tribunal (N.S.) et al.** (1994), 135 N.S.R. (2d) 58; 386 A.P.R. 58 (C.A.), Roscoe, J.A., speaking for this court, said at p. 63:
>
> > In my view the Labour Standards Tribunal is a specialized tribunal in

> matters of determining, among other things, the length of employment and although the issue in this case is a question of law, curial deference should be shown to the decision of the tribunal. It should not be overturned on appeal unless its interpretation of the **Code** can be found to be incorrect.

In the course of her dissent on the main issue, L'Heureux-Dube, J. contributed the following useful observations in **Gould v. Yukon Order of Pioneers**, [1996] 1 S.C.R. 571, at p. 629:

> It is evident that not every decision of an administrative tribunal is entitled to the same degree of deference. In determining the appropriate standard of review, the essential task is to ascertain the intention of the legislature in conferring jurisdiction on the particular administrative tribunal: **United Brotherhood, supra,** at p. 332; **Pezim, supra,** at pp. 589-90. To ascertain legislative intent in this context, a pragmatic and functional approach was developed by Beetz J. In **Bibeault, supra**. Under this approach, the main considerations are: (1) the wording of the statute; (2) the purpose of the statute and the role of the tribunal in carrying out this purpose; and (3) the nature of the problem before the tribunal.

"The purpose of the statute [Code] and the role of the tribunal in carrying out this purpose" was the subject of the decision of the Supreme Court of Canada in **Sobeys Stores Limited v. Yeomans and Labour Standards Tribunal (N.S.) et al.**, [1989] 1 S.C.R. 238, (1989) 90 N.S.R. 271. Wilson, J. wrote at pp. 316-317 (N.S.R.):

> [64] The **Code** represents a comprehensive scheme for the protection of non-unionised workers. It provides what I would classify as both substantive and procedural protections and benefits to such workers. By substantive protections I refer to the provisions dealing with minimum wages, equal pay,

> maternity leave, hours of work, child employment, statutory minimum notice periods on termination, and reinstatement. Most of these areas are the standard fare of collective agreements and in designating certain minimum standards the legislature has recognized the historic imbalance in bargaining power between an employer and an individual employee and has sought to provide some counterbalance to that. **...**

It is to these causes that the Tribunal is, by the **Code**, dedicated to administer. In doing so, the Tribunal by s. 20(1) has broad powers to decide questions and make decisions that are "final and conclusive". Its decisions are subject always that they may be appealed to this Court "where a question of law or jurisdiction arises" (s. 20(2)). This means, as Hallett, J.A. stated in **Ben's, supra**, that the decisions of the Tribunal are not protected by a full and complete privative clause. They are, as he said, "subject to appeal for errors of law or jurisdiction".

Returning to the words of L'Heureux-Dube, J. in **Gould, supra**, she refers to "the wording of the statute" and "the nature of the problem before the tribunal".

The words of s. 71(1) of the **Code** are crucial to the nature of this problem before the Tribunal. To repeat, the relevant portion is:

> Where the period of employment of an employee with an employer is ten years or more, the employer shall not discharge or suspend that employee without just cause **...**

And to repeat, s. 2(c):

> "discharge" means a termination of employment by an employer other than a lay-off or suspension;

There being no lay-off or suspension of Mr. Ottens, the definition

provided in the **Code** imports its ordinary meaning in the context of labour relations. It simply means the termination of employment by an employer. That is a fact situation where some triggering action is taken by the employer. It infers some unilateral action by the employer. The phrase "without just cause" following the word "discharge" supports that proposition. Where such unilateral action is taken, then it falls upon the tribunal to decide the issue of cause.

The nature of the problem before the Tribunal in this case is that there was no discharge by the employer. The problem lacks a factual foundation upon which the Tribunal could have reached that conclusion. The non-renewal of a fixed term contract of employment is not a unilateral act by the Province amounting to a discharge, as Mr. Ottens suggests.

The Tribunal concluded the contract of employment which the parties entered was to be interpreted as though it was forced upon Mr. Ottens by acts of the agents of the Province that were close to being unconscionable. In fairness that word is not used by the Tribunal but it can be inferred from its analysis of the situation.

An examination of the contract cannot be avoided. It is a written document that is complete on its face. There are no ambiguities in its provisions. While in substance it related to a continuation of the work to which Mr. Ottens had been accustomed for seven years, it nevertheless contained conditions of employment that were new and much more favourable to Mr. Ottens than the

uncertainties under which he had laboured for seven years. These included the following:

1. His pay was settled at $41,797.44 per annum "to be adjusted annually in accordance with increases granted under the technical classification pay plan". Previously Mr. Ottens' pay had been increased only twice in seven years.
2. It provided for the payment of expenses to the extent allowed employees under the travel policy of the Province.
3. It allowed Mr. Ottens to participate in group life, health and superannuation plans in the same way as employees in the Civil Service.
4. It provided for sick leave benefits at the rate of 1.5 days per month for each month of completed service.
5. It provided for a fixed term of employment for 36 months with a mutual termination clause of two months. This compared to the uncertain nature of this employment which had hitherto existed where his employment could have been ended by the Province at any hour of any day. Had such occurred during the earlier relationship, without cause, there may well have then been reason for the Tribunal to intervene. However, there was no such occurrence.

Significant also is paragraph 8 of the contract which provides that, "This Agreement supercedes and absolutely replaces all previous agreements

[emphasis added] and contracts between the parties hereto." and paragraph 9 which makes the agreement binding upon the parties.

Mr. Ottens urges that the agreement was forced upon him and others similarly employed in various capacities on the Bluenose II. Freedom of contract is a fundamental principle. His evidence indicates there was discussion respecting the terms of the proposed contract and in particular its length. Some wanted the contract to extend for five years while the Province wanted three years. They ultimately settled on three years. The contract is signed by the Minister of Tourism and Culture on behalf of the province of Nova Scotia and by Mr. Ottens on his own behalf. It contains no feature that bespeaks a unilateral nature. On the contrary, the document is in all respects a bilateral contract of employment. The contract does not have the earmarks of an unconscionable contract; therefore, it governs the relationship between the parties.

Freedom of contract implies a bargain that has been freely entered by the parties. This contract is for a fixed term. On that issue alone it brought a measure of stability to the employment relationship which had not previously existed. It now contained an end date at which time presumably either the parties would go back to the bargaining table or they would not. Mr. Ottens knew the end date. The element of surprise in that respect was eliminated.

While I am in complete agreement that the **Code** is designed to provide a safety net and protection for non-unionized workers, the Province in this instance cannot be classified as an employer who set about on a course of conduct to evade the provisions of the **Code**. Three years is quite a long time to continue an employment relationship solely to avoid the impact of the **Code**.

That this was not a dodge to avoid the **Code** is further evidenced by the fact that the Province did not opt for the provision of two months notice to terminate the contract but instead let it run its full course. That the Province was attempting to evade the **Code** is to draw an inference from the circumstances which in my view is untenable.

The inescapable result is that Mr. Ottens was employed on a term contract. In other words, he was a contract employee. Each party knew when the contract was to expire, namely, April 7, 1993. Neither required notice to that effect. It was unmistakably a clear provision in the contract. It is understandable that from Mr. Ottens' perspective, it would be a matter of regret that the contract was not renewed. Undoubtedly it was tremendously disappointing but effectively he had three years notice that that could be the result. In such circumstances, neither Mr. Ottens nor the Province was required to give notice of termination to the other. Shortly put, there was no discharge.

Reference was made to the Tribunal and this Court of the decision of the Federal Court of Canada in **Eskasoni School Board and Eskasoni Band Council v. MacIsaac et al.** (1986), 69 N.R. 315. The case involved school teachers who had a written contract of employment for one year. The contract was renewed for a second one year term to August, 1983. In May, 1983, the School Board informed them their contracts would not be renewed and would end in August, 1983. The case came on appeal to the Federal Court of Appeal from the decision of an adjudicator who found the teachers had been unjustly dismissed. The Court of Appeal allowed the appeal concluding that the non-

renewal of a fixed term written contract of employment is not a unilateral termination. Although the words "to dismiss" and "dismissal" were not defined in the **Canada Labour Code**, the comments of two of the Justices are worthy of note. Pratte, J. wrote at p. 317:

> **...** However, the meaning of these words and of their french equivalents congédier and congédiement is reasonably clear: they all refer to an act or decision of an employer that has the effect of terminating a contract of employment. In the absence of a statutory provision extending the normal meaning of those expressions, I am unable to read them as embracing the failure of an employer to renew a contract for a fixed term of employment.

Urie, J. (concurring) stated at p. 317:

> [11] The words "dismiss" and "dismissal" have, in the employer-employee relationship, a meaning so well understood that resort need not be had to dictionaries, or case law to substantiate that meaning. In my view, that well-known meaning connotes the unilateral termination of the employment of an employee by the employer for whatever reason. There cannot be, in my view, the slightest connotation that their meaning embraces the bilateral agreement of an employer and the employee to terminate the employment relationship whether by the effluxion of time of a term contract of employment, or otherwise.

The words dismiss, dismissed and discharge in relation to employment are synonymous.

The Tribunal did not consider the observations of Pratte and Urie, J.J. appropriate to the complaint of Mr. Ottens for the reason that there had been a history of seven years of employment without contract whereas the teachers at Eskasoni were employees under written contract from the beginning of their employment.

It is my opinion, for the reasons given, that the circumstances underlying the complaint of Mr. Ottens are not the same as the interpretation placed upon them by the Tribunal and as a result the comments of Pratte and Urie, J.J. are apt to this appeal.

Conclusion

I am persuaded the Tribunal incorrectly interpreted s. 71 of the **Code** and in particular the meaning of "discharge" as used in that section. As a result of that error in law, the Tribunal erred in law in finding that Mr. Ottens was discharged and thereby entitled to the remedy which the Tribunal ordered.

Returning and repeating the words of Hallett, J.A. in **Ben's, supra,** at p. 376:

> The Tribunal cannot incorrectly interpret the law when applying the law to a fact situation it has under consideration or incorrectly interpret the **Code** and have its decisions survive judicial review on appeal to this Court.

Accordingly I would allow the appeal, set aside the order of the Labour Standards Tribunal dated August 6, 1996, and restore the decision of the Director of Labour Standards, Mr. Mitchell, dated March 15, 1994, all without costs.

C.J.N.S.

Concurred in:

Hallett, J.A.

Flinn, J.A