Date: 19970910 Docket: CA 137269

NOVA SCOTIA COURT OF APPEAL

Cite as: International Brotherhood of Electrical Workers Union, Local 1852 v. Linair Electric Ltd. Inc., 1997 NSCA 152

Chipman, Freeman and Roscoe, JJ.A.

BETWEEN:	)	
	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS UNION, LOCAL 1852, AND THE CAPE BRETON ISLAND BUILDING CONSTRUCTION TRADES COUNCIL	)	Raymond F. Larkin, Q.C. for the Appellants
Appellants	)	
- and -	)	
LINAIR ELECTRIC LIMITED INCORPORATED and B. AUCOIN'S ELECTRIC AND ALARM LIMITED	)	Eric Durnford, Q.C. and Karen P. Oldfield for the Respondents
Respondents	)	
- and -	)	
LABOUR RELATIONS BOARD (NOVA SCOTIA)	)	Jonathan Davies for the Respondent
Respondent	)	
	)	Appeal Heard: September 10, 1997
	)	Judgment Delivered: September 10, 1997

THE COURT: The appeal is dismissed with costs as per oral reasons for judgment of Chipman, J.A.; Freeman and Roscoe, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal by the Union and the Council from a decision of Justice Hamilton in Chambers quashing an order of the Construction Industry Panel of the Labour Relations Board (Nova Scotia) issued with respect to the respondents Linair and Aucoin's Electric.

On September 27, 1995, the Union applied to the Panel pursuant to s. 98(8) of the **Trade Union Act** for a determination whether Linair was bound by the collective agreement between Construction Management Bureau Limited and the Union. The Council joined in the Union's application. The Panel convened a hearing for 6:00 p.m. on October 2.

At the hearing, counsel for Linair challenged the jurisdiction of the Panel to consider the application on several grounds. During his presentation, the following exchange took place between Linair's counsel and the chair of the Panel:

> THE CHAIR In the Schedule A which form part of that --
>
> MR. COLES Um-hmm.
>
> THE CHAIR -- the applicant must fill two conditions. Firstly, he must be an employer of unionized employees," and if you look up the definition of "unionized employees" that ties you back.
>
> MR. COLES Yes.
>
> THE CHAIR He is making that representation because "unionized employees" refers to employees, which refers to more than one.

MR. COLES Well -- well you see, I --

THE CHAIR So.

MR. COLES No, if --

THE CHAIR Oh, okay. Well, I --

MR. COLES You have to break it down; you have to go a little slower than that.

THE CHAIR All right.

MR. COLES -- with respect.

THE CHAIR All right. You take me back more slowly.

MR. COLES This is an application, remember? He's applying for membership.

THE CHAIR I mean, now let's make -- let's be fair about this. I mean, this is a guy who wants to suck and blow at the same time. He wants to take all the advantages and now he wants to resile [sic]. Now I'm saying he can't. Well, let's not pretend Mr. Linair is being --

MR. COLES That's the union's position.

THE CHAIR Well, I know, but on the face of it, I meant he signed this. You can't say the man was an ignoramus. He had every right to -- every means of finding out what it meant. So he's trying to take advantage of things. Now he may have the legal right to. We'll see, but let's not pretend that he's some noble creature. He's not. He's trying to take advantage of things.

MR. COLES Well, you know, for the record, I --

THE CHAIR So you show me how.

The Panel then heard evidence from Blair Aucoin in cross-examination on his affidavit and the submissions of the parties. It then adjourned to consider its decision on jurisdiction. The chair of the Panel subsequently advised the parties that it found that it had jurisdiction to hear the application and would provide reasons at a later date.

On October 5, 1995, counsel for the appellants advised the Panel that as a result of Aucoin's testimony, the Union and the Council would ask the Panel to exercise its discretion under s. 21 of the **Act** to find that Linair and Aucoin Electric was a single employer for the purposes of the **Act**. A copy of this letter was sent to Linair's counsel.

The Panel reconvened the matter for hearing on October 12. On the day previous, Linair's counsel advised the chair of the Panel that as a result of comments made by him on October 2, he would ask him to withdraw from further participation of the matter. At all material times Linair's position was that it had no objection to the participation of the other two members of the Panel.

At the hearing on October 12, the chair apologized for remarks he had made on October 2 and agreed to step aside. He denied creating a reasonable apprehension of bias with respect to Linair or Blair Aucoin.

> THE CHAIR -- a reasonable apprehension of bias. I'll deny it, I'll admit that it was a long day and I was taken aback by this challenge. I mean, after all the government -- we had a great long fuss to try and sort out the problems with the Steen decision. And we had an investigation in which I felt it was fairly obvious that Linair Construction was trying to have its cake and eat it too. My language was perhaps inappropriate, but it was certainly not designed to show bias, that is to deal with the matters and merits. In fact, I thought that the ultimate decision on the jurisdiction was a fair one in the circumstances. I honestly believe, and my colleagues obviously, I'm one of three, obviously believe that we have jurisdiction to hear the matter.
>
> And so I would apologize for the remarks but I guess at this stage my situation is this -- if you believe that that apprehension exists I'll withdraw. My further question is, are you now insisting that we go back and re-do the jurisdiction question or simply proceed with the merits.
>
> I mean, I want to make it clear I deny any bias. It was an unfortunate choice of language.

. . .

> THE CHAIR All right. Then I will close it by issuing apologies to all parties. I did not intend to display bias. I'm not bias but I can understand why Mr. Connors might feel there is and I apologize to him. I apologize -- I think it was -- having said what I said I think the lady in the back of the room at the last hearing was quite upset by it and I did not intend it in any negative way, simply to bring people back to earth. My mistake. I should not have done it. But having done it the best thing for me to do is withdraw from further proceedings.
>
> It it comes to -- well, I think -- how do I put this. I think on the question of whether we should go back to square one. To be honest with you, I don't know what my situation is. I was not bias. I don't think the reasons will show that there's any bias and I don't know whether I should simply withdraw and leave it up to a new chairman to decide whether he has to re-hear the whole thing. It would seem to me that when you read the reasons you may not agree with them, but you will agree that there's no bias reflected and it may just reflect the reading of the Act is different from yours.

On October 16, 1995, the Panel issued reasons for its decision that it had jurisdiction under s. 98(8) of the **Act**.

The hearing on the merits of the application continued with a new chair on October 18, 1995 and November 7, 1995. On November 9, the Panel issued its decision finding that Linair and Aucoin Electric were to be treated as a single employer for the purposes of the **Act** and that they were bound by the collective agreement between the Bureau and the Union as of April 23, 1993, the date on which Linair's application for membership was accepted by the Bureau.

Linair and Aucoin's Electric applied to the Supreme Court for an order in the nature of certiorari quashing the decision of the Panel. In granting the order for certiorari, Justice Hamilton found that the chair of the Panel had created a reasonable apprehension

of bias through the remarks he had made on October 2, 1995, and that as a result, the decisions of the Panel both as to jurisdiction and the merits should be set aside. Justice Hamilton, in her reasons, said:

> The written reasons of the Panel with respect to the jurisdictional hearing held October 2nd, 1995, were written by Chair Darby and were dated October 16th, 1995. At page 16 of those written reasons it states:
>
> > The relevance of Mr. Aucoin's testimony is that Linair, in fact, had employed, contrary to the "premise" upon which Mr. Coles had based his arguments under this third ground, two (2) employees in 1992, 1993 and 1994 and in late 1994. Moreover, in 1995 there were two (2) related or associated companies under common direction and common ownership that, together, employed between two (2) and six (6) electricians. Mr. Larkin did not seek through cross-examination to elicit this evidence, it was blurted out and, in the unanimous opinion of the Panel, would justify a finding, as of a date in November 1994 (or so), that Linair and B. Aucoin Electric and Alarm Ltd. were "employers" within the meaning of section 21 of the **Act**. This determination, which admittedly is one that goes to the merits, nevertheless is an irresistible finding that would lead the Panel to treat Linair and B. Aucoin Electric and Alarm Ltd. as constituting one employer for the purposes of the **Act**.
>
> This is a very strong statement to make in a decision before the issue has been dealt with on the merits.
>
> . . .

After considering the test for reasonable apprehension of bias, Justice Hamilton continued:

> Applying this test I find that Chair Darby's comments do give rise to a reasonable apprehension of bias. I have not reached this decision based on the fact he withdrew, for the reasons why a person exercising a quasi judicial function withdraws, may relate to prudence or an abundance of caution, rather than because they agree there is a reasonable apprehension of bias. Rather, I base my decision on the words said and the stage during the proceedings at which they were said.

> The Union argued that if I found a reasonable apprehension of bias existed, I should only quash the first Panel's decision on jurisdiction issues, not the decision of the second Panel on the merits. I do not agree and find that both decisions should be quashed. The jurisdiction issues and the merits issues are interdependent and constitute one proceeding. This is reinforced by the fact that the written reasons for the decision of the second Panel refer to the written reasons for the decision of the first Panel.

On this appeal, the Union and the Council submit that:

(1) Justice Hamilton erred when she found the chair of the Panel created a reasonable apprehension of bias through his remarks on October 2, 1995.

(2) Justice Hamilton erred when she quashed the decision of the Panel on the merits of the application, as well as quashing the decision on jurisdiction.

We have considered the record, the written and oral argument of counsel for the parties, and the relevant authorities to which they have referred.

In her decision, Justice Hamilton adopted the test for reasonable apprehension of bias set out in **Committee for Justice and Liberty Foundation et al. v. National Energy Board** (1976), 9 N.R. 115 (S.C.C.); **Ripley v. Investment Dealers Association of Canada** (1991), 108 N.S.R. (2d) 38 (N.S.S.C.A.D.).

We are not persuaded that Justice Hamilton erred in the application of the appropriate test and in reaching the conclusion that there was a reasonable apprehension of bias that tainted both the decision as to jurisdiction and the decision as to the merits.

The appeal is dismissed with costs which we fix at $2,500.00 inclusive of disbursements, the amount which both counsel before us considered appropriate for this case.

Chipman, J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.