C.A. No. 106015

NOVA SCOTIA COURT OF APPEAL

Hallett, Matthews and Roscoe, JJ.A.

Cite as: Scott Maritimes Ltd. v. Nova Scotia (Labour Standards Tribunal), 1994 NSCA 196

BETWEEN:	)	
	)	
SCOTT MARITIMES LIMITED	)	Eric B. Durnford, Q.C.
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
LABOUR STANDARDS TRIBUNAL (N.S.) and REGINALD A. CONRAD	)	Bruce T. MacIntosh, Q.C.
	)	for the Respondent,
	)	Reginald A. Conrad
Respondents	)	
	)	
	)	
	)	
	)	Appeal Heard:
	)	October 18, 1994
	)	
	)	
	)	Judgment Delivered:
	)	October 28, 1994

THE COURT: The appeal is dismissed with costs to the respondent Conrad in the amount of $1,500 as per reasons for judgment of Roscoe, J.A.; Hallett and Matthews, JJ.A., concurring.

ROSCOE, J.A.:

The issue in this appeal is whether the Labour Standards Tribunal committed an error in law or jurisdiction in its decision dated June 6, 1994, when it found that it had the jurisdiction to consider the complaint of Reginald Conrad pursuant to s. 71 of the **Labour**

Standards Code, R.S.N.S. 1989, c. 246 which 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. Conrad began employment with Scott Maritimes on December 6, 1976 and was discharged on January 30, 1992. For the first eight years of his employment, Mr. Conrad was a member of a bargaining unit and covered by a collective agreement. From March 31, 1984 until he was dismissed he was a supervisory employee not covered by a collective agreement. The appellant submitted to the Board and to this Court that Mr. Conrad is not entitled to the protection of s. 71 of the **Code** because of the operation of Regulation 2(5), made by the Governor in Council pursuant to s. 7 of the **Code**, which is as follows:

> "2(5) Persons engaged in work as employees under a collective agreement are exempted from application of
>
> (a) Sections 37, 38, 39, 40, 41, 42 and 43; and
>
> (b) Sections 71, 72, 73, 74, 75, 76, 77 and 78 of the Code."

The effect of Regulation 2(5) is that persons covered by a collective agreement do not have the benefit of the provisions of the **Code** dealing with paid holidays and termination of employment.

The Board in its decision said:

> "Mr. Conrad from the commencement of employment by Scott was entitled to the benefit of Section 2(o) which defined "period of employment" as follows:
>
> > "2(o) "period of employment" means the period of time from the last hiring of an employee by an employer to his discharge by that employer and includes any period of lay-off or suspension of less than twelve consecutive months and "employed" has a corresponding meaning."
>
> Therefore in considering whether to accept work outside of the bargaining unit where he would not be protected by a Collective Agreement Mr. Conrad was entitled to consider that there would be

> no break in his period of employment for purposes of the Labour Standard Code.
>
> The Tribunal is satisfied that at the time the Complainant was terminated the Complainant Conrad was not engaged in work as an employee under a Collective Agreement. The Tribunal is further satisfied that in calculating period of employment for purposes of Section 71 Mr. Conrad is entitled to the benefit of Section 2(o) which makes it clear that the only relevant qualifying prerequisites was his date of hire by Scott Maritimes and his date of discharge. Section 2(o) always applied to Mr. Conrad . . .
>
> The Tribunal finds that Mr. Conrad had ten years of employment as required by Section 71 of the Code and therefore the Tribunal has jurisdiction to consider a complaint under Section 71."

Subsection (2) of s. 20 of the **Labour Standards Code** deals with the right of appeal:

> "(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. "

The scope of an appeal of a decision of a statutory tribunal not subject to a privative clause has been set out by the Supreme Court of Canada in **Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)**, [1989] 1 S.C.R. 1722 and affirmed in **Pezim v. British Columbia (Superintendent of Brokers)**, S.C.C., June 23, 1994 No. 23107, 23113. In **Bell**, Gonthier J., stated the following at pp. 1745-46:

> "It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal.
>
> However, within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the principle of specialization of duties. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise."

In **Pezim**, after quoting the above passage from **Bell**, Iacobucci, J., continued as follows:

"Consequently, even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise. This point was reaffirmed in **United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.**, [1993] 2 S.C.R. 316 **(Bradco)**, where Sopinka J., writing for the majority, stated the following at p. 335:

> . . . the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause. Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in **Bell Canada**, **supra**, it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.
>
> On the other side of the coin, a lack of relative expertise on the part of the tribunal **vis-à-vis** the particular issue before it as compared with the reviewing court is a ground for a refusal of deference.

In my view, the pragmatic or functional approach articulated in **Bibeault** is also helpful in determining the standard of review applicable in this case. At p. 1088 of that decision, Beetz J., writing for the Court, stated the following:

> . . . the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal."

The purpose of the **Labour Standards Code** was the subject of the decision of the Supreme Court of Canada in **Sobeys Stores Limited. v. Yeomans**, [1989] 1 S.C.R. 238 where the constitutional validity of the **Code** was in issue. Wilson. J., for the majority, described the purpose of the legislation as follows: (Page 278)

> ". . . The fact that the legislature combined into a single Code a number of separate statutes dealing with individual employees and gave the administration of the entire Code to a unitary administrative agency demonstrates a desire to consolidate, rationalize and unify policy in the area. When the Nova Scotia

> Legislature enacted the Code in 1972 it brought together a number of diverse statutes all dealing with minimum employment standards. Consolidated in the Code were the **Vacation Pay Act**, R.S.N.S. 1967, c. 322; **Industrial Standards Act**, R.S.N.S. 1967, c. 142; **Minimum Wage Act**, R.S.N.S. 1967, c. 186; **Equal Pay Act**, S.N.S. 1969, c. 8; **Limitation of Hours of Labour Act**, R.S.N.S. 1954, c. 154; **Employment of Children Act**, R.S.N.S. 1967, c. 88. Since 1972 the Code has been amended on six occasions including the 1975 and 1976 amendments which together incorporated what is now s. 67A: see S.N.S. 1975, c. 50; S.N.S. 1976, c. 41.
>
> 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. Under section 4 the Code's standards give way to any rights or benefits that are more favourable to an employee. All Canadian jurisdictions have similar legislation and in each case the scope of protections has increased gradually over the years, although thus far only Nova Scotia, Quebec and the federal government have included a reinstatement provision."

And further at page 280:

> "The social policy of providing employee protections and enforcing them expeditiously is reflected in the Code as a whole and in s. 67A in particular. When dealing with a claim for reinstatement under s. 67A the Director and Tribunal together provide low-cost and accessible methods of investigation and dispute resolution. They do so in response to changed social conditions since Confederation and in an administrative context significantly different from the practice in the courts. Neither the Director nor the members of the Tribunal are required to be lawyers. Although the Tribunal does carry out a judicial function with regard to s. 67A and many other aspects of the Code, that function is necessarily incidental to the broader social policy goals that the Code is designed to achieve."

The reasons for the existence of the tribunal and the expertise of its members were also commented upon in the minority judgment by La Forest, J. in **Sobeys**: (page 284)

> ". . . Enforcement is not by legal action by an aggrieved individual.

> Enforcement is centred in the Director appointed under the Code. An alleged contravention of a Code standard is first dealt with by the Director, either on complaint made to him or where he has reasonable cause to believe such a contravention has occurred (s. 19(1) and (2)). The Director's task is to effect a settlement if he can, but if he is unable to do so, he may order compliance with the Code and the rectification of injury or the payment of compensation. Essentially, these are conciliatory procedures having some affinity to those employed by human rights commissions discussed in my dissenting opinion in **Scowby v. Glendinning**, [1986] 2 S.C.R. 226 (the majority opinion was not directed to this matter). The Director is not governed by legal norms but by the dynamics of labour relations. There is no requirement that he, or for that matter the members of the Tribunal, be members of the Bar, and we understand that they are not. They are, however, knowledgeable in labour relations.
>
> An appeal lies from an order of the Director to the Tribunal which decides whether there has been a contravention of the Code and orders the contravening party to comply with the Code and to rectify the injury or pay compensation. There is undoubtedly a judicial component here, but it does not involve a **lis** between the complainant and the alleged contravenor. The Director has the carriage of the matter (s. 20). And the dispute, we saw, is not concerned with contract, but with modern statutory norms devised to displace contractual terms offensive to these norms. It is not surprising, then, that these bodies tend to find labour arbitration rather than common law experience more relevant in determining the meaning of standards such as "unjust dismissal"; see England, **supra**, at p. 21; see also Gérard Hébert and Gilles Trudeau, **Les normes minimales du travail au Canada et au Quebec**, at p. 168."

It is interesting to note that the three members of the tribunal who heard the Conrad complaint in 1994 are the same panel who heard the **Sobeys v. Yeomans** matter in 1984. That the panel has expertise in matters related to the **Code** cannot be seriously questioned. In this respect, Mr. Justice Sopinka observed in **Bradco** at page 336 (S.C.R.):

> ". . . a distinction can be drawn between arbitrators, appointed on an **ad hoc** basis to decide a particular dispute arising under a collective agreement, and labour relations boards responsible for overseeing the ongoing interpretation of legislation and development of labour relations policy and precedent within a given labour jurisdiction. To the latter, and other similar specialized tribunals responsible for the regulation of a specific industrial or technological sphere, a greater degree of deference is due their interpretation of the law notwithstanding the absence of a privative clause."

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.

The appellant submits that Mr. Conrad is not entitled to the protection of s.71 of the **Code** because "he did not have the requisite ten year period of employment as a non-unionized employee prior to his termination". The section does not mention "non-unionized" employees. Although Wilson J. in **Sobeys** referred to the **Code** as a "comprehensive scheme for the protection of non-unionized workers", it is in addition, an Act which also provides rights and protection to unionized employees which augment those benefits contained in their collective agreements. Regulation 2(5) exempts unionized employees from those parts of the **Code** that deal with paid holidays and dismissal, however several other employment benefits are conferred by the statute including vacation and vacation pay, minimum wages, equal pay, pregnancy and parental leave, bereavement and court leave, hours of work and protection of pay. The regulations do not exempt unionized employees from these benefits.

The interpretation of s.71 urged by the appellant is based on an incorrect premise that the **Code** did not apply to the respondent Conrad while he was a member of a union. Section 2(o), which defines period of employment, does not provide for intervals of interruption from the calculation during periods that specific sections may not apply to an employee because he is covered by a collective agreement. The plain meaning of s.2(o) does not allow for a reading in of exceptions. If it were the intention of the legislature to exclude any periods of service from the calculation of period of employment, it would have been easy to say so, by adding words such as "but does not include any period of time a person was engaged in work under a collective agreement." An interpretation of regulation 2(5) that is inconsistent with s.2(o) is not permissible. See **Dreidger on The Construction of Statutes**, 3rd edition,

page 185 et seq. Ordinarily, a regulation should not be used as an aid to interpreting the statute. (**Dreidger**, p.246) The interpretation of the various provisions by the tribunal in this case, is in my view, consistent with the expressed legislative intent and the ordinary meaning of the words and therefore should be upheld.

I would dismiss the appeal with costs to the respondent Conrad in the amount of $1500.

Roscoe, J.A.

Concurred in:

Hallett, J.A.

Matthews, J.A.