C.A. No. 112076

NOVA SCOTIA COURT OF APPEAL

Cite as: Ben's Ltd. v. Decker, 1995 NSCA 103
Hallett, Hart and Freeman, JJ.A.

BETWEEN:

BEN'S LIMITED Appellant - and - RON DECKER, A. ROSS MITCHELL, Director of Labour Standards for the Province of Nova Scotia, and STEPHEN K. MONT, ANN HEBB and HENRY MARTELL in their capacity as Chairman and Members respectively of the Labour Standards Tribunal (Nova Scotia) and LABOUR TRIBUNAL (NOVA SCOTIA) Respondents	Karin A. McCaskill for the Appellant John H. Graham for the Respondents Appeal Heard: May 9, 1995 Judgment Delivered: June 5th, 1995

THE COURT: Appeal allowed per reasons for judgment of Hallett, J.A.; Hart and Freeman, JJ.A. concurring.

HALLETT, J.A.:

This is an appeal by Ben's Limited from a decision of the Labour Standards Tribunal in a case initiated by the respondent, Ron Decker who appealed to the Tribunal from a finding of the Director of Labour Standards that the appellant had not failed to comply with the provisions of the **Labour Standards Code**, R.S.N.S. 1989, c. 246. The respondent had originally complained to the Director that he had been dismissed from his employment without just cause contrary to the provisions of s. 71 of the **Labour Standards Code**.

The respondent became an employee of the appellant on August 11, 1963, and was continually employed until May 20, 1992. At the time of his termination, the respondent was the Maintenance Supervisor at the appellant's bakery on Pepperell Street in Halifax with an annual salary of $41,057 per annum.

The reasons for his termination and the severance arrangements (which provided him with fifteen months' notice of termination by way of salary and benefit continuance) are set out in a letter to him from Rick Smith, Plant Manager, dated May 20, 1992. The letter makes reference to a reorganization being undertaken due to severe economic conditions.

The appellant is a commercial bakery founded in 1902, with plants in Halifax and Moncton and a distribution centre in Bedford. It distributes products throughout the Maritimes. For many years, the appellant was the primary commercial bakery in the region. In early 1992, the appellant employed approximately 600 people in its operations. Two years later, as a result of the reorganization undertaken by the appellant, the employee complement had been reduced to 525.

Larry Boudreau, Vice-President of Human Resources in the spring of 1992 (and Vice-President of Sales and Marketing at the time he testified at the hearing on January 19, 1994) testified that changes in the marketplace had had a significant impact on the fortunes of the

appellant. For example, the appellant has lost "market share" to the in-store bakeries of the big chain stores like Sobey's, IGA and the Co-op. These stores had come to control over twenty percent of what had been the appellant's bread market and about fifty percent of what had been the appellant's roll market. Mr. Boudreau testified that the appellant was losing market share because it was not the low cost producer and could therefore not compete in the marketplace. In an effort to reduce overhead the appellant decided to eliminate non union salary positions. One of the positions eliminated was that of the respondent.

In addition to the in-store bakeries, competition was beginning to come from bakeries in Quebec and, with the advent of free trade, the United States. Mr. Boudreau testified that the population of the Maritimes has not grown in many years and neither has the demand for bread.

The appellant decided it must reduce its costs throughout the organization to the greatest extent possible in order to remain a viable business.

The respondent's position was selected for elimination because management believed there was a significant overlap between what the respondent did as Maintenance Supervisor and what his immediate superior did as Maintenance Superintendent at the Pepperell Street plant.

Furthermore, there were six levels in the organization of the Pepperell Street facility, from the President to production floor employees. The position eliminations affected not only the respondent and the maintenance department, but the executive level and the production component of the plant as well. The appellant eliminated two layers of management.

Sections 71(1) and Clause(d) of s. 72(3) of the **Code** are the provisions relevant to the dispute:

"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.
>
> > 72(3) (d) a person who is discharged or laid off for any reason beyond the control of the employer including complete or partial destruction of the plant, destruction or breakdown of machinery or equipment, unavailability of supplies and materials, cancellation, suspension or inability to obtain orders for the products of the employer, fire, explosion, accident, labour disputes, weather conditions and actions of any governmental authority, if the employer has exercised due diligence to foresee and avoid the cause of discharge or lay-off."

The word "discharge" which appears in s. 71 is defined in s. 2(c) of the **Code** as follows:

"2(c) "discharge" means a termination of employment by an employer other than a lay-off or suspension".

The word "lay-off" which appears in the definition of "discharge" is defined in s. 2(i) of the **Code** as follows:

> "2(i) "lay-off" means temporary or indefinite termination of employment because of lack of work and includes a temporary, indefinite or permanent termination of employment because of the elimination of a position, and "laid off" has a corresponding meaning." (Emphasis added)

The words underlined were added to the definition by c. 14 of the Statutes of Nova Scotia, 1991.

As a result of this amendment, if there has been a permanent termination of employment because of the elimination of a position, there has not been a discharge within the meaning of s. 71. Therefore, if the position of a 10-year employee is eliminated that employee does not have the benefit of s. 71. As a consequence it is critical to determine if

a termination of employment arises as a result of the elimination of a position.

At the Tribunal hearing, the parties agreed that there were two issues to be considered by the Tribunal. First, whether Mr. Decker's job was eliminated, and, secondly, whether Clause (d) of s. 72(3) of the **Labour Standards Code** was applicable.

The appellant submitted to the Tribunal firstly that s. 71(1) of the **Labour Standards Code** did not apply under the circumstances where the respondent's position was eliminated and alternatively, if that submission was not accepted, that the appellant was entitled to exemption from the operation of s. 71 by reason of Clause (d) of s. 72(3) because the termination of the respondent's employment was caused by the aforementioned financial and competitive problems facing the appellant.

With respect to the first submission, the Tribunal held that the respondent's position had not been eliminated. With respect to the second submission, the Tribunal held that while it was satisfied that some corporate reorganization was necessary if the appellant was to remain viable, the exemption contained in Clause (d) did not apply because the appellant "did not exercise due diligence to either foresee or avoid Ron Decker's termination."

Although not expressly stated in the decision, the Tribunal obviously found that the appellant violated s. 71(1) of the **Code** by discharging the respondent without just cause. The Tribunal ordered that the respondent be reinstated to his position as Maintenance Supervisor without loss of seniority or employment benefits. The Tribunal further ordered that the appellant reimburse the respondent for any lost wages and benefits from the date of termination until reinstatement. The appeal to this court arises from that Tribunal decision.

Scope of Appeal

The scope of an appeal to this court is governed by the provisions of s. 20(1) and (2) of the **Labour Standards Code** which state:

> "20 (1) If in any proceeding before the Tribunal a question arises under this Act as to whether
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> (a) a person is an employer or employee;
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> (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).
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> (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)

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.

The appellant alleges that the Tribunal erred in law in reaching its conclusion that the respondent's position did not disappear and erred in law in its interpretation of Clause (d) of s. 72(3) of the **Code**. 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.

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 (Superintendent of Brokers)**, [1994] 2 S.C.R. 557. 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.

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.

I have carefully reviewed the 3-page decision of the Tribunal. After a summary review of the facts and the relevant sections of the **Code** the Tribunal stated:

> "The first issue which must be decided by the Tribunal was whether Mr. Decker's job had been eliminated. The Nova Scotia Supreme Court Appeal Division in Porter v. CIL Inc. and Town of Yarmouth v. Manser et al determined that where the job has disappeared or been eliminated there can be no reinstatement.
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> The Tribunal heard a great deal of evidence on the issue of whether Mr. Decker's job disappeared. Counsel for the Complainant suggests that the job did not disappear at all and that the job duties were, in fact still being done by Wally Morris and bargaining unit employees. Counsel for the employer suggests that while many of the duties that Mr. Decker performed did not disappear, the job itself did disappear. Counsel for the employer suggests this was a true elimination of a position.
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> It is clear to the Tribunal after reviewing the evidence of all the witnesses that Mr. Decker's job did not disappear.
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> The Tribunal notes in particular the evidence of Rick Smith. Mr. Smith was the Plant Manager. Mr. Smith said in reference to the task requirements of a Maintenance Supervisor listed in Tab 3 of Exhibit C.A., that these duties were critical to maintenance. He said someone had to do them. They were assigned to Ron Decker. Mr. Smith said these job functions didn't disappear. They must still be done after Ron Decker left. Mr. Smith said they are just done by someone else.
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> The Tribunal was referred to the Supreme Court of Canada's analysis of "discontinuance of a function" in Flieger v. New Brunswick (1993) 48 C.C.E.L.1. However the Tribunal does not find in the circumstances of this case that this was a discontinuance of a function as described in the Flieger case.

The second issue which must be decided by the Tribunal is was Mr. Decker discharged for any reason beyond the control of the employer and if so did the employer exercise due diligence to foresee and avoid the cause of discharge or lay off.

The Tribunal is satisfied from the evidence of Mr. Boudreau that some re-organization was necessary if the Company was to remain viable. However the Tribunal is not satisfied that it was necessary to terminate Mr. Decker.

Mr. Boudreau testified that when he looked at the organizational chart he concluded that it was not necessary to have two people a Maintenance Supervisor Ron Decker and a Maintenance Superintendent Wally Morris supervising nine people. Mr. Boudreau testified that Barry Kendall had come to the same conclusion. Mr. Boudreau testified that although he never did a detailed job analysis of the two positions he came to the conclusion that there was very little difference in what Mr. Decker and Mr. Morris were doing.

It is apparent to the Tribunal that the Company having came to the conclusion it didn't need Mr. Decker did not consider whether they could use him to do anything else to avoid his termination.

Mr. Boudreau said the Company let Decker go without considering whether he could be used in the special project of installing a second bread line.

Mr. Boudreau admitted that there were three or four months of supervisory work to be done in connection with the realignment to be started in mid-summer. Mr. Boudreau said clearly Ron Decker could do the job but said he didn't think it would be a good idea to offer the job to Mr. Decker.

Mr. Boudreau said he could have organized the second bread line in a manner that would have kept Mr. Decker on as supervisor.

Rick Smith gave evidence on behalf of the Company. Mr. Smith testified about the installation of the second bread line. Mr. Smith stated that in May of 1992 the Company knew it was definitely going to put in a second bread line using equipment purchased in New York which Ron Decker had gone to see and participated in the dismantling off. Mr. Smith admitted that Mr. Decker was the most knowledgable person in the Company about this particular machinery. Mr. Smith said that this project began ten days after Ron left the Company. Yet Mr. Smith says he never seriously considered involving Mr. Decker. Mr. Smith also testified that he did not consider Ron Decker for retraining for any other positions.

The Tribunal finds that Ben's Limited did not exercise due diligence to either foresee or avoid Ron Decker's termination.

> Therefore the Tribunal is satisfied that the exemption provided by Section 72 (3)(d) of the Labour Standards Code does not apply in this case.
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> The Labour Standards Tribunal (Nova Scotia) orders that Ron Decker be reinstated to his position as Maintenance Supervisor without loss of seniority or employment benefits. The Tribunal further orders that the Respondent reimburse the Complainant for any lost wages and benefits from the date of termination until reinstatement. Should the Complainant and the Respondent Company be unable to agree on the amount due, the Tribunal will retain jurisdiction to fix the amount.
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> This order is issued in accordance with Section 26 of the Labour Standards Code and Regulations."

I have set the operative part of the decision out in full because it is necessary in order for the reader to understand how the Tribunal reached its decision and why, in my opinion, the Tribunal made errors of law in the process. Although the Tribunal's finding that the respondent's job did not disappear is a finding of fact, in reaching this conclusion the Board obviously rejected the reasoning of the Supreme Court of Canada in **Flieger v. New Brunswick** (1993), 48 C.C.E.L. 1. Although that decision dealt with an interpretation of the words "discontinuance of a function" in my opinion the reasoning of Cory J. is equally applicable to making a determination of what constitutes the elimination of a position. As was recognized by the Tribunal, there cannot be a reinstatement where there has been an elimination of a position as the job had disappeared. (**Town of Yarmouth v. Manser** (1977), 18 N.S.R. (2d) 353; **Porter v. C-I-L Inc.** (1980), 42 N.S.R. (2d) 624). These two cases held that s. 71(1) simply does not apply as there cannot be a discharge from a position that has ceased to exist. The effect of these decisions appears to have been codified by the amendment to the definition in the **Code** of the word lay-off to which I have previously referred.

In **Flieger** two sergeants in the New Brunswick Highway Patrol were given one month's notice that their services were no longer required because of the discontinuance of

a function, the Province having decided to disband the patrol and to contract out those duties to the R.C.M.P. Section 26(1) of the **Civil Service Act**, S.N.B. 1984, c. C-5.1 states:

> "26(1) When the services of an employee are no longer required because of lack of work or because of the discontinuance of a function, the deputy head, in accordance with regulations made by the Board, may lay off the employee."

Mr. Justice Cory, writing for the majority, (Madam Justice L'Heureux-Dube dissenting) analyzed the meaning of the phrase "discontinuance of a function". He reviewed relevant Canadian decisions and obviously approved of the approach taken in **Mudarth v. Canada (Minister of Public Works)**, [1989] 3 F.C. 371 (T.D.). He concluded as follows at p. 13:

> "How then should "discontinuance of a function" be defined: "Discontinuance" obviously refers to the termination of something that is termed a function. A "function" must be the "office" that is to say the bundle of responsibilities, duties and activities that are carried out by a particular employee or group of employees.
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> It is this definition of "function", in the sense of "office" which best comports with the environment of the work place. The very word "employment" indicates the existence of an employee and an employer. A term such as "function" or "office" must have a meaning for both these parties. For example, a person may have the "office" of plant superintendent. A person functioning as a plant superintendent carries out a regime or set of activities and duties that forms the office of plant superintendent. Both the employer and the employee understand what is required in order to perform or to carry out that particular office. Similarly the "office" of secretary or punch press operator carries with it a particular set of activities and duties. A particular bundle of skills is required to perform the duties and activities required by each of these offices. Once again both the employer and employee will know exactly what is required to perform the activities of the particular office.
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> Therefore, a "discontinuance of a function" will occur when that set of activities which forms an office is no longer carried out as a result of a decision of an employer acting in good faith. For example, if a particular set of activities is merely handed over in its entirety to another person, or, if the activity or duty is simply given a new and different title so as to fit another job description then there would be no "discontinuance of a function". On the other hand, if the

> activities that form part of the set or bundle are divided among other people such as occurred in *Mudarth*, supra, there would be a "discontinuance of function". Similarly, if the responsibilities are decentralized, as happened in *Coulombe*, supra, there would also be a "discontinuance of a function"."

After making these general statements Mr. Justice Cory applied those definitions to the facts of the case and concluded at p. 14:

> "The decision of the province to terminate its own highway patrol and enter into a contract with the RCMP to provide the service was a legitimate management decision. That decision terminated the "office" of the New Brunswick Highway Patrol personnel. It meant that the "function", that is to say the set of duties and activities, of the appellants as sergeants in New Brunswick Highway Patrol had been discontinued. Their office had ceased to exist."

It is clear from a review of the Tribunal decision that it is founded on the premise that as the work that had been done by Mr. Decker as Maintenance Supervisor was still being done by others the respondent's position did not disappear; in other words the Tribunal found his position was not eliminated. That is the approach the Tribunal took in **Byrne v. Central Guaranty Trust Company**, L.S.T. No. 846 (October 22, 1991); that decision was not interfered with on appeal to this Court. In a short oral decision - S.C.A. No. 02580 dated September 28, 1992 (unreported) we stated:

> "Under s. 20(2) of the **Code** an appeal to this Court is limited to a question of law or jurisdiction. Under s. 20(1) of the **Code** the decisions of the Board are final and conclusive subject to the limited right of appeal under ss. 2. In our view the decision of the Board in this case related solely to questions of fact. It cannot be said that there was no evidence to support the conclusions of the Board. No question of law or jurisdiction arises in this case. The appeal is dismissed with costs in the amount of $800.00 plus disbursements."

It should be noted that in the **Byrne** case the employee had been discharged on November 13, 1990. This was subsequent to the **Town of Yarmouth** and **Porter** decisions but prior to the amendment of the definition of layoff in the **Code**. Most significantly the

Tribunal's decision did not solely turn on its finding that Ms. Byrne's position had not been eliminated but on findings from which it can be inferred that the Tribunal concluded that the employer was not acting in good faith in terminating Ms. Byrne for the reasons set out in their decision.

In my opinion the discontinuance of a function by an employer as interpreted by Cory J. in **Flieger** and the elimination of a position are virtually the same thing. Therefore, where the activities of Maintenance Supervisor (the respondent's position) were divided among other staff, as is clear from the evidence, his office as maintenance supervisor had ceased to exist. In short, his position was eliminated. The fact that the work still existed but had been divided up amongst others does not mean that his job did not disappear as found by the Tribunal. The approach employed by the Tribunal on this aspect of its decision is no longer correct in view of the decision in **Flieger**. Counsel for the respondent has argued that the interpretation in **Flieger** involved different words in a different statute in a different province but, with respect, the concept of whether a function has been discontinued or whether a position has been eliminated is essentially the same. In my opinion, as a result of the **Flieger** decision, the Tribunal should no longer follow the approach it took in **Byrne** when trying to determine if a position has been eliminated. There is, of course, a requirement that the employer acted in good faith in eliminating the position. The Tribunal erred in failing to follow and apply the reasoning of Cory J. in **Flieger**. It erred in its interpretation of the plain meaning of the words "elimination of a position" in the definition of layoff in the **Code** and as a consequence erred in its interpretation of s. 71(1). Therefore its finding of fact that the position had not been eliminated cannot stand.

I will now deal with the second issue although it is not strictly necessary in view of my conclusion on the first issue. However, to deal with it could avoid future problems.

I am of the opinion that the Tribunal misinterpreted s. 71(1) of the **Code** as it

misinterpreted the meaning of Clause (d) of s. 72(3). The Tribunal concluded that it was satisfied from the evidence that some re-organization of the appellant was necessary if the company was to remain viable. However, it went on to state (as set out in the Tribunal decision previously quoted herein) that it was not satisfied that it was necessary to terminate Mr. Decker. The Tribunal then reviewed certain facts indicating that there was work that the appellant could have found for the respondent, at least on a temporary basis, but that the appellant never seriously considered involving the respondent in the work. On the basis of these considerations the Tribunal then stated:

> "The Tribunal finds that Ben's Limited did not exercise due diligence to either foresee or avoid Ron Decker's termination.
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> Therefore the Tribunal is satisfied that the exemption provided by Section 72(3)(d) of the Labour Standards Code does not apply in this case."

In my opinion s. 71(1) requires an employer to exercise due diligence to foresee and avoid the cause of a discharge or lay-off of an employee. In this case the cause would appear to have been the need to reduce costs to remain a viable company. This was apparently caused by increased competition in the bread business. The Tribunal was required to determine if this underlying cause was beyond the control of the employer, not whether the employer could have, in the exercise of due diligence, found a place for the employee in the employer's operations.

In summary, s. 71(1) provides that where, in the absence of the position having been eliminated, an employee has ten years or more of service, the employer cannot discharge or suspend the employee without just cause unless the employer can fit itself within the exemption provided by Clause (d) of s. 72(3). It is to be noted that the words of s. 71(1) and of Clause (d) of s. 72(3) which is incorporated into s. 71, taken as a whole, display a legislative intention to relieve an employer of the burden of s. 71(1) if a 10-year employee

is discharged or laid off for certain reasons beyond the control of the employer including such things as destruction of the plant, or the unavailability of supplies and materials, provided, however, the employer exercised due diligence to foresee and avoid that cause which led to the discharge or lay-off. The word "cause" in Clause (d) relates to the reason why the discharge was necessary, that is, an event of the nature referred to in Clause (d); something over which the employer did not have control. Included in the enumerated causes that fit into this exemption section is the "inability to obtain orders for the products of the employer". In this case Ben's Limited was losing market share; it could not sell at a competitive price all it could produce. Management came to a decision that it had to cut costs - the all too familiar downsizing that has become so common in the 1990s. The Tribunal was required to consider whether the inability to sell its products was beyond its control. The employer is required under this section to prove that it exercised due diligence to avoid the necessity to downsize (to re-organize) to remain competitive in the market. The Tribunal in this case found that some re-organization was necessary but then applied Clause (d) as if it meant that the employer had to exercise due diligence to avoid the discharge of this particular employee, Mr. Decker. In my opinion, the Tribunal was required to direct its attention to the underlying cause of the discharge and whether or not it was beyond the control of the employer and whether the employer had exercised due diligence to foresee and avoid that cause. The Tribunal did not do that in this case but simply concluded that the appellant did not exercise due diligence to either foresee or avoid the respondent's termination. That is not the issue it was required to determine and in so doing it misinterpreted s. 71(1).

Counsel argued that the Tribunal had properly characterized the second issue in its decision and, therefore, understood what issue it had to decide despite the language used in the concluding paragraph of that aspect of the decision. Upon a review of the basis upon

which the Tribunal reached its conclusion on the second issue it is apparent to me that the essence of the Tribunal's decision on the second issue is its condemnation of the employer's failure to consider Mr. Decker for another position. The Tribunal did not find that the re-organization was not necessary, in fact, it found to the contrary. The Tribunal did not consider whether the employer had exercised due diligence to foresee or avoid the loss of market share due to its inability to sell its products. That was the underlying cause of the need to re-organize which led to the employer's decision to eliminate Mr. Decker's position. Therefore the Tribunal misinterpreted s. 71(1).

If a position is eliminated on a re-organization there is nothing in the **Code** that compels an employer to offer a long term employee another position, therefore the employer was not compelled to do so. In fact, the 1991 amendments to the definition of layoff shows a legislative intent to deprive a ten year employee of the protection of s. 71(1) if that employee's position is eliminated. However, the law requires that in such reorganizations the employer must act in good faith in deciding whether to eliminate a particular position.

I would therefore allow the appeal and remit the matter to the Tribunal to be decided in accordance with the principles set forth in this decision.

Hallett, J.A.

Concurred in:

Hart, J.A.

Freeman, J.A.

C.A. No. 112076

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

BEN'S LIMITED Appellant - and - RON DECK, A. ROSS MITCHELL, Director of Labour Standards for the Province of Nova Scotia, and STEPHEN K. MONT, ANN HEBB and HENRY MARTELL in their capacity as Chairman and Members respectively of the Labour Standards Tribunal (Nova Scotia) and LABOUR TRIBUNAL (NOVA SCOTIA) Respondents	)	R E A S O N S FOR JUDGMENT BY: HALLETT, J.A.