IN THE SUPREME COURT OF NOVA SCOTIA

Citation: International Union Bricklayers & Allied Craft Workers, Local 2 v. Halifax Caulking Company , 2005NSSC54

Date: 20050311
Docket: SN. No. 225807
Registry: Halifax

Between:

The International Union of Bricklayers & Allied Craft Workers, Local 2

Applicant

v.

Halifax Caulking Co. Ltd.

Respondent

Judge: The Honourable Justice Donald M. Hall

Heard: December 8, 2004, in Sydney, Nova Scotia

Counsel: Blaise MacDonald, Esq., counsel for the applicant

Malcolm Boyle, Esq., counsel for the respondent

By the Court:

[1] This is an application for judicial review and an order in the nature of *certiorari*, with an order in the nature of *mandamus* in aid, to quash a decision and award of arbitrator Peter Lederman made on the 27th day of May, 2004.

[2] The issues argued in this review are: (1) What is the standard of review that ought to be applied in this case; (2) whether the arbitrator ought to have granted the adjournment requested by the union; (3) whether the arbitrator's refusal to grant the adjournment resulted in a denial of natural justice, and (4) whether the award and decision of the arbitrator ought to be set aside.

[3] The facts and circumstances leading to this application for judicial review are summarized for the most part in the arbitrator's decision, a portion of which is as follows:

> This grievance was brought by the International Union of Bricklayers and Allied Craft Workers, Local 2, against Halifax Caulking Co. Ltd., alleging a breach of various provisions of the Cape Breton Industrial projects Collective Agreement, a comprehensive agreement between the Construction Management Bureau Limited, the Cape Breton Island Building & Construction Trades Council and Signatory Building Trade unions. Both parties to this grievance are parties to and bound by this agreement. Blaise MacDonald acted for the Grievor and Malcolm Boyle acted for the employer. Mr. MacDonald was accompanied by Ray Deleskie, business agent for the union.

Mr. MacDonald, counsel for the Grievor, outlined the essence of the grievance as follows. He stated that during the months of October, November and December of 2003 Halifax Caulking Limited had three workers on the site of the new Thermo Mechanical Plant at Stora Enso in Port Hawkesbury. One of these workers was a Fred Dillman, who had been sent to the site without consultation with the Grievor union. Nonetheless, the union took no issue with this because under Appendix 1 of the agreement referred to above, dealing with the rates of pay and conditions of work of bricklayers, the employer had the right to "name hire the first employee", with the union to "supply the second employee", with this one to one ratio to be repeated thereafter. However, the second worker on the job, an Alfred Saulnier, was improperly present at the site, having been placed there by the employer and not the union. This violated the one to one ratio rule for the selection of workers. There was a third worker on site, a Robert MacDonald, who was placed there by the union.

Mr. MacDonald then indicated that in addition to the improper selection of Mr. Saulnier, the union alleged that Dillman and Saulnier were under paid. The obligatory pay scale for bricklayers is found in appendix 1 to the agreement, and sets the base hourly rate at $29.97. Added to this are varying small amounts for vacation pay, health and welfare, pension, group rsp, bereavement fund and union dues, bringing the total hourly amount up to $38.13. The union allegation was that the actual amount paid to these two workers was $17.00. Mr. MacDonald argued that if convinced of the accuracy of the union allegation, I should award Dillman the difference between what he was paid and what he should have been paid under appendix 1, with appropriate amounts to be paid to the various funds noted above, and order that the total amount payable to Saulnier under appendix 1 be paid to the union in trust, since an unemployed union member should have filled his position and Saulnier was not entitled to the wages. Mr. MacDonald also drew my attention to provisions in the agreement allowing for the award of legal costs and interest on delinquent payments. He estimated the amount owing to the union to be in the vicinity of $30,000.00.

Mr. MacDonald also commented that he had attempted to subpoena William Orman, the owner of the employer company, at his home in Halifax, but his process server had been unable to locate him. He therefore served a subpoena on Pierre Boilard, a supervisor at the Stora Enso site, and he was called as the Grievor's first witness.

Mr. Boilard explained that he was a professional engineer, working for KSH Solutions Inc., a company that had entered into a contract with Stora to build the

new Thermo Mechanical Plant as a turn key operation. He was the construction manager, in charge of engineering, procurement and development at the site. KSH had contracted with Strescon Ltd. for the supply of a precast building, fabricated in Dartmouth and erected on site in Port Hawkesbury. Halifax Caulking Limited was a sub contractor of Strescon. I gathered that most of the work done by Halifax Caulking Limited involved the installation of caulking between the precast concrete panels of the building. Entered as an exhibit through Mr. Boilard was a multi page document entitled "weekly labour distribution sheet", which set out the number of hours worked per week by the various trades on the job site. Mr. Boyle questioned whether this document qualified as a business record for purposes of admissibility, but I ruled that it did fit that definition even though Mr. Boilard had played no personal role in its creation. Hourly statistics are shown for "Bricklayers", and these figures were reviewed with Mr. Boilard. This document revealed that a total of 640 hours of work was done by bricklayers up to the week ending October 4th, 2003. After that date, the building was finished and no further statistics were collected, but Mr. Boilard said that Halifax Caulking employees were there after that. It is of some significance to note that these statistics were collected for reasons unrelated to payment for work, since Strescon had a fixed price contract with FSH to supply the building.

On cross examination, Mr. Boilard commented that Strescon did not normally work on Fridays. Four ten hour shifts per week was the norm. The statistics collected in the exhibit were collected by Strescon, not by FSH. He did not believe that Strescon had any motive to exaggerate the number of hours worked, since FSH had other ways to determine the number of hours worked on the site.

On re-examination, Mr. Boilard agreed with Mr. Macdonald that work could have been done on Friday and Saturday if time had been lost due to rain.

The next witness was Bernard MacNeil, was presence was secured by subpoena served on him at the Stora work site. He testified that he had been working on the site as a bricklayer with a different company during the fall of 2003, and had seen Dillman and Saulnier working on the site. They were there when he was there, working four ten hour shifts, Monday to Thursday. A third man, Robert MacDonald, was also present, but not as frequently.

The last witness for the Grievor was Ray Deleskie, business agent for the local. He also works as a bricklayer and is the financial secretary of the local. He

testified that he was alerted to a problem at the Stora site when he saw the report of hours returned by Halifax Caulking Limited relating to the payment of fringe benefits. A series of monthly reports was entered as an exhibit and he reviewed them, noting that the total number of hours on this job was being reported as 184. In his opinion, this was a gross underestimation of the hours necessary to complete such a job. In his words, "it flipped me out". He went on to the job site at one point and discovered that Saulnier was working there improperly. He appears to have agreed that Saulnier could stay if an additional man from local 2 was also hired. This led to the hiring of Robert MacDonald, who apparently was paid the correct amount under appendix 1. He testified that he had a conversation with Dillman, who admitted that he was only making $17.00 per hour and gave him a listing of days worked by himself and Saulnier, which Mr. Deleskie wrote down. This list was tendered as an exhibit and is referred to hereafter as the "Dillman list". Mr. Boyle vigorously opposed the admission of this evidence, which clearly was hearsay. I allowed it to be admitted, with the proviso that the absence of Mr. Dillman would affect the weight that I gave to it.

At this point in the proceedings, Mr. MacDonald requested an adjournment until the next day, so that Mr. Orman could be compelled to appear with his pay roll records. Those records would resolve the entire issue of who was working, how many hours were worked, and what the rate of pay was. Dillman and Saulnier could also testify. He suggested as well that service of a subpoena on Mr. Boyle requiring Mr. Orman to attend could be ordered, a form of substituted service.

The adjournment was refused.

[4] Additional evidence is set forth in the affidavit of Ray Deleskie, sworn July 7, 2004. In his affidavit Mr. Deleskie sets forth the circumstances of certain communications between the union and the employer and counsel for the respective parties. He also recited the following facts: the Union through its counsel, Mr. MacDonald, by letter dated February 23, 2004, requested the Minister of Environment and Labour to appoint an arbitrator pursuant to s. 107 of the **Trade Union Act** to resolve the dispute between the parties. On

April 27, 2004, a further letter was sent by Mr. Macdonald to Mr. Ken Zwicker, Chief Industrial Relations Officer of the Department, requesting an immediate appointment of an arbitrator. On May 7, 2004, Mr. Zwicker advised counsel that an arbitrator would be appointed May 25, 2004 with the hearing to begin the following day. On May 25, 2004, Mr. Lederman was appointed arbitrator and the hearing was scheduled to begin at 11:00 a.m. the following day at Port Hawksbury. Immediately upon learning the identity of the arbitrator, Mr. MacDonald had a subpoena *duces tecum* issued for Mr. Orman requiring him to bring the Company's payroll records to the hearing, but Mr. Orman could not be located.

[5] The applicant's counsel, Mr. Blaise Macdonald, submitted that the arbitrator ought to have granted the requested adjournment as the desired evidence was crucial to and determinative of the case and there was ample time remaining to complete the case before the forty-eight hour period expired. He maintains that the refusal to grant the adjournment resulted in a denial of natural justice and that the applicant was denied a fair hearing. He submitted that the appropriate standard of review is one of correctness.

[6] Mr. Malcolm Boyle, on behalf of the respondent, argued that the standard of review is patent unreasonableness since an arbitrator appointed under s. 107

of the **Trade Union Act** is a highly skilled specialist in the field of arbitrating labour disputes and entitled to a high degree of deference by the court. Mr. Boyle maintained that the arbitrator possessed the expertise to determine if the proceeding could be concluded in a timely manner if an adjournment were to be granted and concluded that it could not. Mr. Boyle says that the ruling was correct in every respect and he further submitted that it certainly cannot be said that the decision to refuse the adjournment was clearly irrational or erroneous and the decision and award should stand.

[7] The applicable sections of the **Trade Union Act** are as follows:

> 16(7) The Board and each member thereof has the powers, privileges and immunities of a commissioner under the **Public Inquiries Act**, including, but not so as to limit those powers, the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things which the Board deems requisite to the full investigation of any matter within its jurisdiction.
>
> 16(8) The Board may receive and accept any evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper, whether admissible as evidence in a court of law or not.
>
> 43(1) An arbitrator or an arbitration board appointed pursuant to this Act or to a collective agreement
>
> > (a) shall determine his or its own procedure, but shall give full opportunity to the parties to the proceedings to present evidence and make submissions to him or it;

(b) has, in relation to any proceedings before him or it, the powers conferred on the Board, in relation to any proceedings before the Board by subsections (7) and (8) of Section 16;

(c) has power to determine any question as to whether a matter referred to him or it is arbitrable;

(d) where

(i) he or it determines that an employee has been discharged or disciplined by an employer for cause, and

(ii) the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration;

has power to substitute for the discharge or discipline any other penalty that to the arbitrator or arbitration board seems just and reasonable in the circumstances; and

(e) has power to treat as part of the collective agreement the provisions of any statute of the province governing relations between the parties to the collective agreement.

107(1) Notwithstanding Sections 41 and 42 and any provision in a collective agreement, where an employer or an employers' organization enters a collective agreement, any dispute or difference between the parties to the collective agreement, including he persons bound by the collective agreement, relating to or involving

(a) the interpretation, meaning, application or administration of the collective agreement or any provision of the collective agreement;

(b) a violation or an allegation of a violation of the collective agreement;

(c) working conditions; or

(d) a question whether a matter is arbitrable;

shall be submitted for final settlement to arbitration in accordance with this section in substitution for any arbitration or arbitration procedure provided for in the collective agreement.

(2) where a dispute or difference arises between the parties to a collective agreement to which this Section applies during the period from the date of its termination to the date the requirements of Section 105 have been met, this section applies to the settlement of the dispute or difference.

(3) When a dispute or difference arises which the parties are unable to resolve, the parties to the dispute or difference shall agree by midnight of the day on which the dispute or difference arises upon the appointment of a single arbitrator to arbitrate the dispute or difference.

(4) When one of the parties advises the Minister that a dispute or difference has arise and that the parties to the dispute or difference have failed to comply with subsection (3), the Minister may appoint an arbitrator.

(5) Notwithstanding any provision of this section, the Minister may, with the written consent of the employer and the trade union or unions representing the employees who are represented by a trade union, appoint

> a person to be the arbitrator for the purpose of this section for the term of the collective agreement or for the term mentioned in the appointment and the provisions of subsections (3) and (4) shall not apply.
>
> (6) the arbitrator appointed pursuant to this Section has the powers conferred by Section 43 and, without restricting his power and authority, his decision shall be an order and may require
>
> (a) compliance with the collective agreement in the manner stipulated;
>
> (b) reinstatement of an employee in the case of a dismissal or suspension in lieu of dismissal with or without compensation.
>
> (7) The decision of the arbitrator shall be rendered within forty-eight hours of the time of appointment unless an extension is agreed upon by the parties.
>
> (8) The parties to the dispute or difference shall be bound by the decision of the arbitrator from the time the decision is rendered and shall abide by and carry out any requirement contained in the decision.

[8] As counsel have pointed out, the Supreme Court of Canada has indicated that on an application for judicial review, the reviewing court must first determine the appropriate standard of review. The Court endorsed the "pragmatic and functional" approach in determining the appropriate standard in a given case. In **Voice Construction v. Construction & General Workers Union, Local 92**, (2004) 1 S.C.R. 609. The court said, per Major, J., at paragraphs 15 - 19 the following:

Canadian jurisprudence is plain that in assessing an arbitrator's ruling, the reviewing judge should adopt a pragmatic and functional analysis to determine the appropriate standard of review: **U.E.S., Local 298 v. Bibeault**, [1988] 2 S.C.R. 1048; **Pushpanathan v. Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 982; **Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.**, [2001] 2 S.C.R. 100, 2001 SCC 36; **Dr. Q v. College of Physicians and Surgeons of British Columbia**, [2003] 1 S.C.R. 226, 2003 SCC 19; **Law Society of New Brunswick v. Ryan**, [2003] 1 S.C.R. 247, 2003 SCC 20; **Toronto (City) v. C.U.P.E., Local 79**, [2003] 3 S.C.R. 77, 2003 SCC 63. The purpose is to ascertain the extent of judicial review that the legislature intended for a particular decision of the administrative tribunal: **Pushpanathan, supra,** at para. 26; **Dr. Q, supra**, at para. 21; **C.U.P.E., Local 79, supra**, para 13.

The pragmatic and functional approach involves the consideration of four contextual factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question - law, fact or mixed law and fact: **Pushpanathan, supra**, at paras 29-38; **Dr. Q, supra**, at para. 26; **Ryan, supra**, at para. 27. No one factor is dispositive: **Mattel, supra**, at para. 24.

Three standards of review have been recognized - patent unreasonableness, reasonableness and correctness: **Canada (Director of Investigation and Research) v. Southan Inc.**, [1997] 1 S.C.R. 748, at para. 30; **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R 817, at para. 55; **Ryan, supra**, at para. 24.

Dr. Q, supra, confirmed that when determining the standard of review for the decision of an administrative tribunal, the intention of the legislature governs (subject to the constitutional role of the courts remaining paramount - i.e., upholding the rule of law). Where little or no deference is directed by the legislature, the tribunal's decision must be correct. Where considerable deference is directed, the test of patent unreasonableness applied. No single factor is determinative of that test. A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause,

> demonstrates circumstances calling for the patent unreasonableness standard. By its nature, the application of patent unreasonableness will be rare. A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd. Between correctness and patent unreasonableness, where the legislature intends some deference to be given to the tribunal's decision, the appropriate standard will be reasonableness. In every case, the ultimate determination of the applicable standard of review requires a weighing of all pertinent factors: see **Pushpanathan, supra**, at para 27.

> Only after the standard of review is determined can the administrative tribunal's decision be scrutinized. It is important to recognize that the same standard of review will not necessarily apply to every ruling made by an arbitrator during the course of an arbitration: see **C.U.P.E., Local 79, supra**, at para 14.

[9] As to whether there is a privative clause, it is to be noted that ss 107(1) of the **Trade Union Act** provides that disputes such as in the present case. ". . .shall be submitted for final settlement to arbitration in accordance with this section . . .". It is also noted that there is no provision in the **Act** for appeals from an arbitrator's decision. In **Principles of Administrative Law**, Jones and Devillers, Carswell, 1985, the learned authors state at pages 419 - 420:

> Many statutes contain provisions which state that the delegate's decision shall be "final", "binding", "conclusive", "not subject to appeal", "unappealable" or "not subject to be questioned". The courts have almost universally treated such provisions as meaning that no appeal lies from the delegate's decision, which merely reiterates the common law rule that no appeal lies without being specifically created by statute. Accordingly, such clauses do not have the effect of depriving the superior courts of their inherent jurisdiction to review the legality of a delegate's actions. The courts' power in this regard undoubtedly extends to correct any jurisdictional defects in the delegate's actions, and the better view is that "final and binding" clauses do not affect the courts' right to correct intra-jurisdictional errors of law as well. However, Laskin C.J.C. in **Alberta Union of Provincial Employees v. Alberta Public Service Employees' Relation Board** indicated that the privative "gloss" of a final and binding clause should restrict the

courts to correcting only those intra-jurisdictional errors of law which are "patently unreasonable":

> In the face of this explicit provision for review [by *certiorari* within 30 days of the decision], it is impossible to read it out of this statute or to subordinate it to ss. 9 and 11 [which provided that the action or decision of the Board was "final and conclusive for all purposes"] or even to limit it to questions of jurisdiction in the strict sense, as urged by counsel for the union and counsel for the Board. That being said, however, *it still remains to consider the scope of review on alleged errors of law, and it is my opinion that the commanding terms of s. 9(1) and especially of s. 11 cast a gloss on the extent to which decisions of the Board may be overturned by a court. Certiorari, considered in the light of ss. 9(1) and 11, is a long way from an appeal and is subject to restriction in accordance with a line of decisions of this court which, to assess them generally, preclude judicial interference with interpretations made by the Board which are not plainly unreasonable.* Jurisdictional errors, including want of natural justice, are clearly reviewable and subject to reversal as was conceded by the appellants, but they are not involved here.

For the reasons set out in chapter 10, the better view is that the patent unreasonability test has no application in a case such as this where no jurisdictional defect is alleged in the delegate's actions. Accordingly, a "final and binding" clause does not have the effect of restricting the ambit of the superior court's supervisory powers over inferior tribunals, whether by restricting the availability of *certiorari* or of any other remedies. At most, it may indicate the legislature's intention that some credence and deference be given to its delegate when the courts decide whether to exercise their discretion to refuse judicial review, even in circumstances where the applicant has shown the illegality of the delegate's actions.

[10] From this it would appear that there is no significant privative clause applicable in this case and although some deference should be accorded, a high degree of deference is not justified on this ground.

[11] Next, one must consider the expertise of the tribunal relative to that of this court respecting the adjournment issue. Generally speaking, I think it can be

fairly stated that the courts of this land have as much or more experience in dealing with adjournments than do specialized tribunals. Thus, one might be inclined to conclude that no deference should be accorded to the arbitrator's expertise in this respect. However, as Mr. Boyle pointed out, an arbitration under s. 107 of **The Trade Union Act** is a very special kind of proceeding wherein strict time limitations are imposed on the arbitrator and the parties. Mr. Boyle succinctly set out this proposition in his pre-hearing brief where he stated:

> The fast pace of construction industry grievance arbitrations mean that an arbitrator faced with a request for an adjournment must inject a great deal of labour relations expertise into what would otherwise be a straightforward procedural question. An arbitrator must rule on such a request having regard to the nature of the industry and the dynamics of labour relations therein. For a section 107 Arbitrator, a request for an adjournment (even a brief one) is a very difficult question, and a much different question than it is for any other Court or Tribunal. In other words, a Section 107 Arbitrator must apply specialized expertise.

[12] Although I agree with Mr. MacDonald's submission that courts do have (or should have) expertise in dealing with requests for adjournments, I acknowledge that a s. 107 arbitrator has a better understanding and appreciation of time constraints in such a hearing than do the courts in general likely have. Accordingly, in my view, the arbitrator is entitled to some deference in this respect.

[13] One must also bear in mind that this particular piece of legislation was designed and intended to promote the speedy resolution of differences that may arise between employer and employee in the construction industry from time to time during the currency of a collective agreement. It would appear, therefore, that time is always of the essence in such proceedings and an arbitrator is required to complete his or her mandate in the time allotted, that is, forty-eight hours. Failure to do so would undoubtedly result in a loss of jurisdiction.

[14] Finally, whether to grant or refuse a request for an adjournment is a matter of judicial discretion which must be exercised judicially and involves a question of law or mixed fact and law, which is generally subject to review by an appeal court. The Supreme Court of Canada in **Darville v. The Queen** (1956), 116 C.C.C. 113, set out three conditions that must ordinarily be established to entitle a party to an adjournment on the grounds of the absence of witnesses. These are: (a) that the absent witnesses are material witnesses in the case; (b) that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses; and (c) that there is a reasonable expectation that the witnesses can be procured at the future time to which it is sought to put off the trial.

[15] Here it seems clear that Mr. Ormon is a material witness for the appellant and that the desired payroll records may be determinative in this case. It is less clear as to whether the appellant has not been guilty of *laches* or neglect in its efforts to obtain the attendance of the witnesses and payroll records. There is no direct evidence on this point, but in his affidavit Mr. Deleskie refers to some prehearing communications between the appellant and its counsel on the one hand and the respondent's employee and counsel on the other, but there is no mention of any request for the records in question, nor that Mr. Orman's presence at the hearing would be required, although the parties had been informed on May 7, 2004 that the Minister would appoint an arbitrator on May 25. 2004, with the hearing to begin the following day. Furthermore, there was no evidence presented to support a reasonable expectation that the witnesses' attendance could be procured within the limited time available.

[16] In my opinion, all of the foregoing indicates that in this case some not insignificant deference should be accorded the arbitrator, but not at such a level as would engage the patent unreasonableness standard. Accordingly, I have concluded that the appropriate standard of review in this case is neither correctness nor patent unreasonableness, but that of reasonableness.

[17] This brings us to the question of whether the arbitrators refusal to grant the agreement was unreasonable resulting in a denial of natural justice. Natural justice was described by Clarke, C.J.N.S., in **Municipal Contracting Limited v. International Union of Operating Engineers, Local 72**1, (1989) 91 N.S.R(2d) 16 at paragraphs 33 and 34:

> Natural justice is not a difficult or complicated concept. In Reid and David, **Administrative Law and Practice**, Second Edition, the authors state at p. 213:
>
> > "Natural justice is a simple concept that may be defined completely in simple terms: natural justice is fair play, nothing more."
> >
> > Natural justice requires that a party be made aware of the case against him and be given an opportunity to respond (see **Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police**, [1979] 1 S.C.R. 311; 23 N.R. 410; **Scott et al. v. Rent review Commission** (1977), 23 N.S.R.(2d) 504; 32 A.P.R. 504). It is interesting to note that although the rule of *audi alteram partem* does not always require a hearing, it does require that the parties be given an opportunity to make their submissions. Such was stated by Fauteux, J., of the Supreme Court of Canada in **Quebec Labour Relations Board v. Canadian Ingersoll Rand Co. Ltd. et al.** (1969), 1 D.L.R.(3d) 417, at p. 422:
> >
> > > "But, as this court has recently held in the unreported decision of **R. v. Quebec Labour Relations Board, Ex. p. Komo Construction Inc**. [since reported, ante, p. 125, [1968] S.C.R. 172], the *audi alteram partem* rule does not require that there must always be a hearing. What is required is that the parties be given an opportunity to put forward their arguments."

[18] What is unreasonable in this context was considered by Major, J., in **Voice Construction v. Construction General Workers Union Local 92, supra** at paragraph 31 where he said:

> In **Ryan, supra**, at para 55, Iacobucci J. explained that a decision will be unreasonable
>
> > . . . only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see **Southam**, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see **Southam**, at para 79).
>
> It is not necessary for every element of the tribunal's reasoning to pass the reasonableness test. The question is whether the reasons as a whole support the decision: **Ryan, supra**, at para 56.

[19] In the present case it is apparent that the arbitrator was very conscious of the time constrictions under which he was functioning. In giving his reasons for refusing the adjournment he adopted the argument put forth by Mr. Boyle stating :

> . . . Mr. Boyle opposed the adjournment, pointing out that it was impractical and unprecedented under the expedited hearing provisions of section 107, as was the suggestion that substituted service be made on him. He remarked that the union had chosen to go the route of section 107 and would have to live with the

> problems entailed by the 48 hour maximum time frame allowed for the hearing and decision. It is not always possible to line up witnesses on such short notice, and no motives should be inferred from a failure to appear. I agreed with Mr. Boyle on these points, and declined to adjourn.

[20] The comments by the arbitrator are supported by the statement of Clarke, C.J.N.S., in **Municipal Contracting Ltd v. International Union of Operating Engineers, Local 721, supra**, where he said at paragraph 38 with respect to s. 107 of **The Trade Union Act (**formerly s. 103):

> It is necessary to return to the scheme of the legislation to access whether Municipal was denied natural justice. Arbitrator Kydd sought to obtain the agreement of the parties to extend the time within which he was obliged by s. 103(7) to render a decision. The Union did not agree. The arbitrator then concluded that he was obliged under the **Act** to proceed and render his decision within forty eight hours of his appointment. He was aware of the argument Municipal advanced with respect to s. 41 of Part I. The effect of his decision was that s. 41, to which reference is made in s. 103(6), is modified by s. 103(7). With this, I agree. *The Legislature compressed the time within which the last step of a grievance arising in the construction industry is processed. It does not permit the more leisurely pace of Part I arbitrations. The Legislature has provided for expedited arbitration in the construction industry. This does not mean that the natural justice has been displaced by s. 103. It is still to be observed and applied: there is just less time available in those circumstances where the parties do not agree to extend the time limits available to the arbitrator.* (Emphasis added).

[21] Whether I would have responded in the same way to the adjournment application as the arbitrator ruled is immaterial. As Iacobucci. J., said in **Ryan, supra,** "If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere."

[22] In the present case it is to be noted that the applicant had the opportunity to present evidence and did make its submissions. Although it did not present all of the witnesses that it wanted to, it would appear that that was the result of inadequate preparation, there being no previous request or notice that Mr. Orman's presence or the payroll records would be required. As well, there was no explanation offered as to why the two employees, Mr. Dillman and Mr. Saulnier, were not previously subpoenaed.

[23] Having regard to all of the foregoing, I must conclude that the reasons given by the arbitrator for refusing the adjournment are tenable and that his refusal did not amount to a denial of natural justice.

[24] Accordingly, I have no reason to interfere with his award.

[25] In view of this conclusion I decline to make any ruling on the application for substituted service other than to say that in the circumstances of this case, the method of service proposed by the applicant was inappropriate and efforts to serve Mr. Orman personally were inadequate to support the granting of an order for substituted service.

[26] The application is therefore dismissed.

[27] At the hearing counsel agreed that costs of $1,500.00 should go to the successful party. Accordingly, I will order that the respondent have its costs of this proceeding in the agreed amount of $1,500.00.

Donald M. Hall, J.