Date: August 13, 2001
Docket: S.H. 167385

2000

IN THE SUPREME COURT OF NOVA SCOTIA

Cite as: Nova Scotia (Education and Culture) v Nova Scotia Teachers' Union, 2001NSSC113

IN THE MATTER OF:	***The Arbitration Act*, R.S.N.S., 1989, c. 19**
	- and -
IN THE MATTER OF:	**An Arbitration between the Nova Scotia Teachers' Union and the Minister of Education and Culture**
	- and -
IN THE MATTER OF:	**An Application by the Minister of Education and Culture for an Order to Quash and Set Aside the Arbitration Award of Innis Christie, dated September 17, 2000 (the "Supplementary Award")**

BETWEEN:

THE MINISTER OF EDUCATION AND CULTURE
(the "Employer") **APPLICANT**

- and -

NOVA SCOTIA TEACHERS UNION
(the "Union") **RESPONDENT**

D E C I S I O N

HEARD:	**before the Honourable Chief Justice Joseph P. Kennedy, Supreme Court of Nova Scotia, Halifax, Nova Scotia, in Chambers, February 13, 2001.**
DECISION:	**August 13, 2001**
COUNSEL:	**Eric Durnford, Q.C. for the Applicant** **Lorraine P. Lafferty for the Respondent**

KENNEDY, C.J.:

[1] The applicant, the Minister of Education, by this proceeding, seeks to have this Court, order that the supplementary award made by Arbitrator, Innis Christie and dated September 17, 2000, be quashed and set aside.

[2] That award was made supplementary to an award dated June 10, 1999 ("The original award").

BACKGROUND

[3] The *Public Sector Compensation (1994-1997) Act* imposed a "pay freeze" on teachers' salaries, reduced pay rates and by S. 10 cancelled entitlement to salary increments based on years of teaching experience. These increments were a benefit provided in the Collective Agreement between the parties in place at the time of the enactment of this "pay freeze" legislation.

[4] When the term of the legislation expired on October 31, 1997, the school boards of Nova Scotia refused to restore the salary increments. The Union grieved, seeking the reinstatement of the increments, retroactive to the expiration of the legislation, that being November 1, 1997.

[5] The Minister of Education represents the school boards in response to that grievance.

[6] The grievance filed by the respondent Union, dated April 23, 1998, alleged that salary increments should have been restored to the teachers and that the teachers ought to have been paid their increments from November 1, 1997. At the outset, it was clear that the restoration of salary increments to that date was central to the grievance.

[7] By the original award, the arbitrator allowed this grievance. The June 10, 1999, decision reads at pp. 27-28:

> "Conclusion and order. For all of those reasons this Grievance is allowed. The Halifax Regional School Board is ordered to pay all affected teachers any pay owing to them as a result of not having paid them in accordance with Articles 18, 43 and Schedules D1 and D2 of the Collective Agreement as interpreted here from November 1, 1997 to the time of the Grievance. Their rights from then forward, under the relevant Schedules, would appear to be similar."

[8] That ruling was upheld on judicial review by Justice Davison of this Court, and his finding was upheld by the Court of Appeal, that decision dated May 17, 2000.

[9] Arbitrator, Christie's original award anticipated a second or supplementary hearing. It reads at p. 2:

> " At the outset of the hearing in this matter the parties agreed that I am properly seized of it, that I should remain seized after the issue of this award to deal with any matters arising from its application, including the quantification of any payments ordered, and that all time limits, either pre- or post- hearing are waived. Counsel agreed that the question of whether interest could or should be ordered be part of this retained jurisdiction."

[10] And, at p. 28:

> "As stated at the outset, the parties agreed that I should retain jurisdiction to deal with any issues arising from the application of this Award, including specifically the question of whether the school boards are obligated to pay interest. I will, therefore, reconvene the hearing in this matter at the request of either of the parties to deal with that issue, ... should the parties be unable to agree upon them, and with any other matters arising from the application of this Award."

[11] At the request of the parties, the Arbitrator did hold a supplementary hearing on July 11, 2000. At that hearing, the applicant Employer raised the issue of the "start date" for the calculation of payments to teachers, in light of the limitation in the Collective Agreement for filing grievances.

[12] The respondent Union, as previously indicated, had sought by the grievance a retroactive "start date" of November 1, 1997, the date of the expiration of the "pay freeze" legislation and therefore the point of first breach of the application.

[13] At the supplementary hearing, the applicant argued that November 1, 1997, was not the proper "start date", because the Collective Agreement contained a time limit for filing grievances to within thirty days "of the effective knowledge of the facts which give rise to the alleged grievance." The Employer argued that the Employer's liability for continuing breach is limited by the agreement, to the grievance time limit of thirty days prior to the grievance.

[14] The date of the grievance herein was April 23, 1998.

[15] The applicant submitted before Arbitrator Christie, that the "start date" for the restoration of teacher entitlement under this award therefore, was thirty days prior thereto or March 23, 1998.

[16] Although the Union had not filed its grievance within thirty days of November 1, 1997, Arbitrator Christie, by the supplementary award, found that it had filed within thirty days of "effective knowledge of facts which gave rise to the alleged grievance", because it did not have "effective

knowledge" until it had an understanding of the correct interpretation of the *Act* and was entitled to claim redress to the first date of breach, that being November 1, 1997.

[17] Arbitrator Christie, made this ruling in the alternative. He otherwise found in the supplementary decision was that he was *functus officio* on this issue. He had already determined the "start date" of November 1, 1997, as part of the "original decision". He found that his award of June 10, 1999, definitively determined the "start date" of payments.

[18] The applicant argues that, by so declining jurisdiction, the Arbitrator committed reversible error. The applicant says that this decision is clearly wrong, because no aspect of the remedy had been argued or dealt with at the original liability hearing and it was open to, and in fact obligatory for, the Arbitrator to determine all of the remedy issues raised by the grievance at the supplementary hearing, after giving both parties a fair hearing.

[19] During the original hearing, the Arbitrator's task was, says the applicant, to determine whether the *Act* had an ongoing effect so as to permanently affect the teachers' salary scales.

[20] The focus of the evidence and argument at that point was solely on the interpretation of the *Act* and the effect of its alleged expiry on October 31, 1997.

[21] There was no evidence or argument on remedy, because liability and remedy issues had been split.

[22] The applicant says that the "original award" sets out the scope of the grievance. It cites from p. 3:

> *"This is a matter of the interpretation of the Collective Agreement and of that* Act. *How does, or did, the* Act *affect the Collective Agreement, and did the* Act *cease to have any relevant effect after October 31, 1997?"*

[23] And at p. 11:

> "*Thus the Union's claim and its Grievance is that upon the expiry of the* Public Sector Compensation (1994-97) Act *teachers became entitled, from then forward, to be paid their increments in accordance with the Schedules to the Collective Agreement, based on actual years of teaching experience."*

[24] And, at p. 17:

> *"The issues: (1) I will consider, first, the issue of whether, as a matter of the interpretation of the Collective Agreement, in context, including the* Public Sector Compensation (1994-97) Act, *teachers experienced-*

base salary increments provided for by Article 43.01 of the Collective Agreement and denied them for the school year 1994-95 by section 10 of the Act*, are lost not only as increases to their salaries during the period the* Act *was in force but also as steps on the basis of which their salaries after October 31, 1997 are to be determined.*
(2) *I will then consider the issue of whether, quite apart from the words of the Collective Agreement, section 10 of the of the* Public Sector Compensation (1994-97) Act *is to be interpreted as not only having denied teachers the increments otherwise due them for the school year 1994-1995 as increases to their salaries during the period the* Act*, was in force but also as steps on the basis of which their salaries after October 31, 1997 are to be determined. Another way of stating this issue is to ask whether section 10 of the* Pubic Sector Compensation (1994-97) Act *continued to have any force and effect in this respect after October 31, 1997."*

[25] And, in coming to his decision, the Arbitrator wrote in the "original award" at p. 27:

" For all these reasons this Grievance is allowed. The Halifax Regional School Board is ordered to pay all affected teachers any pay owing to them as a result of not having paid them in accordance with Articles 18, 43 and Schedules D1 and D2 of the Collective Agreement as interpreted here from November 1, 1997 to the time of the Grievance."

[26] Thus, says the applicant, it was clear that the "original hearing" was heard and argued solely on the issue of liability. The issues put to the Arbitrator at this second hearing, particularly the issue of "start date", were not put to him at the first hearing. It's that simple, says the applicant.

[27] The Arbitrator's order to pay "any pay owing from November 1, 1997" only reflects his conclusion that the *Act* did not have ongoing effect beyond October 31, 1997. The actual amount owing to each individual teacher was not dealt with and had to be part of the subsequent remedy hearing, which was to determine all aspects of remedy, including the grievance time limits.

[28] Counsel for the applicant argues that the Arbitrator did not finish the job, that he has an obligation to hear this issue.

[29] The respondent Union says, to the contrary, that there was never any agreement expressed or implied to divide the grievance hearing into "liability and remedy". The "original award" requires the Board "to pay all affected teachers any pay owing to them from November 1, 1997 to the time

of the grievance" which wording echoes the language of the grievance. It is significant that the "start date" clearly set out by the award was not challenged before Justice Davison on the judicial review of that finding, a point made by Arbitrator Christie.

[30] It is, says the respondent, a reasonable surmise that at one point the applicant thought that the "start date" had been determined by the "original award".

[31] The respondent cites from a letter sent by counsel for the applicant to the Arbitrator as late as May 25, 2000, which is referred to in the supplementary decision. (at p. 4) The letter is significant. It reads in part:

> " I have just received a copy of a letter of today's date sent to you by Ms. Lafferty regarding the above in which she requests you to reconvene the hearing ... 'to deal with issues arising from the application of the award, including the question of interest and other matters regarding which the parties are unable to reach agreement.'
>
> The Minister strongly disagrees with the implication from this request that there is any outstanding issue other than the question of possible interest - the awarding of which will be opposed by the Minister."

[32] At p. 5 of the supplementary decision, the arbitrator makes reference to subsequent correspondence sent to him by counsel for the Union and copied to the applicant.

> " We spoke briefly this morning. Thank you for confirming your availability to reconvene on Tuesday, July 11 to deal with the issue of interest on this Award.
>
> I note from your Award that you retained jurisdiction to deal with any issues arising from its application. To clarify, at this stage, I do not know whether there are any additional issues, apart from interest. If there are, hopefully they will be identified by the parties in advance of July 11 so that they may be addressed at that time as well."

[33] On the same date counsel for the applicant responds by letter to the Arbitrator copied to counsel for the Union:

> " I have a copy of a fax Ms. Lafferty sent you this morning regarding the above.
>
> As previously advised on May 25th, 2000, the Minister strongly disagrees with any suggestion being made that there is any issue in your retained jurisdiction other than possible interest.
>
> To be quite frank, I am perplexed by what appears to be an attempt by the Union to enlarge the scope of the Grievance to matters not

> grieved. Any jurisdiction you retained, was as the Minister understood, the usual incidental jurisdiction to deal with matter arising from the application of the Award ie. in this instance, the finding that the Board is required to pay all affected teachers 'any pay owing to them as a result of not having been paid ...' in accordance with your interpretation of the Collective Agreement from November 1, 1997, to the time of the grievance. This could include quantification of any payments, but there is no expectation that there will be a problem.
>
> The matter of possible interest was a specifically retained issue which, I note, arose at the time of the hearing, and not before."

[34] When the second hearing reconvened before Arbitrator Christie, on July 11, 2000, the issues left to be determined, says the respondent Union, were the methodology of quantifying payments to individual teachers, and the question of any interest payable.

[35] For the first time at this second hearing, the applicant requested that the Arbitrator rule on the "start date" for the calculation of payments to the teachers, in light of the time limit in the Collective Agreement for filing grievances. The respondent immediately objected to the request, submitting that the "start date" had already been decided by the Arbitrator and then only argued that the grievance was not untimely in the alternative to that position.

[36] When the applicant submitted to the Arbitrator at the second hearing, that there is nothing in the text of his "original award" that addresses the "start date", Arbitrator Christie, responded in his supplementary award as follows at p. 14:

> "Counsel for the Minister is certainly correct in pointing out that there is nothing in the text of my June 10, 1999 Award other than the passages quoted from pp. 2-3 and 27-28 that addressed the 'start date' issue. On the other hand, there was no suggestion that the start date was a divisive issue, so it was appropriate to deal with it cursorily, without there necessarily being any assumption that it would be dealt with later, as part of my retained jurisdiction."

[37] Based on all of the evidence and submissions before him, Arbitrator Christie determined that his award of June 10, 1999, was "explicit", that the award had determined the "start date" of payments, and that the parties would have reasonably assumed that the question had been dealt with and was not left to be determined as part of his retained jurisdiction as a matter of "application" or "quantification".

[38] The applicant's letters to the Arbitrator dated May 25, 2000, and May 29, 2000, strongly arguing that there was no issue in his retained jurisdiction, other than interest, and making reference to the Arbitrator's finding that the Board was required to pay teachers "from November 1, 1997", are indicative says the Union that as of that point, the applicant did believe that the "start date" issue had been decided.

[39] The respondent cites case law to establish that an Arbitrator, having finally decided an issue that was integral to a proceeding, cannot then alter or amend that decision once it has been delivered.

[40] *Jonquière (Cité) v. Munger* [1964] S.C.R. 45, a decision of Cartwright, J. is the Supreme Court of Canada case oft cited for the proposition that an arbitration tribunal, once it has been definitive in an award, has no power to subsequently make alterations or amendments to that finding. It has 'the right to interpret the award ... but not to amend it".

[41] In *Regina Police Assn. v. Regina (City) Police Commissioners,* [1998] S.J. No. 79, Hunter, J. gives a useful review of the law at pp. 7 and 8:

> "23 With respect to the application of the doctrine of functus officio, both parties rely on the principles as stated in Brown and Beatty, Canadian Labour Arbitration, 3d ed. (Aurora: Canada Law Book, as am.) as follows at p. 1-37; 1:5600:
>
> > ' An Arbitrator's jurisdiction to make a decision in any particular case begins with the submission to arbitration and concludes when he finally determines the matters so submitted to him ... where the arbitrator has done everything which he had to do to perfect the award, he is said to be functus officio and he cannot afterwards alter his award except to correct clerical mistakes, errors arising from accidental slips or omissions, or errors of a merely technical nature. Thus, a positive response by a board to a request for clarification would constitute an amendment to the original award which the board of arbitration has no authority to make and, in such circumstances, a court would hold that the board had completed its award and was functus officio ... [See: Crown in right of Ontario (Ministry of Health) (1994), 44 L.A.C. (4th) 215 (Kaplan); Nelsons Laundries Ltd. v. Laundry, Dry Cleaning & Dye House Workers' Int'l Union, Local 292 (1964), 44 D.L.R. (2d) 463, 64

C.L.L.C. 15,509 (B.C.S.C.). See discussion in Canada Post Corp. (1990), 10 L.A.C. (4th) 244 (Burkett); Barber Hydraulic Turbine Ltd. (1978), 20 L.A.C. (2d) 372 (Shime); but see discussion in Skeena Sawmills (1990), 15 L.A.C. (4th) 432 (Bird); Canada Post Corp. (1990), 10 L.A.C. (4th) 244 (Burkett); but see Northern Telecom Co. Ltd. (1989), 4 L.A.C. (4th) 11 (O'Shea); see discussion in Kingston (City) (1996), 55 L.A.C (4th) 148 (H.D. Brown); Canada Post Corp. (1995), 52 L.A.C. (4th) 81 (Thistle); Firefighters' Social and Athletic Club (1994), 45 L.A.C. (4th) 440 (Kelleher); Lake Ontario Steel Co. (1992), 24 L.A.C. (4th) 355 (Mikus); Metropolitan Authority of County of Halifax (1988), 33 L.A.C. (3d) 333 (MacDougall); Cf. Board of School Trustees, School District No. 35 (Langley) (1996), 55 L.A.C. (4th) 1 (Bruce); R. v. Andrews, ex p. Nurses' Ass'n, St. Joseph's General Hospital (1969), 8 D.L.R. (3d) 193, 69 C.L.L.C. 14,209 (Ont. H.C.J.), affd 10 D.L.R. (3d) 43, 70 C.L.L.C. 14,032 (C.A.); Cf. Dunkley Lumber Co. Ltd. (1984), 17 L.A.C. (3d) 192 (Brokenshire)].'

24 In discussing the exhaustion of jurisdiction of an arbitrator, Brown and Beatty, at p. 2-105; 2:4000, note as follows:

> ' The doctrine of functus officio stipulates that once a board of arbitration has finished making its decision, its grant of jurisdiction is terminated and thereafter it has no power to render any further decision or award. As one court has put it:
>
> > ...there is abundant authority for the proposition that a board of arbitration set up under commercial agreements or under the Labour Relations Acts of the various Provinces is functus when it has made its award, probably upon making of the award and undoubtedly upon communication of it to the parties.
>
> ...
>
> Thus, where an arbitrator has in his view issued a final and binding award he is functus unless he has failed to

> determine an issue which was specifically submitted to him. Moreover, in any subsequent decision an arbitrator may not reinterpret his prior award, nor may he expand the scope of a previous award. Rather, he is limited simply to completing it ... However, where an arbitrator has retained a jurisdiction to deal with a remedy, e.g. respecting the calculation of compensation, either with or without the parties' agreement, the issuance of a subsequent award particularizing the remedy is within his jurisdiction ...'

25 The applicability of the doctrine of functus officio to labour arbitrators was considered in McDonnell Douglas Canada Ltd. and C.A.W., Loc. 673, Re (1992), 29 L.A.C. (4th) 284 (Burkett) where at p. 285 the arbitrator accepted that after issuing an award he was not entitled to amend, vary or revoke it. In reviewing the jurisprudence he referred to his previous decision in Re Canada Post Corp. and C.U.P.W., re National Policy Grievance, No. N-00-88-00022, Medical remuneration Supplement (August 14, 1992), unreported (Burkett) wherein he considered the decision in Re Gearmatic Co., a division of Paccar of Canada Ltd. and U.S.W., [1978] 1 Can. L.R.B.R. 502 and quoted as follows at p. 287:

> ' However, the doctrine of functus officio continues to have some vitality in the industrial relations setting of grievance arbitration. It continues to operate to the extent of preventing an arbitration board from reversing the substance of an earlier decision or clearly altering the nature of an earlier decision ...'

26 Accordingly, once a board of arbitration has finished making its decision, its jurisdiction is terminated and it has no power to render any further decision or award. It is functus officio. While the arbitrator may clarify, the arbitrator has no power to reinterpret or expand the scope of his award (see: R. v. Andrews, exp. Nurses' Assn., St. Joseph's General Hospital (1969), 8 D.L.R. (3d) 193 affm. 10 D.L.R. (3d) 43). It is common practice for arbitrators to retain jurisdiction to deal with matters naturally flowing from their decision such as the calculation of the compensation awarded in the award.

27 In Palmer and Palmer, Collective Arbitration in Canada, 3d ed. (Toronto: Butterworths) at p. 42 the authors note that the arbitrators

often retain jurisdiction until the award is final and that clarification of an earlier award is possible provided the clarification does not constitute an amendment to the arbitrator's decision.
28 In this case, the CBA expressly provides that the arbitrator may clarify his award. But this is limited to clarifying the decision. The arbitrator cannot amend, alter, vary or revoke his award. If he has amended or varied his original award, he exceeds his jurisdiction and the supplementary award is subject to being quashed on an application for judicial review.
29 The word 'clarify' is defined in the Oxford dictionary as meaning 'to cause to become clear or easier to understand'. In the Webster dictionary it is defined as 'to explain clearly ... make understandable ...' and 'to make less complex or less ambiguous'.
30 'Amend' is defined as to correct, rectify; to alter formally by modification, deletion or addition; to make minor improvements in, change slightly. 'Vary' means to make different by introducing changes."

[42] The respondent submits that the Arbitrator was correct in his finding, that he was *functus officio*. That he did not have jurisdiction to deal with the issue of a "start date" at the "supplementary hearing" and asks that his decision not be set aside.

STANDARD OF REVIEW

[43] Because this is a question of jurisdiction, Arbitrator Christie, finding that he was *functus officio* on the issue of "start date" is reviewed by this Court based on the standard of "correctness". Deference to the administrative tribunal is at its lowest under this test.

[44] Either an Arbitrator has jurisdiction or he doesn't. He cannot be wrong when he determines that issue.

[45] He cannot mistakenly create jurisdiction that he does not have, or in this context, decline jurisdiction on a significant issue that he does have.

[46] I make reference to the applicant's brief (at pp. 19 - 20):

" In *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)*, [1984] 2 S.C.R. 412, the Supreme Court of Canada distinguished mere error of law from jurisdictional error as follows:

' A mere error of law should also be distinguished from a jurisdictional error. This relates generally to a provision which confers jurisdiction, that is, one which

> describes, lists and limits the powers of an administrative tribunal, or which is [TRANSLATION] "intended to circumscribe the authority" of that tribunal, as Pigeon, J. said in *Komo Construction Inc. v. Commission des relations de travail du Québec,* [1968] S.C.R. 172 at p. 175. A jurisdictional error results generally in an excess of jurisdiction or a refusal to exercise jurisdiction, whether at the start of the hearing, during it, in the findings or in the order disposing of the matter ... (at pp. 420-421)'

In discussing the standard of review for jurisdictional error, the Court then went on to state:

> ' ...Unquestionably, as has already been noted, it is often difficult to determine what constitutes a question of jurisdiction, and administrative tribunals like the Board must generally be given the benefit of any doubt. Once the classification has been established, however, it does not matter whether an error as to such a question is doubtful, excusable or not unreasonable, or on the contrary is excessive, blatant or patently unreasonable. What makes this kind of error fatal, whether serious or slight, is it jurisdictional nature; ...
>
> ...
>
> Once a question is classified as one of jurisdiction, and has been the subject of a decision by an administrative tribunal, the superior court exercising the superintending and reforming power over that tribunal cannot, without itself refusing to exercise its own jurisdiction, refrain from ruling on the correctness of that decision, or rule on it by means of an approximate criterion.
>
> This is why the superior courts which exercise the power of judicial review do not and may not use the rule of the patently unreasonable error once they have classified an error as jurisdictional. (at pp. 441-442)' "

FINDING

[47] I am satisfied that when he determined the issue of jurisdiction, Arbitrator Christie was correct.

[48] When he found that he had, by the "original award" definitively decided the issue of "start date" he was correct.

[49] When the Arbitrator Christie found that he was *functus officio* and was required to decline jurisdiction to determine the possible limiting effect of the mandatory time limit on the Union's right to recover unpaid wages, he was correct.

[50] The original award was as the Arbitrator has suggested, "explicit" on the question of "start date". I find that when read in conjunction with the grievance, that his decision is clear and unambiguous.

[51] The employee's conclusion that the Arbitrator's order to pay "any pay owing from November 1, 1997" was simply a reflection of his finding that the *Act* did not have ongoing effect beyond October 31, 1997, was, I find, not the most obvious interpretation.

[52] It is possible that Arbitrator Christie mistook the position of the Employer and was premature in making that decision, however, the Employer's reaction to his finding did not suggest so.

[53] I make reference to the failure to raise the question on judicial review before Justice Davison and the letters of May 25, 1997, and May 29, 1997, written to the Arbitrator by counsel for the Employer.

[54] Arbitrator Christie did find the "start date" in his "original award", and having done so, was correct in his determination that he was constrained from revisiting that issue by supplementary hearing.

[55] The reasonableness of his having determined the "start date" as part of the original award was an issue that Justice Davison could have been asked to review.

[56] Although it was appropriate for the Arbitrator as part of his supplementary award, to determine the "start date" issue in the alternative, having found that he was *functus officio* on that issue, I do not consider it proper or necessary for this Court to review that alternative finding.

[57] Having agreed with the Arbitrator that he was *functus officio* on the issue of "start date" at the supplementary hearing, I will not interfere with his finding.

[58] I dismiss the application with costs to the Union of $1000.00.

Chief Justice Kennedy

Halifax, Nova Scotia