IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Twin City Drywall and Interiors Limited v. United Brotherhood of Carpenters and Joiners of America, Local 83, 2008 NSSC 41

Date: 20080228
Docket: SH 286615
Registry: Halifax

Between:

Twin City Drywall and Interiors Limited
(Talbot's Drywall and Interiors Limited)

Applicant

v.

United Brotherhood of Carpenters and Joiners
of America, Local 83

Respondent

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	January 16, 2008 (in Chambers), in Halifax, Nova Scotia
Written Decision:	February 28, 2008
Counsel:	Victor J. Goldberg, for the Applicant Raymond A. Mitchell, for the Respondent

Coughlan, J.:

[1] The United Brotherhood of Carpenters and Joiners of America, Local 83 filed a grievance against Twin City Drywall and Interiors Limited, now Talbot's Drywall and Interiors Limited, pursuant to the Collective Agreement between the Union and the Construction Management Bureau Limited alleging the company was bound by the Collective Agreement. An arbitrator was appointed pursuant to s. 107 of the *Trade Union Act*, R.S.N.S. 1989, c. 475. A hearing of the grievance was held August 9, 2007 and the learned arbitrator gave his decision dated August 17, 2007. Talbot's Drywall and Interiors Limited applied for an order setting aside the arbitrator's decision.

[2] The facts are as follows:

[3] Twin City Drywall and Interiors Limited (the old company) was incorporated on November 16, 1987. David Andrew McIntosh and Gary Lamont Allen were directors of the company. The company's registration was revoked November 30, 1991. It was reinstated and its registration was again revoked on November 30, 1992. The company was struck from the register on November 27, 2002. Gary Allen had registered a partnership/business name Twin-City Drywall and Interiors with the Registrar of Joint Stock Companies on May 20, 1987. The name was revoked for non-payment on August 31, 1988. The old company was subject to the collective agreement between the Union and the Construction Management Bureau Limited.

[4] Robin Talbot, the son of Gary Allen, had worked in the drywall industry for about ten years. On June 20, 2003, Mr. Talbot registered a partnership called Talbot's Drywall, to carry on the business of drywall and drywall related construction. At first, the enterprise had little business and Mr. Talbot wished to expand. The Twin City name was known in the Halifax area. Mr. Talbot testified he needed Mr. Allen involved as he, Mr. Talbot, had little experience in estimating and managing such a business. On March 29, 2005, Mr. Talbot incorporated a company called Twin City Drywall and Interiors Limited. Mr. Talbot was the sole shareholder and officer of the company. Gary Allen was employed with Twin City Drywall and Interiors Limited as manager and estimator shortly after its incorporation. Mr. Allen virtually ran the company's operations from its office, solicited business, hired personnel and negotiated all contracts under $50,000.00. Any contract in excess of $50,000.00 had to be approved by Mr. Talbot. Mr. Allen

used his contacts gained through his thirty years in the drywall business. The company changed its name to Talbot's Drywall and Interiors Limited on June 18, 2007.

[5] Mr. Talbot put his own money in the company, carried on business dealings with banks and leasing companies, visited all of the company's job sites and supervised the work, including the firing of employees.

[6] The arbitrator found there had been a transfer of the business from Twin City Drywall and Interiors Limited (the old company) to Talbot's Drywall and Interiors Limited and that Talbot's Drywall and Interiors Limited is bound by the collective agreement.

[7] In conducting a judicial review, the Court must determine the appropriate standard of review, using the pragmatic and functional approach. In *Nova Scotia Government and General Employees Union v. Capital District Health Authority* (2006), 244 N.S.R. (2d) 74, Fichaud, J.A., in giving the Court's decision, described the approach to be taken at p. 84:

> Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence or wording of a privative clause or statutory appeal; the comparative expertise of the tribunal and the court on the appealed or reviewed issue; the purpose of the governing legislation; and the nature of the question, fact, law or mixed. The ultimate question is whether the legislature intended that the issue under review be left to the arbitrator. From this analysis the court selects, for each issue, a standard of review of correctness, reasonableness, or patent unreasonableness: *Pushpanathan*, at ¶ 26; *Dr. Q.*, at ¶ 26-35; *Ryan*, at ¶ 27; *Voice*, at ¶ 15-19; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; 243 N.R. 22; 174 D.L.R. (4th) 193, at ¶ 55-62; *Granite* at ¶ 21; *Nova Scotia Teachers Union v. Nova Scotia Community College* (2006), 241 N.S.R. (2d) 183; 767 A.P.R. 183; 2006 NSCA 22 at ¶ 11.

[8] The arbitration was subject to s. 107 of the *Trade Union Act*. which provides in part:

> **107 (1)** Notwithstanding Section 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 the persons bound by the collective agreement, relating to or involving
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> > (a) the interpretation, meaning, application or administration of the collective agreement or any provision of the collective agreement;
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> > (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.

[9] The section requires matters be submitted to the arbitrator for "final settlement". Subsection 107(8) provides the parties to the dispute or difference shall be "bound" by the decision and "shall abide by and carry out" any requirement in the decision. There is no statutory appeal from the arbitrator's award. There is not an express bar to judicial review. While not a strong privative clause, it has been long recognized courts give deference to arbitrations in the labour relations field.

[10] The issue the arbitrator had to first address was, did the *Trade Union Act* give him authority to decide whether a transfer had occurred between the two companies. While not addressing the issue, the arbitrator must be taken to assume he had authority as he made the decision and his reasoning was directed toward the issue of whether a transfer of the business had taken place.

[11] In addressing the issue of the expertise of the tribunal, Cromwell, J.A., giving the majority judgment in *Halifax Employers Association v. International Longshoremen's Association, Local 269* (2004), 226 N.S.R. (2d) 159, stated at p. 171:

> As *Pushpanathan* makes clear, expertise must be understood as a relative concept. The evaluation of relative expertise has three dimensions: the court must characterize the expertise of the tribunal in question: the court must

> consider its own expertise relative to that of the tribunal; and finally, the court must identify the nature of the specific issue before the administrative tribunal in relation to this expertise. In light of this last consideration, it is clear that consideration of relative expertise and of the nature of the problem are closely inter-related: *Pushpanathan*, para. 33.
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> It has long been recognized that the expertise of labour arbitration boards militates in favour of deference: see *Board of Education of Toronto v. Ontario Secondary School Teachers' Federation District 15 et al.*, [1997] 1 S.C.R. 487; 208 N.R. 245; 98 O.A.C. 241, at paras. 35-37. This deference is appropriate not only to an arbitrator when interpreting provisions of a collective agreement but may also extend to an arbitrator's interpretation of the constituent legislation intimately connected with the arbitrator's mandate. Section 60(1.1) of the *Code* in issue in this case is such a provision: see, for example, *Lethbridge Community College*, supra, at para. 17 and *Toronto (City) Board of Education*, supra, at para. 39.

[12] In dealing with matters concerning collective agreements, the expertise of arbitrators support them being accorded deference. However, here the issue is whether the *Act* gave the arbitrator authority to determine if a transfer had taken place, a question of statutory interpretation not usually dealt with by arbitrators appointed pursuant to s. 107 of the *Act*. In the circumstances, the court has as much expertise as the arbitrator to answer the particular question. This suggests less deference be given to the arbitrator's decision.

[13] The purpose of Part II of the *Trade Union Act* is to promote the speedy and effective resolution of labour relation disputes in the construction industry. The particular question is does the arbitrator have authority under the *Act* to determine if a transfer, sale or lease of a business has taken place. The particular question is closely related to the expertise of the tribunal. The reasonableness of the arbitrator's decision depends on the arbitrator correctly answering the question.

[14] The determination of whether an arbitrator has authority pursuant to the *Trade Union Act* to determine if a transfer of a business has taken place is a question of law.

[15] The appropriate standard of review is that of correctness. As Cromwell, J.A. stated in giving the Court's judgment in *Public Service Commission (N.S.) v. Nova Scotia Government and General Employees Union* (2004), 223 N.S.R. (2d) 57 at p. 63:

> In *Social Services Administration Board (Parry Sound District) v. Ontario Public Service Employees Union, Local 324 et al.,* [2003] 2 S.C.R. 157; 308 N.R. 271; 177 O.A.C. 235, the Court observed that there are instances in which the reasonableness of a tribunal's decision is dependent upon it having correctly answered a question of law which may be outside its area of expertise and which the Legislature did not intend to leave to the tribunal. Such questions must be answered correctly in the sense that the court is entitled to substitute its own answers for those of the tribunal without deference: at para. 21.

[16] The question of whether an arbitrator has authority pursuant to the *Trade Union Act* to determine if a transfer of the whole or part of a business has taken place is a question outside the arbitrator's area of expertise which the Legislation did not intend to leave to the arbitrator.

[17] In a case such as the present, where two different bodies corporate are involved, the only way the new company, Talbot's Drywall and Interiors Limited, incorporated March 29, 2005, could be bound by the collective agreement to which the old company, Twin City Drywall and Interiors Limited, incorporated November 16, 1987, was bound is if the business or the operations or part thereof of the old company was sold, leased or transferred to Talbot's Drywall and Interiors Limited. The arbitrator's reasoning was directed toward the issue as to whether a transfer of the business or the operations had taken place.

[18] The determination of the question of the transfer of the business or its operation and successor rights is vested in the Labour Relations Board (Nova Scotia) by virtue of s. 31 of the *Trade Union Act*, and with regard to the construction industry, the Construction Industry Panel by virtue of s. 94 of the *Act.* It is clear from the *Trade Union Act* the Legislature intended and gave the Construction Industry Panel authority to determine the issue of successor rights and whether a transfer of business has taken place. A labour arbitrator appointed pursuant to s. 107 of the *Act* does not have authority to find there had been a transfer of business from Twin City Drywall and Interiors Limited, (the old company), to Talbot's Drywall and Interiors Limited. That is a decision for the Construction Industry Panel.

[19] The arbitrator was not correct in finding he had authority to determine if a sale, lease or transfer of the business or its operations or any part thereof, or any

part of either of them, had occurred; therefore, I grant the application and set aside the arbitrator's decision dated August 17, 2007.

[20] In accordance with the parties agreement, no costs will be awarded to either party.

Coughlan, J.