IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Public Service) v. Nova Scotia Government and General Employees Union,, 2003 NSSC 34*

Date: 20030218
Docket: S.H. 184187
Registry: Halifax

Between:

The Nova Scotia Public Service Commission, representing Her Majesty the Queen in the Right of the Province,

Appellant

and

Nova Scotia Government and General Employees Union and S. Bruce Outhouse, Q.C.

Respondent

Judge:	The Honourable Associate Chief Justice Michael MacDonald in Chambers
Heard:	January 8, 2003 in Halifax, Nova Scotia *(Written Decision: February 18, 2003)*
Counsel:	Ms. Dale A. Darling, *Department of Justice (NS) for the Crown* Mr. Gordon N. Forsyth, *Pink Breen Larkin for the Union*

By the Court:

[1] This Application for *Certiorari* raises two related questions: Does an arbitrator have an implied jurisdiction to award interest when retroactively setting wage increases for newly classified employees? If so, does it matter that the employer is the Crown, attempting to invoke immunity from such an award.

BACKGROUND

[2] Certain Nova Scotia Government employees classified as "Buyers" felt that, over the years, their responsibilities had changed to the point where they deserved a pay raise. Failing to negotiate the same, they grieved under the terms of the existing *Collective Agreement*. In August of 1999, this grievance went to adjudication before Arbitrator Bruce Outhouse, Q.C.

[3] Mr. Outhouse's first task was to determine whether the classifications were substantially altered so as to trigger a corresponding pay increase. In July of 2001, Arbitrator Outhouse found that they had. While reserving the jurisdiction to set the rates, if necessary, he directed the parties to first attempt a negotiated settlement. *Article 40.01* of the *Collective Agreement* provides for this process:

> (b) If the parties are unable to agree on the rate of pay for the new or substantially new altered classification, the Union may refer the matter to a Single Adjudicator, established in accordance with Section 35 of the *Civil Service Collective Bargaining Act* who shall determine the rate of pay.
>
> (c) The new rate of pay shall be effective on the date agreed to by the parties or the date set by the arbitrator but, in any event, not earlier than the date of implementation of the classification.

[4] A negotiated settlement could not be reached so in February of 2002 Arbitrator Outhouse set the rates. In his award, he also included an award of interest. He stated at page 10 of his supplemental decision:

> In the present case, the incumbents in the Buyer 3 and Buyer 4 classifications have been paid below the rate they should have been earning since April 18, 1999. The Employer has had the benefit of the savings and the employees have suffered a corresponding detriment by not having the use of monies to which they were entitled. Accordingly, I find that interest ought to be paid on the

> retroactive compensation and fix the rate at 5% per annum, not compounded.

[5] The Crown has asked me to review only that part of his award dealing with the interest entitlement. It maintains that Arbitrator Outhouse had no jurisdiction to make such an award. The Respondent Union maintains that this jurisdiction is implied within his mandate as a "final and binding" arbitrator of this dispute.

[6] The key issue therefore involves the learned Arbitrator's alleged jurisdiction to make such an award in the absence of an expressed authorization to do so. If he was without jurisdiction, this aspect of his award is certainly reviewable and ought to be overturned. If he had this jurisdiction, there is nothing unreasonable about exercising it in the manner he did. Thus the narrow questions are: (a) did Arbitrator Outhouse have an implied jurisdiction to award interest and (b) does it matter that his Order is against the Crown?

[7] I will now address each issue in order:

Implied Jurisdiction

[8] I begin with the premise that there is nothing in the governing *Civil Service Collective Bargaining Act*, R.S.N.S. 1989, c. 71 ("the *Act)* or the *Collective Agreement* expressly authorizing Arbitrator Outhouse to award interest on the retroactive salary adjustment. The Crown in fact asserts that his mandate was to simply set the rate and the corresponding effective dates. He was not asked and therefore would have no authority to do any more than this. On the other hand the Union maintains that silence in both the *Act* and *Collective Agreement* does not necessarily signal a lack of jurisdiction. The right to set interest they argue is an implied part of the arbitrator's overall mandate to resolve this dispute. In the instant case, Arbitrator Outhouse felt his jurisdiction derived from his mandate to make "the aggrieved party whole". At page 10 of his supplemental decision he explained:

> Over the course of the past 20 years or so, arbitrators have increasingly recognized that awarding interest is not a form of penalty but, rather, is simply a matter of making *the aggrieved party whole*. Thus, for example, where wages which should have been paid to an employee are withheld for some reason, then the employee ought to be compensated for having been deprived of the use of the monies so withheld. Such compensation takes the form of interest which is simply a measure of the time-value of money. [Emphasis added]

[9] The Crown suggests that the cases referred to by Arbitrator Outhouse come primarily from Ontario and British Columbia where arbitrators enjoy broad mandates based on the relevant statutes and corresponding collective agreements; all designed to make an "aggrieved party whole". Furthermore this line of cases has been questioned even in Ontario. I refer to *Keeprite Inc. and Keeprite Workers' Independent Union* (1982), 8 L.A.C. (3d) 35, where at page 8 the Ontario Labour Relations Board noted:

> The review of the existing jurisprudence indicates that there are only two cases which support the proposition put forward by the union. The basis upon which the cases arrive at their conclusions ignores the appropriate legal principles of damages law and this board declines to follow these cases. It is concluded that there is no inherent jurisdiction in a board of arbitration to award interest as damages. The application of the principles of contract law in the assessment of damages do not permit it without the intervention of statute. The request in this case involves both pre-judgment interest and post-judgment interest. In order to give the Ontario courts jurisdiction to give specific amendments to the *Judicature Act* were undertaken in 1977. There is a similar need to intervene by statute on behalf of boards of arbitration in order that they may have a similar jurisdiction to that currently provided to the courts of Ontario. Until such intervention occurs, boards of arbitration are without the substantive or remedial jurisdiction to award interest unless it has been conferred by the private agreement of the parties.

[10] At the same time, as the Union properly points out, there are real risks in taking too conservative an approach when it comes to considering an arbitrator's jurisdiction to resolve disputes. These risks go to the very purpose of the labor arbitration process. Regardless of the province, labor arbitrators in this country play a crucial role in promoting labor peace and avoiding work stoppages during the term of a collective agreement. To be effective in this important task, they must have the ability to order final and binding relief. To achieve this important goal, when faced with silence, jurisdiction may have to be inferred. In other words, an arbitrator's authority should be liberally construed. See *Heustis v. New Brunswick Electric Power Commission*, [1979] 2 S.C.R. 768.

[11] This approach was also convincingly explained by Ontario Labour Relations Board in *Re Beckett Elevator Co. Ltd. and International Union of Elevator Constructors, Local 50* (1983), 11 L.A.C. (3d) 289 (Ont. Labour Relations Bd.) where at page 296 they wrote:

> Since the seminal decision of Professor Bora Laskin (as he then was) in *Re Oil, Chemical & Atomic Workers and Polymer Corp. Ltd.* (1959), 10 L.A.C. 51, 59

> C.L.L.C. para 18,159, it has been clear that an arbitrators' [sic] remedial authority can arise either expressly or *by implication* from the terms of a collective agreement. In Professor Laskin's view (which was ultimately confirmed in the Supreme Court of Canada [33 D.L.R. (2d) 124, 12 L.A.C. 204*n*, [1962] S.C.R. 338 *sub nom. Imbleau et al. v. Laskin et al*., 62 C.L.L.C. para. 15, 406]), the power to direct financial compensation arose from the contractual (and statutory) requirement to render a final and binding determination, even though the collective agreement contained no express power to award damages; moreover, in reaching this conclusion, he referred to the special role which arbitration must play in a collective bargaining process mandated by statute.

[12] Having considered the respective submissions in this matter, I find the approach taken in *Beckett* to be preferred. In other words I find that it was within Arbitrator Outhouse's implied jurisdiction to award interest for that portion of the adjusted salary that is to be paid retroactively. It is part of his overall jurisdiction to direct a final and binding resolution to this grievance. Specifically, I apply the Board's logic in *Beckett* where beginning at page 305 they viewed the problem in simple terms:

> *Westcoast Transmission* affirmed (as a number of labour arbitrators have recognized) that an interest component is an important aspect of the measure of damages when an aggrieved party is able to establish that a sum of money should have been paid some months or years before. The interest component is not a penalty. It is part of the compensation for the loss incurred, and that there is a cost or loss arising when money is not paid on time is obvious to anyone who has worried about the size of his accounts receivable. Thus, the issue before us really boils down to this: should the aggrieved employees in this case be compensated for the tangible and readily foreseeable losses which they have suffered as a result of the respondent's breach of the collective agreement? In our view, the answer is yes. We see no reason why this board should apply a standard in which an aggrieved party (be it the employer, the trade union, or an individual) should receive less than full compensation for a breach of the collective agreement. If there is to be such limitation upon the arbitrator's (or the board's) remedial authority, it must be found in the express language of the parties' agreement. Here there is none, and that being so, we are of the view that the power to make a final and binding determination includes the power to make an interest component part of the compensation award.

[13] I find that arbitrators like Mr. Outhouse have the implied jurisdiction to award interest on that portion of salary adjustments that are to be paid retroactively.

Crown Immunity

[14] The Crown has quite properly reminded the Court that any award against it must be justified either by statute or waiver through contract. See *D.J. Lowe v. Foundation Maritime and Defence Construction (1951) Ltd.* (1982), 54 N.S.R. (2d) 135.

[15] For its part, the Union submits that any immunity the Crown would otherwise have is vitiated by statute and the *Collective Agreement.* Section 14 of the *Act* provides:

> s. 14 A collective agreement entered into by the employer and the Union is, subject to and for the purposes of the *Act*, binding upon
>
> (a) the Union and every employee represented by the Union on whose behalf the agreement has been entered into, and
>
> (b) the employer.

[16] As noted above Clause 40.01 of the *Collective Agreement* forms the basis of Arbitrator Outhouse's mandate. It is from this mandate that I have inferred his jurisdiction to award interest. Thus I find that the Crown, as a signatory to this *Agreement* has contracted out of any immunity flowing from its enforcement. Thus for the purposes of my decision, it makes no difference that the employer is the Crown.

[17] In fact, other arbitrators in this Province have recognized a jurisdiction to award interest against the Crown. I refer to *Re: Nova Scotia (Minister of Education and Culture) and N.S.T.U.*, 2000 C.L.A.S.J. LEXIS 8668 where at paragraph 56 Arbitrator Innis Christie noted:

> In past cases, some of which were cited to me here, as arbitrator under other collective agreements, I have awarded interest. In my opinion, my authority to award interest is part of my implied remedial authority. It flows from the legislation under which I have been agreed upon as surely as does my authority to award damages. I agree with Arbitrator Swan in *Canada Post and CUPW (Tang)* (1999), 79 L.A.C. (4th) 489, where he says at pp. 446, after considering the awards of the issue of whether simple or compound interest should be awarded:
>
> > Each of them recognizes that the purpose of awarding interest is compensatory and punitive, and that while various presumptions about how interest is to be calculated, and various mechanistic principles to simplify that calculation, may appropriately be considered, ultimately the purpose is to attempt to achieve a degree of fairness between the parties...

[18] In fact in this *NSTU* decision, the Crown appeared to acknowledge the arbitrator's discretion to award interest. At paragraph 50, Arbitrator Christie noted:

> Counsel for the Union agreed with counsel for the Minister that the awarding of interest by arbitrators is discretionary under collective agreements which do not explicitly address the point.

[19] Finally, I acknowledge that in an earlier arbitration involving these parties, Arbitrator Outhouse found he had no jurisdiction to award interest against the Crown. See *Nova Scotia Government Employees Union and Civil Service Commission* (David Cook) March 3, 1987. That being said, it must be remembered that arbitrators are not bound by their earlier rulings. See *Nova Scotia Government Employees Union (NSGEU) v. Nova Scotia Civil Service Commission,* [1992] N.S.J. No. 303 (N.S.C.A.).

[20] The Application is dismissed.

[21] In light of my conclusions, it is not necessary for me to deal with the Union's preliminary objection to having this matter proceed by way of *certiorari* (as opposed to under the *Arbitration Act,* R.S.N.S. 1989, c.19).

[22] Assuming the parties can agree on costs (which should normally follow the event), I direct Mr. Forsyth to prepare the Order. It can be presented to the Court after Ms. Darling has consented as to form. Should the parties be unable to agree on costs, I invite written submissions by Mr. Forsyth on or before February 28th, 2003 and in reply by Ms. Darling on or before March 14th , 2003.

Michael MacDonald
Associate Chief Justice