Cite as: Bakery, Confectionary and Tobacco Workers' International Union, Local 446 v. Ben's Ltd., 1988 NSSC 20

1988 S.H. No. 65316

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

IN THE MATTER OF: the Arbitration Act, R.S.N.S., 1967, Chapter 12

- and -

IN THE MATTER OF: an arbitration between Ben's Limited and Bakery, Confectionery and Tobacco Workers' International Union, Local 446

- and -

IN THE MATTER OF: an Application by the Bakery, Confectionery and Tobacco Workers' International Union, Local 446 to set aside the Arbitration Award of Judge J.A. MacLellan, Eric Durnford Q.C. and Rick Clarke.

BETWEEN:

BAKERY, CONFECTIONERY AND TOBACCO WORKERS' INTERNATIONAL UNION, LOCAL 446

Applicant,

- and -

BEN'S LIMITED

Respondent

HEARD at Halifax, Nova Scotia, before the Honourable Mr. Justice John Davison, Trial Division on October 25, 1988. (In Chambers)

DECISION October 25, 1988 (Orally at conclusion of hearing).

COUNSEL Gordon N. Forsyth, Esq., for the applicant
Ms. Karin McCaskill, for the respondent

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Applicant,

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Respondent.

DAVISON J.: (Orally at conclusion of hearing)

This is an application for an order in the nature of certiorari to set aside the arbitration award rendered by a board on June 6, 1988, which dismissed the grievance of one Blair Higgins, the grievor.

Ben's Limited, the employer operates a four year apprentice program leading to the employee's journeyman's papers. In 1984 the employer employed three journeymen, two apprentices, (including the grievor) and one bodyman. Under the program an employee would not be classified as a journeyman unless there was a vacancy in the journeyman ranks. If no such vacancy existed when the apprentice reached the stage in the program when he otherwise would become a journeyman, he continued to be an apprentice at the rate of pay of a third year apprentice until he has moved up to the position of journeyman.

In 1984 the grievor received his journeyman papers, but continued to be paid as a third year apprentice until 1985, when the employer eliminated the position of bodyman and made the grievor and one other, apprentice journeymen. It was understood that the journeymen would assume the responsibilities of the bodyman.

This change in personnel classification did not work out, and the employer returned to the previous system and hired a bodyman. As a result, the grievor and the other apprentice were reclassified as apprentices. The other apprentice was laid off and the grievor, who was senior to that other apprentice, was reclassified as a third year apprentice at reduced pay.

The grievor filed a grievance requesting he be returned to the same level of pay as a journeyman. He performed substantially the same type of work as an apprentice as when he was a journeyman. The grievance was not resolved during the grievance process and the matter proceeded to arbitration before a Board, which by a majority decision, concluded:

> " The Employer acted within the terms of the Collective Agreement and was within its right to reclassify the Grievor, because of a lack of work in the journeyman classification. In reclassifying the Grievor the Employer did not violate any terms of the Collective Agreement."

In reaching its conclusion, the Board apparently referred to the

evidence before it and, in particular noted, that the apprentices regularly did the work of journeymen mechanics from time to time and that the grievor had testified he did approximately the same type of work before he was classified as a journeyman mechanic as he did when he was reclassified as an apprentice.

In a pre-trial conference, counsel agreed that before the grievor was classified as a journeyman, he was a third year apprentice, but doing the work of a journeyman and being paid as a third year apprentice and that when reclassified as a third year apprentice, he continued to do the work of a journeyman and was paid that of a third year apprentice.

The following portions of the agreement are relevant:

> "2.01 The Union acknowledges that it is the exclusive function of the Employer to:
>
> (b) Hire, discharge, transfer, promote, classify, demote, discipline and assign work to employees, provided that a claim of discriminatory promotion, demotion or transfer or a claim that an employee has been discharged or disciplined without reasonable cause may be the subject to a grievance and dealt with as hereinafter provided;"

Article 18.01 reads as follows:

> "18.01 Attached hereto and constituting part of this agreement are the following schedules:
>
> Schedule "D" - Job Classifications and Hourly Rates"

Schedule "D" sets out wage rates for licensed journeyman mechanics and the various levels of apprenticeship. S.4 of Schedule "D" reads as follows:

> " Third year apprentices who wish to advance to the fourth year level of apprenticeship shall be subject in such advance to the existence of a vacancy for a fourth year apprentice and/or licensed mechanic in the Fleet Maintenance

> Department of the Employer. Should a vacancy not exist the third year apprentice Fleet Maintenance employee may continue with the apprentice program to qualify for a vacancy when one occurs."

The Arbitration Board was a consensual arbitrator. The authorities are clear that the court should not interfere with an award by a consensual arbitrator, except in the most extraordinary situations. Legislators intend arbitrators to be the final decision makers and only when they abuse the powers given to them, should a court interfere.

The scope of review was thoroughly canvassed in International Union, United Automobile Aerospace and Agricultural Implement Workers of America (U.A.W.), Local 720 v. Volvo Canada Ltd. (1979) 99 D.L.R. (3d) 193. In that decision, Chief Justice Laskin stated at 210:

> "Certainly, in the field of labour-management arbitration, which is an ongoing process and not the episodic process under which the common law rules of review have developed, there is a good case for affirming a hands-off policy by the Courts on awards of consensual arbitrators, subject to bias or fraud or want of natural justice and, of course, to jurisdiction in the strict sense and not to the enlarged sense which makes it indistinguishable from questions of law. At least this should be so where specific questions of law are referred. In other cases of a reference to consensual arbitration, the approach to review ought also to be marked by caution in the light of the fact that the parties to a collective agreement have thereby established their own legislative framework for the regulation of the work force engaged in the enterprise, have designated their own executive and administrative officers to apply the agreement on an ongoing basis and have provided for their own enforcement machinery to resolve and, if need be, to effect a final and binding settlement of all differences arising under the terms

of the agreement."

During the course of his argument, solicitor for the Union, made reference to a number of authorities including Blanchard v. Control Data Canada Ltd. et al (1985) 14 D.L.R. (4th) 289 and Canadian Broadcasting Corporation v. National Association of Broadcast Employees and Technicians (1986) 70 N.S.R. (2d) 184. In my opinion the test used in the Control Data case dealt with the test normally applied when reviewing the decisions of administrative tribunals, and did not deal with the scope of review for the decisions of consensual arbitrators. In this respect I refer to the words of Laskin C.J.C. in the Volvo case at 204:

> " In my opinion, equally untenable is the suggestion of Chief Justice MacKeigan that the award of a consensual arbitrator under a collective agreement, to whom a specific question of law has been referred, may be impeached if he has given clauses of the collective agreement an interpretation which their language will not reasonably bear. This has been a ground of review, open but cautiously approached, where statutory arbitration is ccncerned: see Re. Canadian Westinghouse Co. Ltd. - and - Local 164, Draftsmen's Ass'n of Ontario (1961), 30 D.L.R. (2d) 673, [1962] O.R. 17. To introduce it into consensual arbitration is to strike at the very foundation of such arbitration when it is concerned with a specific question of law, that is of construction of the collective agreement."

The Chief Justice goes on to say:

> "This Court has said quite plainly, and has followed English cases to the same effect, that even if the construction put upon the collective agreement be, in the view of a Court, a wrong one, the award

must stand ..."

It seems clear to me that from these authorities and others to which I'll refer, that the role of the Court in dealing with the Board of an Arbitrator should interfere in the administrative process as little as possible.

The Supreme Court has equated the terms 'patently unreasonable' with 'outrageous' or 'patently unjustifiable'. Again I refer to the words of Laskin C.J.C. in Shalansky et al v. Board of Governors of Regina Pasqua Hospital, 145 D.L.R. (3d) 413, at 414, where he says:

> "There being a consensual arbitration, we are not trammelled by any **certiorari** question nor by any other statutory considerations. What is before us are certain terms of a voluntary collective agreement which gave rise to a dispute which the parties submitted to arbitration. Since the parties addressed the central issues before this court as turning essentially on whether a specific question of law was involved or a general question in the course of which questions of law could rise, I do not find this a proper occasion upon which to consider whether the **Absalom** rule F.R. Absalom Ltd. v. Great Western (London) Garden Village Society Ltd., [1933] A.C. 592, should no longer be held to apply to consensual labour arbitration."

Again at 415, referring to a decision of Chief Justice Bayda in Bell Canada v. Office and Professional Employees' Int'l Union, Local 131 (1973), 37 D.L.R. (3d) 561, Chief Justice Laskin said:

> "I agree with Chief Justice Bayda that there is no significant difference in the meaning of the aforementioned three terms. Indeed, it would be my view that, apart from a question of emphasis, the test of unreasonableness or test of clearly wrong is also not different. Bayda C.J.S. himself concluded that the board was presented with two reasonable constructions and hence was entitled to choose the one it did rather than the one

preferred by the Chief Justice."

It should be noted that the three terms which Chief Justice Laskin said have the same meaning are 'patently unreasonable', 'outrageous' and 'patently unjustifiable'.

The Appeal Division of our court commented on the decisions in Shalansky and Volvo in Acadia University v. I.U.O.E. Local 968B (1985) 66 N.S.R. (2d) 296 and Canadian Broadcasting Corporation v. National Association of Broadcast Employees and Technicians (supra).

The applicant's solicitor indicated there was no dispute that the Board could re-classify but the question was whether it re-classified properly. He set forth a very persuasive and carefully analyzed argument. Nevertheless, the issue before the Board was one of fact. The management rights clause sets out the basic rights. The effect of the Board's decision is that Schedule "D" does not prevent re-classification "downward". When I consider the agreement and the evidence, I cannot conclude the Board's decision was patently unreasonable.

The application to quash is refused, with costs to the respondent.

J.

Halifax, Nova Scotia
October 25, 1988