PORT ARTHUR SHIPBUILDING COMPANY ..... APPELLANT;

1968
*Feb. 1, 2;
Oct. 1

AND

HARRY W. ARTHURS, DWIGHT STOREY, A. W. MALONEY, UNITED STEELWORKERS OF AMERICA LOCAL 5055, JOHN W. BEAUCAGE, JACK GERAVELIS AND PATRICK MANDUCA ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour relations—Arbitration—Collective agreement—Right to discharge for proper cause—Employees dismissed for absenting themselves to work for another employer—Whether board of arbitration exceeded jurisdiction in substituting suspension in place of dismissal.

Certiorari—Legislation compelling recourse to arbitration board—Board a statutory creation and therefore subject to review in Courts by certiorari—The Labour Relations Act, R.S.O. 1960, c. 202, s. 34.

Three employees of the appellant company stayed away from their employment for the purpose of taking temporary employment with another employer and in absenting themselves gave false reasons for so doing. When the company discovered these breaches of duty, it discharged the three employees. The employees then filed grievances that they had been unjustifiably discharged. A board of arbitration, by a majority, held that the employees' conduct did not constitute proper cause for dismissal. The board substituted periods of suspension in the place of dismissal.

The award was quashed on *certiorari*. On appeal the Court of Appeal, by a majority, restored the award of the board of arbitration. The company then appealed to this Court, asking for the restoration of the order made at trial quashing the award.

Held: The appeal should be allowed.

Under the terms of the collective agreement, the company had the right to discharge for proper cause. The task of the board of arbitration was to determine whether there was proper cause. On the facts there was only one proper legal conclusion, namely, that the employees had given the management proper cause for dismissal. The board, however, did not limit its task in this way. It assumed the function of management. It determined, not whether there had been proper cause, but whether the company, having proper cause, should have exercised the power of dismissal. The board substituted its judgment for the judgment of management and found in favour of suspension.

*PRESENT: Cartwright C.J., Abbott, Martland, Judson and Hall JJ.

1968

PORT ARTHUR SHIPBUILDING CO. v. ARTHURS et al.

The sole issue in the case was whether the three employees left their jobs for someone else and whether this fact was a proper cause for discipline. Once the board had found that there were facts justifying discipline, the particular form chosen was not subject to review on arbitration.

As to the question whether this Court had by *certiorari* a power of review over the award made by this board of arbitration, the wording of the provisions of s. 34 of *The Labour Relations Act*, R.S.O. 1960, c. 202, was clear and unambiguous. The parties to a collective agreement were required to arbitrate their dispute. There was no alternative course of action open to them. The legislation compelled recourse to an arbitration board and that board was therefore a statutory creation and hence subject to review in the Courts by *certiorari*.

Quite apart from this, the board's award was subject to review in this Court. Under the common law an ordinary motion could be made to the Court to set aside an award on the ground that there was error of law on the face of it.

[*Re International Nickel Co. of Canada Ltd. and Rivando*, [1956] O.R. 379, approved and applied; *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw*, [1952] 1 K.B. 338; *R. v. National Joint Council for the Craft of Dental Technicians (Disputes Committee) et al., Ex p. Neale*, [1953] 1 Q.B. 704; *Howe Sound Co. v. International Union of Mine, Mill and Smelter Workers (Canada), Local 663*, [1962] S.C.R. 318; *Re Ewaschuk, Western Plywood (Alberta) Ltd. v. International Woodworkers of America, Local 1-207* (1964), 44 D.L.R. (2d) 700; *R. v. Board of Arbitration, Ex p. Cumberland Railway Co.* (1968), 67 D.L.R. (2d) 135, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Brooke J. Appeal allowed.

John J. Robinette, Q.C., for the appellant.

John H. Osler, Q.C., for the respondents.

The judgment of the Court was delivered by

JUDSON J.:—Three employees of the appellant, Port Arthur Shipbuilding Company, stayed away from their employment for the purpose of taking temporary employment with another employer. Two of them, Jack Geravelis and Patrick Manduca, left work before the end of their shifts on Monday, April 11, 1966. They gave sickness as their reason for so doing. This was an untrue statement. They both then drove to Terrace Bay where, according to arrangements that they had already made, they worked for

[1] [1967] 2 O.R. 49, 62 D.L.R. (2d) 342, *sub nom. R. v. Arthurs, Ex p. Port Arthur Shipbuilding Co.*

F. W. Brunwin Welding Limited on April 11, 12 and 13, 1966. John W. Beaucage was absent from work from April 11 to April 15, 1966, both days inclusive. During that time he was working for Barnett-McQueen Company Limited at Marathon, Ontario. He told the company that he intended to take a week off without pay.

When the company discovered these breaches of duty, it discharged the three employees. The employees then filed grievances that they had been unjustifiably discharged. A board of arbitration made the findings of fact which I have just summarized but held by a majority that they did not constitute proper cause for dismissal. The board substituted periods of suspension in the place of dismissal.

The company then applied before a judge of the Supreme Court of Ontario to quash the award. This was done by the judgment of Mr. Justice Brooke. On appeal by the union on behalf of the men, the Court of Appeal[1], by a majority, restored the award of the board of arbitration. The company in this appeal asks for the restoration of the order made by Mr. Justice Brooke quashing the award.

The collective agreement in force at the time of dismissal provides in art. III for Management Rights:

> 3.01 The Union recognizes the Management's authority to manage the affairs of the Company, to direct its working forces, including the right to hire, transfer, promote, demote, suspend and discharge for proper cause any Employee and to increase, or decrease the working force of the Company, provided that the Company shall not exercise these rights in a manner inconsistent with the terms of this Agreement.
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> 3.02 An employee affected by the exercising of this authority who feels that he has cause for dissatisfaction may have the complaint dealt with in accordance with the "Grievance Procedure".

Article VIII deals with Grievance Procedure and Arbitration. Section 8.17 provides:

> 8.17 The Board of Arbitration shall not alter, modify, amend or make any decision inconsistent with the terms of this Agreement.

The proceedings in this case relating to a discharge were begun under s. 8.20:

> 8.20 In all cases of grievance over layoff or discharge, a written grievance naming the individual grievor must be submitted by the Grievance Committee to Management within two (2) working days after the termination of employment and the settlement procedure is to continue as specified above starting at Sub-Section 8.08.

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[1] [1967] 2 O.R. 49, 62 D.L.R. (2d) 342.

1968

PORT ARTHUR SHIP-BUILDING CO. v. ARTHURS et al.

Judson J.

The sections beginning with s. 8.08 and continuing to s. 8.14 deal with the institution and conduct of proceedings on arbitration.

The reason why I have set out or summarized these sections is that the arbitration was concerned only with a grievance over discharge, as mentioned in s. 8.20. It was not an arbitration at large contemplated by s. 8.03, which reads:

> 8.03 Any difference arising between the Union and the Company relating to the interpretation, application or administration of this Agreement, or where an allegation is made that the Agreement has been violated, shall be resolved in accordance with the provisions of Article VIII, commencing at Sub-section 8.08.

The provisions relating to seniority, absence and leave of absence are next set out. Section 9.03(b) reads:

> 9.03 (*b*) Seniority Holders will be recalled, in the reverse order of lay-off, as required by the work at hand. Such recall shall be through the Personnel Office and shall be recorded.

Section 9.04 provides for cancellation of seniority rights and one of the grounds is:

> 9.04 (*d*) If an Employee is absent for five (5) consecutive working days without establishing a satisfactory reason with the Personnel Office.

Section 11.03, dealing with leave of absence, reads:

> 11.03 Leave of absence shall not be granted to any employee for the purpose of engaging in employment elsewhere or to engage in his own business.

It is apparent that in the case of Beaucage, he lost his seniority under s. 9.04 (*d*) and that all three employees were in breach of s. 11.03, which prohibited the granting of leave of absence to any employee for the purpose of engaging in any employment elsewhere.

The proposition of the appellant company is that the board had no power to substitute suspension for dismissal. I deliberately avoid the term "jurisdiction". The company, under art. III dealing with management rights, has the right to discharge for proper cause. I draw no distinction between "proper" cause and "just" cause. This is subject only to s. 3.03, which gives the employee a right to have his case dealt with according to grievance procedure. The only limitation on the power of management is that it

shall not be exercised "in a manner inconsistent with the terms of this agreement". In this case there cannot be any suggestion that there was anything in the agreement that the company breached.

The task of the board of arbitration in this case was to determine whether there was proper cause. The findings of fact actually made and the only findings of fact that the board could possibly make establish that there was proper cause. Then there was only one proper legal conclusion, namely, that the employees had given the management proper cause for dismissal. The board, however, did not limit its task in this way. It assumed the function of management. In this case it determined, not whether there had been proper cause, but whether the company, having proper cause, should have exercised the power of dismissal. The board substituted its judgment for the judgment of management and found in favour of suspension.

The sole issue in this case was whether the three employees left their jobs to work for someone else and whether this fact was a proper cause for discipline. Once the board had found that there were facts justifying discipline, the particular form chosen was not subject to review on arbitration. This was the opinion of Mr. Justice Brooke and Mr. Justice Schroeder, dissenting on appeal, and with this opinion I agree.

Notwithstanding obvious and serious breaches of the collective agreement by these three individuals, the board has, in effect, said "We will hold that these breaches are not a proper cause for dismissal but call for suspension".

A collective agreement is binding on employer and employees. These were not trivial breaches and the board had no power to substitute its own judgment for that of management in the circumstances of this case. If this kind of review is to be given to a board under s. 3.03, it should be given in express terms, namely, that the management's authority to demote, suspend or discharge will be subject to full review by the board of arbitration. Management would then understand what its position would be. But as the agreement is presently drawn, the board's power is limited to a determination whether management went beyond its authority in this case. The question before them

1968

PORT ARTHUR SHIP-BUILDING CO. *v.* ARTHURS *et al.*

Judson J.

was, could an honest management, looking at the group of employees as a whole and at the interests of the company, have reached the conclusion that they did? In other words, did management go beyond its rights? There is only one answer to this question and the answer is "No". It was the board that exceeded its authority in reviewing the decision of management by purporting to exercise a full appellate function.

After the conclusion of argument the question was raised whether this Court had by *certiorari* a power of review over the award made by this board of arbitration. Counsel were invited to submit written argument on this point.

It is clear that the prerogative writs of prohibition and *certiorari* will not lie against a non-statutory tribunal. The reasons for this are mainly historical and are explained by Lord Denning in *R. v. Northumberland Compensation Appeal Tribunal, Ex. p. Shaw*[2]. At one point in his judgment the learned judge referred specifically to awards of arbitrators and pointed out that, (p. 351),

> The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs.

Similarly in *R. v. National Joint Council for the Craft of Dental Technicians (Disputes Committee) et al, Ex p. Neale*[3], where the question was whether the Council was a private arbitration body constituted by agreement or a statutory entity, Lord Goddard C.J, after some general remarks on the scope of the prerogative writs, said, at p. 708:

> There is no instance of which I know in the books where certiorari or prohibition has gone to any arbitrator except a statutory arbitrator, and a statutory arbitrator is one to whom by statute the parties must resort.

Thus, the question is whether the board of arbitration whose award is the subject of this litigation is a statutory body to which the parties to a collective agreement must resort. This depends upon what interpretation is to be given to certain provisions of the Ontario *Labour Relations Act*, R.S.O. 1960, c. 202.

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[2] [1952] 1 K.B. 338.

[3] [1953] 1 Q.B. 704.

Section 34(1) of that Act provides:

> Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

This provision is supported by nine other subsections all of which (with the exception possibly of the tenth subsection) are directed towards ensuring that the arbitration process is carried through to its conclusion. And although somewhat general in nature, they do provide a clear and defined framework within which the parties must conduct the process of arbitration.

In *Re International Nickel Co. of Canada Ltd. and Rivando*[4], the Court of Appeal for Ontario considered these provisions and came to the conclusion that the parties to a collective agreement were compelled to arbitrate their differences. Aylesworth J.A., who delivered the judgment of the Court, said at pp. 386-387:

> Consideration of these statutory provisions makes it abundantly clear that the parties are under compulsion to arbitrate their differences. The parties are directed by statute as to the matters which must be governed by arbitration; they are told that they must abide by the award and they are also told, (a) that if they fail to include in their collective agreement an arbitration provision, then the statutory provision in subs. (2) will form part of their agreement, subject in proper cases to modification of the provision by the Labour Relations Board, and (b) that if they fail to appoint an arbitrator or to constitute a Board of Arbitration, the necessary appointments will be made by the Minister of Labour.
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> With respect, it seems to me that the element and degree of compulsion inherent in the *Labour Relations Act* regarding arbitration of industrial disputes establishes the instant Board of Arbitration as a statutory Board. If this be so, then admittedly *certiorari* may issue to it from this Court.

This decision was referred to in this Court in *Howe Sound Co. v. International Union of Mine, Mill and Smelter Workers (Canada), Local 663*[5]. In that case this Court considered the same question as confronted the Court of Appeal of Ontario, but under the relevant provisions of the British Columbia *Labour Relations Act*, 1954 (B.C.), c. 17,

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[4] [1956] O.R. 379, 2 D.L.R. (2d) 700.
[5] [1962] S.C.R. 318.

1968

PORT ARTHUR SHIP-BUILDING CO. v. ARTHURS et al.

Judson J.

and held that *certiorari* would not lie against the arbitration board as it was a private tribunal constituted by agreement between the parties. Cartwright J., who delivered the judgment of the Court, adopted and endorsed what was said by Tysoe J.A. in the Court of Appeal[6]. Tysoe J.A., in his reasons for judgment, said at pp. 78-79:

> *Certiorari* does not lie against an arbitrator or Arbitration Board unless the arbitrator or board is a statutory arbitrator or statutory board —that is a person or board to whom by statute the parties must resort. Prerogative writs of *certiorari* and prohibition do not go to ordinary private Arbitration Boards set up by agreement of parties: *R. v. Nat'l. Joint Council for the Craft of Dental Technicians,* [1953] 1 Q.B., 704. We must, therefore, decide whether this Arbitration Board is a private arbitration body set up by agreement, or a statutory board.
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> In my opinion, if the Arbitration Board qualifies as a statutory board, it does so only by reason of the provisions of s. 22 of the *Labour Relations Act.* Without them, I doubt if anyone would suggest the Board would be other than a private arbitration body. The question would, therefore, seem to be, does s. 22 have the effect of constituting the Arbitration Board to which the parties to the collective agreement have agreed to refer for the final settlement of differences, a statutory arbitral tribunal? In my opinion, the answer to this question is in the negative.
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> Section 22 does not create an arbitral tribunal or any other tribunal or body. It merely requires the parties to a collective agreement to agree between themselves on a method for finally and conclusively settling any differences without stoppage of work, and to embody their agreement in the collective agreement. If they do not do this, the Minister is to do it for them and his method becomes embodied in and forms part of the collective agreement. The method may be "by arbitration or otherwise". The parties may select and provide their own method and the only condition is that it shall achieve the desired result, namely, the final and conclusive settlement of differences without stoppage of work. The Legislature has not said the parties must resort to an Arbitration Board or to any particular person or body of persons. It has left the parties complete freedom of choice in this respect. All the Legislature has said is that there must be a method by which disputes will be finally and conclusively determined without stoppage of work. To find the method one turns to the agreement.

It is true that the British Columbia legislation is very similar to that in effect in Ontario. But there are differences, the most important of which is that the British Columbia legislation provides for the settlement of disputes under the collective agreement *by arbitration or otherwise,* whereas the Ontario legislation provides for no alternative except *arbitration.* This was recognized by Cartwright J., who expressly reserved his opinion on

[6] (1961), 29 D.L.R. (2d) 76, 36 W.W.R. 181.

whether the Court of Appeal of Ontario in *Rivando* were correct in their interpretation of the Ontario legislation. He said at p. 329:

> In support of this submission the appellant relies, amongst others, on the case of *Re International Nickel Company of Canada Limited and Rivando,* [1956] O.R. 379; 2 D.L.R. (2d) 700, a unanimous decision of the Court of Appeal for Ontario.
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> Whether this argument is entitled to prevail must depend chiefly on the wording of the statute which is said to compel the creation of the tribunal and to require the parties to resort to it, and there are differences between the Ontario legislation and that in force in British Columbia.

The *Howe Sound* decision was referred to and followed by Riley J. in the Alberta decision of *Re Ewaschuk, Western Plywood (Alberta) Ltd. v. International Woodworkers of America, Local 1-207*[7]. However, the relevant provision of the *Alberta Labour Act,* R.S.A. 1955, c. 167, is substantially the same as that of the British Columbia Act, and Riley J. noted that the Ontario legislation was different. He said at p. 702:

> Section 22(1) of the British Columbia *Labour Relations Act* and s. 73(5) [rep. & sub. 1960, c. 54, s. 21] of the *Alberta Labour Act,* R.S.A. 1955, c. 167, are substantially the same in that neither section sets up arbitration as the only means for settling disputes. Conversely, in Ontario, the *Labour Relations Act* requires that every collective agreement provide for the final settlement of grievances solely by arbitration. Consequently, Arbitration Boards in that Province have been held to be statutory boards against which *certiorari* will run: *Re International Nickel Co. and Rivando* (1956), 2 D.L.R. (2d) 700, [1956] O.R. 379.

To the same effect is the recent Nova Scotia decision of *R. v. Board of Arbitration, Ex p. Cumberland Railway Co.*[8], where the relevant provision was s. 19(1) of the *Industrial Relations and Disputes Inventigation Act,* R.S.C. 1952, c. 152, which is substantially the same as that of the British Columbia Act. McKinnon J.A., who delivered the judgment of the Court, after a consideration of the *Howe Sound* decision, said at pp. 141-142:

> An examination of the above sections will show that the wording of s. 19(1) of the *Industrial Relations and Disputes Investigation Act,* with which we are concerned herein, is, for our purposes the same as the British Columbia section which was under consideration in the *Howe Sound* case, and which the Court found did not constitute the board a statutory one.

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[7] (1964), 44 D.L.R. (2d) 700, 47 W.W.R. 426.
[8] (1968), 67 D.L.R. (2d) 135.

1968

PORT ARTHUR SHIPBUILDING CO. v. ARTHURS et al.

Judson J.

On the other hand, the Ontario Act, being the *Labour Relations Act*, R.S.O. 1960, c. 202, s. 34(1). is as follows:

> "34(1) Every collective agreement shall provide for the final and binding settlement *by arbitration*, without stoppage of work, of all differences between the parties ..."

This was the section which the Court took under consideration in the *International Nickel & Rivando* case.

Considering the above, it would seem that the Courts have distinguished private and statutory arbitration boards by the wording of the statutes which provided for the setting up of such boards, and where such statutory provision included the words "or otherwise" following the words "by arbitration", this did not create a statutory tribunal or body. "It merely requires the parties to a collective agreement to agree between themselves on a method for finally and conclusively settling any differences ...": *Howe Sound Co. v. International Union*, 29 D.L.R., (2d) at p. 79.

The Courts of Ontario have consistently followed *Rivando*. This Court reserved its opinion on the correctness of that decision in the *Howe Sound* case and made no comment upon it apart from a reference to it in *Imbleau et al. v. Laskin et al.*[9]. It is therefore open to this Court to adopt the reasoning of Aylesworth J.A. and I propose to do so. The wording is clear and unambiguous. The parties to a collective agreement must arbitrate their dispute. There is no alternative course of action open to them. The legislation compels recourse to an arbitration board and that board is therefore a statutory creation and hence subject to review in the Courts by *certiorari*.

Quite apart from this, I am of the opinion that the board's award is subject to review in this Court. In *R. v. Northumberland Compensation Appeal Tribunal, supra*, Lord Denning pointed out that under the common law an ordinary motion could be made to the Court to set aside an award on the ground that there was an error of law on the face of it. He said at p. 351:

> Leaving now the statutory tribunals, I turn to the awards of arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set aside for misconduct of the arbitrator on the ground that it was procured by corruption or

[9] [1962] S.C.R. 338.

other undue means: see 9 & 10 Will. 3, c. 15. At one time an award could not be upset on the ground of error of law by the arbitrator, because that could not be said to be misconduct or undue means; but ultimately it was held in *Kent v. Elstob* (1802) 3 East 18, that an award could be set aside for error of law on the face of it. This was regretted by Williams J. in *Hodgkinson v. Fernie* (1857), 3 C.B.N.S. 189, but is now well established. This remedy by motion to set aside is, however, confined to arbitrators.

And in the *Howe Sound* decision, Cartwright J. said:

> In my view it is open to the parties should occasion arise, to question the jurisdiction of the board or the validity of any award it makes in such manner as is permitted by the *Arbitration Act*, R.S.B.C. 1960, c. 14 or by the common law.

The main consequence of s. 34(10) of the Ontario Act which provides that the *Arbitrations Act*, R.S.O. 1960, c. 18, does not apply to arbitrations under collective agreements, is that the power of the Supreme Court of Ontario to review and quash awards of private arbitrators and boards of arbitration comes from the common law. It is an inherent power not affected nor limited in any way by the *Arbitrations Act*. This was made clear by Wright J. in his reasons for judgment in *Beach v. Hydro-Electric Power Commission of Ontario*[10], which were affirmed on appeal[11], but on other grounds. However, the Court of Appeal did not dispute his opinion on this point.

In Ontario relief by way of *certiorari* is obtained in an originating motion and no writ is issued. This is the same procedure that is used to quash an award of a private arbitrator or arbitration tribunal. The notice of motion in these proceedings makes it clear that the relief asked for is an order quashing the award. It does not seem to me to be of any consequence that the motion contains a reference to *certiorari*. The procedure is the same and in my opinion this notice of motion is sufficient to justify an order quashing the award.

Furthermore, and as I have already indicated, there is no doubt in my mind that the award should be quashed. An arbitration board of the type under consideration has no inherent powers of review similar to those of the Courts. Its only powers are those conferred upon it by the collective agreement and these are usually defined in some

[10] (1924), 56 O.L.R. 35.

[11] (1925), 57 O.L.R. 603.

1968

PORT ARTHUR SHIP-BUILDING CO. v. ARTHURS et al.

Judson J.

detail. It has no inherent powers to amend, modify or ignore the collective agreement. But this is exactly what this board did in this case and it was clearly in error in so doing, and its award should be quashed.

I would allow the appeal and restore the order of Brooke J. quashing the award, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: McCarthy and McCarthy, Toronto.

Solicitors for the respondents: Jolliffe, Lewis & Osler, Toronto.