CANADIAN CAR & FOUNDRY COMPANY LIMITED (*Defendant*) ..... APPELLANT;

1959

*Jun. 4, 5
Nov. 30

AND

W. E. DINHAM (*Plaintiff*) ..... RESPONDENT;

AND

BROTHERHOOD RAILWAY CARMEN OF AMERICA ..... MISE-EN-CAUSE.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Labour—Collective agreement—Retirement plan during life of agreement instituted unilaterally by employer—Whether violation of seniority provisions in agreement—Grievance of compulsory retired employee dismissed by Council of Arbitration—Whether entitled to action for wrongful dismissal—Jurisdiction of Council of Arbitration.

The plaintiff, who had been in the defendant's employ for several years, was retired from service under a retirement plan instituted by the defendant and requiring all employees over 65 to be retired. The plaintiff was then 72 years of age. The collective agreement in force at the time between the defendant and the mise-en-cause contained no retirement provision on account of age, but provided for a reduction of the work force according to seniority. The management had also the right to discharge for cause. The plaintiff lodged a grievance before a Council of Arbitration, but the grievance was dismissed. He then commenced this action, alleging that the arbitrator's decision was null and void and claiming damages for illegal termination of employment. The trial judge dismissed the action on the ground that there had been no violation of the conditions of the collective agreement. This judgment was reversed by the Court of Appeal.

Held: The appeal should be allowed and the action dismissed.

The plaintiff, although he had not been obliged to invoke the grievance procedure, was bound by the decision of the Council of Arbitration. The council had jurisdiction to render the decision it did, its proceedings were conducted according to law and, therefore, its decision was final and binding upon all parties concerned and was not subject to review upon the merits by the Courts.

Moreover, the collective agreement did not touch upon the question of retirement age. The determination of that question was clearly a function of management, and the exercise of this function was not a violation of the seniority provisions of the agreement.

*PRESENT: Taschereau, Fauteux, Abbott, Martland and Judson JJ.

1959

CDN. CAR & FOUNDRY CO. LTD. v. DINHAM et al.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Smith J. Appeal allowed.

J. L. O'Brien, Q.C., E. E. Saunders and P. Casgrain, for the defendant, appellant.

P. Cutler and *R. Lachapelle,* for the plaintiff, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal, by leave of the Court of Queen's Bench, from a judgment of that Court[1], rendered March 27, 1958, reversing a judgment of the Superior Court and maintaining respondent's action against appellant for damages in the amount of $800, claimed to have been caused by the wrongful dismissal of respondent from appellant's employ.

The facts can be shortly stated. On February 11, 1954, appellant entered into a collective agreement with the mise-en-cause covering wages and working conditions for certain designated employees of appellant in Montreal. This agreement, which ran for one year from October 1, 1953, was in force in June 1954 when appellant instituted a pension plan for its employees (including the employees subject to the said collective agreement) and at the same time put into force a retirement plan under which all employees over the age of 65 were compulsorily retired from the company's service. Among the employees retired were respondent and fifty-seven other employees whose wages and working conditions were also covered by the said collective agreement.

At the request of respondent and these other employees, appellant's right to retire them was submitted to a Council of Arbitration pursuant to the provisions of the *Quebec Trade Disputes Act,* R.S.Q. 1941, c. 167, as amended. The employees contended that the compulsory retirement of employees reaching the age of 65 years constituted a violation of the terms of the collective agreement and was in direct violation of s. 24 of the *Labour Relations Act,* R.S.Q. 1941, c. 162A, as amended. The majority of the Council of Arbitration held that appellant had not violated the terms of the collective agreement nor the provisions of the *Labour*

[1] [1958] Que. Q.B. 852.

Relations Act and that it had not acted in any way contrary to public order in terminating the employment of respondent and the fifty-seven other employees.

Following the decision of the Council of Arbitration, respondent (and a number of the other employees affected by the decision) instituted actions in damages for wrongful dismissal against appellant. In the present action, respondent asked that the decision of the Council of Arbitration be declared null and void and be annulled, and that appellant be condemned to pay him $800 as damages. It might be noted in passing that, in his declaration, respondent did not challenge the jurisdiction of the Council of Arbitration to hear and determine the question, but claimed, in para. 5, that its decision was null and void "in that it did alter, amend, or modify clause 17, paragraph (*e*) of the said collective contract or agreement". In its defence to respondent's action, appellant pleaded that respondent was bound by the decision of the Council of Arbitration, and also that appellant was not obliged, by the collective agreement, to keep respondent in its employ after he had reached the age of 65 years.

At the trial, the only witness called was respondent, whose testimony was limited to a statement of his age—which was then 72 years—his length of service with appellant, and the fact that his employment and that of a number of other employees had been terminated on June 30, 1954. As to other pertinent facts, both parties relied on the facts set out in the majority decision of the Council of Arbitration, which was filed as an exhibit by respondent.

This Council of Arbitration had been appointed, pursuant to the provisions of the collective agreement and of the *Quebec Trade Disputes Act,* by the Minister of Labour for the Province of Quebec, cl. 17(*e*) of the collective agreement dealing with arbitration reading as follows:

> 17. (*e*) *CONCILIATION OR ARBITRATION*: The parties to this agreement may refer any unsettled dispute to Conciliation and Arbitration in accordance with the Trades Dispute Act. Such Arbitration Board shall be composed of one (1) representative selected by the Company, one (1) representative selected by the Union of Lodges 322 and 930, and a Chairman mutually agreed upon by the representatives of both parties. Should the representatives fail to agree upon a Chairman, the Minister of Labour of the Province will be requested to name a Chairman. After such Arbitration Committee has been formed, it shall meet and hear the evidence of both sides and render a decision within seven (7) days of the completion

1959

CDN. CAR & FOUNDRY CO. LTD. v. DINHAM et al.

Abbott J.

of the taking of evidence. The majority decision of the Arbitration Board shall be final and binding on all parties. The Arbitration Board shall not alter, amend or modify any clause in this agreement.

The matter referred to the Council of Arbitration was respondent's complaint, framed in the following terms:

> Details of grievance . . . The Company violated the Seniority Clause of the Controlling Agreement in the case of Mr. W. E. Dighan (sic) Badge No. 1537, 17 years service with the Company. This man is being laid off according to a new policy established by the Company in regard to employees of 65 years of age or more.
>
> By applying this policy the Company forfeith (sic) his engagement of abiding by the rule set out in the Collective Agreement which govern both parties.
>
> Therefore it is hereby that all money lost by the above mentioned employee due to the application of this rule, be reimbursed until reinstated back at work.

Public hearings were held by the council as required by the statute, at which the respondent and the mise-en-cause were represented by counsel. In its majority report, the council set out in detail the submissions of both the mise-en-cause and of appellant, and carefully reviewed those submissions. It stated that the position taken by respondent and by the mise-en-cause was that the collective agreement precluded appellant from compulsory retiring, by reason of age, the respondent and the other employees subject to the said collective agreement while that agreement continued in force. Appellant, on the other hand, took the position that it had consistently refused to negotiate with the mise-en-cause with respect to retirement or severance plans—giving as its reason that it was impracticable to do so because of the numerous unions to which its employees belong across Canada—and that it was entirely the prerogative of the management to institute retirement plans and to establish a mandatory retirement age. Appellant also contended that its right to retire or terminate the employment of over-age employees was beyond the scope of the collective agreement.

The conclusion of the majority of the Council of arbitration was expressed by its chairman in the following terms:

> I must find that the Company has not violated any of the terms of the Collective Agreement, or any provisions of the Labour Relations Act, or that it has acted in any way contrary to public order in terminating the employment of W. E. Dinham and the 57 other employees in respect of which grievances were filed in the circumstances in which the same was done and, as a result the Company cannot be compelled to reinstate in

employment such employees or to compensate them for the periods which have elapsed since their services were so terminated.

The learned trial judge did not find it necessary to deal with the question of the binding effect of the report of the Council of arbitration. He held on the facts that respondent had failed to establish that there was anything, either in his contract of hire or in the collective agreement, which deprived appellant of its right to terminate the respondent's contract at any time, without cause, upon giving him the notice of termination prescribed by law, and he dismissed the action.

The Court of Queen's Bench[1] allowed respondent's appeal, but all three members of the Court delivered separate reasons for judgment, and all appear to have treated the action as an appeal from the majority report of the Council of Arbitration. Mr. Justice St-Jacques found that the collective agreement was a definite contract of hire for a period of one year and could only be terminated for cause. Mr. Justice Bissonnette found that appellant was bound towards respondent under a contract of hire for a fixed period, and that the termination of respondent's contract, because of age, was a violation of the seniority clause in the collective agreement. Neither of these learned judges discussed the provision in the agreement that "the majority decision of the Arbitration Board shall be final and binding on all parties". Mr. Justice Hyde found that respondent had been hired for an indefinite period and were it not for the fact of the collective agreement there would appear to be no doubt that his employment was legally terminated. He considered, however, that the individual agreement of lease and hire of services between appellant and respondent and the collective agreement must be read together and that the terms of the collective agreement precluded appellant from retiring respondent merely on grounds of age. Mr. Justice Hyde, who was the only member of the Court who touched directly on the question, found that the report was not final and binding upon the parties. He referred to it in the following terms:

> The existence of the arbitration clause in the agreement and the fact that arbitration was resorted to does not deprive appellant of his recourse to the Courts under his contract of employment with his employer. It is that contract which respondent terminated and although we are obliged

[1] [1958] Que. Q.B. 852.

1959

CDN. CAR & FOUNDRY CO. LTD. v. DINHAM et al.

Abbott J.

to consider the terms of the collective agreement as well the arbitrators had jurisdiction over that agreement only and not over appellant's individual contract with respondent.

With the utmost respect for the learned judges below, who appear to have held a contrary view, in my opinion the respondent was bound by the decision of the Council of Arbitration.

It is clear that, unless respondent had acquired some special right under the collective agreement, appellant was entitled to terminate the contract of hire of respondent's services at any time, for any reason, upon giving to him the notice of termination required under the *Civil Code*. Although he was not obliged to do so, respondent (and the other employees referred to) sought to have the legality of his compulsory retirement dealt with by arbitration under the provisions of cl. 17(*e*) of the collective agreement which I have quoted. Respondent, both before the arbitrators and in the present action, took the position that the question as to whether his compulsory retirement was a breach of his rights under the collective agreement was a dispute which the Council of Arbitration had jurisdiction to decide.

Respondent did not attempt to show that the Council of Arbitration acted in an arbitrary or capricious manner or in any other way contrary to law. His only attack upon the decision is contained in para. 5 of his declaration, which reads as follows:

> 5. A decision was rendered by the arbitration board, which is null and void, in that it did "alter, amend or modify" clause 17, paragraph *e* of the said collective contract or agreement;

No evidence whatever was adduced to establish that the Council of Arbitration in rendering its decision purported to "alter, amend or modify clause 17, paragraph (*e*)". On the contrary, the report makes it quite clear that the arbitrators proceeded to make their inquiry in strict accordance with the requirements of the clause in question and of the *Quebec Trade Disputes Act*. In my opinion, the Council had jurisdiction to render the decision which it did, its proceedings were conducted according to law, and, that being so, its decision was final and binding upon all parties

concerned and is not subject to review upon the merits by the Courts; s. 34(*a*) of the *Quebec Trade Disputes Act*, R.S.Q. 1941, c. 167; *Mantha* vs. *City of Montreal*[1].

While that is sufficient to dispose of the appeal, in view of the basis upon which the action was dealt with in the Courts below, I think I should add that I am in agreement with the decision of the arbitrators.

The collective agreement is stated to be an agreement "covering wages and working conditions for the designated employees of the Dominion and Turcot Plants, Montreal, Quebec," of the appellant. The determination of a mandatory retirement age, applicable to all employees, is clearly a function of management. While it may well be that the age at which such compulsory retirement should become effective could be made the subject of a collective agreement, the agreement under consideration here, does not touch upon it.

As will be seen from perusal of the agreement, seniority rights have no direct relationship to the age of an employee, but generally speaking are based upon length of service of such employee in a particular department or classification. A man 65 years of age might well have less seniority than a very much younger man. In my opinion, compulsory retirement at age 65 is not a violation of the clauses in the collective agreement respecting seniority rights, nor did appellant violate any other provision of the collective agreement when, during the pendancy of that agreement, it established, as company policy, that all employees in all divisions of the company should be retired upon attaining the age of 65 years.

For the foregoing reasons, I would allow the appeal with costs here and below, and restore the judgment of the learned trial judge dismissing respondent's action with costs.

Appeal allowed with costs.

Attorneys for the defendant, appellant: *Magee, O'Donnell & Byers, Montreal.*

Attorneys for the plaintiff, respondent: *Cutler & Lachapelle, Montreal.*

---

[1] [1939] S.C.R. 458, 4 D.L.R. 425.