British Columbia Labour Relations Board

William Scott & Co. v. C.F.A.W., Local P-162

1976 CarswellBC 518, [1976] 2 W.L.A.C. 585, [1976] B.C.L.R.B.D. No. 98, [1977] 1 Can. L.R.B.R. 1

Wm. Scott & Company Ltd. and Canadian Food and Allied Workers Union, Local P-162

A. Macdonald Member, C.J. Alcott Member, P.C. Weiler Chair

Judgment: July 26, 1976
Docket: 46/76

Counsel: Irwin G. Nathanson, for the Employer
Marguerite Jackson, for the Union

Subject: Labour; Employment; Public

Decision of the Board:

III

1 This is an application under s. 108 of the Labour Code. Section 108(1)(b) entitles the Board to set aside an award on the ground that it is "inconsistent with the principles expressed or implied in the Code". The Labour Code addresses itself directly to the issue of discharge of an employee. First, s. 93(1) [rep. & sub. 1975, c. 33, s. 23] requires that:

> Every collective agreement shall contain a provision governing the dismissal or discipline of an employee bound by the agreement and that provision, or another provision, shall require that the employer have a just and reasonable cause for the dismissal or discipline of an employee;

2 Then, in any grievances brought to challenge discharge under that clause of the agreement, the Code confers this statutory authority on the arbitrator [rep. & sub., S.B.C. 1975, c. 33, s. 27]:

> 98. For the purposes set out in s. 92, an arbitration board has all the authority necessary to provide a final and conclusive settlement of a dispute arising under the provisions of a collective agreement, and, without limiting the generality of the foregoing, has authority
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> > (d) to determine that a dismissal or discipline is excessive in all the circumstances of the case and substitute such other measure as appears just and equitable,

3 The wording of each of these provisions of the Code embodies the significant 1975 amendments contained in Bill 84. This explicit legislative attention to the problem of discharge and discipline testifies not only to the serious impact these measures may have on the individual employee, but also the need to provide adequate, peaceful machinery for reviewing such cases as an antidote to possible industrial unrest in the bargaining unit.

4 In this, the first s. 108 application in which the Board has analyzed this legislative language, we wish to emphasize the significance of the legal change from discharge as a pure matter of contract law under the individual contract of employment, to discharge as the subject of legislative policy governing the collective agreement between employer and trade union. Without reviewing the common law of master and servant in any detail, suffice it to say that the contract of employment allowed the employer to dismiss an employee without notice for cause (some relatively serious forms of misconduct which, in the eyes of the law, made the continuance of the employment relationship undesirable). But that particular doctrine of the common law can be appreciated only in light of two other features of the master-servant relationship. First of all, even in the absence of cause on the part of the employee, the employer could unilaterally dismiss an employee with reasonable notice, or with pay in lieu of notice. This meant that employees had no legal expectation of continuity of employment even if their performance was satisfactory and work was available. Secondly, if an employee was guilty of some misconduct at work, the employer had no other form of discipline available. The contract of employment did not entitle the employer to suspend the employee, for example. The presence of these two subsidiary doctrines naturally coloured the common law analysis of what constituted "cause" for discharge, in two respects: first, the law concentrated on the Immediate incident which triggered the discharge, rather than the situation of the individual employee; secondly, gradually the law took the view that certain serious forms of misconduct automatically justified discharge (e.g. insubordination, dishonesty, or disloyalty) on the grounds that these amounted to a fundamental breach of the contract of employment.

5 The nature of the legal right to discharge an employee has taken on a very different hue In the world of collective bargaining. A classic depiction of that new reality is contained in the award of the arbitrator in the crucial case of *Port Arthur Shipbuilding* (1967), 17 L.A.C. 109 at p. 112:

> Without exploring the common law rules of the master-servant relationship, it must be said that this board of arbitration Is charged only with the administration of the collective agreement, and was not intended to provides forum for the enforcement of common law rights. A basic difficulty in this argument advanced by the company was its failure to allege, let alone prove, the existence of a common law contract of employment. Indeed, today the ordinary employee almost inevitably enjoys only an at-will relationship with his employer, which at common law could be terminated for any reason virtually without notice. However, the collective agreement does create an entirely new dimension in the employment relationship; It is the Immunity of an employee from discharge except for just cause, rather than the former common law rule of virtually unlimited exposure to termination. Whatever may have been the early views of labour arbitrators, it is common knowledge that over the years a distinctive body of arbitral jurisprudence has developed to give meaning to the concept of "just cause for discharge" in the context of modern industrial employment. Although the common law may provide guidance, useful analogies, even general principles, the umbilical cord has been severed and the new doctrines of labour arbitrators have begun to lead a life of their own. Thus we turn to the question of whether or not just cause for discharge existed, and to the company's alternate submissions to this effect.

6 No doubt this legal shift is ultimately attributable to such socio-economic factors as the transformation of the personal relationship of "master and servant" in a small firm into the impersonal administration of a large industrial establishment by a personnel department. But within the collective agreement itself, there were specific, contractual features which required from arbitrators a different conception of discharge.

7 First of all, under the standard seniority clause an employer no longer retains the unilateral right to terminate a person's employment simply with notice or pay in lieu of notice. Employment under a collective agreement is severed only if the employee quits voluntarily, is discharged for cause, or under certain other defined conditions (e.g. absence without leave for five days; lay-off without recall for one year, and so on). As a result, an employee who has served the probation period secures a form of *tenure*, a legal expectation of continued employment as long as he gives no specific reason for dismissal. On that foundation, the collective agreement erects a number of significant benefits: seniority claim to jobs in case of lay-off or promotion; service-based entitlement to extended vacation or sick leave; accumulated credits in a pension plan funded by the employer. The point is that the right to continued employment is normally a much firmer and more valuable legal claim under a collective agreement than under the common law individual contract of employment. As a result, discharge of an employee under collective bargaining law, especially of one who has worked under it for some time Under the agreement, is a qualitatively more serious and more detrimental event than it would be under the common law. At the same time, the standard collective agreement also provides the employer with a broad management right to discipline its employees. If an individual employee has caused problems in the work place, the employer is not legally limited to the one, irreversible response of discharge. Instead, a broad spectrum of lesser "sanctions are available: verbal or written warnings, brief or lengthy suspensions, even demotion on occasion (see *Cominco Ltd.* (1974), 6 L.A.C. (2d) 225). Because the employer is now entitled to escalate progressively its response to employee misconduct, there is a natural inclination to require that these lesser measures be tried out before the employer takes the ultimate step of dismissing the employee, and thus cutting him off

from all of the benefits associated with the job and stemming from the collective agreement.B

8 Recognizing the cumulative impact of these contractual developments flowing from the modern industrial environment, Canadian labour arbitrators did gradually evolve quite a different analysis of discharge grievances. The essence of that approach was nicely conveyed by Mr. Justice Laskin [as he then was] speaking for the Ontario Court of Appeal in upholding the arbitrator in *R v. Arthurs ex p. Port Arthur Shipbuilding Co.* (1967), 62 D.L.R. (2d) 342 at pp. 363-4, [1967] 2 O.R. 49:

> The collective agreement leaves the extent of discipline (be it as light as a warning or as heavy as discharge) at large under the formula of "proper cause". By this I mean that there are no fixed consequences for specified types of misconduct. This is so even in respect of a violation of such a specific prohibition as is involved in art. 11.03. The reason is simple; experience has shown that there must be a pragmatic and not a cut and dried, Medes and Persians approach to discipline. Employers and unions are, in my opinion, wise to leave room in collective agreement administration (which includes arbitration) for consideration of the worker as an individual, and not as simply part of an indistinguishable mass. The formulae of "just cause" or "proper cause" or "reasonable cause" or "just and proper cause" which are found in collective agreements join to the pragmatic case by case approach a sensible individualization in the assessment of punishment for misconduct. Whether the qualifying word be "proper" or "just", it expresses the duty to act according to the circumstances of the case in which an issue of discipline, reaching perhaps to discharge, arises.

9 In evaluating the immediate discharge of an individual employee, the arbitrator would take account of "the employee's length of service and any other factors respecting his employment record with the Company In deciding whether to sustain or interfere With the Company's action". The following Is an oft-quoted, but still not exhaustive, canvass of the factors which may legitimately be considered *Steel Equipment Co. Ltd.* (1964), 14 L.A.C. 356 at pp. 40-41:

> 1. The previous good record of the grievor.
>
> 2. The long service of the grievor.
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> 3. Whether or not the offence was an isolated incident in the employment history of the grievor.
>
> 4. Provocation.
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> 5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional Impulses, or whether the offence was premeditated.
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> 6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
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> 7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
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> 8. Circumstances negativing intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it.
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> 9. The seriousness of the offence in terms of company policy and company obligations.
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> 10. Any other circumstances which the board should properly take into consideration, e.g., (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so; (b) where a grievor was discharged for improper driving of company equipment and the company, for the first time, issued rules governing the conduct of drivers after the discharge, this was held to be a mitigating circumstance; (c) failure of the company to permit the grievor to explain or deny the alleged offence.
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> The board does not wish into be understood that the above catalogue of circumstances which it believes the board should take into consideration in determining whether disciplinary action taken by the company should be mitigated and varied, Is either exhaustive or conclusive. Every case must be determined on its own merits and every case is different, bringing to light in its evidence differing considerations which a board of arbitration must consider.

Unfortunately, this indigenous arbitral solution was abruptly aborted by the Supreme Court of Canada, when it reversed the Ontario Court of Appeal and the arbitrator in *Port Arthur Shipbuilding Co. v. Arthurs et al.* (1968), 70 D.L.R. (2d) 693 at p. 696:

> 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.
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> 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*.

[Emphasis added.] On its face, that passage seemed to suggest that if an arbitrator found some employee misconduct, no matter how trivial, then management had a totally unreviewable discretion to select any form of discipline, no matter how heavy, up to and including the dismissal of a long service employee. Although some arbitrators attempted to mitigate the impact of such as draconian doctrine (e.g. *S.K.D. Manufacturing* (1969), 20, L.A.C. 231), Canadian legislatures uniformly considered it necessary to overturn *Port Arthur Shipbuilding* by statutory reform. Section 98(d) of the Labour Code, the provision under analysis in this case, is the vehicle through which the B.C. Legislature has sought to place on a contemporary, industrial relations footing the law of discharge under a collective agreement.

10 We have reviewed this historical background to s. 98(d) to emphasize strongly its central thrust. The B.C. Legislature, in common with all other Canadian legislatures, wished to eradicate once and for all the residual traces of the common law of master and servant which had surfaced in *Port Arthur Shipbuilding* and which would prevent an arbitrator coming to grips with the “real substance” and “respective merits” of a discharge grievance (s. 92(3)) and thus impair the ability of arbitration to provide a satisfactory resolution of such disputes “without resort to stoppages of work” (s. 92(2)). For that reason, it is hot legally correct for an arbitrator in a discharge case to assume that the common law definition of “cause” remains unchanged under the Code, subject only to the possibility that an arbitrator might exercise ah ill-defined discretion to rescue an employee from the “normal” legal consequences of discharge and substitute a lesser penalty on “equitable” grounds. An arbitrator Who approaches a discharge grievance with that reluctant state of mind simply is not proceeding in accordance with the principles of the Labour Code.

11 Instead, arbitrators should pose three distinct questions in the typical discharge grievance. First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer’s decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

12 Normally, the first question involves a factual dispute, requiring a judgment from the evidence about whether the employee actually engaged in the conduct which triggered the discharge. But even at this stage of the inquiry there are often serious issues raised about the scope of the employer’s authority over an employee, and the kinds of employee conduct which may legitimately be considered grounds for discipline. (See for example Douglas Aircraft (1973), 2 L.A.C. (2d) 56.) However, usually it is in connection with the second question — is the misconduct of the employee serious enough to justify the heavy penalty, of discharge? — that the arbitrator’s evaluation of management’s decision must be especially searching:

> (i) How serious is the immediate offence of the employee which precipitated the discharge (for example, the contrast between theft and absenteeism)?
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> (ii) Was the employee’s conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?
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> (iii) Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history?
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> (iv) Has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem (for example, of persistent lateness or absenteeism)?

(v) Is the discharge of this individual employee in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment (an issue which seems to arise particularly in cases of discipline for wildcat strikes)?

13 The point of that over-all inquiry Is that arbitrators no longer assume that certain conduct taken in the abstract, even quite serious employee offences, are automatically legal cause for discharge. (That attitude may be seen In such recent cases as *Phillips Cables* (1974), 6 L.A.C. (2d) 35 (falsification of payment records); *Toronto East General Hospital* (1975), 9 L.A.C. (2d) 311 (theft); *Galco Food Products* (1974), 7 L.A.C. (2d) 350 (assault on a supervisor).) Instead, it is the statutory responsibility of the arbitrator, having found just cause for some employer action, to probe beneath the surface of the immediate events and reach a broad judgment about whether this employee, especially one with a significant investment of service with that employer, should actually lose his job for the offence in question. Within that framework, the point of the third question is quite different than it might otherwise appear. Suppose that an arbitrator finds that discharge and the penalty imposed by the employer is excessive and must be quashed. It would be both unfair to the employer and harmful to the morale of other employees in the operation to allow the grievor off "scot-free" simply because the employer over-reacted in the first instance. It is for that reason that arbitrators may exercise the remedial authority to substitute a new penalty, properly tailored to the circumstances of the case, perhaps even utilizing some measures which would not be open to the employer at the first instance under the agreement (e.g. see *Phillips Cables*, cited above, in which the arbitration board decided to remove the accumulated seniority of the employee).

IV

14 Returning to the particulars of this case, the primary focus of the Union's attack on the arbitration award was on its finding that Mrs. Martelli did something wrong, for which the employer was entitled to issue any discipline at all. The Union contended that the only reasonable inference from the facts at the hearing was that Mrs. Martelli's statement about the inefficiencies at the plant Were true and that she was not motivated by any desire to defame or harm her employer. However, the majority of the arbitration board disagreed with the Union's position with respect to these matters of concrete fact. There is no basis under s. 108 of the Code for this Board to substitute its own views about the proper findings of fact for those made by the arbitration board. In our recent decision in *Simon Fraser University*, [1976] 2 Canadian LRBR 54, we said that the arbitrator's interpretation of the language of the particular agreement should not be touch by this Board under s. 108 simply because we might disagree about the proper meaning. A *fortiori*, that requirement of self restraint applies to the arbitrator's judgment about the concrete sequence of events leading up to a grievance. This Board does not hear the evidence about these events. It does not see the witnesses, and it does not have access to any transcript of arbitration proceedings. It is hardly practical for us to assume that we could reach a more accurate judgment about the facts than members of the arbitration board which does have each of these advantages (and on the assumption that the arbitration board has afforded both parties a "fair hearing" within the meaning of s. 108(1)(a) of the Labour Code). We do not interpret the limited supervisory role afforded to this Board under s. 108 as entitling us to find that alleged erroneous findings of fact by an arbitrator may render its award "inconsistent with the principles expressed or Implied" in the Labour Code.

15 Accordingly, we must address the Union's first argument upon the assumptions with which the majority of the arbitration board perceived the evidence: Mrs. Martelli phoned up the newspaper, accused her employer of serious inefficiencies, and did so In a vindictive effort to discredit her employer. She took this action at a time when her employer, a Crown-owned corporation, was under vigorous public attack by farm organizations for creating a backlog in the processing of poultry, a backlog which was costing farmers a great deal of money. Understandably, in the summer of 1975 in British Columbia, Mrs. Martelli asked the newspaper not to quote her directly "unless you want to get me fired". We reiterate that we are not endorsing these factual conclusions of the arbitration board. But we are in no doubt that the facts as the board majority found them to be would give the employer just and reasonable cause for some discipline.

16 However, there Is a further difficulty in the arbitration decision. Reading the award on its face, the Board appeared to have adopted a two step procedure. First of all, it evaluated the evidence of the Immediate incident on the assumption that if the employee did engage in the conduct as alleged by the employer that would constitute just cause for *discharge*. Having so found, and thus concluding in answer to the first question that the grievor "was not unjustly dismissed by the employer", only then did the arbitration board turn to a second inquiry about whether to order reinstatement under its statutory authority under s. 98(d). It was in response to that second question that the arbitration board canvassed the evidence of the grievor's motivation, attitude, and previous disciplinary record.

17 For the reasons we have spelled out in detail in the preceding section of this decision, that manner of posing the issues in a discharge case is not correct. Having found as a matter of fact that Mrs. Martelli had engaged in immediate conduct

which warranted discipline, the arbitration board must then decide whether the form of *discipline* selected by the employer — *discharge* — was or was not excessive in all of the circumstances. Such features as the employee's motivation, attitude, and disciplinary record are directly relevant to the question of whether the employee was justly dismissed by the employer in the first place. They should not be relegated to a secondary level of inquiry in which the arbitrator must be persuaded that there are good and sufficient reasons for relieving employees of the fate which is allegedly required as a matter of law for their immediate offence.

18 But while we disapprove of the manner in which the written reasons for decision were phrased, we are not satisfied that the board's analysis and ultimate conclusion regarding the immediate grievance was actually impaired by that inadequate formulation of the questions. Reading the majority and the minority opinions together, it is apparent that this arbitration board did come to grips with the substance and the respective merits of this dispute. Both opinions assume that Mrs. Martelli was wrong in phoning the newspaper as she did and that she deserved some penalty for this action. The majority took a much graver view of this incident because of its findings of fact about her motivation. From its appraisal of the grievor on the stand, the majority also believed that she remained recalcitrant in her attitude towards her employer. The majority then considered her previous disciplinary record, the most prominent feature of which was the fact that she had been fired not that long before; and while she was reinstated by the earlier arbitration board, that board substituted a one-year suspension, thus indicating its view of the seriousness of the earlier incident. Mrs. Martelli went back to work pursuant to that arbitration decision in April 1975. Less than five months later, she was in the further difficulty reflected in these arbitration proceedings. Having evaluated the results of the grievor's experience of a very long suspension, the majority of this arbitration board was now of the view that dismissal was required in the circumstances and refused to order her reinstatement a second time. We wish to make It clear that we are neither endorsing nor disapproving of these judgments. However, we are not satisfied that the decision of the majority of this arbitration board was inconsistent with the principles expressed or implied in the Labour Code and that there are any grounds for setting aside that award.

19 Accordingly, the Union's application under s. 108 of the Labour Code is hereby denied.