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Case Name:

Ontario (Ministry of Community, Family and Children's Services) v. Ontario (Crown Employees Grievance Settlement Board)

IN THE MATTER OF an application under s. 2(1) of the
Judicial Review Procedure Act, R.S.O. 1990, c. J.1, as
amended
AND IN THE MATTER OF an arbitration award of the Crown
Employees Grievance Settlement Board dated May 15, 2003

Between

Her Majesty the Queen in Right of Ontario as
represented by the Ministry of Community, Family
and Children's Services, applicant, and
Crown Employees Grievance Settlement Board and Ontario
Public Service Employees Union, respondents

[2005] O.J. No. 221
Court File No. 511/03

Ontario Superior Court of Justice
Divisional Court
G.D. Lane, P.T. Matlow and J.D. Ground JJ.

Heard: December 3, 2004.
Judgment: January 24, 2005.
(38 paras.)

Counsel:

Kelly Burke, Fateh Salim and Benjamin Parry, for the Applicant

Ed. J. Holmes and David Wright, for the Respondents

ENDORSEMENT

The judgment of the Court was delivered by

¶ 1 **G.D. LANE J.** (endorsement):— On December 3, 2004, we heard this application for judicial

review and dismissed it from the Bench for reasons to follow in writing. These are our reasons.

¶ 2 This application is brought by the applicant for judicial review of an award of the Crown Employees Grievance Settlement Board (the "Board") dated May 15, 2003. The issue before the Board was whether the applicant's inability to produce certain documents that had been in the possession and control of its agent was fatal to the respondent Union's ability to advance its case. The documents were notes generated by the applicant's consultant, of interviews held in the course of an inquiry into working conditions at the grievor's place of employment. Despite a contractual term making these documents the property of the applicant, the consultant destroyed them in the ordinary course of its business.

¶ 3 The Board determined that, despite the availability of viva voce evidence from the persons interviewed, the case of the grievor had been severely damaged. Those interviewed could no longer be cross-examined on what they had told the consultant about the alleged conduct of the grievor, as compared to their viva voce testimony. In the circumstances of this particular case, the Board held at page 20:

In light of the specific issues raised in this matter, it is critical to go behind the [consultant's] report to review what was said to the reviewers, and what they relied upon. Therefore, I conclude that the notes and documentation destroyed by [the consultant] were highly relevant, and in fact crucial to the Union's case.

¶ 4 The Board held that, although there had been no deliberate conduct intended to suppress these documents, the applicant could not escape from the fact that they were destroyed by its agent. The effect was to do irreparable damage to the Union's case and to defeat the ability of the Board to conduct a fair hearing. After canvassing the possibility of an alternate remedy and finding none, the Board concluded that the only remedy was to allow the grievances. The Board therefore ruled that the grievances should be upheld in their entirety and the grievor granted a full remedy. The Board granted this extraordinary remedy without making any finding of abuse of process and/or finding breach of a substantive right but on the basis that the act of the applicant's agent irreparably prejudiced the grievor's case.

¶ 5 The applicant seeks to have this decision quashed and overturned by this Court on the following basis as set out in the factum:

The Board's decision constitutes a denial of natural justice by upholding the grievance without hearing the relevant viva voce evidence on the merits of the case, and without hearing the necessary evidence to determine if it had jurisdiction; and

- i) the Board erroneously applied jurisprudence relating to disclosure in criminal law proceedings to the labour arbitration context;
- ii) the Board erroneously granted an extraordinary remedy and exceeded its jurisdiction when it upheld the grievances without making specific findings, which are a condition precedent, to the conclusions it reached.

¶ 6 The grievor is a long-term employee in the respondent Ministry as a probation and parole officer in the St. Catharines office. There is reportedly a history of a poor working environment in this office.

¶ 7 On March 10th and 23rd, 1998, the grievor filed grievances pertaining to certain letters being placed in his personnel file. The grievances proceeded to arbitration before the Board and were settled

by the parties on April 14, 1999. The settlement provided that the applicant could not refer to or rely upon these letters in any way in subsequent proceedings, and that the letters would be withdrawn from the file. Additional grievances were filed on June 19 and September 13, 2000, and January 20, 2001. These also proceeded to the Board and were settled on July 19, 2001. The applicant agreed to destroy all documentation related to the grievances and not to rely on the contents of certain documents.

¶ 8 In or about November or December, 2001, the applicant imposed a disciplinary suspension on the grievor without pay and unilaterally transferred him from the St. Catharines office to the Simcoe office. These acts gave rise to grievances on November 16 and December 20, 2001, which proceeded to the Board and were settled by a memorandum of settlement dated February 22, 2002. It is the alleged breach of this settlement that forms part of the basis for the present grievances. That settlement required the applicant to rescind the discipline imposed, to reimburse lost pay and any sick credits utilized, and to place the grievor on a paid leave of absence for a maximum of four months. The settlement also confirmed that the grievor's home position remained the St. Catharines office. The settlement also provided that the applicant was not permitted to take disciplinary or substantive punitive action against the grievor related to the allegations giving rise to the grievances. Moreover, the investigation report of November, 2001, would not be provided to a workplace review consultant (the "Consultants") to be engaged by the applicant.

¶ 9 The applicant retained the consultant, whose terms of reference included interviewing staff about whether the workplace was free of harassment, discrimination and violence, reviewing both past and present complaints in the St. Catharines office, and investigating whether the work environment was a positive one conducive to growth and development.

¶ 10 The consultant's report advised that the grievor should not be returned to his position in St. Catharines and recommended that he be relocated to another office so that all concerned could have a "fresh start". The report identified the grievor as a person causing difficulties in the St. Catharines office. The applicant reassigned the grievor to the Simcoe office, as it had done in November, 2001, which had given rise to the grievances of late 2001. The grievor filed a grievance on August 2, 2002, alleging unjust discipline, a breach of the February 2002 settlement, and discrimination. The Union considered that the applicant's actions breached the settlement agreement and requested that the Board reconvene the matter for a hearing.

¶ 11 The Union sought disclosure of all materials and information, notes and documentation in possession of the applicant and the consultant in connection with the grievance and the investigation. The applicant responded that the consultant had destroyed all of their materials related to the matter. The applicant claims to have been unaware of, and to not have authorized, the documents' destruction. In fact, the contract with the consultant stated that information gathered would be the sole property of the applicant, would be given to the applicant on request, and would not be destroyed without the applicant's written consent. The Union also pressed for copies of the documents which the applicant had given to the consultants.

¶ 12 The Board held a preliminary hearing on November 19, 2002, at which the Union continued to raise concerns related to disclosure of documents. The applicant informed the Union on April 4, 2003, the business day before the full hearing set for April 7, 2003, that the applicant had destroyed the documents that it provided to the consultant. Based on the applicant's responses regarding disclosure, at the April 7 hearing the Union gave notice of a motion to grant the grievances due to its inability to have a full and fair hearing in the absence of full disclosure. On April 8, 2003, the next day, the applicant advised that it had erred in its statement that the requested materials were shredded. The applicant claimed to have understood that the materials requested were those that had been destroyed as a result of the July 19, 2001 settlement. The documents provided to the consultant were, the applicant now

claimed, not destroyed.

¶ 13 On May 6 and 7, 2003, the Union argued its motion to grant the grievances. It argued that by reason of the applicant's actions the Union had been precluded from advancing its claims, and that to proceed with the hearing would deny natural justice and constitute an abuse of process. This was alleged to be so due to the applicant's initial refusals to provide disclosure, the shredding of relevant documents by the applicant's agent, the consultant, and the applicant having changed its position. The documents provided to the consultant had been shredded and then were suddenly recovered. The applicant submitted that the witnesses interviewed by the consultant could give viva voce evidence as to what they told the consultant, so the Union would have the evidence necessary to challenge the applicant's decision without having recourse to the actual notes from the interviews. The issue before the Board on the Union's motion was whether a full and fair hearing, consistent with the requirements of natural justice, could be held, given the destruction of relevant materials and information by the consultant.

¶ 14 On May 15, 2003, the Board released the decision summarized above, in respect of which the applicant seeks judicial review.

¶ 15 The first issue is one of due process: whether the act of the applicant's agent, the consultant, rendered it impossible to hold a full and fair hearing into the grievance and, as a key part of the inquiry, whether there had been a breach by the applicant of the settlement agreements which bound it not to rely on certain documents and events. In dealing with issues of procedural fairness, courts do not generally recognize other tribunals as having any advantage over the court in relevant expertise which would entitle the tribunal to deference. [See Note 1 below]

Note 1: *London (City) v. Ayerswood Development Corp. et al.*, [2002] O.J. No. 4859; 167 O.A.C. 120 paras. 9, 10.

¶ 16 Faced with a similar problem in *Air Nunavut*, Tremblay-Lamer J. [See Note 2 below] said at paragraph 47:

Although I recognize the expertise of the Tribunal in matters relating to "aeronautics" the question of determining whether a notice of suspension was issued in accordance with the principles of natural justice does not fall squarely within the expertise of the Tribunal. As a result, low deference should be afforded to the decision-maker. In such a case, I find the standard of review to fall in the middle of the spectrum between "patently unreasonable" and "correctness". Thus the appropriate standard with respect to this particular issue is reasonableness simpliciter.

Note 2: *Air Nunavut Ltd. v. Canada (Minister of Transport)*, [2001] 1 F.C. 138 (Fed. Ct. Trial Div.).

¶ 17 In the present case, it is right to acknowledge that a labour arbitration board expressly constituted by statute to adjudicate such disputes as the present, is well placed to assess the impact upon the fairness of the process of a failure to produce relevant documents of a particular kind. It falls squarely within the Board's expertise to consider the disclosure obligations in the collective agreement

and to make the factual determination of the importance of the documents in question and the possibility of holding a full and fair hearing in the light of the destruction of those particular documents.

¶ 18 Having regard to the limited nature of the privative clause, the purpose of the legislation (to create an expert tribunal to resolve labour disputes with a degree of finality), the expertise of the tribunal and the particular nature of the problem (to apply the concepts of natural justice to a case where a party has destroyed important documents), we conclude that some deference is owed to the Board on the issue of the order to be made in these circumstances. Accordingly, the question of whether natural justice has been given is for the court to determine, accepting the Board's reasonable findings on the facts, and the question of the remedy is for the Board, to be assessed on the basis of the standard of reasonableness.

¶ 19 The applicant submits that natural justice requires that the Board hear all the evidence. Counsel submitted that this was so at common law and also pursuant to section 48(1) of the Board's Act [See Note 3 below], (CECBA) which provides:

- (1) Subject to the specific requirements in this Part and to any requirements in the Labour Relations Act, 1995, the Grievance Settlement Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceeding to present their evidence and to make their submissions.

Note 3: Crown Employees Collective Bargaining Act, S.O. 1993 c. 38.

¶ 20 In our view, neither the common law nor this section requires the Board to hear evidence on the merits of a case where a preliminary issue, such as the present fairness issue, is presented to it. It is sufficient that the Board give the parties a full opportunity to present their case on the fairness issue. Otherwise, the provision that the Board shall control its own procedure would be undercut. The Board found that the destruction of the documents prevented the holding of a fair hearing. It makes no sense to stretch section 48(1) to make it into a prohibition of any termination of a grievance proceeding except by a full hearing. We conclude that the Board, having heard what the applicant wanted to say about the fairness issue, did not deprive the applicant of natural justice by confining the hearing to that issue.

¶ 21 The applicant's submissions thus call into question the concept of a preliminary motion disposing of an issue on grounds other than the merits. However, the CECBA incorporates certain portions of the Labour Relations Act, 1995, including section 48(12)(b), which gives the Board the power to order any party to produce documents. The consequences of a refusal or failure to obey have been discussed in a leading textbook: [See Note 4 below]

However, where a timely request is made [for the production of documents] and there is no response to it or to an order for production, it is open to the arbitrator to refuse to admit the document into evidence or to grant an adjournment. And if the party's refusal continues thereafter, the arbitrator may make an award of costs payable by the recalcitrant party where he has authority to do so, or may convene the hearing and either allow or dismiss the grievance.

Note 4: Brown, D. and Beatty, D. Canadian Labour Arbitration, 3rd edition, 2004 (Canada Law Book) page 3:1421.

¶ 22 The textbook's reference to allowing or dismissing the grievance is supported by several arbitral decisions cited in footnote 23 to the text cited. These include National Standard [See Note 5 below], Thompson Products [See Note 6 below], Budget Car Rentals [See Note 7 below] and Re Foothills General Hospital [See Note 8 below]. In Thompson Products it was submitted that there was no explicit statutory authority for an order to produce documents and the Board should refuse to make one. The Board disagreed and held that there was such a power by analogy to the Rules of Practice and the obvious need for disclosure to enable the parties to prepare and the Board to hold a proper hearing. The Board further held that the deliberate refusal of the grievor to produce documents in a timely way should also be dealt with by analogy to the Rules of Practice and therefore could give rise to the dismissal of the grievance. As the failure to include the documents in the document production was deliberate and not in good faith, the Board dismissed the grievance.

Note 5: National Standard of Canada Ltd. (1994) 39 L.A.C. (4th) 228.

Note 6: Thompson Products Ltd., (1970) 22 L.A.C. 85.

Note 7: Budget Car Rentals Toronto Ltd., (2000) 87 L.A.C. (4th) 154.

Note 8: Re Foothills Provincial General Hospital and Civil Service Association of Alberta (1974) 7 L.A.C. (2nd) 436.

¶ 23 In National Standard, the arbitrator ruled that the grievor must produce a tape recording in his possession, but the portion of the tape produced did not contain the crucial conversation. This was discovered and a request was made for the remainder of the tape, which was refused at first, but later the grievor produced a tape which turned out to be an incomplete and edited version of the telephone conversation in question. On these facts, the company sought dismissal of the grievance, relying on the Board's power to control its own procedure and the powers in the Labour Relations Act [See Note 9 below] to:

make such orders or give such directions in proceedings as he, she or it considers appropriate to expedite the proceedings or to prevent the abuse of the arbitration process.

Note 9: Labour Relations Act, section 45(8.1) para. 5 enacted S.O. 1992 c. 21, section 23(3); repealed by Labour Relations Act, 1995 S.O. 1995 c. 1.

¶ 24 The Board, having found that arbitrators have the power to order the production of documents, continued:

The general issue, then, is what one can do if a party fails to comply with such orders. In my opinion, as was ordered in the Thompson Products case, the most reasonable approach is to adopt the procedure of the courts. This is consistent with the philosophy

