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Re Textile Workers Union and Lady Galt Towels Ltd

Innis Christie

RE TEXTILE WORKERS UNION AND LADY GALT TOWELS LTD.

I. Christie, V. Skurjat, G.B. Lawrence. September 23, 1969.

EMPLOYEE GRIEVANCE alleging improper filling of posted vacancy.

T.E. Armstrong and others for the union.
J.P. Sanderson and others for the company.

AWARD (in part)

The issues: The first issue is: under this collective agreement, who determines whether the employees have "relatively equal qualifications"? Second, what is the meaning of the phrase "relatively equal" qualifications? Third, who bears the onus of proving that qualifications were or were not relatively equal? Fourth, what are the qualifications required for the job here in question? Fifth, and finally, were the grievor's qualifications "relatively equal" to those of the employee who got the job?

Decision: Determining whether the grievor and Mrs. Havens have relatively equal qualifications involves two decisions. In the first place, the qualifications required for the job must be determined, and, secondly, it must be decided whether the employees are relatively equal when measured against that standard. See *Re United Brewery Workers, Local 173, and Carling Breweries Ltd.* (1968), 19 L.A.C. 110, p. 111, (Christie, arbitrator) and *Re United Cork Linoleum & Plastic Workers, Local 380, and Union Carbide Canada Ltd.* (1966), 17 L.A.C. 171, p. 172 (Christie, chairman). In the normal course of things, where the qualifications required are not set out in the collective agreement the company initially makes both decisions.

The question is, on what basis can either of the company's decisions be questioned in arbitration proceedings.

The company cited *Re United Electrical Workers, Local 523, and Union Carbide Canada Ltd.* (1967), 18 L.A.C. 109 (Weiler, chairman) for the proposition that all a board of arbitration can do is to determine, in accordance with the formula set out by Mr. Justice Roach in the leading decision in *Re United Mine Workers of America, Local 13031, and C.I.L. Nobel Works* (1948), 1 L.A.C. 234, p. 237, whether the company acted in an arbitrary, dishonest or unreasonable way. In my opinion that proposition applies to *both* decisions involved in a determination of employee qualifications *only* where the right to determine qualifications is expressly given to management by the collective agreement, as it was in Professor Weiler's *Union Carbide* case.

In my opinion where the collective agreement expressly gives management the power to determine qualifications, management may unilaterally establish the standard against which employees are to be judged and an arbitrator should not question the standard established, except on the very limited basis that management must be *genuinely* doing what it purports to do. In other words the company must not "act arbitrarily, unreasonably or in bad faith, and use 'establishing qualifications' as a guise in defeating employee rights under the agreement." See *Union Carbide Canada Ltd., supra,* at p. 174 (Christie, chairman). Even where the right to determine qualifications is not expressly given to the company, in my opinion the right to decide what qualifications a job requires flows from a standard managements rights clause. As is suggested in the *Carling Breweries* case, *supra,* at p. 112:

> "... it seems to me that the right to determine the standard of qualifications necessary for a job is one which would be expected to inhere in management and which therefore, subject to some limitation in the agreement, flows from any standard management rights provision. That right must, of course, be exercised *bona fide*."

On the other hand, the second decision, whether the employees in this case are "relatively equal" in the qualifications required by the company is, under this collective agreement, a matter to be determined by the board of arbitration. Article 3.01, which empowers the company to "promote" etc.,

is expressly subject to provisions of the agreement, including art. 9.08, the seniority clause, thus it is not enough that the company satisfies this board that it did not act in an arbitrary, discriminatory or unreasonable fashion or in bad faith in applying its own standard of qualifications. It must also satisfy the board that it applied the standard correctly in not adhering to seniority. Where, as in the two *Union Carbide* cases cited above, the right to determine qualifications is expressly given to management the power of an arbitration board would appear to be limited in respect of this second decision as well. But such is not the case here.

Notwithstanding the fact that the decision whether the qualifications of an employee measure up to the company's standards is a matter for the arbitration board to decide, to quote the *Carling Breweries* case again, at p. 112:

> "An arbitrator must, of course, realize that an employee's supervisors are in the best position to judge his qualifications and an arbitrator should for that reason hesitate to substitute his own judgment for that of the company."

The task of assessing skills or qualifications has been undertaken by boards of arbitration, where it is not given over to management by the collective agreement, in, for example, *Re Textile Workers, Local 755, and Dominion Fabrics Ltd.* (1963), 13 L.A.C. 201 (Little, D.C.J., chairman); *Re Northern Electric Employee Ass'n and Northern Electric Co. Ltd.* (1965), 16 L.A.C. 278 (Lane, C.C.J., chairman); *Re Int'l Chemical Workers, Local 721, and Brockville Chemicals Ltd.* (1966), 16 L.A.C. 393 (Weatherill, chairman) and *Re United Packinghouse Workers, Local 459, and H.J. Heinz Co. of Canada Ltd.* (1966), 17 L.A.C. 58 (note only – Thomas, chairman), the full report of which was introduced at the hearing.

Having reached the conclusion that it is for the board to determine whether, in accordance with the qualifications honestly required by the company, Mrs. Havens and the grievor were "relatively equal", I must now consider the meaning of that phrase. For the union, Mr. Armstrong argued that, where the collective agreement stipulates that employees must be only "relatively" equal for seniority to govern, the gap between them may be wider than where the seniority provision requires that their qualifications be "equal". Mr. Sanderson denied this distinction, arguing that in the application of sen-

iority clauses "equality" of ability is never exact and the parties have simply recognized reality by the use of the word "relatively". He cited *Re U.A.W. and Westeel Products Ltd.* (1960), 11 L.A.C. 199 (Laskin, arbitrator), where, in considering a provision which reads as follows [at p. 199]:

> "In all cases of promotion... experience and ability to perform the work required shall be considered but when these factors are equal seniority shall govern."

The arbitrator commented that "it was essential to the union's case that Doyle's experience and ability be equal (or relatively equal – I believe it is futile to speak of absolute quality in such cases) to the experience and ability of Dutton...".

In the collective agreement before us I have come to the conclusion, in the words of the arbitrator in *Owens – Illinois Glass Co.* (1962), 2 CCH Arb. 8660, that "the real test is one to determine who is best qualified by a substantial and demonstrable margin. ... If the margin is less than substantial then qualifications are relatively equal and seniority becomes the determining factor." Whether the same might be said where the seniority clause referred to qualifications being simply "equal" need not be decided in this case.

Except in cases of discharge (and, some arbitrators have held, discipline) where a *prima facie* case may be considered to be made out by the admitted facts of employment and dismissal, the accepted rule in Ontario grievance arbitration is that the original onus is on the union to establish that the company has failed to abide by the collective agreement. Just what the union must establish to make out a *prima facie* case, so that the evidentary burden will swing to the company, must depend on the wording of the collective agreement. In this case, in my opinion, the union must establish that the grievor has greater seniority, because by art. 9.08 "seniority shall be the deciding factor" and it must also make out a *prima facie* case that the grievor's ability is "relatively equal", because only in such circumstance is seniority "the deciding factor". The same conclusion on the matter of onus was reached in *Dominion Fabrics Ltd., supra,* on very similar wording, and was approved in *J.J. Heinz Co., supra.*

[The award is reported in part only; the facts and decision of the particular case have been omitted].

[Full award 13 pages]