3-10-1970

Re Retail, Wholesale & Department Store Union and Hershey Chocolate of Canada (1967) Ltd

Innis Christie

RE RETAIL, WHOLESALE & DEPARTMENT STORE UNION AND HERSHEY CHOCOLATE OF CANADA (1967) LTD.

I. Christie, J. Fry, M. J. O'Brien. March 10, 1970.

EMPLOYEE GRIEVANCE alleging improper discharge. Preliminary objection as to arbitrability.

S. Simpson and *A. Patterson* for the union.
I. H. McGowan and *A. J. McRitchie* for the company.

AWARD

Employee grievance alleging discharge contrary to the collective agreement between the parties dated November 18, 1968. The company made a preliminary objection to the board's jurisdiction on the ground that there is no provision of the collective agreement under which a discharged person can file a grievance. This award deals only with the preliminary objection.

The facts:

At the commencement of the hearing in this matter Mr. McGowan, for the company, entered a preliminary objection to the jurisdiction of the board and requested that we reach a decision on the objection before hearing the matter on its merits. Thus there are no facts before the board other than exhibits indicating that the grievance, if otherwise proper, was filed in good time by a person who was a member of the bargaining unit while he was employed by the company.

The three most directly relevant provisions of the collective agreement are the following:

> *Article 2 — MANAGEMENT RIGHTS*:
>
> 2:01 Except where specifically abridged by the terms of this Agreement, the management of the Company's operations and the selection and direction of employees will continue to be vested exclusively with the Company.
>
> *Article 5 — GRIEVANCE PROCEDURE*:
>
> 5:01 *Step #1*:
>
> If an employee has a grievance he wishes to bring to the attention of the Company, he shall take the matter up orally with his foreman. (The remaining steps of the grievance procedure are quite standard.)
>
> 6:05 The Arbitration Board shall not render any decision that is inconsistent with the terms of this Agreement, nor shall the said Board add to, alter, amend or deal with any matter not contained herein.

Issues:

The issue to be determined in connection with the company's preliminary objection is whether this board has jurisdiction to hear a discharge grievance under the terms of the collective agreement between the parties. Mr. McGowan argued that under art. 5:01 the right to grieve and to proceed to arbitration is granted only to "an employee" and this, he contended, does not include a person who has been discharged by the company. Secondly, Mr. McGowan argued neither art. 2:01 nor any other part of the collective agreement in any way limits management's right to discharge an employee. Mr. Simpson, for the union, argued that on a proper interpretation of art. 2:01 and the agreement as a whole the company could only discharge an employee for just cause.

Decision:

The first argument put forward by Mr. McGowan is without merit. Many collective agreements use the phraseology of art. 5:01, that "an employee" may commence a grievance in a specified way. Generally, and in this case, I am unable to

ascribe to parties who have used such language in their agreement any intention to deny the right to invoke the grievance procedure to an employee who has been discharged. One way to answer Mr. McGowan's first argument is to say that it begs the question. A man is no longer "an employee" only if he was properly discharged and therefore until it is finally determined that his discharge was proper he must be allowed to invoke the grievance procedure.

Another answer is found in the *Labour Relations Act*, R.S.O. 1960, c. 202, s. 1(2) of the Act provides:

> 1(2) For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for his employer as a result of a lock-out or a strike *or by reason only of his having been dismissed by his employer contrary* to this Act or *to a collective agreement.*

(Emphasis added.)

Section 1(2), in providing "for the purposes of this Act", clearly applies to arbitrations under the Act. Sections 37 and 34(1) of the Act make this clear. Section 37 provides that a collective agreement is binding on the union and the company and "upon the employees in the bargaining unit defined in the agreement" and s. 34(1) provides:

> 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 arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

The Supreme Court of Canada has recently reaffirmed that because of these sections a board of arbitration established under a collective agreement in Ontario is a statutory board. (*Port Arthur Shipbuilding Co. v. Arthurs et al.*, 70 D.L.R. (2d) 693, at pp. 698-701, [1969] S.C.R. 85). From this it would seem to follow that a provision for "purposes of this Act" applies to a matter before a board of arbitration set up in accordance with the Act.

For these reasons it is clear to me that the fact that the grievor had been dismissed before he launched his grievance provides no basis for objection to the jurisdiction of this board. I now turn to the more serious ground of objection.

It was objected that this collective agreement does not give an employee any basis on which he may grieve against discharge. In determining whether this is so art. 6:05, which precludes an arbitration board from adding to, altering, amending or dealing with any matter not contained in the collective agreement, must be borne in mind. Nevertheless, I

have concluded that on a proper interpretation of art. 2:01 the company may not discharge an employee except for cause and thus that the grievor has properly invoked the jurisdiction of the board.

Not only does art. 2:01, the management rights clause, omit the usual provision that discharge must be for "cause" or "just cause", it fails to provide expressly for any right of discharge at all. Article 2, it may be recalled, provides:

> 2:01 Except where specifically abridged by the terms of this Agreement, the management of the Company's operations and the selection and direction of employees will continue to be vested exclusively with the Company.

Nevertheless there can be little doubt that the parties intended management to have the right to discharge employees. For instance art. 7:04 provides, among other things, that seniority will be lost whenever an employee is discharged.

I have concluded that in agreeing, in art. 2:01, that the company is to continue to be vested with "the management of [its] operations and the selection and direction of employees" the parties intended to include the right to discharge. "Selection" of employees may well consist of retaining some and discharging others. There being no indication to the contrary, I have also concluded that this implied right of management to discharge must be taken to be a right to discharge for cause only. There is no reason to say that a power to manage and to select and direct employees implies a power to discharge them arbitrarily. It is not, however, necessary to base our decision on this implication. There are other grounds for concluding that, under this collective agreement, management's power is to discharge for cause.

Under art. 2:01 management "*will continue*" to have the same rights of management, selection and direction of employees that it had previously. The collective agreement that preceded the one before us had an identical art. 2:01 and it is safe to conclude that the first and each succeeding collective agreement between these parties contained the same provision. In this context the meaning of art. 2:01 becomes clearer. Before there was any collective agreement, at common law, the employer had to prove "cause" for discharge. Where he was dealing with a wage employee the requirement to show cause for discharge was normally of little consequence because at common law any employee can be dismissed with due notice, and due notice for a wage employee is very brief, usually a day or even an hour. But the fact remains, to quote Carrothers, *Labour Arbitration in Canada* (1961), at p. 125, that:

> At common law an employer may terminate the contract of employment without notice only for cause and the burden is on the employer to show cause.

It follows that the right which, in accordance with art. 2:01, "*will continue* to be vested exclusively with the Company", "unless specifically abridged", is the right to discharge *for cause.*

The right to discharge for cause is not "specifically abridged" by the terms of the agreement but it would appear that the right of management to discharge upon due notice *is* "specifically abridged" by the seniority provisions of the collective agreement. At common law the employment of any employee can be discontinued without cause, provided he is given the notice required by his contract of employment, which is said to be "reasonable" notice where not expressly agreed upon. The general rule appears to be that notice need not be more extensive than the period of payment (Fridman, *The Modern Law of Employment* (1963), at p. 469), so any wage employee need be given very little notice. But under the collective agreement before us seniority must be taken into account when employment is discontinued, under certain circumstances at least:

> 7:01 Any employee hired as a new employee by the Company will be on probation and will not have any seniority standing until after he has completed sixty (60) days of work. His seniority will then date back the sixty (60) days he has worked for the Company.
>
> 7:02 In all cases of layoff due to lack of work and recall following such layoff, the skill, ability and experience of employees shall be the governing factors, and where these factors are relatively equal between employees, seniority shall govern. The application of this section will be on a departmental basis only.

"Layoff" is an employment status peculiar to the collective bargaining regime, implying as it does the right of an employee to insist through his union that he be recalled to work in order of seniority. Under similar circumstances at common law employment would be terminated, subject perhaps to an understanding that the employee would be recalled when work became available, but all the same, due notice of termination would normally be required unless pay was to continue.

Generally, and under this agreement, seniority provisions are obviously intended to provide protection against personal bias, favouritism or the like. It appears to me that where the company purported to dismiss on notice *and not for cause* it would as a matter of fact almost certainly be doing so either because of lack of work, in which case the seniority provi-

sions would apply, or for such illegitimate reasons which undercut seniority directly and therefore cannot be permissible under the agreement. If the company has an unlimited right to discharge for unsubstantiated reasons no real protection is afforded to seniority by art. 7. If the company need not show any cause at all for discharge it could simply discharge a senior employee if it wished to retain a junior one, or recall the senior employee only to discharge him so that the junior one could be recalled. The agreement is clearly based on the understanding that employees generally may not be discharged at will. In any event, if the case did somehow arise in which the company allegedly invoked the "continuing" right of management to discharge with due notice but without cause it surely would be a question for the arbitrator whether, in fact, seniority rights were infringed.

While there is no evidence of any practice established under the current collective agreement, there is some indication that under the preceding one, both parties thought that there was a right to grieve against discharge. The right to grieve is important because the clear intention appears to be that any matter that may be grieved can be taken to arbitration. Article 5:06 provides "if the grievance is to be referred to arbitration, it shall be done within ten days following the date of the reply at step No. 3." This in itself does not expressly grant a right to take any matter to arbitration but it indicates that the parties assumed that matters of grievance could proceed to arbitration. Nothing in art. 6, which deals with arbitration, limits the matters that may go to arbitration, except the requirement that they be properly processed through the grievance procedure.

The indications referred to that both parties thought there was a right to grieve over discharge are to be found in the uncontradicted statements by Ronald MacNamara and Audrey Atherley who testified that in September, 1968, a grievance against discharge filed by Vincent Wynn was taken to the third stage, after which he was reinstated in employment. Prior to that, a grievance against discharge by Robert Clark went at least to the second stage of the grievance procedure and the company agreed to reinstate him if he wished to return to employment. Clark did not in fact return but the company withdrew the record of discharge from his file. In neither of these cases did the company raise any objection to the union's right to grieve over discharge.

Article 7:01 in the agreement that preceded the current one contained the words "an employee laid off or discharged

during the probationary period shall have no recourse to the grievance procedure contained herein". In my view that provision is a clear indication that the parties thought that employees who had completed the probationary period did have recourse to the grievance procedure. That sentence has been dropped from art. 7:01 in the current collective agreement, which, in my view, can only mean that probationary employees now have the same right to invoke the grievance procedure that employees with seniority have. It was argued that the removal of the sentence is an indication that during negotiations the parties realized that no one had a right to grieve over discharge but I am unable to accept that logic. In relation to both the past practice and this change in wording it must be reiterated that the rights vested in management by art. 2:01 of this collective agreement are those which "*continue*" to be vested in management and this, of course, adds greatly to the significance of indications of intent under the preceding agreement.

In light of these considerations I must conclude that the right of management to discharge upon due notice is "specifically abridged by the terms of this Agreement" and therefore does not "continue to be vested exclusively with the Company". The company has the continuing right to lay-off employees in accordance with art. 7, to discharge for cause, or, theoretically, to dismiss with due notice, if, in fact, it can do so without infringing the seniority provisions of art. 7. Whichever the company purports to do a grievance that it has failed to abide by the terms of the collective agreement may be taken to arbitration.

I have deliberately refrained from stating that the company may only discharge employees for "just" cause. The distinction between a requirement of "cause" and one of "just cause", if there is any, need not be explored here. The only question for the moment is whether this board has jurisdiction to consider the merits of a discharge grievance. A finding that under this collective agreement discharge must be for cause is sufficient to establish the board's jurisdiction and I do not intend to carry the matter beyond that.

In the course of argument for the company Mr. McGowan cited four authorities, two Court decisions and two arbitration awards. In *Union Carbide of Canada Ltd. v. Weiler,* 70 D.L.R. (2d) 333, [1968] S.C.R. 966, the Supreme Court of Canada held that a board of arbitration did not have power to relieve against the failure of the union to enter its grievance within

the time limited by the collective agreement. The Court held that at p. 335:

> By assuming to relieve against the time limit and imposing a penalty as a condition for the exercise of this power, the board amended, modified or changed the provisions of the collective agreement in spite of the express provision contained in art. XI, s. 4.

Article XI, s. 4 of the collective agreement in question provided, as does art. 6:05 of the agreement before us, that the board had no power to alter or amend the collective agreement in question. To this extent the *Union Carbide* case is obviously relevant. However, in concluding that under the collective agreement before us management has the right to discharge and may discharge only for cause this board has not added to, altered or amended the agreement nor has it made a decision inconsistent with the agreement and thus contrary to art. 6:05. We have simply interpreted art. 2:01, we have given the words of the collective agreement the meaning which, in our judgment, the parties intended them to have.

Mr. McGowan also referred to *Port Arthur Shipbuilding Co. supra,* in which the Supreme Court of Canada held that a board of arbitration exceeded its jurisdiction when, having held that there was not just cause for discharge, the board substituted a lesser form of discipline without express power to do so under the collective agreement. The *Port Arthur* case is no more relevant to the matter before us than is the *Union Carbide* case. It surely cannot be contended that it is beyond the jurisdiction of this board to interpret the management's right clause of the collective agreement.

The first arbitration award cited was *Re Int'l Chemical Workers Union, Local 424, and A. C. Horn Co. Ltd.* (1953), 4 L.A.C. 1524 (Laskin). In that case the majority of the board held that although discharge appeared to be unjustified the board had no jurisdiction to rule on the matter because there were "no specific provisions of the agreement which touched the question of unjustified discharge", at p. 1526. In my opinion the *A. C. Horn* award was based on a collective agreement significantly different from the one before us. The management rights clause considered in the *A. C. Horn* arbitration was closer to the standard version than is the one before us in that it expressly endowed management with the right to discharge employees. It provided at p. 1525:

> The management of the business and the direction of the working force, including the right to plan, direct and control operations; maintain order and efficiency; hire, suspend, layoff, discipline,

> transfer, promote, demote or discharge employees; . . . shall be vested solely and exclusively in the Company.

Faced with this provision the board found unavoidable the conclusion that the parties had not intended to provide for the review of discharges through the grievance procedure. The parties dealt with the matter of discharge expressly but, significantly, did not limit management's right to discharge to cases where there was "cause" or "just cause", and this omission was taken by the board to be intentional. In the management rights clause before us, on the other hand, there is no express mention of discharge and we are unable to treat this as an intentional omission. Rather we have concluded that in general language with regard to the management of the company's operations and the selection and direction of employees the parties intended to provide for discharge. These general terms, which we have interpreted as including the right to discharge, do not manifest an intent to preclude a requirement that discharge be for cause as did the glaring omission of a requirement of "cause" in the *A. C. Horn* agreement. Indeed, as we have held, the fact that management's rights are specified to be those which existed previously clearly indicates that "cause" must be shown under the agreement before us.

If the *A. C. Horn* case cannot be distinguished on these grounds, as I believe it can, I am forced to say that I simply disagree that a similar result should be reached here. For the reasons already given I am of the opinion that the collective agreement before us does not give the company a right to discharge except for cause.

The *A. C. Horn* case was followed in *Re Int'l Woodworkers of America and Canadian Gypsum Co. Ltd.* (1968), 19 L.A.C. 341 (Weiler). The principle issue in the *Canadian Gypsum* award was whether the incident in question was a "quit" or "discharge". Having concluded that there had been a discharge the board faced an issue similar to the one before us. The majority concluded as follows at pp. 347-8:

> Assuming that the company can justify its action on the basis that it was a discharge . . ., the union runs into the immediate difficulty that there was no provision in the agreement which explicitly limited the company's powers in this regard. Nor was there any evidence of negotiating history or past practice which suggested this was an inadvertent omission of what the parties mutually intended to be established by the agreement. The only mention of discharge in the agreement is contained in art. 16.03(b), which provides for loss of length of service rating if an employee "is discharged without reinstatement by the company through the

grievance procedure". This merely allows the company to reverse a previous decision to discharge in the grievance procedure while saving an employee's seniority position relative to other employees. It does not *limit* management's right to discharge to instances where there is *cause*, determinable in an *arbitration* hearing.

Should a limitation on an employer's power of discharge be implied from the very existence of a collective agreement? The *Sun Oil* case, referred to above, was presented with this same problem, and for reasons discussed in detail there, refused to make such an inference. [The case referred to is reported at 19 L.A.C. 365, but the reported and edited version of the award is concerned only with the issue of whether the grievor had "quit"]. In doing so it is supported by the decision in *Re Int'l Chemical Workers Union, Local 424, and A. C. Horn Ltd.* (1953), 4 L.A.C. 1524 (Laskin). In this case the implication of a limitation on the power of discharge was refused by the same arbitrator who, almost alone, was ready to make such an inference in the case of subcontracts affecting the bargaining unit. Even the latter is a closed issue now, if only for reasons of precedent (see *Re U.S.W. and Russelsteel Ltd.* (1966), 17 L.A.C. 253 (Arthurs)). Hence, the assertion by arbitration boards of a power to insert into collective agreements provisions dealing with wholly untouched matters is impossible in Ontario under the standard arbitration clause, and present expectations about its scope.

Although the exact wording of the articles of the collective agreement in question in the *Canadian Gypsum* case is not clear from the report, it appears from the passage quoted that the collective agreement there in question was similar to the one before us in that it did not provide explicitly for a management right to discharge. Nevertheless, it suffices to point to two differences which justify a different result in the case before us. In the first place, we have held that, far from being "wholly untouched", the right of management to discharge for cause is part of what the parties contemplated when they agreed that "the management of the Company's operations and the selection and direction of employees *will continue* to be vested exclusively with the Company". (Emphasis added.)

Secondly, in the case before us there is *some* evidence of negotiating history and past practice which suggests that the parties did intend to provide for discharge and to limit management's right to discharge by subjecting its exercise to the grievance procedure. I refer, of course, to the Wynn and Clark grievances and to the provision in art. 7:01 of the previous collective agreement, which indicated that the parties thought that employees with seniority had a right to grieve against discharge. Further, in this agreement a right to grieve must be taken to imply a right to invoke arbitration.

In summary, the management's right clause of the collective agreement before us must be interpreted as reserving to management a right to discharge because such a right was contemplated by the parties as indicated by the reference to discharge in art. 7:04. Thus the proper interpretation of the language of art. 2:01 is that it includes a right to discharge, and there is no reason to interpret art. 2:01 as granting any greater right than the common law right to discharge for "cause". The parties must have intended to include some such limitation, unless the seniority rights set out in art. 7:02 and the "pregnancy" rights in art. 14:03 were intended to be without substance.

The wording of art. 2:01, in terms of powers which "will continue to be vested", has led us to conclude that management's right to discharge is limited, as it was at common law, by a requirement that cause be shown. Evidence of past practice and negotiating history lends support to this conclusion.

Since cause must be shown an employee who alleges that he was discharged without cause has a grievance under art. 5:01 and arbitration may properly be invoked at the conclusion of the grievance procedure under art. 6:01. The ruling of the board is that we have jurisdiction to hear and decide on the merits of this grievance.