Date: 20000203
Docket: CA 159897

NOVA SCOTIA COURT OF APPEAL

[Cite as: Trenton Works Ltd. v. United Steelworkers' of America, Local 1231, 2000 NSCA 26]

Chipman, Roscoe and Pugsley, JJ.A.

BETWEEN:	)	
	)	
THE UNITED STEELWORKERS' OF AMERICA, LOCAL 1231	)	Leanne W. MacMillan for the Appellant
	)	
Appellant	)	
	)	
- and -	)	
	)	
TRENTON WORKS LIMITED	)	Eric B. Durnford, Q.C. and Bernadine MacAulay
Respondent	)	for the Respondent
	)	
	)	
	)	
	)	
	)	Appeal Heard: February 3, 2000
	)	
	)	
	)	Judgment Delivered: February 3, 2000

THE COURT: The appeal is dismissed with costs as per oral reasons for judgment of Chipman, J.A.; Roscoe and Pugsley, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by:

CHIPMAN, J.A.:

[1] This is an appeal from a decision of MacAdam, J. in Chambers setting aside the award of a consensual arbitrator resolving a dispute arising under a collective agreement. The arbitrator's decision was protected by a privative clause which provided that his decision was final and binding.

[2] At issue, was the arbitrator's finding that the respondent had made representations to the appellant by letters, notices and other documents relating to overtime. The arbitrator found that the employer made representations to the union that a provision in the collective agreement that seniority and the requirement for time clock punching did not apply to group overtime in certain circumstances would not be observed. These, he found, gave rise to an estoppel. The grievor in whose favour the arbitrator found had claimed that his seniority entitled him to group overtime work in view of such representations.

[3] After referring to **Maritime Electric Co. v. International Brotherhood of Electrical Workers, Local 1432, and Murnaghan** (1993), 112 Nfld. & P.E.I. R. 119 (P.E.I. S.C.A.D.), dealing with the issue of estoppel of an employer with respect to the terms of the collective agreement. MacAdam, J. said:

> Although invited, counsel for the respondent could not identify any reference to Group Operations in the conduct or correspondence relied on by the Arbitrator as constituting the representation he found to sustain the application of the doctrine . . .

[4] MacAdam, J. continued:

> The enquiry is as to whether the Employer, on any of the evidence, made any representation in respect to Group Operation overtime, or the representations made it possible to draw the reasonable inference such a representation was being made. If there was any evidence, it is not for this Court to determine whether it would have drawn the same inference; the authorities are absolutely clear that this is the province of the Arbitrator. This enquiry is to determine if there was any such evidence.

[5] After reviewing the evidence and the arbitrator's decision, MacAdam, J. said:

> As was said in ***Manitoba Electric***, supra, I am of the opinion the Arbitrator could not reasonably have reached the conclusion that any of the statements in the notices, letters and correspondence indicated a requirement to punch the overtime clock in order to be eligible to be awarded overtime in respect to Group Operations. There was no representation, let alone a clear and unambiguous promise, commitment or assurance that the company was not going to continue to exercise its discretion in awarding overtime in respect to the Group Operations. There was no direct evidence supporting such a finding, and no basis, on the evidence reviewed by the Arbitrator, for such an inference to be drawn. The fact the Union had this understanding, does not, of itself, justify the conclusion the company made "a clear and unambiguous promise, commitment or assurance".

[6] MacAdam, J. concluded that the application of the doctrine of estoppel was therefore in the circumstances patently unreasonable.

[7] We are of the opinion that MacAdam, J. did not err in reaching the result that he did. In **Toronto (City) Board of Education v. O.S.S.T.F., District 15** (1997), 144 D.L.R. (4th) 385, the Supreme Court of Canada recently applied the doctrine of patent unreasonableness as the basis of setting aside the decision of a board of arbitrators acting

pursuant to a collective agreement which, by statute, was required to contain a clause providing for submission to arbitration for final and binding resolution. The statute contained a privative clause. Cory, J. for the majority of the court said commencing at para. 41:

> [41] A number of decisions of this Court have considered the circumstances which will give rise to a finding that a decision of an administrative body is patently unreasonable. The test has been articulated somewhat differently for findings of fact and findings of law.
>
> [42] Where a tribunal is interpreting a legislative provision, the test is:
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> > . . . was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?
> >
> > See *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at p. 237, 97 D.L.R. (3d) 417.
>
> [43] A slight variation of this test applies to arbitrators interpreting a collective agreement. In those circumstances, a court will not intervene "so long as the words of that agreement have not been given an interpretation which those words cannot reasonably bear": *Bradco*, *supra*, at p. 341.
>
> [44] It has been held that a finding based on "no evidence" is patently unreasonable ...
>
> . . .
>
> [45] When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact": *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at p. 669, 76 D.L.R. (4th) 389 *per* McLachlin, J.

[8] We do not consider the position of the board of arbitrators in **Toronto, supra**, to differ materially for our purposes from the position of the arbitrator before this Court.

[9] MacAdam, J. has found, and we agree, that in this case the arbitrator's decision was based on no evidence because the evidence before him viewed reasonably was incapable of supporting his finding that there was an estoppel. MacAdam, J. was therefore correct

in holding that the arbitrator's decision was, for this reason, patently unreasonable.

[10] The appeal is dismissed with costs which we fix at $1,500.00 inclusive of disbursements.

Chipman, J.A.

Concurred in:

Roscoe, J.A.

Pugsley, J.A.