[1977] 1 CLRBR 39

BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT NO. 68 (NANAIMO) AND CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 606 (MID-ISLAND SCHOOL EMPLOYEES).

Before: J. Baigent, Vice-Chairman.
British Columbia, October 7, 1976. Decision No. 68/76.

Arbitration — Arbitration appeal — Hearsay evidence — Onus under a promotion clause — Substitution of award.

The grievor complained that an employee junior to him had been promoted to a higher position when he should have been given that position. He and the person who would have been his superior in the new position testified as to his capabilities for the job. The employer called no witnesses, submitting only documents which he said formed the basis for his decision. Many of these documents were obviously prepared after the decision had been made. The arbitration panel upheld the employer's decision.

The Board held that s. 108(1)(a) of the Code had been violated: the grievor had been denied a fair hearing. He had established a *prima facie* case of his eligibility under the collective agreement. Although an arbitration panel has the discretion to accept hearsay evidence under s. 101(a), this discretion must be exercised by balancing its probative value against the dangers inherent in its use. As a rule, uncorroborated hearsay evidence should not be preferred to direct sworn testimony and hearsay evidence alone should not be admitted to establish a crucial and central point.

The Board substituted its own decision, ordering pay to the grievor until the breach of the collective agreement was rectified, because no evidence with any probative value was given by the employer, although the grievor had established a *prima facie* case.

Eric J. Harris, for the employer.
Dr. J.J. Gow, for the union.

Decision of J. Baigent, Vice-Chairman:

I

This matter involves an application by the Canadian Union of Public Employees, Local 606 (the "Union") to set aside the decision of an arbitration board made on March 16 of this year. The other party to that arbitration was the Nanaimo School Board (the "School Board").

The jurisdiction of the Labour Relations Board on the appeal of an arbitration award is set out in s. 108 [amended, 1975 (B.C.), c. 33, s. 28] of the Labour Code:

> 108(1) On the application of a party affected by the decision or award of an arbitration board, the board may set aside an award of the arbitration board, or remit the matters referred back to the arbitration board, or stay the proceedings before the arbitration board, or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground
> (a) that a party to the arbitration has been or is likely to be denied a fair hearing; or
> (b) that the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Act, or any other Act dealing with labour relations.

At the hearing of the appeal this panel was asked to set aside the award of the arbitration board on the grounds that the grievor was "denied a fair hearing" because of the procedure followed by the arbitration board.

II

The arbitration was concerned with the grievor's complaint that he had been wrongfully passed over for a promotion to the position of maintenance helper. An employee, junior to the grievor, was selected for the position and the grievor

argued that in the circumstances, this amounted to a violation of the collectiv agreement.

At the arbitration hearing the Union called two witnesses. The first witness was the person to whom the successful applicant had been appointed helper. Since the grievor had previously worked with this witness, the latter was well qualified to give evidence on the comparable ability of the two employees. That tradesman testified that both the grievor and the successful applicant had sufficient capacity to perform the job but that in several job-related areas the grievor's ability was superior. His opinion was based on actual experience working with both the grievor and the successful applicant.

The second witness was the grievor himself who had been in the employment of the School Board for some 13 years. He testified that during that period he had never received any kind of reprimand or complaint. He then testified to his general experience and qualifications for the job. There is no doubt from the description of that testimony in the minority report of the arbitration board that he had the background experience and ability to handle the job. In fact, prior to his becoming an employee of the School Board he had worked for the first witness in the very capacity called for in the job competition which led to the grievance.

At the conclusion of the Union's case, the School Board elected not to call any evidence. Instead the tack taken by the School Board was described in the minority award.

> The representative of the Employer chose not to present witnesses, and indeed scarcely examined the grievor and Johnstone. Instead, without having put any of them to th witnesses, or obtained the prior consent of the representative from the union, he f documents with the Board upon which documents he submitted that the Employer had properly appointed Burnett. Many of these documents were apparently prepared well after the fact of grievance proceedings being launched. The Union objected to this material being received by the Board as evidence on the ground that only documents relevant to the difference and in existence at or prior to the time that Burnett was appointed were admissible. The Chairman noted the Union representative's objection, but did not rule on it.

After considering the contents of the material filed by the School Board, the arbitration board dismissed the grievance. The majority award is a model of brevity and dealt with the merits of the grievance in the following terms:

> The arbitration board, having heard the case of both parties, including evidence adduced by Mr. W. Maasanen (the "grievor" in this instance) has unanimously concluded that the question to be determined by it properly is: "did the Employer fairly assess the relative qualifications of the applicants to the job?" and the majority of the board (Mrs. Leach dissenting) holds that the answer to that question must be "Yes", and so awards.

On the basis of the procedure already described, several important legal questions arise. First, is an arbitration board allowed to accept evidence of the type tendered by the School Board in this case. That evidence was, of course, all hearsay since the authors of the written documents were not present. Secondly, what of the "manner" in which the evidence was tendered and here the panel refers to the fact that by calling no witnesses, the School Board effectively de the grievor any opportunity to cross-examine the authors of the docum supporting the decision he sought to challenge.

The panel's answers to both those questions involve an interpretation of s. 101(a) of the Labour Code and the correlation of that section with the "fair hearing" requirements implicit in the provisions of s. 108 of the Code. Section

101(a) provides:

> An arbitration board has power
>
> (a) to receive and accept such evidence and information on oath, affidavit, or otherwise as in its discretion it considers proper, whether or not the evidence is admissible in a court of law;

Section 92(3) [amended, 1975 (B.C.), c. 33, s. 23] is important as a backdrop for the interpretation of those sections.

> 92(3) An arbitration board shall, in furtherance of the intent and purpose expressed in subsection (2), have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties thereto under the terms of the collective agreement, and shall apply principles consistent with the industrial relations policy of this Act, and is not bound by the strict legal interpretation of the issue in dispute.

III

The arbitration hearing considered the meaning of this clause in the collective agreement.

> Promotions and Staff Changes
>
> 16(a) Both parties agree that job opportunities and security should increase in proportion to length of service; therefore in all cases of upgrading, promotions, transfers and layoff due to lack of work, and/or termination for other than proper cause affecting regular and probationary employees, the Board will fairly and justly take into consideration the following factors: ability, skill, experience and seniority.

The starting point for most comparative analyses of seniority clauses in collective agreements is the decision of Bora Laskin in *Re U.A.W. and Westeel Products Ltd.* (1960), L.A.C. 199 at p. 199.

> Two alternative themes are generally found in seniority articles. Under one, seniority is qualified in greater or lesser degree by a requirement of ability or competence to do the required work. In such case, a senior man who is equal to the job is entitled to it, although there may be a junior applicant who can do it better. The other theme involves a contest between competing applicants, and seniority governs only when their competence or ability is relatively equal.

In more recent years, these two themes have come to represent extremes rather than alternatives and there has developed a range of promotional clauses which have been described as "hybrids". Those clauses — and para. 16(a) is such a clause — provide that seniority is neither determinative nor irrelevant depending on the circumstances (as is true in the two "alternative themes" set out above). Instead the clauses provide that seniority is *a* factor which must always be considered in arriving at a decision, *(Re J.A. Wortherspoon & Son Ltd. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1256* (1972), 25 D.L.R. (3d) 70 (Ont. H. Ct.) at p. 73).

The collective agreement in this case falls midway between the two positions described by Mr. Justice Laskin [as he then was]. Rather than providing that seniority should only take effect if the ability of the applicants is "relatively equal", it stipulates that four factors should be taken into account in any promotion. There is a strong suggestion in the opening clause of the agreement that seniority is to be given more weight than the other factors listed. In any event, it is abundantly clear from the wording of the section that seniority is to be considered in all instances — not only when the abilities of the applicants are "relatively equal".

In order to succeed in his grievance, the grievor had to show that the School

Ability, skill, experience and seniority".

Normally, a grievor could establish a violation of this clause by leading evidence to indicate that his combined ability, skill, experience and seniority outweighed that of the successful applicant. When such a *"prima facie"* case has been established, the employer must then lead evidence to establish that it had acted "reasonably, in good faith and without discrimination". If the arbitration board is satisfied that the company acted in this manner, then the grievance should be dismissed. The arbitration board cannot sustain the grievance simply because it might have reached a different decision than the employer.

In the present case the grievor did establish a strong *prima facie* case that he possessed all of the four qualifications more fully than the successful applicant. The tradesman for whom the successful applicant worked testified that the grievor did in fact possess more ability/skill for the job. As to experience, the grievor established that prior to coming to the School Board, he had worked in the construction industry and had in fact worked at a similar job with the same tradesman. Seniority was conceded.

After the grievor had established a *prima facie* case, the School Board rested its case on a group of documents it filed with the Board. The majority of the documents were obviously intended as "background" material — the collective agreements, the job competition, and each man's employment application both at the outset of his employment with the School Board and the application for the job in issue. The file also contains three claim forms submitted by the grievor for separate job injuries over a 12 year period. None of those injuries is serious b related letter indicates that at some date prior to 1965 the grievor did suffe a "permanent partial disability". One of those Workers' Compensation Board forms and all the remaining documents in the file were prepared *after* the Board had made its decision (as was apparent from a quick perusal). The panel will bypass that indelicacy for a moment to indicate that the remaining documents consisted of pithy descriptions of each man's job experience with the School Board.

The grievor's 13 years' experience is detailed in some 20 words while the successful applicant who had worked with the School Board for one-fifth the period of time, is the subject of a lengthy and detailed report.

After the file was tendered, no witness were called and the Board closed its case.

IV

An earlier decision of this Board — *Simon Fraser University and Association o University and College Employees, Local 2*, [1976] 2 Canadian LRBR 5 distinguished between the "substance" of an arbitration decision and the procedure that was followed in arriving at that decision. The Board indicated in that decision that it will be very slow to second guess an arbitration board's assessment of the evidence or interpretation of the agreement. That policy is based in the final analysis on a policy designed to safeguard the integrity of the arbitral system by ensuring that it remains a quick, informal and final method o settling contract disputes during the term of a collective agreement.

The relative immunization of arbitration boards from substantive r should be complemented by this Board's strict interpretation of the "fair hea g requirements of s. 108 of the Labour Code. A policy in favour of limited arbitra review of "issue determination" requires as its corollary the provision to th parties of a full opportunity to present their case and to meet the case of the othe side. It is important for arbitration boards to recognize that their obligation t

grant a full and fair hearing can be frustrated rather than advanced by a failure to critically evaluate the types of evidence it may receive under the broad provisions of s. 101(a) of the Code.

The documents filed in this case, with the exception of those prepared by the grievor, were hearsay, *i.e.*, they were statements made by someone not present and statements which purported to justify the employer's decision. Instead of being presented through the testimony of a sworn witness — as hearsay usually is offered — they were contained in the file tendered by the School Board's representative. Counsel for the grievor's main objection at the hearing of this appeal centred on the effect of the arbitration board's decision to accept the "evidence" contained in the file. That decision effectively meant he could not cross-examine the authors of the documents.

That denial of the right of cross-examination lies at the heart of the traditional objections to hearsay evidence. The objection to hearsay evidence derives from the premise that a person should not be prejudiced by testimony when he cannot challenge its author. The rule is a sensible one.

Nevertheless, the reference in s. 101(a) to evidence ". . . on oath, *affidavit* or *otherwise* . . ." allows arbitration boards to accept such evidence. The weight or reliance that is to be put on that evidence is another matter. Both the admittance and weight to be attached to hearsay evidence, if any, must be determined by balancing its probative value against the dangers inherent in its use. Where its utility is outweighed by its unreliability, then the arbitration board must exercise its discretion against it. Where the danger is sufficiently minimal to admit it, then any inherent problems arising from its use should go to weight. When one places this view of the admission and interpretation of evidence in the context of an arbitration board's mandate under s. 92(3), the standard wariness that must be taken regarding hearsay does not substantially change. Given his expanded mandate it may be that the arbitrator in assessing contemporary industrial relations may allow hearsay a greater and more expanded role, particularly in sketching in the background to a particular grievance or a specific collective agreement. This does not, however, eliminate the need to balance the danger of admitting hearsay evidence against its probative value.

Because strict adherence to the hearsay rule militates against the informal and expedited nature of arbitration hearings, arbitration boards have traditionally attempted to reconcile the competing interests by permitting hearsay evidence to be adduced but developing two restrictive rules in its use. Those rules can be stated as follows: (a) Uncorroborated hearsay evidence should not be preferred to direct sworn testimony; (b) Hearsay evidence alone should not be admitted to establish a crucial and central question. Both these rules emerge in a succinct passage from the judgment of Mr. Justice Holland in *Re Grivin et al. and Consumers' Gas Co.* (1973), 40 D.L.R. (3d) 509 at p. 512 (Ont. Div. Ct.):

> It is to be observed that the board in this case made a finding of fact excluding, in effect, the evidence of the grievor and relied exclusively on hearsay evidence, some of which evidence was in conflict. Such evidence may well be admissible by reason of the subsection of the *Labour Relations Act* . . . referred to, but it must be borne in mind that in cases of this type the burden is on the employer to show that the employer acted properly in the discharge of the employee, and in order to satisfy that burden in this case the employer, in effect, relied exclusively on hearsay evidence. Even though that evidence may well have been admissible we are all of the view that the employee did not receive a fair hearing in the circumstances. His counsel had no real opportunity to cross-examine on the evidence that was presented.

(The section of the Ontario Labour Relations Act referred to is almost identical to s. 101(a) of the B.C. Labour Code.)

These restrictive rules on the use of hearsay need not signal a more formal, legal character to arbitration board proceedings. Arbitration boards may properly and sensibly admit hearsay evidence to establish many of the facts necessary to a determination of the issue. However, an arbitration board cannot accept hearsay evidence over sworn direct testimony unless it has been corroborated by other evidence. As well, when an arbitration board allows hearsay evidence on a crucial issue, that evidence should be given no weight unless it is corroborated by other direct sworn testimony. In the panel's view this approach does not offend the Legislature's broad mandate of s. 93(2) of the Labour Code to "have regard to the real substance of the matters in dispute". Indeed, the failure of the arbitration board in this case to observe either of those rules ensured that "the respective merit of the positions of the parties" was not *considered.*

The panel has no hesitation in concluding that the grievor in this instance was denied a fair hearing by the board's acceptance of uncorroborated hearsay evidence on a crucial point and in preference to the sworn testimony of the Union's witnesses.

V

Under s. 108 of the Labour Code, the Board has several options when it allows an appeal.

> . . . the board may set aside an award of the arbitration board, or remit the matters referred back to the arbitration board, . . . or substitute the decision or award of the board for the decision or award of the arbitration board . . .

Had the arbitration board in this instance merely considered improper evidence, then this Board would set aside the decision with directions to the arbitration board to exercise its jurisdiction in accordance with the principles set out above. The uniqueness of this case, and the reason why the Board is now going to substitute its own decision, centres on the fact that the material which was filed by the board is completely without any probative value.

One can consider the arbitration board's obligation under para. 16(a) of the collective agreement:

> 16. Promotions and Staff Changes
>
> Both parties agree that job opportunity and security should increase in proportion to length of service; therefore in all cases of upgrading, promotions, transfers and layoff due to lack of work, and/or termination for other than proper cause affecting regular and probationary employees, the Board will fairly and justly take into consideration the following factors: ability, skill, experience and seniority.

Once the grievor had established a *prima facie* case that he was better suited for the job according to the criteria listed in this section, the employer had an obligation to lead evidence which would establish that its decision to promote another employee was made reasonably, in good faith and without discrimination. This could have been done in a number of ways. Normally, the person who made the decision would be called and he would explain the reasons for his decision. The union would be allowed to challenge that testimony in an attempt to show that, in fact, the decision had not been a reasonable one or that it had been made in a discriminatory or arbitrary fashion.

In this case, the documents filed by the employer's counsel offered no support for the employer's decision. In fact, if one excludes the documents prepared *after* the promotion had been made, there is absolutely nothing in the file to indicate

any basis upon which the School Board might have acted. This is not a case where a remittance would allow the employer to present evidence excluded at the hearing. In fact, counsel for the Union objected to the School Board's refusal to call direct evidence and with notice of that objection the School Board elected to rest its case on those documents. A passage from the arbitration award in *Re International Harvester Co. of Canada Ltd. and United Automobile Workers, Local 127* (1974), 5 L.A.C. (2d) 290 (Hinnegan) is particularly *a propos.*

> The Courts have considered the effect which should be given to the action of a party in not calling a witness who could give evidence which it was in his power to give and by which the facts might be elucidated. In *Sandison v. Rybiak et al.*, [1973] 1 O.R. (2d) 74, 39 D.L.R (3d) 366, Mr. Justice Parker of the Ontario High Court of Justice stated that where a defendant can, by his own testimony, throw light upon matters in issue necessary to his defence and fails to go into the witness box, the Court is entitled to infer that his evidence would not support such a defence. This principle has been recognized in a recent arbitration case in *Re Great Canadian Oil Sands Ltd. and McMurray Independent Oil Workers* (1973), 3 L.A.C. (2d) 245 (Sychuk).

In the present case, regardless of the hearsay nature of the evidence upon which the arbitration board came to its conclusion, the fact remains that that evidence did not begin to rebut the *prima facie* case which the grievor had established. That is not only because the evidence was untested, but simply because it had no probative value.

Pursuant to s. 108 of the Labour Code, this Board will substitute its decision for that of the arbitration board. That decision is that the School Board was in violation of para. 16 of the collective agreement and that the grievor has suffered an injury by reason of the School Board's contravention of the promotion provisions. The Board fixes the monetary value of that injury as the difference in pay between the amount being presently paid to the grievor and the rate the grievor would have received as maintenance helper. The Board orders the School Board to pay the grievor that amount for the period from the date the promotion was made until such time as the breach of the collective agreement is rectified.

BOARD OF SCHOOL TRUSTEES, SCHOOL DISTRICT NO. 57, PRINCE GEORGE AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 858.

Before: P.C. Weiler, Chairman, C. Alcott, J. Billings, J. Brown, A. MacDonald Members.
British Columbia, November 16, 1976. No. 79/76.

Arbitration appeal — Precedential effect of prior arbitration decisions — Accumulated sick leave.

This case was an appeal from an earlier ruling of the Board sitting as an arbitration panel under s. 96 of the Code on whether a clause in the collective agreement entitled employees who voluntarily quit to sick leave. The same issue with the same employer and the same clause had been previously arbitrated and an application to set that award aside had been dismissed by the B.C. Court of Appeal.

Held: The Board upheld its earlier decision. Arbitrators, as a matter of principle not law, should consider themselves bound by previous arbitration awards and should follow the general interpretation and principles of earlier decisions. While there are cases where an