RE HOOGENDOORN AND GREENING METAL PRODUCTS & SCREENING EQUIPMENT CO. et al.

Supreme Court of Canada, Cartwright, C.J.C., Judson, Ritchie, Hall and Spence, JJ. November 27, 1967.

Labour relations — Collective agreement — Compulsory check-off — Refusal of employee to authorize deduction — Employer failing to dismiss — Union filing grievance — Agreement to arbitrate — No notice to employee — Whether breach of natural justice.

Administrative law — Natural justice — Labour arbitration — Right of employee to continued employment involved — Refusal to authorize compulsory check-off — Union grievance — No notice to employee.

A collective agreement provided for the deduction by the employer of union dues from wages of employees authorizing the deduction and required the execution of an authorization as a condition of employment. Appellant employee refused to execute an authorization but was not dismissed. A "wildcat" strike ensued and the union filed a grievance claiming breach of the collective agreement. By agreement with the employer the normal grievance procedures were waived and the matter was submitted to a single arbitrator. No notice of the proceedings, which resulted in a finding that the employer was in breach of the collective agreement and a direction to the employer to dismiss the employee if he failed, after notice, to execute an authorization, was given to the employee. On appeal from the dismissal of an application to quash the arbitrator's award the Ontario Court of Appeal upheld the finding of a breach but excised the direction. On further appeal to the Supreme Court of Canada, *held, per* Hall, J., Cartwright, C.J.C., and Spence, J., concurring, the appeal should be allowed and the arbitrator's award quashed. The arbitration was an *ad hoc* proceeding aimed at securing appellant's dismissal. As such it was a denial of natural justice to proceed in appellant's absence, since he was not represented by the union which took a position adverse to his interest. The defect could not be cured by excising the direction.

Per Judson, J. (Ritchie, J., concurring), dissenting, the grievance was a policy grievance as to a provision of the collective agreement equally applicable to all employees. To require that notice and the right to be present be given each employee on any occasion when a provision of a collective agreement having general application was being interpreted would be to destroy the principle of the bargaining agent and vitiate the purposes of the *Labour Relations Act*, R.S.O. 1960, c. 202. The judgment of the Court of Appeal should be upheld.

[*Re Bradley et al. and Ottawa Professional Fire Fighters Ass'n*, 63 D.L.R. (2d) 376, [1967] 2 O.R. 311, aprvd & apld]

APPEAL from a judgment of the Ontario Court of Appeal, 62 D.L.R. (2d) 167, [1967] 1 O.R. 712, affirming an order of Grant, J., 58 D.L.R. (2d) 338, [1966] 2 O.R. 746, dismissing an application to quash a labour arbitration award.

B. A. Kelsey, for appellant.

J. H. Osler, Q.C., for respondent union.

CARTWRIGHT, C.J.C.:—The relevant facts and the question in issue are set out in the reasons of other members of the Court and do not require repetition.

I agree with the reasons and conclusion of my brother Hall and wish to add only a few words, to emphasize my view that the decision of this appeal turns on the peculiar facts of the case.

I agree with the opinion of my brother Judson as to the scheme of the *Labour Relations Act*, R.S.O. 1960, c. 202, which he expresses as follows [*infra*, p. 644]:

> The scheme of the *Labour Relations Act*, R.S.O. 1960, c. 202, is to provide for a bargaining agent which is given power to conclude an agreement with an employer, on behalf of the employees of that employer, which agreement becomes binding upon all employees. No ratification or consent by the employees or any of them is required before a lawful agreement can be concluded and the bargaining agent is given specific authority by the Act to make the kind of agreement represented by art. 5.02 in the instant case. No individual employee is entitled as of right to be present during bargaining or at the conclusion of such an agreement. To require that notice and the right to be present be given to each employee on a occasion when a provision in a collective agreement having gen application to all employees was being interpreted would b destroy the principle of the bargaining agent and to vitiate the purpose of the Act.

The reason that I differ from the result at which he arrives is that I am unable to regard the arbitration which was held as anything other than an inquiry as to a single question, that is, whether or not the employer was bound to discharge the appellant.

I would dispose of the appeal as proposed by my brother Hall.

JUDSON, J. (dissenting):—Greening Metal Products and the United Steelworkers of America, Local 6266, entered into a collective agreement on March 18, 1965. The company and the union amended art. 5.02 of the original agreement on September 1, 1965, so as to read as follows:

> As a condition of their continued employment, all present employees shall, on or before the 15th day of September, 1965, and all future employees shall, within 30 days following their employment be required to execute and deliver to the Company an authorization for deduction of their union dues or an amount equivalent to the regular monthly dues paid by members as the case may be. S authorization may be revoked by any employee by giving wr notice to the Company and the Union within the 30 day pe prior to the termination date of the contract.

Before the amendment of September 1, 1965, art. 5.02 had read as follows:

> All employees shall as a condition of employment within thirty (30) days of their employment be required to execute an authorization for deduction of their union dues or an amount equivalent thereto. Such authorization may be revoked by the employees by giving written notice to the company and the union within the thirty day period prior to the termination date of the contract.

Hoogendoorn had been discharged on March 22, 1965, for refusing to execute an authorization for deduction of union dues under the original art. 5.02. He was reinstated on April 5, 1965, because the company accepted representations made by his solicitors that the article could only have application to new employees and not to those in the employment of the company at the time of the execution of the agreement. This was the reason why the agreement was amended on September 1, 1965.

Hoogendoorn persisted in his refusal to sign authorization after the collective agreement had been amended. On March 18, 1966, all other employees of the plant ceased to work and pickets were set up as a result of his continued refusal to execute a dues authorization form.

The company and the union went to arbitration on the question whether the company was in violation of art. 5.02 of the current collective agreement as amended on September 1, 1965. They agreed to submit the matter to a sole arbitrator. The award of the arbitrator was in the following terms:

> . . . I therefore conclude that the company is in violation of Article 5.02 as amended and require the company to notify the employee Hoogendoorn in writing forthwith by registered mail that he must execute and deliver to the company a proper authorization form for deduction of his union dues or an amount equivalent to the regular monthly dues paid by members as the case may be (enclosing such form) within seven (7) days from the date of the postmark date on the envelope containing the notice or be discharged from his employment. If Mr. Hoogendoorn fails to comply then I direct that the company exercise its powers as an employer and discharge him.

Hoogendoorn was not notified of, nor present, nor represented directly at the hearing. He moved before Grant, J., in the Supreme Court of Ontario to quash the award. His motion was dismissed [58 D.L.R. (2d) 338, [1966] 2 O.R. 746]. He appealed to the Court of Appeal against the dismissal. This appeal failed [62 D.L.R. (2d) 167, [1967] 1 O.R. 712]. The only modification made by the Court of Appeal was to direct the deletion of the last sentence of the arbitrator's award, which had directed the company to discharge Hoogendoorn if he failed to comply with the request for an authorization.

The only issue in the present appeal is whether Hoogendoorn was entitled to notice of and representation at the arbitration proceedings. The union says that this was a "policy grievance" for the purpose of obtaining a decision whether the employer was in breach of one of the provisions of the collective agreement — a provision of general application to all employees. The majority decision of the Court of Appeal accepted this and held that Hoogendoorn had no enforceable right to participate in the administration of the collective agreement against the wishes of the union, or to intervene in arbitration respecting the union's policy grievance, and that he had, therefore, no right to notice of the arbitration.

The dissenting judgment of Wells, J.A., held that the union was seeking the dismissal of Hoogendoorn and at the same time was the only agency that in fact represented him before the arbitration, and that, in these circumstances, he should have been notified of the arbitration and allowed to intervene and state his case, and that failing to do this was failure to render natural justice.

I agree with the majority judgment. The scheme of the *Labour Relations Act*, R.S.O. 1960, c. 202, is to provide for a bargaining agent which is given power to conclude an agreement with an employer, on behalf of the employees of that employer, which agreement becomes binding upon all employees. No ratification or consent by the employees or any of them is required before a lawful agreement can be concluded and the bargaining agent is given specific authority by the Act to make the kind of agreement represented by art. 5.02 in the instant case. No individual employee is entitled as of right to be present during bargaining or at the conclusion of such an agreement. To require that notice and the right to be present be given to each employee on any occasion when a provision in a collective agreement having general application to all employees was being interpreted would be to destroy the principle of the bargaining agent and to vitiate the purpose of the Act.

What was before the learned arbitrator was an allegation that the respondent company had violated the agreement by failure to notify the appellant Hoogendoorn of the obligatio imposed on all employees, including Hoogendoorn, to execu an authorization to deduct dues, as a condition of employmen The disputed clause was in no sense more or less applicable to Hoogendoorn than to any other employee within the bargaining unit and the question of whether or not the clause had

been violated was, at that stage, the exclusive concern of the company and the union.

The rights or interests of Hoogendoorn were not in issue and could not be affected by the answer to the question placed before the arbitrator, namely, whether the company was obligated under the terms of the collective agreement to require each employee to execute a dues authorization form. There was only one possible answer to this question and it applied to all employees whether they agreed or disagreed with the existence of art. 5.02 in the collective agreement. What they would do when the demand for the authorization was made by the company was entirely within their own choice, although it is obvious that the consequence of a refusal would be dismissal. The arbitration procedure has been attacked as a sham battle designed to secure the dismissal of one man. This, I do not accept. I agree with the *ratio* of the majority reasons of the Court of Appeal expressed in the following terms [p. 183 D.L.R., p. 728 O.R.]:

> On the facts the contention fails. It was not in the union's power to procure the discharge of the applicant if he was prepared to pay the periodical union dues. Discharge is for management, either as a matter of cause at large or as specifically provided by the collective agreement. The union policy grievance was designed to force management to put the option under art. 5.02 before the applicant. If he decided to pay, his job was secure against union coercion.

The question of the right to notice of and the right to participate in an arbitration has again been dealt with by the Ontario Court of Appeal in reasons dated June 14, 1967, in the case of *Re Bradley et al. and Ottawa Professional Fire Fighters Ass'n,* 63 D.L.R. (2d) 376, [1967] 2 O.R. 311. That case had to do with art. 12.01 of the collective agreement dealing with promotions. It provided that all promotions in the Fire Department were to be based on seniority of years of service together with efficiency. The fire chief made a number of promotions of men whom I will refer to as included in Group A. The association protested and claimed that the promotions should have been made in favour of Group B. The arbitrator stated that "the grievance concerns solely the proper interpretation to be placed upon Section 12.01". He did construe this provision and it was admitted in the Court of Appeal that if he had stopped there, Group B could not have challenged his award because the arbitration would have amounted to no more than a declaratory proceeding by which the association and the city would have resolved their difference as to the proper meaning of art. 12.01. How that mean-

ing would affect promotions already made or those to be made in the future would be a matter for further consideration and determination.

However, he went further. He revoked the promotions of five of the six members of Group A. Both the Judge of first instance on an application for *certiorari* and the Court of Appeal held that in spite of the arbitrator's declaration that he was concerned only with the interpretation of art. 12.01, he went on to apply it to five members of Group A without giving them an opportunity to be heard. The Court of Appeal held, in agreement with Hartt, J., that the award should be quashed. They distinguished the case from Hoogendoorn's case. What the Fire Fighters' Association did was to take up the cause of Group B in opposition to Group A. The association did not represent Group A. Nevertheless, it persisted throughout the proceedings in asking for the replacement of Group A by Group B, whose cause alone it was advocating. Hoogendoorn's case is concerned solely with a policy grievance and the interpretation of art. 5.02.

I would dismiss the appeal with costs.

RITCHIE, J. (dissenting), concurs with JUDSON, J.

HALL, J.:—This is an appeal from a judgment of the Court of Appeal of Ontario [62 D.L.R. (2d) 167, [1967] 1 O.R. 712] which dismissed an appeal from the order of Grant, J. [58 D.L.R. (2d) 338, [1966] 2 O.R. 746], on an application to him to quash an arbitration award made by G. H. F. Moore, Co.Ct.J., as arbitrator, pursuant to an agreement between the respondent company and the respondent union, entered into to bring an end to a "wildcat" strike which had started on March 18, 1966, and continued to March 25, 1966.

The facts are shortly that the appellant Hoogendoorn became an employee of the respondent company in September, 1955. On June 27, 1962, the respondent union, United Steelworkers of America, Local 6266, was certified by the Ontario Labour Relations Board as the sole and exclusive agency representing the employees. A collective agreement was entered into in December, 1962, which provided for a check-off of union dues. Subsequently, on March 18, 1965, there was a new collective agreement which provided for the compulsory deduction of union dues. Hoogendoorn had taken the position and had told the company that he and two other employees could not join or financially support the union because of political and religious convictions. Following this, on March

22, 1965, Hoogendoorn and the two other employees were dismissed. Hoogendoorn was reinstated on April 5, 1965, following a protest from his solicitors that the dismissal was unlawful and a threat of legal action for reinstatement and damages. The two other employees appear to have accepted their dismissal and gone elsewhere.

The situation remained static until September 1, 1965, when art. V of the collective agreement of March 18, 1965, was amended to read:

> 5.01 During the term of this Agreement the Company agrees to deduct Union dues or a sum equivalent to Union dues as certified by the Union to be currently in effect according to the Constitution of the International Union from the wages of each employee, who has authorized such deduction, on the second pay day of each calendar month and to remit the amounts so deducted to the International Secretary-Treasurer of the United Steelworkers of America.
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> 5.02 As a condition of their continued employment, all present employees shall, on or before the 15th day of September, 1965, and all future employees shall, within 30 days following their employment be required to execute and deliver to the Company an authorization for deduction of their union dues or an amount equivalent to the regular monthly dues paid by members, as the case may be. Such authorization may be revoked by any employee by giving written notice to the Company and the Union within the 30 day period prior to the termination date of the contract.

Hoogendoorn's solicitors again notified the company and the union that even as amended art. V did not apply to him. The company and the union thereupon agreed between themselves that the amendment should not be enforced until March 17, 1966, the expiry date of the March 18, 1965, agreement. However, by virtue of Art. XXVIII the collective agreement continued in force from year to year unless terminated by notice as provided in that article. As no notice of termination had been given, the agreement continued in force after March 17th.

As of March 17, 1966, Hoogendoorn still refused to sign any authorization as required by art. 5.01 and .02 to the deduction of union dues and as a result, there occurred the "wildcat" strike previously referred to. This strike arose out of the objection of the other employees to Hoogendoorn's continued employment. To break this impasse, the company and the union agreed to submit the matter to arbitration. A grievance in writing, dated March 22, 1966, reading as follows:

> It is the Union contention that on March 18, 1966, the Company did violate Article V, Section 5.02 of the Current Collective Agreement as amended on September 1st, 1965.

was brought by the union.

The company and the union did not follow the grievance procedure set out in art. VIII of the collective agreement, but entered into an agreement which read in part as follows:

> The parties appearing at this hearing re the dispute covered in grievance dated March 2, 1966 have mutualy agreed to waive the grievance procedure as outlined in the collective agreement, and to waive a Board of Arbitration, and instead submit this matter to a sole arbitrator whose authority will be the same as that of a Board of Arbitration under the collective agreement.

Referring to this, Wells, J.A., said [pp. 170-1]:

> It was argued also that this was a policy grievance, and as such the only parties concerned were the union and the employer company. In my opinion the hearing was not a policy grievance at all. The provisions of arts. 7 and 8 were completely disregarded, particularly art. 8.04 which provides:
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> > "No matter may be submitted to arbitration which has not been properly carried through all previous steps of the Grievance Procedure."
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> The arbitration before us can only be described as an *ad hoc* body set up by the union and employer to solve the situation created by the unlawful strike caused by Hoogendoorn's continued employmen If there was power to do this it must be justified under art. 26.0 which is as follows:
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> > "The parties reserve the right to amend and supplement this Contract by mutual agreement at any time during the duration thereof."

On the facts it is obvious that the proceeding was aimed entirely at securing Hoogendoorn's dismissal. The learned arbitrator correctly understood the situation for he concluded his award by saying: "If Mr. Hoogendoorn fails to comply, then I direct that the Company exercise its powers as an employer and discharge him." The majority in the Court of Appeal recognized the impropriety of this direction and ordered that it be deleted from the award, holding that it was severable and that the award could be amended by its deletion and as so amended, should be upheld. On this aspect of the case, Wells, J.A., said [p. 171]:

> In my opinion, there might be some weight to this point of view if the proceedings before the learned arbitrator had proceeded as an impersonal interpretation of the agreement without reference to any individual. One has only to look at the learned arbitrator's reasons, however, to realize that this was not the case. He dealt exclusively with Hoogendoorn's case and any reference to gener principles as unrelated to Hoogendoorn, in my opinion, was c incidental.

I agree that this represents the actual situation as it developed. I think the learned arbitrator correctly understood what he was adjudicating upon, namely, Hoogendoorn's con-

tinued employment and nothing else. His proper understanding of his function in the *ad hoc* arbitration proceeding led him inevitably to ordering Hoogendoorn's dismissal. The arbitration proceeding was unnecessary as between the union and the company. Both fully understood and agreed that the collective agreement required Hoogendoorn to execute and deliver to the Company a proper authorization form for deduction of the monthly union dues being paid by members of the union. Both the company and the union wanted him to do so. The arbitration proceeding was not necessary to determine that Hoogendoorn was required so to do. Both knew he was adamant in his refusal. The proceeding was aimed at getting rid of Hoogendoorn as an employee because of his refusal either to join the union or pay the dues. It cannot be said that Hoogendoorn was being represented by the union in the arbitration proceeding. The union actively took a position completely adverse to Hoogendoorn. It wanted him dismissed.

I can come to no other conclusion but that in the circumstances of this case it was improper for the learned arbitrator to proceed as he did in Hoogendoorn's absence. The issue here is whether natural justice was done by proceeding in his absence and without notice to him. On this issue I agree fully with Wells, J.A., when he said [p. 172]:

> The requirements that natural justice should be done is a fundamental one in our jurisprudence and I think may be succinctly stated by quoting from the opinion of the Judicial Committee of the Privy Council in the case of *University of Ceylon v. Fernando*, [1960] 1 All E.R. 631. This was a case of a student accused of cheating at examinations and the Judicial Committee examined the problem at some length. Lord Jenkins expressing the reasons for the report by the Committee made the following observations at p. 638, which I would respectively adopt.
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> > "The last general statement as to the requirements of natural justice to which their Lordships would refer is that of HARMAN, J., in *Byrne v. Kinematograph Renters Society, Ltd.*, [1958] 2 All E.R. 579 at p. 599, of which their Lordships would express their approval. The learned judge said this:
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> > > 'What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more.' "
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> As I have indicated, these observations apply in my opinion to the circumstances revealed in this case. Without questioning anyone's good faith, I am of the opinion that Hoogendoorn, under all the peculiar circumstances, which I have indicated, was entitled to be heard and with respect, I differ from the view that part of the learned arbitrator's decision can be deleted and that what is left is

a proper adjudication of the problem, without any intervention by Hoogendoorn.

The case of *Re Bradley et al. and Ottawa Professional Fire Fighters Ass'n*, 63 D.L.R. (2d) 376, [1967] 2 O.R. 311, was relied on by the respondents. That case had to do with art. 12.01 of a collective agreement dealing with promotions. It provided that "all promotions in the [Fire] Department shall be based on seniority of years of service together with efficiency". The chief of the Fire Department promoted a number of men, six in all. The association objected, claiming that others should have been promoted. The dispute was referred to arbitration. The arbitrator, E. M. Shortt, Co.Ct.J., stated at the outset of his award that "the grievance concerns solely the proper interpretation to be placed upon Section 12.01". In this respect, the grievance there being arbitrated was singularly like the grievance dealt with by the arbitrator in the instant case which reads:

> It is the Union contention that on March 18, 1966, the Compar did violate Article V, Section 5.02 of the Current Collec Agreement as amended on September 1st, 1965.

The present case and the *Ottawa* case are identical in that upon such similar submissions the arbitrator in the *Ottawa* case went beyond interpreting art. 12.01 and directed that five of the six promotions made by the chief of the Department be revoked. The Court of Appeal set aside the award because it was made without notice to the five men so affected although three of them were in fact present during the arbitration hearing as onlookers and not as parties and the other two were alleged to have been aware of the pending arbitration.

Laskin, J.A., said at pp. 378-9 in the *Ottawa* case:

> Judge Shortt in his award stated at the outset that "the grievance concerns solely the proper interpretation to be placed upon Section 12.01". He went on to construe this provision, and it is conceded that if he had concluded his award after giving his construction, it would not have been open to Bradley and the other *certiorari* applicants to challenge it. The arbitration would then have amounted to a declaratory proceeding by which the Association and the city would have resolved their difference as to the proper meaning of art. 12.01; and how that meaning would affect promotions already made or those to be made would be a matter for furt consideration and determination. If the arbitrator had proceed this manner the case would be within the principles examine this Court in *Re Hoogendoorn and Greening Metal Products & Screening Equipment Co. et al.*, [1967] 1 O.R. 712, 62 D.L.R. (2d) 167.

Judge Shortt went beyond his terms of reference in directing that the disputed promotions be revoked. The arbitrator in the present case likewise went too far when he directed the company to dismiss Hoogendoorn. Accordingly, on substantially the same question, the Court of Appeal appears to have taken directly opposite positions. It deleted the direction to discharge Hoogendoorn in the one case and upheld the award and in the other it refused to delete the part revoking the promotions and struck down the whole award. I think it was right in the *Ottawa* case and wrong in Hoogendoorn's. In both cases the issue was whether an employee whose status was being affected by the hearing was entitled to be represented in his own right as distinct from being represented by the union which was taking a position adverse to his interests.

It follows that I would allow the appeal and quash the award made by the learned arbitrator.

The appellant should have his costs here and in the Courts below.

SPENCE, J., concurs with HALL, J.

Appeal allowed.

ABRAMZIK et al. v. BRENNER et al.

Saskatchewan Court of Appeal, Culliton, C.J.S., Woods and Brownridge, JJ.A. December 12, 1967.

Negligence — Duty of care — Nervous shock — Mother suffering shock and physical illness on being told of death of her children killed by defendant's negligence — Whether shock reasonably foreseeable.

A mother who suffers nervous shock and resulting physical illness on being told that two of her children were killed by the defendant's negligent driving has no cause of action against the defendant for these injuries. The defendant owed her no duty of care because a reasonable man in the defendant's position would not have foreseen nervous shock resulting to her from his conduct.

[*Hay or Bourhill v. Young*, [1943] A.C. 92, apld; *Dulieu v. White & Sons*, [1901] 2 K.B. 669; *Wilkinson v. Downton*, [1897] 2 Q.B. 57; *Janvier v. Sweeney*, [1919] 2 K.B. 316; *Purdy v. Woznesensky*, [1937] 2 W.W.R. 116; *Hambrook v. Stokes Brothers*, [1925] 1 K.B. 141; *Guay v. Sun Publishing Co. Ltd.*, [1953] 4 D.L.R. 577, [1953] 2 S.C.R. 216; *King et al. v. Phillips*, [1953] 1 K.B. 429; *Boardman et al. v. Sanderson*, [1964] 1 W.L.R. 1317; *Cook v. Swinfen*, [1967] 1 W.L.R. 457; *Schneider v. Eisovitch*, [1960] 2 Q.B. 430; *Re Polemis and Furness, Withy & Co., Ltd.*, [1921] 3 K.B. 560, refd to]

Torts — Nervous shock, other than flowing from a physical injury, is a substantive tort, not a particular instance of damage.