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Bakery and Confectionary Workers' International Union of America Local 468 v. White Lunch Ltd. et al. 1966 S.C.R. 282

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LABOUR LAW

Bakery And Confectionary Workers' International Union of America Local 468 *v. White Lunch Ltd. et al.* [1966] S.C.R. 282.

LABOUR LAW—ADMINISTRATIVE LAW—STATUTORY INTERPRETATION—RETROACTIVE ADMINISTRATIVE DECISIONS — B.C. LABOUR RELATIONS ACT s. 65(3).

Introduction

The recent *White Lunch case*[1] is the culmination of a needlessly long labour dispute.[2] The decision of the Supreme Court rests on a simple matter of statutory interpretation; however, it is apparent from the facts that the court did not wish to involve itself in some very interesting problems. It is of some significance that this decision, which seemed obvious to the Supreme Court, was a complete reversal of the case's history in the lower courts.

Facts

The facts of the case are quite complex and since the time sequence is of importance it may be useful to set out the facts[3] in the following table:

Background: The prosecutor, seeking to have the B.C. Labour Relations Board's orders quashed, was White Lunch Ltd. White Lunch had extensive restaurant operations in the Vancouver area. The business was operated through a maze of corporations. Clancy's Pastries Ltd. was part of the White Lunch organization, supplying baked goods for the restaurants. The two companies had the same individual shareholders, president, general manager, and solicitor.

September 26, 1962: The union, local 468, made an application for certification as the bargaining agent for the employees in the bakery department of White Lunch. The Board sent notice of the application to White Lunch.

October 1: The solicitor for White Lunch (and Clancy's) sent a letter to the Board acknowledging receipt of the notice, but stating that White Lunch had no bakery department, that the baking was done by Clancy's and that the application should be directed against Clancy's. The next day the Board sent notice of an application for certification to Clancy's.

October 12: The Solicitor for the companies represented to the Board that a rumor that the Clancy's company would close down was untrue.

October 16: The Board certified the union as bargaining agent for the employees of Clancy's. There had apparently been a start to negotiations before this on or about Oct. 10; there were already complaints of unfair labour practices.

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1 *Bakery and Confectionary Workers' International Union, Local 468 v. White Lunch Ltd. et al.* [1966] S.C.R. 282, 56 D.L.R. (2d) 193. For the trial decision see 42 D.L.R. (2d) 364 (B.C.S.C.). The appeal to the B.C.C.A. is reported in 51 D.LR (2d)72

2 The judicial history of the case lasted from Sept. 26, 1962, when the union applied for certification, until the decision of the Supreme Court was handed down on Jan. 25, 1966, a period of three and one-third years. However, as in most labour disputes, one suspects that the actual struggle was over when the interim injunction was granted to White Lunch on Dec. 13, 1962. The decision of the Supreme Court is probably only a paper victory for the union.

3 The facts are mainly taken from the decision of Mr. Justice Hall in the Supreme Court, with some of the facts being obtained from the decisions of the lower courts.

November 8: The hearing of the unfair labour practices was held and the Board made three orders; Clancy's was ordered to cease intimidating the workers and to reinstate two workers and pay them wages lost because of their having been discharged.

November 24: The shareholders of Clancy's, (in a meeting which required 14 days notice), voted to wind-up voluntarily the Clancy's company, and the employees were discharged.

February 13, 1963: The Board held a hearing as a result of which the previous orders against Clancy's were changed so that the certification as well as the unfair practice orders were to operate against White Lunch instead of the company which no longer existed.

The discharged employees picketed White Lunch on December 7, 1962. White Lunch then sought an injunction and a declaration that it was not the employer of the picketers. It was at the hearing for an interim injunction on Dec. 13 that the union and the Board first found out that Clancy's was no longer in existence and that it had been wound-up on the day when the workers had been discharged. The interim injunction was obtained, and the trial for the permanent injunction and the declaration was ordered to be held as soon as possible. However, before the trial, the union sought to have the previous orders of the Board varied. The orders were varied at the hearing on February 13. White Lunch then brought the issue before the courts, seeking a judicial review of the Board's power to change previous orders. Both the British Columbia Supreme Court and Court of Appeal found that the Board did not have this power. The Supreme Court of Canada reversed their findings and held that this action was within the statutory power given to the Labour Relations Board.

The finding by the Court that the Board had jurisdiction to make the orders in question rests upon the judicial interpretation of the word "vary" as it appears in s. 65(3) of the Labour Relations Act.[4] Upon a reading of the facts it is evident that the real reason for the decision to allow the Board to vary the orders was because of the way in which the Board and the union had been misled by the representations of the solicitor of the companies. Unfortunately, the Supreme Court did not take the opportunity to discuss the standard of conduct necessary when dealing with a quasi-judicial body. Further, when considered in conjunction with what appears in the judgments in the lower courts, there is an even more fundamental problem raised. The Board was chastised by the trial judge[5] for holding the hearing while the same issue was before the court in the injunction proceeding. Just who was usurping whose jurisdiction is a difficult problem to determine, but the important point is that in this

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[4] Labour Relations Act, R.S.B.C. 1960 c. 205 as amended by 1961 c. 31 s. 37(c). The section reads:

65(3). "The Board may, upon the petition of any employer, employers' organization, trade-union, or other person, or of its own motion, reconsider any decision or order made by it under this Act, and may vary or cancel any such decision or order, and for the purposes of the Act the certification of a trade-union is a decision of the Board."

The Ontario Labour Relations Board has the same power; see Labour Relations Act, R.S.O. 1960 c. 202 s. 79(1)

[5] See 42 D.L.R. (2d) 364 at 369 for a rather emotional outburst.

area there are two adjudicators available to the parties. Thus, as a result of the dispute in this case, there is an injunction and declaration of the British Columbia Supreme Court that White Lunch is not the employer and a decision of the Supreme Court of Canada holding that White Lunch is the employer of the workers.

In the Supreme Court of British Columbia

Judicial review of the Board's orders of February 13, 1963 was started by White Lunch on a motion of certiorari. At trial the orders were quashed. The basis of the court's decision was that these orders were of a retroactive nature and would "saddle White Lunch Ltd. (a stranger to the proceedings of November 8, 1962) with responsibility for the financial and other obligations of Clancy's which the Board thought existed during the corporate existence of Clancy's."[6] The issue of retroactivity is only mentioned by Sullivan J. The Board had relied on the power to vary previous orders given in s. 65(3) of the Labour Relations Act. A variance of previous orders had been allowed by the Supreme Court of Canada in the *Oliver Co-operative case*,[7] but the court here found that case "easily distinguishable".[8]

Surely the crucial problem here is what is meant by "vary" in s. 65(3). It could mean that the Board has power to change a previous order but that the changed order is only effective from the date of the hearing to change it, or that the Board could vary the results of a previous order retroactively to the date of the original order.

The other part of Mr. Justice Sullivan's argument is that White Lunch was not a party to the earlier proceedings. Without disturbing the classical "corporate veil" theory, this may very well be the case. However, since Clancy's and White Lunch had the same shareholders and managers it is difficult to believe that White Lunch did not have actual notice of the hearing against Clancy's.

The Supreme Court (British Columbia) was also gravely concerned that because the issue before the Board involved a decision as to whom was the real employer of the workers in question, and that since there were injunction proceedings before the court by White Lunch against the union, the Board was being discourteous to the British Columbia Supreme Court in hearing the matter at this time. The concern is no doubt similar to that felt by administrative tribunals with respect to judicial review in spite of privative sections of statutes. In the end such jurisdictional disputes are a form of political activity which is no longer expected from the judiciary.

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6 *Ibid.*, at 368-9

7 *Labour Relation Board of B.C. et al. v. Oliver Co-operative Growers Exchange and Okanagon Federated Shipping Ass'n.* [1963] S.C.R. 7, 35 D.L.R. (2d) 694.

8 42 D.L.R. (2d) at 369, the case was dismissed in just these words, see *Infra*, footnote 12.

In the British Columbia Court of Appeal

In the British Columbia Court of Appeal the decision of Sheppard J.A.[9] is based completely on the finding that the word "vary" as it is used in s. 65(3) does not include the power to vary retroactively, and that the Board had exceeded its statutory powers and the writ of certiorari would lie. He did not refer to the injunction proceedings. However, Bull J.A. did mention these and decided that they ought to be completely ignored since they were irrelevant to the finding of want of jurisidiction. He also based his decision on the meaning of the word "vary", noting that it was within the Board's power only to vary the orders effective from the date of the second hearing.

Before going on to consider the reasoning of the Supreme Court, let us consider what has happened so far. By hiding under the separate corporate entities of the two companies, the managers of White Lunch have not only successfully dodged a certification proceeding[10] but also they have managed to get rid of the pro-union employees permanently, in blatant contravention of the protection afforded workers under any statute which encourages collective bargaining.[11] The case was interpreted in the lower courts as a *bona fide* closing down of the bakery; in fact, it is a not too well hidden variation of the "runaway shop". To saddle the Board with a theory of corporate identity from company law, when it is dealing with industrial relationships that it defines in a realistic and functional way, is the height of absurdity. So far all we have seen is another argument for the proposition that the courts ought to keep out of such a specialized field, or if they insist on playing watchdog, then they ought not to try to import obsolete or irrelevant law.

In the Supreme Court of Canada

The decision of the Supreme Court is short and to the point. After setting out the facts the court comments that the Labour Relations Act is not to be narrowly construed as a derogation of common law rights, but as a conscious altering of the common law by the legislature in the light of the Industrial Revolution. Once the scope of the interpretation is determined there is little left of the case. The interpretation of "vary" is the same as that in the *Oliver Co-operative case*,[12] the Board having an independent power to vary former orders. Furthermore, the Board under this power to vary has the final and

9 51 D.L.R. (2d) 72.

10 They would presumably be certified at least from the time of the second hearing, if the variation is to be prospective only.

11 See R.S.B.C. 1960 c. 205 s. 4 and R.S.O. 1960 c. 202, s. 48 to s. 59b, in particular s. 50.

12 In that case the Board had varied previous certifications, changing them so that a larger union, formed out of a series of locals, was certified in place of the various locals. The variance was, in effect, a short-cut to going through the complete certification procedure again. Because the problem was not raised by the successor union the issue of retroactivity was not raised in that case. It is, however, a latent matter; there is the possible problem as to what rights the new union took over and from what date it took over those rights.

conclusive decision. There were no defects in natural justice at the hearing of February 13, since the interested parties had notice and were allowed to speak on the issue of varying the original orders. The fact that the operation of the order may be retroactive is not a denial of justice:

> . . . circumstances will frequently arise where it must have a retroactive effect. The present case is a classical example.[13]

Analysis

Was the meaning which the Board gave to the word "vary" really as terrible as the lower courts suggested? There is a similar use of the word "vary" in common legal usage. Suppose that a writ has been issued with the name of the party defendant incorrectly spelled, the Statute of Limitations subsequently preventing the issuance of a new writ before the error has been discovered. It is quite obvious that the plaintiff can have the original writ *varied* so as to have the correct spelling put on the writ.[14] This is a variance of the writ dated back to the date of the original writ. There is no issue of retroactivity here; this is merely the correction of a mistake. There is a general qualification that such variations should not be allowed to work injustice. We are, however, dealing with more than a spelling mistake in this case.

Hanging over the whole of this discussion is the reference by the courts to "retroactivity". There are few words so emotionally charged as this when dealing with the "justice" of any judicial decision. If the Board uses its power to vary incorrectly by making an order that is retroactive, then nothing, not even the consent of the parties, would give the Board jurisdiction where it has none and the writ of certiorari would properly lie.

The use of this word in the judgments betrays a failure to make a fundamental and obvious distinction concerning retroactivity. The common problem is with respect to the interpretation of a statute and whether that statute operates retroactively, i.e. whether it is to affect the law for times prior to its enactment.[15] There is, of course, the general presumption that statutes are to operate prospectively from the date that they are brought into force. However, this is not the type of problem which is raised by the Board's interpretation of the word "vary". It is not the interpretation of s. 65(3) that is retroactive, since the section was brought into force by an amendment to the Act in 1961 long before the actions of the parties in question.

What the courts seemed to be concerned with is the fact that the Board interpreted "vary" so that it could change the status or rights of the parties as of an earlier date, i.e. the date at which the parties first came before the Board. This, though, is not to interpret the

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13 [1966] S.C.R. at 295, 56 D.L.R. (2d) at 204.

14 See, for example, *Williamson v. Headley* [1950] O.W.N. 185.

15 This is the sort of thing that Sheppard, J.A. is dealing with at 51 D.L.R. (2d) 75-6.

statute retroactively; it is merely to change the rights of the parties at some previous date. Clearly this is nothing startling, but merely a function of any adjudication. Thus, when a court decides that a contract has been breached, it does not say that from the date of the trial the contract is in a state of breach. It in effect declares that at a certain previous time, the defendant breached the contract. There is nothing wrong with this, for all adjudication is based on past conduct and raises no problem of retroactivity. The crucial distinction is that the fear of retroactivity applies to the *state of the law* at the time when people act on it, not to the activities of the people themselves.

The fear of retroactivity is not simply that it affects vested rights, (all new laws do this), but that it puts the citizen in the position that at a given time it is *impossible* for him to determine the legal effect of his conduct. This must not be confused with whether or not he is able to decide what the legal consequences of his conduct are; it is because of such difficulties that people seek the advice of lawyers. The problem is that no amount of legal prediction can determine the legal effect since the law itself is made after the activity.

It may be that what is objected to is that the legal state of affairs was decided by the Board when it certified Clancy's and now the Board is changing that state of the law. The issue of certification having been decided and Clancy's wound-up, why should there now be a new hearing on the same matter? Otherwise, how is one ever to act after a decision of the Board if they can at some later time change their mind? However, White Lunch is not really in a position to avail itself of this argument. It is not unreasonable to say that White Lunch intended the reasonable and probable consequences of its activity. The obvious consequence of the solicitor's letter[16] to the Board was that the union and the Board would end up dealing with the wrong party, with a comany that was about to be wound-up, or which could be wound-up easily and against which any orders would be of no value. Such a misleading of the tribunal, presumably intentional, is hardly a laudable activity. That such activity should be allowed to deprive the workers who were fired from the statutory protection given their jobs would hardly be justice. But this pattern of activity came to light only after the original orders had been made. Thus, the reopening of the previous hearings was to correct the error which the tribunal had made as a result of the prosecutor's conduct. There is no doubt that a court would not allow such a fraud to be committed against it. Why then should the Board, as an adjudicative body, be forced to let such misconduct create an effective block to the operation of the statute that created it?

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16 The conduct of the solicitor is interesting. If they claim to be separate corporate entities here, is he not faced with a conflict of interests? In whose best interests was he acting when he made the assurance that Clancy's was not going to close? In fact, it is impossible to understand the conduct of the solicitor unless we regard the two companies as one entity.

Perhaps what the courts were trying to get at was the notion that White Lunch had no notice of the previous hearing. It was pointed out that, apart from White Lunch's representation to the Board that Clancy's was really the party they were after, the White Lunch company, by virtue of the people involved, was certainly aware of the events of the first hearing.[17] They really cannot say that they had no notice or opportunity to attend the first hearing, since they were in fact there.

The case does raise an interesting theoretical problem. The Supreme Court has in effect said that White Lunch is the employer of the discharged workers. However, White Lunch has an injunction and a declaration of the British Columbia Supreme Court that they are not employers. What is the status of the injunction and the declaration? It is impliedly overruled by the decision of the Supreme Court of Canada, but do they need to have the injunction formally dissolved? Would they be in contempt of the British Columbia court for following a decision of the Supreme Court? This duality of legal status results from the acceptability of two approaches to the same problem. If this duality is to be removed from the law, it is doubtful that the Labour Relations Board would be the one to lose jurisdiction.

Conclusion

This case supplies us with a judicial interpretation of the meaning of the word "vary" as it applies to administrative tribunals, at least to Labour Relations Boards. This meaning is broad enough to be consistent with the adjudicative character of many of these boards.

However, the case does not go far enough in concerning itself with the conduct of the prosecutor (White Lunch) in trying to evade the effect of the Labour Relations Act by means of a misrepresentation. That a person should be able to hide behind a misrepresentation in an adjudication is something that the courts should not hesitate to deal with. Up until now, judicial concern with tribunals has been limited to protecting individuals from improper adjudications. However, the concern with adjudication ought to go the other way as well. The courts ought to have an interest in seeing that adjudication itself is not allowed to be the victim of sham by the parties being heard. When a tribunal is adjudicating, surely a "contempt" of the tribunal is as dangerous to the judicial process as is a contempt of the court.

Cynically, the real facts of the case are that not only did White Lunch manage to deceive the union and the Board, it successfully made a mockery of the law and the courts. Three years after the dispute arose, Mr. Justice Hall, in finally resolving the matter, said:

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[17] *Labour Relations Board of B.C. et al. v. Traders' Service Ltd.* [1958] S.C.R. 672 is an example of a similar case. Here two inter-related companies were also involved. They also pleaded this independent corporate ignorance of the other's affairs. The Supreme Court of Canada refused to accept this as grounds for quashing a certification. There were, however, two dissents in this case, both of which relied on a strict theory of corporate identity.