6-28-1968

Re Ass'n of Radio & Television Employees and Canadian Broadcasting Corp

Innis Christie

M L. Levinson

J W. Healy

RE ASS'N OF RADIO & TELEVISION EMPLOYEES AND CANADIAN BROADCASTING CORP.

I. Christie, M.L. Levinson, J.W. Healy, Q.C. *June 28, 1968.*

EMPLOYEE GRIEVANCE alleging unjust discharge.

M.W. Wright, Q.C., and others for the union.
D.K. Laidlaw, Q.C., and others for the company.

[The award is reported on the procedural point only.]

AWARD (in part)

It is widely accepted by labour arbitration boards in Ontario that the onus of proving "just cause" is on the company in dismissal cases, where the collective agreement contains the usual provision and there is no practice to the contrary clearly established between the parties. See for example *Re Int'l Ass'n of Machinists, Local 749, and Timken Roller Bearing Co.* (1952), 4 L.A.C. 1262 (E.W. Cross, C.C.J., chairman); *Re United Brewery Workers and Dow Kingsbeer Brewery Ltd.* (1958), 8 L.A.C. 198 (B. Laskin, chairman), and *Re U.E.W., Local 504, and Canadian Westinghouse Co. Ltd.* (1966), 17 L.A.C. 427 (E.E. Palmer, chairman). The last of these cases is a discipline case in which Professor Palmer decided that the rule in discharge cases, which puts the onus on the company, should be extended, and cites the decisions of other arbitrators agreeing with him. It is unnecessary for us to deal with this point, but the awards cited by Professor Palmer establish beyond doubt that the normal rule in Ontario is for the company to bear the onus of proving "just cause" in discharge cases.

Under the provisions of most collective agreements, including the one before us, the employer must establish to the satisfaction of the arbitrators that there was "cause" for dismissal and that dismissal was "just". (*R. v. Arthurs, Ex parte Port Arthur Shipbuilding Co.* (1967), 62 D.L.R. (2d) 342 at p. 363, [1967] 2 O.R. 49 [revd 70 D.L.R. (2d) 693]). At common law, where due notice had not been given, the employer had only to prove "cause". Nevertheless, the mechanics of proof seem to be substantially similar in Court and arbitration proceedings. Technically under a collective agreement, as at common law, all the employee must establish is that he was employed and

that he was dismissed: The employer must then establish that the dismissal was justified. See Carrothers, *Labour Arbitration in Canada*, 1961, at p. 125, and also *Federal Supply and Cold Storage Co. of South Africa v. Angehrn and Piel* (1911), L.J.P.C. 1 at p. 2; *Patterson v. Scott* (1876), 38 U.C.Q.B. 642 at p. 645; *Butler v. C.N.R.*, [1940] 1 D.L.R. 256 at p. 261, [1939] 3 W.W.R. 625, 51 C.R.T.C. 121 (Sask. C.A.).

The question before a board of arbitration is not whether the grievor was an employee or whether he was dismissed: these matters are surely not in dispute unless raised as preliminary objections by the company. The question before the board is whether there was "just cause". The board therefore starts at a position where the onus is on the company.

There are, of course, policy reasons to justify placing the onus on the company as well. A leading American commentator states:

> "Discharge is recognized to be the extreme industrial penalty since the employee's job, his seniority and other contractual benefits, and his reputation are at stake. Because of the seriousness of this penalty, the burden generally is held to be on the employer to prove guilt or wrongdoing, and probably always so where the agreement requires 'just cause' for discharge." (Elkouri, *How Arbitration Works*, 1960, rev. ed., at p. 417)

Since the onus is initially on the company the burden of adducing evidence must also rest on the company. From a policy point of view this is desirable because the company has command of the facts on which it acted in dismissing the grievor. Both the culminating incident and the grievor's record may most conveniently be proved by the company.

Because of the seriousness of discharge this board requires clear and convincing proof of the facts alleged by the employer to justify the discharge, but this is not a criminal burden of proof. Since the burden is not a criminal one the rule in *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136, has no application, even where the evidence is entirely circumstantial. To say that a discharge cannot be upheld where the facts in evidence are capable of any rational inference other than one indicating that the grievor was at fault is to say that the reasons for discharge must be established beyond all reasonable doubt. It is another way of stating the criminal burden of proof.

A few arbitrators have held that the rule in *Hodge's Case* does apply in labour arbitration, but we must respectfully dis-

agree with them. See for example *Re Retail, Wholesale & Department Store Union, Local 414, and Automatic Canteen Co. of Canada Ltd.* (1963), 13 L.A.C. 446 (J.A. Hanrahan, arbitrator) [note]. Discharge is a serious matter, but there are a great many very serious matters that are decided on the basis of a civil rather than a criminal burden of proof. In our opinion a civil burden of proof applies here.

[J.W. Healy, Q.C., concurred in the result, and M.L. Levinson dissented.]

[Full award 19 pages]