IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA

APPEAL/CLAIM NO. GDAHCV2008/0558

IN THE MATTER OF AN APPEAL BY THE APPELLANT PURSUANT TO SECTION 62 (1) (2) OF ACT NO. 15 OF 1999 FOR REDRESS AGAINST AN AWARD BY AN ARBITRATION TRIBUNAL IN THE DISPUTE BETWEEN ST. GEORGE'S UNIVERSITY LIMITED (SGU) AND GRENADA TECHNICAL AND ALLIED WORKERS UNION (GTAWU)

BETWEEN:

ST. GEORGE'S UNIVERSITY LIMITED

APPELLANT

AND

GRENADA TECHNICAL AND ALLIED WORKERS UNION

RESPONDENT

Appearances:

Mr. Anthony Astaphan SC with Mr. Richard Williams instructed by Mr. Lloyd Noel for the Appellant
Mr. Reynold C. Benjamin for the Respondent

2009: March 5
2011: June 16
2014: January 24.

JUDGMENT

[1] PRICE FINDLAY, J.: This is an appeal brought by the appellant against the decision of the Arbitration Tribunal delivered on the 30th October, 2008.

[2] The grounds of appeal were stated as follows:

(1) The majority of the Tribunal erred in law and/or misdirected themselves in law and in fact in that they purported to make findings which were unsupported by evidence. As a result their decision is unreasonable and erroneous.

(2) The majority of the Tribunal erred in law and/or misdirected themselves in that they failed to properly consider the submissions, and in particular the closing written address made by the appellant's Attorney at the proceedings of the Tribunal.

(3) The majority of the Tribunal erred in law and/or misdirected themselves in that in their conclusion they considered the evidence substantially, if not solely, from the perspective of the respondent and failed to properly consider all of the evidence before the Tribunal.

(4) The majority of the Tribunal erred in law and/or or misdirected themselves in that they failed to properly consider, as a matter of law, the appellant's evidence and case that:

(a) Night allowance was intended to compensate maintenance staff who were being asked to work only after normal working hours;

(b) It had consistently refused to accept that night allowance would be paid to all shifts;

(c) It had consistently paid night allowance only to the maintenance staff and that;

(d) The payment of night allowance to all shifts including overtime would lead to double payment which would be and is unfair and unreasonable.

(5) The majority of the Tribunal erred in law and/or misdirected themselves in that they failed to properly consider the material evidence that the appellant had signed an agreement with "all shifts" as an oversight and in error instead of limiting the night allowance only to maintenance staff.

(6) The majority of the Tribunal erred in law and/or or misdirected themselves in that they failed to properly consider, construe and/or apply Article 11 of the agreement.

(7) The Decision of the Minority is right.

(8) As a result, a substantial wrong and/or miscarriage of justice have been caused to the appellant.

[3] The respondent filed an Answer to the appellant's notice contending that the appellant had failed to identify the findings, submissions and law on which they intended to rely in the notice of appeal:

> "Procedural –
>
> In the notice of appeal, paragraph 5, the appellant purports to challenge certain findings of fact of the Tribunal contrary to the provisions of section 62 of the Act.

In the notice of appeal, paragraph 6, the appellant has failed to identify the finding of law by the Tribunal against which the appellant appeals.

The Appellant's grounds of appeal –

The respondent will respond to the appellant's legal submissions on the appellant's grounds of appeal when served. However the respondent notes that the appellant in paragraph 7.1 has failed to identify the findings of the Tribunal which are unsupported by evidence. In paragraph 7.2, the appellant failed to identify the submissions that were not properly considered by the Tribunal. Paragraph 7.4 are grounds of fact disguised as grounds or issue or law. Paragraph 7.5 is also an issue of fact disguised as a ground in law.

The respondent will contend in legal submissions in reply to the appellant that the Majority decision of the Tribunal is correct in law and should be upheld."

[4] This matter arose between the appellant and the respondent when negotiations for a new industrial relations agreement was being negotiated.

[5] These relations began sometime in the 1980's but there were periodic reviews over that period of time. The periods under review for the purposes of this appeal were 1st January, 2001 - 31st December, 2003 and 1st January, 2004 – 31st December, 2009.

[6] The issue for determination was the payment of the Night Differential Allowance (NDA) – was it to be paid to all shift workers as alleged by the respondent, or was it to be paid only to maintenance workers as was postulated by the appellant.

[7] It appears that the shift system was introduced for library staff, security officers and drivers from the inception of the University. The maintenance workers worked regular hours. When the University Club came into operation sometime in 2004, workers there began working on a shift system.

[8] There were several industrial relations agreements between the parties. There was one for the period 1997-2000, another for the period 2001-2003 and another for the period 2004-2009.

[9] It was the last such agreement, the 2004-2009 Agreement from which this dispute arose. The Terms of Reference for the Arbitration Tribunal were set out in a document dated September 2008.

[10] In part it reads "WHEREAS the said dispute touches and concerns the USE, MEANING and APPLICATION of the phrase:

> "All Shift workers shall receive a Night Differential Allowance as follows:"
> …

[11] The Tribunal was further mandated to consider, whether the above mentioned phrase meant:

I. All workers who were rostered to work outside the hours of 8:00 a.m. to 4:00 p.m. or 9:00 a.m. to 5:00 p.m. without overtime being paid for hours worked under Article 8 – OVERTIME WORK ON SATURDAYS, SUNDAYS AND PUBLIC HOLIDAYS or

II. Only and exclusively shift workers in the Maintenance Department of the University."

[12] The University and the Union signed an agreement in 2001, Article 11 of that agreement stated as follows:

"It is agreed that all workers covered by this Agreement shall receive the following increases on their wages/salaries.

2001	2002	2003
5% on 2000 wages	5% on 2001 wages	5% on 2002 wages

NIGHT DIFFERENTIAL ALLOWANCE

All shift workers shall receive a Night Differential Allowance as follows: -

		2001 & 2002	2003
4:00 p.m. – 12:00 a.m.	-	$3.00	$3.25
12:00 a.m. – 8:00 a.m.	-	$3.25	$3.50

[13] The University (appellant) continued to pay the NDA to maintenance workers only. The appellant contends that this was the only category of workers who qualified for this payment. It was never intended that any other class of workers would benefit from this payment.

[14] The Union contended that the words in the agreement, "all shift workers" means just that, all shift workers, not just the maintenance staff.

[15] The Tribunal (by majority decision) agreed with the Union's position and it is from this decision that the University now appeals.

[16] The Union makes the point that under the Labour Relations Act, s.62 that no appeal lies against an award of the Arbitration Tribunal on any questions of fact and that this appeal filed by the appellant is largely on questions of fact and ought not to be entertained.

Section 62 of the Labour Relations Act reads as follows: -

> "(1) When a trade dispute has been referred to an Arbitration Tribunal under section 49 and the Tribunal makes an award in settlement of the dispute, any party to the dispute may appeal to the High Court against the award on any question of law, but no appeal shall lie against the award on any question of fact.
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> (2) When an appeal has been made under subsection (1) to the High Court from an Arbitration Tribunal, a further appeal lies to the Court of Appeal from the decision of the High Court on a question of law raised before the High Court, but no appeal shall lie to the Court of Appeal on any question of fact."

[17] In Edwards v Bairstow[1], Viscount Simonds stated:

> "For it is universally conceded that though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are I think fairly summarized by saying that the court if it appears that the commissioners acted without evidence or on a view of the facts which could not be reasonably entertained" …

In those circumstances the Court can overturn the decision of the Tribunal.

[18] The paragraphs in question which the Tribunal had to consider have already been set out in this judgment and I will not repeat them again.

[19] But one has to look at the history of the negotiations between the parties to understand how they came to their respective positions, and then to look at the majority findings in light of that history.

[1] (1955) 3 All ER 48 at 53

[20] From the record produced to the Tribunal it is clear that the NDA was first conceived by the appellant to cover the needs of an expanding institution for almost continuous maintenance of the facilities in question.

[21] Maintenance workers had previously worked "regular hours" and with the expansion of the University and increased student population, maintenance of the facilities on a continuous 24-hour basis became necessary.

[22] The appellant contends that from the outset, NDA was conceived to apply only to maintenance workers.

[23] There seems to be some support for this in the statement of Bert Patterson, one of the respondent representatives before the Tribunal. In his statement he depones:

> "It should be noted that although there was tentative agreement on the quantum for NDA for the period 1997-2000 of $4.50 and $5.50 per hour on March 3, 2000 the Union and St. George's University agreed on the lower figure of $3.00 and $3.50 for the period 2001-2003 initially proposed by the Union for the 2001-2003 negotiations."
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> "The reason for this was because the 1997-2000 NDA was intended for maintenance workers only and compensation for loss of overtime regularly earned."

[24] He goes on to state: "Whereas the proposals and agreement for the period 2001-2003 were intended for all shift workers as is practiced locally and internationally not being compensation for loss of overtime by a particular department."

[25] I can find nothing in the record to suggest that the appellant ever moved from the 1997-2000 position of maintenance workers alone benefitting from NDA, just a

statement by the respondent that there was a change in the 2001-2003 agreement.

[26] When one examines the agreement and looks in particular at Article 11, the hours of work specified therein are 4:00 p.m. to 12:00 a.m. and 12:00 a.m. to 8:00 a.m. From the record, the Arbitration findings and the other documentation submitted, it would appear that the persons who worked those stated shifts were maintenance workers.

[27] Again, applying the mandate of the Tribunal to look at "the use, meaning and application of" the Article, I find that the Tribunal was charged with looking at and examining the history of the negotiations and how it was put into practice by the parties.

[28] This was not to my mind a strict case of purely interpreting the words of the Article as they appeared in the agreement, but called for an approach that took into account all of the attendant factors in the operation of the agreement.

[29] That NDA was conceived to compensate maintenance workers only cannot be lightly set aside. When one looks at the history of the matter, the appellant maintained throughout the period of time not only in writing but in practice of only paying the NDA to maintenance workers, a fact that seemed to have been accepted by the Union which made no complaint about the payment to maintenance workers only until 2003, one year after the commencement of the Collective Agreement for the period 2001-2003.

[30] Given this matrix of factual circumstances I find it strange that the Tribunal found that the Union never wavered from the position that the NDA was intended for all shift workers.

[31] It is clear from the evidence that from 1997 when the NDA was first discussed that the respondent Union was well aware that this was to be applied to maintenance workers only.

[32] I agree with Viscount Simonds in Edwards v Bairstow[2]:

> "The primary facts as they are sometimes called do not in my opinion justify the reference or conclusion which the commissioners have drawn; not only do they not justify it but they lead irresistibly to the opposite reference or conclusion. It is therefore a case in which whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law, by a misunderstanding of the statutory language or otherwise …"

[33] Further, in correspondence from the respondent to the appellant in 1999, reference is made to a shift system being in operation for the following category of workers: "Electricians, A/C Refrigeration Technicians, Plumbers, Computer Technicians.

[34] That correspondence also referred to the hours of work for that class of worker. They stated hours were: 4:00 p.m. – 12:00 midnight and 12:00 midnight – 8:00 a.m.

[35] It is interesting that these are the same hours to which Article 11 in the agreement refers.

[36] Again, in June 2000, the respondent Union wrote to the Labour Commissioner stating that the appellant and respondent were locked in a dispute "over the introduction of a shift system for Maintenance Personnel and Computer

[2] Supra

Technicians". Again, no mention of all shift workers but a specific class of worker, to wit, maintenance workers.

[37] Again, in May 2001, another letter from the respondent to the appellant under the rubric "Re: In the matter of shift work within the Maintenance Department."

[38] It seems that the NDA and the shift system was to be applied to the Maintenance Department and no other workers. All this leading up to the signing of the 2001-2003 Agreement.

[39] The appellant readily agreed that they had been in error in paying the NDA at a daily rather than an hourly rate, but remained adamant throughout that this NDA was for maintenance personnel only.

[40] While I agree that there was no duress in the signing of the 2004-2009 Agreement, I agree with the proposition of the appellant, that there must have been an understanding, given the history of the NDA, that it was to be paid to the maintenance workers only.

[41] The respondent's position is that the Tribunal was to look at the agreement and to interpret the terms of the agreement and nothing more. The Tribunal must not look at anything else in determining the meaning of the agreement.

[42] But the court finds that this was not the mandate given to the Tribunal, it was wider in scope than that.

[43] I agree with the Lord President in Bovis Construction (Scotland) Ltd. v Whatlings Construction Ltd.[3] where he said:

[3] 1994 SC 351 at 357

> "In my opinion the issue which has arisen between the parties in this case requires that reference should be made to the previous correspondence in order to resolve it. This is because the essential point which is in dispute is not the meaning of the words used in the limitation agreement but the circumstances in which it was intended to apply."

[44] Likewise in these proceedings, the essential point in dispute is to whom the allowance was to be paid. What class of worker was to benefit from the payment of the NDA.

[45] He further referred to Inglis v Buttery & Co.[4] where Lord Blackburn stated:

> "It is legitimate to look at the surrounding circumstances and see what was the intention of the parties expressed in the words used, as they were with regard to the particular circumstances and facts with regard to which they were used."

[46] Further Lord Wilberforce in Prenn v Simmonds[5] allowed prior negotiations to be looked at in aid of the construction of a written document, but he recognized that previous documents might be looked at to explain the aims of the parties in the limited sense that the commercial or business object of the transaction ascertained may be a surrounding fact.

[47] He went further to state that evidence of negotiations should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction.

[48] In this matter, looking at the negotiating process going back to 1997 shows clearly to this Court that from its inception the NDA was intended to provide for

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[4] (1878) 5 R (HL) 87 at 103

[5] (1971) 1 WLR 1381

maintenance personnel and no other class of worker. Even the respondent in their correspondence to the applicant recognized and acknowledged that this was the class of worker intended to benefit from this allowance.

[49] Looking at the agreement in question itself, it makes reference to work hours which are exclusive to maintenance personnel.

[50] The Tribunal failed to take into account these facts and issues when arriving at their award. Had they done so they would not have arrived at the decision which they did. I believe that they erred when they failed to do so.

[51] Blackburn, J in Reardon Smith Line v Hansen Tangen[6] stated:

> "No contracts are made in vacuum; there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "surrounding circumstances" but this phrase is imprecise, it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

[52] The Privy Council was of similar view in the case of Donald Halstead v The A-G of Antigua & Barbuda, Cosmos Phillips et al[7] where it was stated:

> "The recognized approach to construction is to consider not only the words themselves but the circumstances with reference to which the particular words were used and to ascertain the object which the parties would have had in view in making the particular agreement."

[53] I believe that the above-mentioned paragraph encapsulates the mandate the Arbitration Tribunal had in this matter. They were to examine all the relevant

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[6] (1976) 1 WLR 989 at 995

[7] Privy Council Appeal No. 53 of 1996

surrounding circumstances and use those circumstances to ascertain exactly who the NDA was to benefit.

[54] I believe that had the Tribunal adopted this all-inclusive approach they would not and could not have come to the conclusion which they did.

[55] Had they examined all the circumstances in their entirety I think they would have come to a different conclusion. They misdirected themselves and as a result arrived at an erroneous conclusion.

[56] I would therefore allow the appeal. I find that the workers to whom the NDA applies are maintenance personnel and not all shift workers. I would award costs in the sum of $6,000.00

Margaret A. Price Findlay
High Court Judge