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Baker v. Wessenger

In The Matter of the Arbitrations Act, R.S.O. 1970, Chapter 25, Sections 11, 12 and 30, as amended

In The Matter of an arbitration award made the 3rd day of March, 1981

Fred Baker on behalf of all members of The Federation of Provincial Schools Authority Teachers Applicant v. R. John Wessenger and Harry J. Waisglass Respondents

Ontario Supreme Court

Griffiths J.

Subject: Corporate and Commercial; Civil Practice and Procedure; Labour and Employment

Arbitration --- Relation to other proceedings

Arbitrator continuing with arbitration in face of Court actions between same parties concerning same issues — Court not allowing private tribunal to oust jurisdiction of Court -- Arbitrator "misconducting" himself by proceeding in face of Court action — Award quashed — Arbitrations Act, R.S.O. 1970, c. 25, s. 12.

Pursuant to a personal employment agreement, respondent gave notice to applicant employer of his desire to negotiate revisions to his contract of employment, and an arbitrator was agreed upon by both parties. Subsequently, applicant notified respondent that his employment had been terminated. Respondent commenced a Court action against applicant, alleging wrongful dismissal. Applicant entered an appearance and statement, of defence. In spite of the Court action, the arbitrator proceeded with the arbitration holding that respondent's contract had been automatically renewed. On application to set aside the award on the grounds that the arbitrator had misconducted himself and proceeded without jurisdiction, held, the application should be allowed. Since respondent had commenced an action for wrongful dismissal prior to the making of the award, the Court was seized of all issues raised in it, including any rights of respondent under his contract of employment with applicant. The parties having elected to pursue their remedies in Court, the arbitrator was functus officio and without jurisdiction to make his award. There could not be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. The Court would not allow its jurisdiction to be ousted, and for a private tribunal to take that decision out of its hands and decide the question itself was a clear ouster of jurisdiction. The arbitrator, by proceeding in the face of the action in Court whereby the parties had voluntarily submitted their rights to the Court, "misconducted" himself.

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Labour Law --- Labour arbitrations — Jurisdiction of arbitration board — Scope — Functus officio

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Labour Law --- Labour arbitrations — Jurisdiction of forums other than arbitration board — Courts

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Griffiths J.:

1 This is an application pursuant to section 12 of *The Arbitrations Act*, R.S.O. 1970, c. 25, for an order setting aside the arbitration award of Harry J. Waisglass, dated March 3, 1981, on the grounds that the arbitrator misconducted himself and proceeded without or in excess of jurisdiction.

2 The applicant is a voluntary unincorporated organization representing approximately six hundred and thirty teachers, who are in the employ of the Provincial Schools Authority.

3 The respondent, R. John Wessenger was employed as a teacher by the Provincial Schools Authority and effective January 1, 1977, he was appointed to the position of executive co-ordinator by the Authority.

4 A Personal Employment Agreement, in writing, which does not appear to have been prepared by a legal draftsman, was entered into between the Federation and Wessenger providing for the terms and conditions of his employment. Article 3:00 of the agreement provides as follows:

Article 3:00 - Duration and Renewal

This agreement shall have effect from September 1st, 1979 and continue in force until August 31st, 1980.

As the Executive Co-ordinator may be on a leave of absence from his school, these provisions will apply only to the terms of the agreement.

Either party to this agreement shall give to the other party written notice of its desire to negotiate revisions of this agreement. Such notice shall be given prior to February 1st of the period of the employment agreement.

Commencement of negotiations shall take place no later than March 1st of the year in which the agreement expires.

The current Employment Agreement shall remain in effect until a new contract is agreed upon by both parties.

Compulsory third party informal arbitration shall be the method of resolving any impasse, and at the request of either party, shall take effect after August 31st of this Employment Agreement.

Reasonable costs involved in any third party proceeding shall be borne by monies allotted from general Federation funds.

5 The agreement provided for termination by Article 6:00 as follows:

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Article 6:00 - Terms of Employment

6:01 - Termination of Position:

The Executive Co-ordinator in a permanent position may only be terminated in the following manner:

1. at any time by mutual agreement of the parties; or,
2. at the regular resignation dates as in the individual teachers' contract; or
3. by the Federation after approval by three-quarters ($\frac{3}{4}$) of the membership in a formal vote and the consent of five-sevenths of the Executive Members who agree to eliminate his staff position.

If his position is terminated it shall take effect, subject to the terms of the Employment Agreement, when a suitable vacancy occurs at the Executive Co-ordinator's previous school, or, he resigns.

6 It was pursuant to the provisions of Article 3:00 that the arbitrator was appointed, whose award is under attack on this application.

7 On February 5, 1980, Wessenger gave notice to the Federation of a desire to negotiate revisions to his contract of employment. Although the notice is not before me it appears that Wessenger was seeking to negotiate the terms of a new contract of employment. The parties in due course accepted the respondent Waisglass as arbitrator.

8 On January 10, 1981, the executive of the Federation was presented with a petition signed by some thirty per cent of the members of the Federation asking for a special meeting of the Federation to consider the continued employment of Wessenger. A special meeting was duly called for on January 24, 1981, and at that meeting a motion was passed terminating the agreement with Wessenger. Wessenger was notified of this purported termination of his employment by letter dated January 24, 1981.

9 On January 28, 1981, the arbitrator gave notice that the first hearing would be held February 7, 1981. The solicitors for the Federation by letter, January 31, 1981, objected to this hearing on the ground that Wessenger's employment had been terminated. The arbitrator nevertheless elected to proceed with the preliminary hearing on February 7, 1981, ruling that he was still seized of the submission. On February 18, 1981, the arbitrator gave reasons for his previous ruling and concluded these reasons as follows:

Finally, the question whether Mr. Wessenger has been properly dismissed is a separate and unrelated dispute to be solved in another forum. I do not accept jurisdiction on the discharge dispute. It is, however, in my jurisdiction to consider the terms and conditions of the employment contract for the period from September 1, 1980, up to at least the alleged date of discharge, and possibly beyond that date, depending upon whether or not the discharge is withdrawn or proven to be invalid.

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10 On February 19, 1981, Wessenger commenced an action in this Court, against the defendant executive members of the Federation. In the statement of claim delivered, Wessenger alleges that his employment had been wrongfully terminated, and that the motion passed by the Federation, at the special meeting of its members on January 24, 1981, was contrary to the provisions of the Federation's constitution. As well, the action claims that Wessenger's employment was not terminated in the manner provided by the provisions of his Personal Employment Agreement. In the action, Wessenger claims a declaration that his agreement of employment had not been terminated and that the agreement remained valid and subsisting. In the alternative damages are claimed for wrongful dismissal.

11 The Federation has entered an appearance and delivered a statement of defence to Wessenger's action. It is quite clear both parties intend to pursue and resolve the issues raised in the action in this Court.

12 Wessenger applied for an interim injunction in his action, restoring him to his position as executive co-ordinator. That application was dismissed by order of Gray J., dated April 30, 1981.

13 On February 27, 1981, the arbitrator held hearings on the substantive issue of the contract dispute between Wessenger and the Federation. The arbitrator delivered an award dated March 3, 1981, wherein he found that Wessenger's contract of employment was for a term of one year to August 31, 1980 but that the contract "contained an automatic renewal provision, with arbitration in the event of an impasse in the negotiations on the renewal terms and conditions".

14 I note that the provisions of Article 3:00 of the employment agreement do not speak of an "automatic right of renewal", and are ambiguous, to say the least, on that issue. I can only assume the learned arbitrator came to the conclusion as to the intention of the parties from evidence, other than the express provisions of the agreement. This issue was not raised by the parties, and I make no finding on it.

15 Counsel for the applicant Federation submits that since Wessenger commenced an action for wrongful dismissal prior to February 27, 1981, this Court is seized of all issues raised in it, including any rights of Wessenger under his contract of employment with the Federation. The parties having elected to pursue their remedies in this Court, the arbitrator was *functus officio* and without jurisdiction to make his award of March 3, 1981.

16 The applicant relies on the decision of *Doleman & Sons v. Ossett Corporation*, [\[1912\] 3 K.B. 257](#). In that case an action had been commenced in June, 1910, upon a contract which contained a provision for arbitration in case of any dispute arising under the contract. It is unclear from the case as reported whether the reference to the arbitrator was first made before or after issue of the writ; in any event, the arbitrator handed down his award in October, 1910. The question raised before the Court was whether, when an action has been brought upon a contract containing an arbitration clause, in respect of a matter that comes within that clause, and no application is made to stay the action (under the English equivalent to our section 7 of *The Arbitrations Act*), an arbitration could still go on notwithstanding the pendency of the action in respect of the same matter. The Court held that any award made after the issue of the writ in June, 1910, was bad at law, since the Court in the absence of an application for a stay, had become seized of the matter to the exclusion of the arbitrator. As Lord Justice Fletcher Moulton said, at p. 269:

...the Court has seisin of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties

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are settled. It follows, therefore, that in the latter case the private tribunal, if it has ever come into existence, is *functus officio*, unless the parties agree *de novo* that the dispute shall be tried by arbitration, as in the case where they agree that the action itself shall be referred. There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. To my mind this is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted.

17 In the decision of *Hudson Bay Fire Insurance Co. v. Walker*, [1914] 16 D.L.R. 275, it was held that the rule in *Doleman* applied even though only a part of the dispute between the parties was sought to be arbitrated. The Court held that to allow a part of the proceedings to go before the arbitrators concurrently with the balance before the Court, is inconsistent with the idea that the Court has *seisin* of the whole dispute.

18 Although the *Doleman* case is distinguishable on its facts, in that there the arbitrator proceeded without notice to, and in absence of, the parties to the dispute, it is nevertheless in my view, sound principle that where the parties have elected to pursue their remedies in court, the jurisdiction of the arbitrator to resolve overlapping issues, should be ousted.

19 Wessenger seeks a declaration in this Court that his contract of employment was never properly terminated. If at the material time the contract of employment was terminated, then there would be no right to arbitration proceedings thereunder. The arbitrator concerned himself with the issues of the appropriate length of renewal of the contract, and the remuneration to be provided. This Court will have to decide, if it finds that Wessenger was wrongfully dismissed, what measure of damages would be appropriate to compensate him for this breach. In short there is considerable overlapping of the issues before the arbitrator and this Court.

20 I respectfully agree with the words of Fletcher Moulton L.J., in the *Doleman* case, where at p. 269 he says:

...There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. To my mind this is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted. Their jurisdiction is to hear and decide the matters of the action, and for a private tribunal to take that decision out of their hands, and decide the questions itself, is a clear ouster of jurisdiction.

Here the arbitrator was a private consensual arbitrator. The right to set the award aside is provided for by section 12(2) of *The Arbitrations Act*, R.S.O. 1970:

S.12(2) Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the court may set the award aside.

21 In my opinion the arbitrator here, by proceeding in the face of the action in the Court, whereby the parties had voluntarily submitted their rights to this Court, "misconducted" himself.

22 The arbitrator award is quashed. Costs of the applicant to be paid by the respondent Wessenger.

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