IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

PRESTEVE FOODS LIMITED

- The Employer

-and-

NATIONAL AUTOMOBILE, AEROSPACE AND GENERAL WORKERS UNION OF CANADA (CAW - CANADA) LOCAL 444

- The Union

AND IN THE MATTER OF a group grievance involving termination of employment

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Erik Grzela	- Counsel

On behalf of the Union:

Niki Lundquist	- Counsel
Rick Laporte	- President, Local 444
Paul Jacques	- Union Representative, Local 444
Gary Bernard	- Grievance Coordinator
Santichai Theptasaeng	- Grievor
Sumalee Wongsawat	- Grievor

Hearing held October 24, 2008, in Windsor, Ontario.

AWARD

I. INTRODUCTION

This is a group grievance contesting the September 2008 dismissal of several employees. At the hearing the Union pursued the dismissal of only two employees, Santichai Theptasaeng and Sumalee Wongsawat.

Much of the hearing was devoted to the question of my jurisdiction to determine the grievance. The Employer said that the labour relations between the parties was a matter of federal, as distinct from provincial, jurisdiction, that there was no valid collective agreement between the parties, and that the referral to arbitration was out of time.

It was the Union's position that it was an abuse of the arbitration process to allow the Employer to argue that there was no collective agreement and that the referral to arbitration was out of time.

During the hearing I made oral rulings on all matters between the parties. This award records those rulings.

II. FACTS

Presteve Foods Limited is the Employer in this matter. The National Automobile, Aerospace and General Workers Union of Canada (CAW-Canada) Local 444 represents these employees.

I was appointed as arbitrator under Section 49 the Ontario *Labour Relations Act, 1995*, (the *Act*) and was directed to schedule a hearing October 24, 2008. October 20 Employer counsel

wrote the Ontario Ministry of Labour to "demand that this hearing be rescheduled at a different date." The reason given was that Jose Pratas, the owner, had "a court appearance on that day for a different matter." The Ministry declined to reschedule the hearing and indicated that the Employer might raise its concerns with me.

Employer counsel and I then exchanged telephone messages. Counsel inquired as to how the hearing would proceed and how the Employer might seek an adjournment. I responded on those issues. However, the Employer did not request to reschedule the hearing, either before or at the hearing. Moreover, although Employer counsel advised during this arbitration hearing that Mr. Pratas' court hearing had finished much earlier than the arbitration, I note that Mr. Pratas did not then attend the arbitration hearing.

The 2002-2006 collective agreement and a grievance were admitted into evidence on consent.

Neither party called any further evidence on the issue of the constitutional jurisdiction.

The Union called two witnesses on the issue of whether there was a valid collective agreement between the parties.

Gary Bernard is a grievance coordinator with the Union. He testified that he attended a meeting at the Ontario Labour Relations Board in May 2008 where three issues were discussed - a Union attempt to obtain money with respect to several arbitration awards which the Employer was refusing to acknowledge or implement, an extension of the collective agreement, and a decertification application. He said all three issues were resolved by the parties.

Mr. Bernard identified both the parties' settlement agreement regarding the arbitration awards and a Board order incorporating that settlement agreement. Those documents extended the terms and conditions of employment contained in the 2002-2006 collective agreement until August 15, 2008, on which day a decertification vote was held.

As for the extension of the collective agreement and the decertification application, Mr. Bernard said the parties agreed that, if the Union won the decertification vote, the collective agreement would be extended for a period of one year from August 15, 2008. Mr. Bernard identified an unsigned agreement which reflected that intention. Although the contents of that unsigned document had been agreed upon by the parties, Mr. Bernard testified that the document was not signed because Jose Pratas, the owner of the Employer, had "stormed out" of the meeting at that point. Mr. Bernard said the meeting had been a lengthy one which lasted from about 9:00 am until about midnight and it had been very stressful. Mr. Bernard testified that the Employer had been represented at the meeting by Jose Pratas and by its counsel, Claudio Martini, and that the unsigned document was the parties' agreement reached when both Mr. Pratas and Mr. Martini were present.

Mr. Bernard also testified that he had been present at the counting of the August 15, 2008, decertification vote and that the Union had been successful. He identified the "Report of Vote Count" form signed by the Board's Returning Officer which indicated the majority of employees voted in favour of the Union.

Rick Laporte, the new President of the Local Union, also testified. He said that during the previous two months he had conducted considerable business with the day-to-day managers of the Employer. Throughout this period the parties had acted in a manner consistent with the collective agreement having been extended for a year. In particular, Mr. Laporte noted that on two occasions the Employer had asked him whether the Union might be willing to

open up the collective agreement and make changes, that is, the Employer asked whether the Union would agree to amend the parties' collective agreement. Mr. Laporte also said that the previous president of the Local Union had advised him that the parties had agreed to extend the agreement by one year if the Union won the decertification vote.

The Employer called no evidence on the issue of whether there was a valid collective agreement other than the collective agreement itself.

For reasons outlined later, the issue of whether the referral to arbitration was out of time was not pursued.

Neither party called any evidence on the issue of just cause for dismissal or on the matter of the remedy.

III. COLLECTIVE AGREEMENT AND THE *ACT*

The key provisions of the parties' 2002-2006 collective agreement are as follows:

ARTICLE 5 - MANAGEMENT RIGHTS

5.01 The Union acknowledges that it is the exclusive function of the Company to . . .

(a) . . . discharge employees for just cause subject to the right of a seniority employee to lodge a grievance . . .

ARTICLE 7 - ARBITRATION

7.01 . . .
The compensation of the Arbitrators and the expenses of the Board shall be met by . . . dividing the compensation and expenses of the Chairman between the parties.
. . .

ARTICLE 12 - SENIORITY

12.07 Seniority shall be lost and employment will be terminated if:

. . .

(b) an employee is discharged for just cause and is not reinstated pursuant to the grievance or arbitration procedure;

. . .

The Labour Relations Act, 1995, contains the following:

49(4) Where a request is received under subsection (1), the Minister shall appoint a single arbitrator who shall have exclusive jurisdiction to hear and determine the matter referred to him or her, including any question as to whether a matter is arbitrable and any question as to whether the request was timely.

. . .

49(9) Where the Minister has appointed an arbitrator under subsection (4), each of the parties shall pay one-half of the remuneration and expenses of the person appointed.

IV. EMPLOYER SUBMISSION

Jurisdiction

- constitutional

The Employer acknowledged that the Ontario Labour Relations Board had certified the predecessor union in 1987, that the parties had operated under the *Act* since that time, and that the nature of the business had not changed since then.

Nevertheless, the Employer said that under the *Constitution Act 1867,* Section 91(12), the federal government had authority with respect to "Sea Coast and Inland Fisheries." The Employer said that the federal authority extended to the preservation of the fishery as a whole, including its economic value. The 2002-2006 collective agreement (which the Employer submitted was no longer in force) noted in the recognition clause that the Employer operated, and the employees worked in, a "processing plant in Wheatley, Ontario"and that agreement had a classification of "filleters." The Employer submitted that I should conclude from those two "facts" that the business was part of "Sea Coast and Inland

Fisheries" and fell under the legislative authority of the Government of Canada, not of Ontario.

The Employer referred to the following authorities: *Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail)* [1988] 1 S.C.R. 749; *R. v. Mersey Seafoods Limited* 2007 NSSC 155 (CanLII); *Ward v. Canada (Attorney General)* [2002] S.C.J. No. 21; and *Bank of Montreal v. Hall* [1990] 1 S.C.R. 121.

- *collective agreement*

As for the question of whether the collective agreement had expired or had been extended until 2009, the Employer first submitted that the issue was one of contract law and that as arbitrator I had to be "correct," as opposed to "reasonable." Secondly, the Employer said the unsigned document was only a draft agreement. Thirdly, the Employer said that while the management at the plant may have acted as though the collective agreement was in effect, this did not indicate that the owner of the Employer, Jose Pratas, behaved similarly and Jose Pratas' view was key. Finally, the Employer suggested that I should conclude there was no collective agreement because it said that its only witness was unable to attend.

- *timeliness*

In its opening statement the Employer had indicated that it intended to argue that I lacked jurisdiction because the Union had not processed the grievance in accordance with the time limits in the collective agreement, such that the referral to arbitration was out of time.

- *reply*

In response to the Union submission that I should refuse to allow the Employer to make submissions on the validity of the collective agreement and on timeliness, issues upon which the Employer intended to call no evidence, the Employer said it should have the right to participate fully and make whatever submissions it wished. Moreover, the Employer submitted that it was within its rights to refuse to pay its share of the cost of the arbitration as the parties fell under federal legislation, there was no valid collective agreement, and the referral to arbitration was out of time.

In the alternative, if I felt it appropriate to limit the Employer submissions in some manner, the Employer suggested that I should prevent the Employer from making any submissions on just cause for dismissal, but allow the Employer to make its submissions on my jurisdiction in this matter.

Just cause for dismissal

Although it led no evidence on the issue of cause or on the issue of remedy, the Employer nevertheless submitted that I should find that reinstatement was not a viable option, that both grievors had other employment and were not seeking reinstatement, and that the grievors were temporary foreign workers and that their term of employment was of limited duration.

V. UNION SUBMISSION

Jurisdiction

- constitutional

The Union noted that its predecessor union had been certified in 1987 by the Ontario Labour Relations Board and that the nature of the business had not changed, and submitted that the

business was not part of the fishery nor integrally related to it. The Union also noted that in the recent past the parties had been engaged in many hearings before the Ontario Labour Relations Board and before arbitrators and yet the first time the Employer had raised this issue was with this grievance. The Union said that the business fell under provincial jurisdiction.

- *collective agreement*

The Union said the evidence was clear that the parties had agreed to extend the collective agreement for one year from August 15, 2008. The parties had since acted in a manner consistent with that agreement being in force. I should find the 2002-2006 collective agreement was in force.

- *timeliness*

Following the Employer's statement that it would not pay its share of the cost of the arbitration (although the Employer did indicate that after it received my award and account it might take a different position), the Union made a submission as to process. The Union said the Employer had a long history of "contempt" for the process of arbitration. The Union noted that the Employer wished to participate in this proceeding but not pay its share of the cost, an obligation imposed upon the Employer under both the collective agreement and the *Act*. The Employer raised multiple objections to jurisdiction but did not intend to call any evidence in support of them.

The Union said that on the timeliness issue the Union might have to call evidence to show that the Employer had refused to accept the grievance as originally filed, had returned the grievance unopened, and that the grievance had been re-filed at a later date. In these

circumstances the Union asked that I not allow the Employer to pursue its preliminary matters (other than the constitutional issue which had already been addressed) and that I move directly to the substance of the grievance.

Just cause for dismissal

The Union said that, given the absence of any evidence on the issue of just cause, I should find the Employer had not proven just cause. Similarly, the Union said I should conclude that the normal remedy of reinstatement, with full back pay and benefits, was appropriate.

VI. CONCLUSIONS

Jurisdiction

- *constitutional*

I note that the only evidence on the issue of constitutional jurisdiction was the 2002-2006 collective agreement and the grievance.

There was no evidence of the nature of the Employer's business. However, both parties appeared to accept that the business operated in a plant in Wheatley and involved fish processing. Both parties also appeared to accept that the nature of the business had not changed since 1987 when the business was apparently held to fall under provincial jurisdiction as a predecessor union was certified by the Ontario Labour Relations Board.

At the hearing I concluded that the Employer authorities indicated that "Sea Coast and Inland Fisheries" in the Canadian Constitution dealt with the process of taking fish from the water, that is "catching fish," but did not cover the subsequent land based processing and/or selling

of the fish. There was no evidence that the Employer business was part of catching fish or that it was involved in the preservation of the fishery. On the basis of the evidence and authorities before me I concluded that the labour relations between the parties was regulated by the Province of Ontario. I now confirm that ruling.

- *collective agreement*

As for whether there was a valid collective agreement between the parties, on this issue the evidence was clear and uncontradicted. The parties agreed to extend the collective agreement until August 14, 2009, provided that the Union won the August 15, 2008, decertification vote. The Union won the vote. Moreover, the parties have since acted as though that agreement was in force. I ruled orally that the 2002-2006 collective agreement remains in effect until August 14, 2009. I now confirm that ruling.

- *timeliness*

As noted, during the hearing the Union made a submission as to process and said that I should not hear the Employer submissions on the collective agreement and on timeliness. The Union said the Employer had shown “contempt” for arbitration.

This Employer has a very poor record in terms of its participation in arbitrations. I am unable to evaluate the Employer participation in all the parties’ arbitrations, but Employer contempt for the process was my experience in my two previous arbitrations between these parties.

In the first arbitration the Employer simply ignored the hearing (see unreported award, September 24, 2007). In addition, in that award I wrote that during the hearing the Union

had:

> . . . provided copies of five recent awards between these two parties - that is, a decision of the Ontario Labour Relations Board (April 25, 2007), and the awards of Arbitrator Samuels in the *Dorogi* grievance (April 20, 2006), of Arbitrator Stephens in the *Pimental* grievance (June 24, 2006), of Arbitrator Etherington in the *Neufeld* grievance (February 16, 2007), and of Arbitrator Samuels in the *Heide* grievance and two policy grievances (May 4, 2007). Those awards note that this Employer had either failed to attend (Labour Board, *Pimental*, and *Heide*), or had attended to advise that the Employer "had no proof whatsoever nor any valid argument to provide just cause for the dismissal" and "the owner of the Company wanted it made clear that he would not allow the grievor back onto Company property" (*Dorogi*, above, at page 1), or had attended but declined to call any witnesses in support of discharge (*Neufeld*). (at page 3-4)

In my second arbitration with these parties (unreported, March 25, 2008) the Employer came to the hearing, agreed to a settlement of the matter, and agreed that the settlement would be incorporated in an award. However, when the Union suggested that the Employer would not implement the settlement/consent award, counsel for the Employer acknowledged that the Union would have to sue to enforce it.

In addition, this Employer had advised me by letter in advance of the hearing in my second arbitration as follows: "Please take note that this company will not be responsible for any of your fees" (unreported, March 25, 2008, at page 2). After my inquiry in this current arbitration, the Employer again said that it would not pay. The Employer did, however, indicate that after it received my award it might change its view and pay my account. I note that although this Employer suggestion of a possible change of opinion after it received my award might seem like an effort to influence me to make my award favourable to the Employer, I did not understand that to be the intention.

In the current hearing I concluded that the Employer was continuing in its effort to frustrate the arbitration process. I concluded that the Employer had elected to appear, but was raising numerous preliminary objections with the intention of extending the hearing, increasing the Union's expenses, delaying the ultimate resolution, and generally frustrating the process. I concluded that the Employer had no intention of actively or substantively pursuing any of

its jurisdictional objections. The Employer had argued that the regulation of the labour relations between the parties fell under federal jurisdiction without leading any evidence in support of that point other than the collective agreement and grievance. The Employer had advised that it wished to argue that the grievance had not been processed in accordance with the collective agreement such that the referral to arbitration was out of time, but that it intended to call no evidence in support of that submission other than the date on the grievance.

As arbitrator I have the responsibility to control the process, and in particular to control the conduct of the arbitration hearing. There are a large number of provisions in the *Act* outlining how arbitrations are to be conducted. There is no doubt that arbitration is intended to be an efficient, effective and fair way to resolve disputes.

I concluded at the hearing that the timeliness issue was simply an attempt by the Employer to delay the matter. The Employer did not raise this issue until the parties arrived at the hearing, despite the fact that Employer counsel sent two letters (one written to the Ministry of Labour and one to Union counsel) to Union counsel and to me regarding preliminary matters. The Employer said it would call no evidence but would simply rely on the date of the grievance. The Union had indicated that, to respond to this submission, it might have to call evidence about the Employer's attempt to frustrate the grievance process by returning the original grievance, unopened, requiring the Union to re-file the grievance at a later date. The Employer did not dispute this. I concluded that to allow the Employer to rely upon its own refusal to accept a grievance as leading directly to a timeliness issue under the collective agreement was grossly unfair and an abuse of the arbitration process. I ruled orally that I would not allow the Employer to argue that the grievance was out of time. I now confirm that ruling.

However, I indicated that there was some doubt as to the existence of a collective agreement and that I would require the Union to prove that point. As noted above, the Union then led evidence on this issue.

Just cause for dismissal

When the issue of cause was to be considered at the hearing, the Employer sought an adjournment to call the Employer owner, Jose Pratas. Employer counsel advised that Mr. Pratas was not in attendance at the arbitration because he had been in court until an hour or so earlier. As it was still early in the day, I suggested to Employer counsel that he contact Mr. Pratas and ask him to attend at the arbitration. I indicated that I was prepared to recess the hearing to await Mr. Pratas' arrival. Following a brief recess, Employer counsel advised that Mr. Pratas would not be attending at the hearing. The Employer then abandoned the adjournment request and called no evidence on the issue of cause.

Given the absence of any evidence in support of just cause, I concluded that the Employer had not proven just cause for the dismissal of either grievor. I now confirm that ruling.

There was no evidence in support of any of the Employer's submissions on remedy. In the absence of any evidence to suggest otherwise, I found that the normal remedy of reinstatement with full compensation was appropriate. At the hearing I ordered the Employer to reinstate the two grievors effective as of the start of business Monday October 27, 2008, and to compensate them in full for lost wages and benefits. I now confirm that ruling.

Retention of jurisdiction

I will remain seised to deal with any difficulties which may arise in the implementation of

this award.

ORDER

1. I order the Employer, Presteve Foods Limited, to reinstate the two grievors, Santichai Theptasaeng and Sumalee Wongsawat, effective as of the start of the Employer's normal business day on Monday October 27, 2008.
2. I order the Employer to fully compensate the two grievors for all lost wages and all lost benefits from the time of their dismissal until the time of their return to work.

Dated at London, Ontario this 6th day of November, 2008.

Howard Snow, Arbitrator