

In the Privy Council.

UNIVERSITY OF LONDON  
W.C.1.  
No. 13 of 1948. -3 OCT 1956  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
11232

ON APPEAL FROM THE COURT OF APPEAL  
FOR SASKATCHEWAN

IN THE MATTER of The Trade Union Act, Statutes of Saskatchewan, 1944  
(Second session) Chapter 69 and amendments thereto ;

AND IN THE MATTER of certain orders made by The Labour Relations  
Board of Saskatchewan.

BETWEEN

THE LABOUR RELATIONS BOARD OF SASKATCHEWAN

APPELLANT

AND

JOHN EAST IRON WORKS, LIMITED... .. RESPONDENT.

CASE FOR THE RESPONDENT

RECORD

1.—This is an appeal from a Judgment of the Court of Appeal for Saskatchewan (Martin C.J.S., Gordon, MacDonald and Anderson, J.J.A.), which quashed without the issue of a writ of certiorari five orders of the Labour Relations Board of Saskatchewan. pp. 16-17

2.—The Labour Relations Board (hereinafter referred to as “the Board”) is a body constituted by The Trade Union Act, Statutes of Saskatchewan 1944, Second session, Chapter 69 and amendments thereto (hereinafter referred to as “the Act”). The Board consists of seven persons as provided by Section 4, subsection 1 of the Act, all of whom are appointed by the Lieutenant-Governor of Saskatchewan in Council. 10

3.—The proceedings which gave rise to this litigation were commenced on May 17th, 1947, when a trade union known as Local 3493, United Steel Workers of America, applied to the Board for six Orders to be made pursuant to Clause (e) of Section 5 of the Act. Only one of these applications (that relating to J. E. Boryski) is printed in the Record but the other five are in like terms. These applications alleged that the persons to whom the applications related were employees within the meaning of the Act of the Respondent and that by Notice dated the 15th May, 1947, the Respondent discharged the said employees from their employment as from the 23rd May, 1947, “because the said employee pp. 51-52 p: 51, l. 40 p. 51, ll. 17-21 20

was a member of and/or active in the said trade union.” The applications alleged that the Respondent or its agent thereby committed an unfair labour practice within the meaning of clause (e) of subsection 1 of Section 8 of the Act, and the trade union thereby applied to the Board for an Order to be made pursuant to clause (e) of Section 5 of the Act requiring the Respondent to reinstate each employee and to pay him the monetary loss suffered by him by reason of his discharge.

4.—The sections of the Act referred to in the applications to the Board read thus :

Section 5 (e) :

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The board shall have power to make orders :

- (e) requiring an employer to reinstate any employee discharged contrary to the provisions of this Act and to pay such employee the monetary loss suffered by reason of such discharge.

Section 8, subsection 1 (e) :

It shall be an unfair labour practice for any employer or employer's agent :

- (e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind with a view to encouraging or discouraging membership in or activity in or for a labour organization or participation of any kind in a proceeding under this Act ; and if an employer or employer's agent discharges an employee from his employment and it is alleged by a trade union that such employer or employer's agent has thereby committed an unfair labour practice within the meaning of this clause, it shall be presumed, unless the contrary is proved, that such employer or employer's agent has discriminated against such employee in regard to tenure of employment with a view to discouraging membership in or activity in or for a labour organization or participation in a proceeding under this Act ; provided that nothing in this Act shall preclude an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in such trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if such trade union has been designated or selected by a majority of employees in such unit as their representative for the purpose of bargaining collectively ;

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5.—One application having been withdrawn at the commencement of the hearing, the other five were heard by a majority of the Board at Saskatoon, on the 10th, 11th and 12th June, 1947. The evidence of a number of witnesses was taken on oath. The Board reserved its decision

until July 8th, 1947, when it granted all five applications and ordered the Respondent (a) to reinstate as of the date of its Order the five employees in their employment with the Respondent, and (b) to pay to each of the employees the monetary loss suffered by reason of his discharge "being the sum of Two Hundred dollars and Eighty cents." RECORD  
p. 54,  
ll. 43-47

6.—The Board arrived at the monetary loss suffered by each employee without any reference to his earnings in other employment after his discharge. This is made clear from the following passage in the Board's reasons for its decision : p. 63,  
ll. 12-20

10            "The monetary loss suffered was identical in all five cases. Each employee was discharged on May 15, 1947, and received wages in full effective to May 23, 1947. Immediately prior to his discharge, each employee received wages at the rate of 80 cents. per hour for a 44 hour week. If any of these employees had been employed continuously from May 23, 1947 until the date of this decision, he would have received as payment for services rendered the sum of \$200.80. Therefore, that sum represents the monetary loss suffered by each employee by reason of his discharge."

20            7.—The Board's Orders were filed with the Local Registrar of the Court of King's Bench, Judicial District of Regina, on the 15th day of July, 1947, pursuant to Section 9 of the Act which reads thus : p. 9, ll. 8-21

" 9. A certified copy of any order or decision of the board shall within one week be filed in the office of a registrar of the Court of King's Bench and shall thereupon be enforceable as a judgment or order of the court, but the board may nevertheless rescind or vary any such order."

30            8.—The Respondent on the 6th November, 1947, gave Notice of Motion for an Order that the Orders of the Board be quashed without the actual issue of a writ of certiorari. This is in accordance with the Saskatchewan Crown Practice Rules. pp. 5-7

9.—The grounds on which the Respondent asked to have the said Orders quashed are set out in the Notice of Motion. Ground number five was not argued before the Court of Appeal. The remaining grounds with the contentions in support thereof may be summarized under three heads as follows : p. 6, l. 22-  
p. 7, l. 15

40            (1) That the Board's decision with respect to the amount of monetary loss suffered by the five employees was based upon an error in law so fundamental that it rendered the Board's findings of no effect. The Board appears to have assumed as a matter of law that the monetary loss was the amount of wages which each employee would have received if employed continuously from the 23rd May, 1947, the date of his discharge from the Respondent's employment, until the date of the Board's decision on the 8th July, 1947. The Board did not consider that any earnings of p. 6,  
ll. 25-40  
  
p. 61,  
ll. 12-20

- RECORD  
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- p. 6,  
ll. 41-46
- p. 8, l. 26-  
p. 9, l. 4
- p. 14, l. 26-  
p. 15, l. 17
- p. 7,  
ll. 6-15
- p. 10
- p. 13,  
ll. 26-28
- the employees in that period were a material factor in determining the amount of the monetary loss suffered by them. The Respondent's contention is that each discharged employee's earnings during that period should have been taken into consideration.
- (2) That the Chairman of the Board had so acted in relation to the proceedings as to indicate that he was disqualified by bias or by the reasonable apprehension of bias from sitting on the Board or taking part in the inquiry, and that such disqualification extended to the Board, depriving it of jurisdiction to make the orders.
- This ground of application was based on the following facts set out in an affidavit of Melville Austin East : Counsel who appeared at the hearing before the Board for the Union Local 3493 sought, during the hearing, to establish a connection between the Respondent and the Blanchard Foundary and Machine Company Limited, another company carrying on business in Saskatoon, and that the shareholders of the two companies were the same. Counsel sought to show and did introduce evidence with a view to showing that the Blanchard Foundary and Machine Company Limited had been opposed to trade unions and that consequently it ought to be inferred that the Respondent was also opposed to trade unions. On the first day of the hearing the Chairman of the Board, Mr. W. K. Bryden, extracted from his brief case certain returns made pursuant to the Companies Act in the Province of Saskatchewan by the Respondent and also by the Blanchard Foundary and Machine Company Limited and gave them to Counsel for the Trade Union. These returns were then used by Counsel to show that the two companies had the same shareholders and directors. The Respondent submits that the explanation given by the Chairman in an affidavit does not justify his conduct.
- (3) That the Act, insofar as it purports (a) to make the orders of the Board enforceable as orders of the Court of King's Bench, and (b) to give to the Labour Relations Board the power to make any order under Section 5 (e) of The Trade Union Act, is ultra vires of the legislature of Saskatchewan as being legislation setting up a superior district or county court or tribunal analogous thereto, the judges or members of which are not appointed by the Governor-General of Canada in Council and as purporting to confer judicial power upon a body whose judges or members not so appointed.
- 10.—Notice was duly given to the Attorney-General of Saskatchewan pursuant to the provisions of the Constitutional Questions Act, Revised Statutes of Saskatchewan 1940, chapter 72, of the Respondent's intention to bring into question the constitutional validity of the Act.
- 11.—The trade union, which had made the application to the Board for the Orders which the Board granted, did not appear on the Respondent's application to quash the orders nor has it taken any part in the proceedings subsequent to the adjudication of the Board. In the Court of Appeal the Respondent's application was opposed by counsel on behalf of the Board and of the Attorney-General.

12.—At the hearing of the application before the Court of Appeal the Respondent offered in evidence a verified copy of the transcript of evidence taken at the hearing before the Board. This material was objected to by Counsel, both for the Board and the Attorney-General of Saskatchewan, and its admissibility was not decided upon by the Court of Appeal. RECORD  
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13.—The Court of Appeal granted the Respondent's application and quashed the five Orders made by the Board on the ground that Section 5 (e) of the Act is ultra vires of the Province conferring as it does judicial powers exercised by the Courts named in Section 96 of the British North America Act upon the Board. Other matters raised were left undecided. p. 17,  
ll. 10-16  
p. 29,  
ll. 11-16  
p. 29,  
ll. 16-28

14.—The Chief Justice of Saskatchewan, who delivered the Court's reasons for judgment, founded his judgment on the decision of the Judicial Committee of the Privy Council in *Toronto Corporation v. York Corporation* [1938] A.C. 415 and on other cases referred to in his reasons. These cases show, in his view, that it was incompetent for the Province to appoint a Board and to give it the powers conferred upon it by Section 5 (e) of the Act because these powers had always been exercised in Saskatchewan by the Courts of the kind referred to in Section 96 of the British North America Act, and that any attempt by the Legislature of Saskatchewan to give such powers to persons not appointed by the Governor-General of Canada in Council was ultra vires. pp. 17-29

15.—Under the British North America Act, in each province the Legislature may exclusively make laws in relation to the administration of justice in the province including the constitution, maintenance and organization of provincial courts. The independence of the judicature is, however, assured by the following provisions :

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

99. The Judges of the Superior Courts shall hold office during good Behaviour, but shall be removable by the Governor-General on Address of the Senate and House of Commons.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

These sections were referred to in the judgment in *Toronto Corporation v. York Corporation* [1938] A.C. 415 at 826 as follows: "These are three principal pillars in the temple of justice, and they are not to be undermined." It was therefore held in that case that so far as the Act there in question purported to constitute a Board a Court of Justice

analogous to a Superior, District, or County Court, it was pro tanto invalid ; because to entrust these duties to an administrative board appointed by the Province would be to entrust them to a body not qualified to exercise them by reason of the sections referred to. The Respondent respectfully submits that in the present case the Board was exercising judicial functions which by reason of these sections the Board was not qualified to exercise.

16.—The Respondent further submits that the Orders of the Board were invalid on each of the grounds relied on by the Respondent with which the Court of Appeal found it unnecessary to deal.

17.—The Respondent therefore contends that the judgment of the 10  
Court of Appeal quashing the five Orders made by the Board is right and should be upheld for the following amongst other

### REASONS

1. BECAUSE the power conferred upon the Labour Relations Board by Section 5 (e) of The Trade Union Act is a judicial power which cannot be validly conferred by the Legislature of Saskatchewan upon a body whose members are appointed by the Government of Saskatchewan.
2. BECAUSE the power conferred by Section 5 (e) of The Trade Union Act can only be conferred upon persons appointed 20  
by the Governor-General of Canada in Council.
3. BECAUSE the power conferred upon the Labour Relations Board by Section 5 (e) of The Trade Union Act is a judicial and not an administrative power.
4. BECAUSE Section 9 and subsections (1) and (2) of Section 10 on like grounds are ultra vires of the Legislature of Saskatchewan.
5. BECAUSE in assessing the monetary loss suffered by the discharged employees the Board proceeded upon an error in law so fundamental as to deprive the Board of jurisdiction 30  
in that the error prevented the Board from making the enquiry and adjudication for which The Trade Union Act provides.
6. BECAUSE the conduct of the Chairman of the Board disqualified him by bias or the reasonable apprehension of bias from taking part in the enquiry and the Board as constituted at the hearing was thereby also disqualified.
7. BECAUSE of the other reasons given by the Chief Justice of Saskatchewan.

E. C. LESLIE. 40  
FRANK GAHAN.

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BOARD OF SASKATCHEWAN  
AND APPELLANT  
JOHN EAST IRON WORKS,  
LIMITED ... , ... .. RESPONDENT.

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CASE FOR THE RESPONDENT

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