A-580-96

CORAM: **DÉCARY J.A.**
LÉTOURNEAU J.A.
ROBERTSON J.A.

BETWEEN:

WAYNE BARRY

Appellant

- and -

TREASURY BOARD
(TRANSPORT CANADA)

Respondent

HEARD at Ottawa, Ontario, Wednesday, October 22, 1997.

JUDGMENT delivered from the Bench at Ottawa, Ontario, on Wednesday, October 22, 1997.

REASONS FOR JUDGMENT BY: ROBERTSON, J.A.

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REASONS FOR JUDGMENT
(Delivered from the Bench, at Ottawa, Ontario
on Wednesday, the 22nd day of October, 1997)

ROBERTSON J.A.:

This is an appeal from an Order of a Motions Judge dismissing an application for judicial review of a decision rendered by an adjudicator under the *Public Service Staff Relations Act* R.S.C. 1985, c.P-35 (the *Act*). The adjudicator held that the respondent employer had made every reasonable effort to accommodate the appellant employee's request for leave, as it was required to do under the terms of the collective agreement. The Motions Judge found no error on the adjudicator's part.

A preliminary issue raised on this appeal concerns the standard of curial deference owed the adjudicator's decision. The Motions Judge was of the view that because the privative clause contained in the *Act* was repealed as of June 1, 1993, the proper standard embraces the question of whether the adjudicator's decision is "supportable by the evidence": see *Public Service Reform Act*, S.C. 1992, c.54, s.73; and *Canada (Attorney General)* v. *Wiseman* (1995), 95 F.T.R. 200; *Canada (Procureur général)* v. *Séguin* (1995), 101 F.T.R. 64.

In our respectful view, the standard of review adopted by the Motions Judge is contrary to the teachings of the Supreme Court. It is true that prior to the repeal of the privative clause, that Court had held in *Canada (Attorney General) v. PSAC* [1993] 1 S.C.R. 941 ("PSAC #2) that the appropriate standard of review for decisions of an adjudicator acting under the *Act* was whether the decision was "patently unreasonable". In our view, nothing has changed by virtue of the repeal of the privative clause. In *United Brotherhood of Carpenters and Joiners of America, Local 579* v. *Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at 337-38, Sopinka J. writing for the Court, held that even where there is no privative clause the standard of review for arbitral awards which involve the interpretation of collective agreements is circumscribed by the concept of patently unreasonable:

> In a number of past decisions, this Court has indicated that judicial deference should be accorded to the decisions of arbitrators interpreting a collective agreement even in the absence of a privative clause. For example, in *Douglas Aircraft Co. of Canada* v. *McConnell*, [1980] 1 S.C.R. 245, Estey J. commented, at p. 275, with the rest of the Court concurring on this point, that:
>
> > the law of review has evolved, even in the absence of a privative clause, to a point of recognition of the purpose of contractually-rooted statutory arbitration; namely, the speedy, inexpensive and certain settlement of differences without interruption of the work of the parties. The scope of review only mirrors this purpose if it concerns itself only with matters of law which assume jurisdictional proportions.
>
> ...
>
> A similarly deferential approach based on the purpose of arbitration was taken in *Volvo Canada Ltd.* v. *U.A.W., Local 720*, [1980] 1 S.C.R. 178, at p. 214. In that case, a majority of this Court applied the patently unreasonable test to the decision of an arbitrator appointed pursuant to a collective agreement, even though this was consensual rather than statutory arbitration and there was no privative clause

> *per se*. Noting that neither of the parties to the agreement had any choice but to have a grievance arbitrated, Pigeon J. stressed, at p. 214 that:
>
> > [o]n the other hand, the arbitration is not meant to be an additional step before the matter goes before the courts, the decision is meant to be final. It is therefore imperative that decisions on the construction of a collective agreement not be approached by asking how the Court would decide the point but by asking whether it is a "patently unreasonable" interpretation of the agreement.

In conclusion, the standard of review of an adjudicator's decision, rendered under the *Act*, with respect to the interpretation of the provisions of a collective agreement is whether the decision is patently unreasonable. This was true prior to June 1, 1993 and the same holds true after that date.

Having regard to the applicable standard of review, we are not persuaded that the Motions Judge erred in refusing to allow the judicial review application. Although the adjudicator's decision is not a model of clarity and evidences some confusion, he did not misapprehend the ultimate issue to be decided, nor can it be said that his decision is "irrational". Accordingly, the appeal must be dismissed with costs.

J.A.