TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. 78 of 2009

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 18(2) OF THE INDUSTRIAL RELATIONS ACT CHAP. 88:01

BETWEEN

EASTERN COMMERCIAL LANDS LTD.

Appellant

AND

BANKING INSURANCE AND GENERAL WORKERS UNION

Respondent

PANEL: Kangaloo JA
Stollmeyer JA
Smith JA

APPEARANCES:
Mr. S Jairam SC & Mr B. Reid for the Appellant
Mr. D Mendes SC & Mr. M Quamina for the Respondent

DATE DELIVERED: 18th May 2010.

I have read the judgment of Stollmeyer JA and I agree with it.

W.N. Kangaloo
Justice of Appeal

I have also read the judgment of Stollmeyer JA and I also agree with it.

G. Smith
Justice of Appeal

JUDGMENT

Delivered by Stollmeyer JA

1. This is an appeal from a decision on the Industrial Court declaring that the Appellant ("Eastern Commercial") is the successor employer to Tru Valu Supermarkets Ltd. ("Tru Valu") under the provisions of Section 48 of the Industrial Relations Act Chap. 88:01 ("the Act") and that Eastern Commercial must: "1. "recognize the Respondent ("the Union") as the Recognised Majority Union for the relevant bargaining units; 2. in good faith enter into negotiations with the Union for the purpose of collective bargaining including, but not limited to, negotiations for new collective agreements.

2. Eastern Commercial initially advanced several grounds of appeal, all on points of law, but only the ground set out at paragraph 3. hereunder was pursued. The others were abandoned *i.e.* those on the "splitting" of the bargaining unit and on the expired collective agreement, although the latter is dealt with at least to some extent in this judgment at paragraphs 34 *et seq*. There was no appeal on any finding of fact, as indeed there cannot be, and there was no appeal impugning a finding of fact based on, for example, the Industrial Court's misapprehension of the evidence.

3. Ultimately, as Eastern Commercial conceded, the appeal falls to be decided solely on the ground of whether the Industrial Court was in error when it held that the payment by Tru Valu of severance benefits to the affected workers did not prevent Eastern Commercial from becoming Tru Valu's successor. Eastern Commercial relied on the Industrial Court's decision in *The Seamen and*

Waterfront Workers' Trade Union v. Shipping Association of Trinidad (Trade Dispute No. 20 of 1969) in support of this submission.

4. The Union raises the issue of whether this court has jurisdiction to hear the appeal in the light of that part of Section 48(3) of the Act which provides that a decision of the Industrial Court on the issue of whether a successorship exists "...shall be binding on ...[the parties or their successors] ... and is conclusive for all the purposes connected therewith" Given the outcome of the appeal, however, it not necessary to decide this issue. At the hearing of the appeal it was indicated to Counsel for the parties that if the Court agreed with the Industrial Court in its interpretation of *Shipping Association*, the question of the interpretation of this part of Section 48(3) would be left for future consideration.

The Facts

5. In brief, the Industrial Court came to the following conclusions as to the facts.

6. Tru Valu is owned by Colonial Life Insurance (Trinidad) Ltd, Plaza Development Company Ltd. and Lawrence Chin Chuck. Colonial Life Insurance (Trinidad) Ltd. belongs to the Colonial Life Financial Group of Companies.

7. Eastern Commercial is owned by Home Construction Ltd., which in turn belongs to the Colonial Life Financial Group of Companies.

8. Tru Valu and Eastern Commercial both have their head office at Level 5, Long Circular Mall, St. James. This mall is owned by Home Construction Ltd.

9. In 2003 Tru Valu operated eight supermarkets; four in the East-West corridor and four in San Fernando and its environs. Three of the former are situated in Malls owned by Home Construction Ltd.

10. On 17th September 2003 Tru Valu informed the union that Mr. Govind Maharaj had been appointed the Chief Executor Officer of Tru Valu. Subsequently, at a meeting with the Union on 25th September 2003 to discuss retrenchment of workers, Mr. Maharaj was introduced to the Union by Tru Valu as the general manager of Eastern Commercial.

11. The Union is the Recognised Majority Union for the hourly and daily (since 1987), the weekly (since 1982) rated employees, as well as for some of the monthly rated and supervisory staff (since 1991).

12. Eastern Commercial was incorporated on 19th February 2003. On 10th July 2003 it signed an Asset Purchase Agreement to buy from Tru Valu the four supermarkets in the East-West corridor.

13. In September 2003 negotiations were taking place between Tru Valu and the Union with a view to arriving at a new collective bargaining agreement for the period 1st March 2001 to 28th February 2004 and agreement had been arrived at on certain items. On 8th September 2003 the Union reported to the Minister of Labour that negotiations had broken down.

14. On 23rd September 2003 Tru Valu told the Union of the Asset Purchase Agreement and that it would be retrenching the services of all the employees at the four supermarkets in the East-West corridor. The Union was also told that Eastern Commercial would be trading as Tru Valu from 1st October 2003 in respect of these four supermarkets and that it had undertaken to offer employment to the affected workers under revised terms and conditions to be mutually agreed upon by those workers and Eastern Commercial.

15. On 29th September 2003 Tru Valu informed the Union that it was proceeding with the retrenchment of the workers and began issuing retrenchment notices. Tru Valu subsequently paid the severance benefits due to those workers.

16. On 30th September 2003 Eastern Commercial, through its general manager Govind Maharaj, offered employment to the workers with effect from 1st October 2003. 264 of the 273 workers affected accepted the offer and assumed duties on 1st October 2003.

17. On 1st October 2003 Eastern Commercial wrote to the Union (obviously replying to an enquiry as to whether it regarded itself as a successor employer) saying that it was not the successor to Tru Valu. On 14th October 2003 the Union filed an application to be declared the successor.

18. Based on its findings of fact, the Industrial Court came to the conclusion that "Even a perfunctory examination of Eastern Commercial's evidence and arguments would show that the reorganisation/restructuring was superficial as were the operational differences set out in the supplemental evidence and arguments. The average person or customer would not have noticed any real difference in the operations of the "East-West corridor" supermarkets consequent on their acquisition by Eastern Commercial".

19. There is no doubt the test of the "three substantials" has been satisfied *i.e.* it is substantially the same operations, carried on in the same way, by the same workers. This of itself almost guarantees a finding of successorship, but in the instant case there are three further factors weighing in favour of such a finding: first, the operation was carried on in the same places; second, it was carried on under the same name; and third, the transaction between Tru Valu and Eastern Commercial was not at arm's length. It was tantamount to a sham.

20. The sole argument raised against the existence of a successorship is Tru Valu paying severance benefits to the affected workers. Eastern Commercial submits that this negates successorship based on the authority of *Shipping Association*.

The Law

21. The outcome of this appeal therefore turns on whether the interpretation placed on the decision in *Shipping Association* is correct, bearing in mind that it was applied in a number of subsequent cases including, for example, *Yorke Holdings Ltd. v. Union of Commercial and Industrial Workers* (Trade Dispute No. 172 of 1986) and *National Union of Government and Federated Workers v. Caribbean Bottlers (Trinidad and Tobago) Ltd.* (Trade Dispute No. 5 of 1998).

22. *Shipping Association* was decided in 1975. It concerned the calculation of severance benefits due to certain workers, and whether the period of service with the previous employer should be taken into account in this computation. More particularly, that judgment at page 3 sets out that "The real issues in this dispute ... are (a) the rate at which severance pay should be calculated and (b) whether service before 1959 should be taken into account for this purpose".

23. The dispute arose in the following circumstances. Shell (Trinidad) Ltd had employed certain workers in one of its operations for some years. In 1959 the Shipping Association took over that operation and employed the workers previously employed with Shell. The Shipping Association entered into a series of collective arguments with the union as the recognised bargaining unit for those workers, the last of which was to expire on 31st December 1968. A collective agreement was therefore in existence. The operation in question ceased in 1968.

24. It was in this context that the Industrial Court had to decide whether there was successorship.

25. In arriving at its decision, the Court (at page 5) said that when the three substantials test is met a new employer assessing "...benefits dependent upon length of service would take into account ...previous service". This "...is based on the fact that [the new employer] has the benefit of the expertise and experience

acquired by the workers' previous service, as well as the advantage of the established arrangements and relationships of a settled working environment and is thereby saved the time, trouble and considerable expense of recruiting and training a whole new work force and establishing smooth working relationships between them. It is considered unfair that a worker should have his experience and service wiped out by a transaction in which he had no part to play and which he quite probably did not even know was taking place" (my emphasis).

26. This is as good as can be found anywhere a statement of general principle concerning a worker's entitlement to compensation for past service and remains good law to the present.

27. The next sentence in that judgment reads "The situation would of course be different if as part of the transaction [as between the previous employer and the new employer] acceptable arrangements were made for compensating the workers for service with the previous employer".

28. This statement has been taken to mean in subsequent cases that if a worker is compensated for his previous service, then there can be no successorship.

29. *Yorke Holdings* was decided in 1988. The Industrial Court did not consider the three substantials test. It relied on *Shipping Association*, referred to several other decisions in which that decision was followed and held that severance payments having been made by the previous employer there could be no successorship.

30. *Caribbean Bottlers* was decided in 2000. In brief, Canning's Ltd. and Cannings Co. Ltd. sold certain assets to Caribbean Bottlers and the latter employed certain of the workers previously employed by the former companies. These workers had their employment terminated by the former companies and were paid severance benefits. The Industrial Court did not consider whether the

three substantials test had been met. Khan P said (at pages 5-6) "...the Industrial Relations Principle of Successorship is intended to protect workers against loss of benefit based on length of service. If these benefits have been paid and their services lawfully terminated, as occurred in this case, no need arises to give any such protection".

31. Khan P. continued: "In my judgment it would be contrary to both good conscience and the principles of good industrial relations practice for these workers to receive severance benefits and carry over with them the same status and privileges which they enjoyed with the former employers.... Upon termination of the workers' employment by the former employers, the collective agreements were no longer applicable to them and could not be carried over to the [new employer], since there was no nexus between the [new employer], since there was no nexus between the [new employer] and the collective agreements".

32. Again, it was held that there was no successorship.

33. The interpretation given to the decision in *Shipping Association*, however, is not correct. First, the Industrial Court was dealing there with the question of entitlement to compensation and whether in that context there was successorship. The latter statement in the judgment which I have referred to ("The situation would of course...") represents an exception to the general rule first stated. Liability for past service with a previous employer can be a consequence of successorship. It is a factor to consider in deciding whether there is successorship, but payment of severance benefits by the previous employer is not necessarily determinative of successorship.

34. Second, the effect of Section 48 (1) (c) of the Act is that a successor employer is deemed to be a party to a registered agreement. Section 48(2) provides that despite a registered collective bargaining agreement having expired by the provisions of S.43 (1) of the Act, the terms of the registered agreement,

insofar as they relate to procedures for avoiding and settling disputes, are deemed to continue until another collective agreement has been registered. This is so even if the original collective agreement has already expired (see, for example, CACiv No. 9 of 1995 *Bank Employees Union v Republic Bank Ltd.* per Jones JA at page 11).

35. It cannot therefore be said that with the expiration of a collective bargaining agreement the employer/union relationship comes to an end. That is the effect of Section 48 (2), and if there is a new employer whom the Industrial Court is satisfied on all the particular facts of the particular case, and in accordance with good conscience and good industrial relations practice should be declared a successor, then the union will continue to be the recognised bargaining unit for the workers concerned.

36. If a collective bargaining agreement does subsist, the successor employer will be bound by its terms. The workers are not without representation solely because they have been terminated and paid severance by the previous employer.

37. In arriving at its decision in *Shipping Association*, the Industrial Court did not consider the provisions of either Section 43(1) or 48(2) of the Act. Indeed, in 1969 the appropriate statute was the Industrial Stablisation Act No. 8 of 1965 which at Sections 20 and 25 set out the precursors to Sections 43 and 48 respectively of the Act. Section 25 of the Industrial Stablisation Act, however, contains no equivalent of Section 48(2) of the Act which, as has been noted, provides that the provisions relating to procedures to avoiding and settling disputes are binding on a successor even if the original collective agreement has already expired. This represents a material difference to the present case. In *Shipping Association* there was a subsisting agreement; in the instant case the collective agreement had expired some time previously. That, however, is not material to the outcome of the present appeal.

38. Nor were these statutory provisions considered or commented upon in either of *Yorke Holdings* or *Caribbean Bottlers*.

39. It is therefore clear to me that there can be a successor employer even if only for the limited purposes of avoiding and settling disputes. This is so because the consequence of the collective agreement for these purposes is a contractual relationship between the employer and the union – the worker's terms and conditions of employment are a matter of contract as between the employee and the employer.

40. Successorship under the Act is therefore equally concerned with perseveration of a union's right and ability to represent the employees, primarily in the matter of avoidance and settlement of disputes, but also in the collective bargaining process. This is a matter separate and apart from a workers terms and conditions of employment, and his or her entitlement to benefits, including severance.

41. There is a further aspect to be considered. In deciding the issue of successorship, Section 48(3) of the Act specifically requires the Industrial Court to determine such an issue "...from all the circumstances in accordance with good conscience and the principles of good industrial relations practice...". These factors speak for themselves, although they are very difficult to define with precision or finality. They are illustrated, however, in the following two cases.

42. *Mary Mathlen-Sue v. The Luciano Valley Vue Hotel (1986) Ltd.* (RSBA 4 1998) was decided in 2002. This is a decision flowing from the Retrenchment and Severance Benefits Act and from unpaid severance benefits Ms. Mathlen-Sue claimed, having been retrenched by the Receiver of Luciano and subsequently re-employed by him. The operations of Luciano were subsequently bought, and its business operated, by Cascadia Hotel Ltd. The issue to be decided was whether Cascadia was a successor employer.

43. His Honour Mr. Elcock examined the previous decisions on successorship, starting with *Shipping Association*. In brief, he came to his conclusion on findings, *inter alia*, that the three substantials test has been met; that *Shipping Association* set out that the obligation of a previous employer became those of a successor employer as a consequence of a successorship and not as a prerequisite to determining whether successorship existed; that a finding of successorship should not be conditional upon a take over of the work force; that while satisfaction of the three substantial test almost guaranteed a finding of successorship, it was not always necessary.

44. He concluded that on the facts of that case Cascadia was a successor employer.

45. *Transport and Industrial Workers' Union v. Trinidad Electrical Manufacturing Corporations Limited/Electrical Industries Limited* (AS of 1999) was decided in 2005. In delivering the Industrial Court's judgment, his Honour Mr. Rabathaly said (at pages 12-13) "the purpose of successorship is not only to protect service, but it has to do with the continuation of a collective bargaining relationship". In the course of that lengthy judgment he makes reference to the statement of Khan P. in *Oilfield Workers' Trade Union v. Petroleum Company of Trinidad and Tobago Limited* (A 6, 7, 8, and 9 of 1994) at pages 18-19: "Successorship in industrial relations is not confined merely to honouring the contracts of employment of the workers and the previous collective agreements. Under the industrial relations principle of successorship, the new employer not only inherits the workers in the bargaining units, and, consequently must apply the terms and conditions of employment to them, but he also inherits the recognised majority union and must treat and negotiate with the recognised majority union for all the purposes of collective bargaining. The recognised majority union is inseparable from the bargaining units in respect of which it obtains and holds its certificate of recognisation as such from the Board so long as its certification continued to subsist. Its bargaining status and authority as the

recognised majority union for the bargaining units are not interrupted because the workers in the bargaining units become the workers of the new employer otherwise there would be no smooth transition from the previous to the new employer. The Union's status does not terminate or is affected or diminished by the fact that certificate of recognisation has not been altered to reflect the name of the new employer".

46. The Industrial Court has therefore been developing and expanding the scope and depth of the concepts and principles of conscience and good industrial relations. It is in keeping with those precepts that it now contemplates and finds circumstances beyond the boundaries of the three substantials test in order to decide whether successorship exists.

47. The concept or principle of successorship is therefore not confined to protection of the worker's right to benefit for past service. as *Shipping Association* has been taken to say.

48. It is clear that even if for only the limited purpose of grievance dispute procedure in the case of an already expired collective agreement, Section 48(2) not only contemplates but provides for successorship.

49. As a matter principle, therefore, it does not appear appropriate to set down as a general rule that payments of severance benefits by a previous employer must of itself negate successorship.

50. It is correct to say that a worker's benefits in respect of past service must be safeguarded/preserved. and for that purpose a successor employer will be liable for past service if the worker has not already been compensated for it. If the worker has been so compensated, then he or she cannot in all conscience call upon the successor for payment of it again. That would be inequitable, as the Industrial Court pointed out (at page 39) of *National Union of Government and*

Federated Workers' Union v. Cummings Limited, T&T Superior Food Ltd. and Bridgelal Jai Ramkissoon (ICA Nos. 8 and 10 of 1990). It would also be contrary to both good conscience and good industrial relations practice as Khan P. said in *Caribbean Bottlers*. This follows logically from what was said in *Shipping Association*.

51. Each case must be regarded and decided on its individual merits and based upon its particular circumstances.

52. The facts of the present case are materially different to those in *Shipping Association* and, indeed, perhaps the others to which this Court has been referred. In brief:

1. the collective agreement(s) have all expired but by Section 48(2) of the Act it (they) remain enforce for certain purpose;
2. the union was not recognised by Eastern Commercial;
3. the three substantials test was clearly satisfied;
4. there are, however, certain factors additional to the three substantials:
   a. the operations were carried on in the same places;
   b. they were carried on in the same name;
   c. Tru Valu and Eastern Commercial had their registered offices in the same place;
   d. Tru Valu and Eastern Commercial have the same chief executive officer/managing director;
   e. The retrenchment and re-employment took place simultaneously;
   f. The transaction between Tru Valu and Eastern Commercial was not at arms length;
   g. That transaction was a sham because it was an attempt to either reduce the workers' terms of employment or to get rid of the union. It could not be a device to pay off the workers and get rid of them completely; that would be contrary to the fact of their employment by Eastern Commercial

53. The facts of the present case are therefore readily distinguishable from those in *Shipping Association* and the Industrial Court's findings below, and its application of the principles and practices of good industrial relations, were not ones that no reasonable court could make, nor was its decision irrational. Its interpretation of *Shipping Association* and its declaration of successorship were correct.

I would therefore dismiss the appeal. As to the costs of the appeal I do not consider there to be an exceptional reason as provided in Section 10(2) of the Act for making any order other than each party bear its own costs. I would therefore make no order as to costs.

C.V.H. Stollmeyer
Justice of Appeal