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**Natrel Inc. v. Milk and Bread Drivers, Dairy Employees,
Caterers and Allied Employees, Teamsters Local Union No. 647**

Between

**Natrel Inc., applicant, and
The Milk and Bread Drivers, Dairy Employees, Caterers and
Allied Employees, Teamsters Local Union No. 647, and Elaine
Newman, respondents**

[2001] O.J. No. 1283

104 A.C.W.S. (3d) 508

Court File No. 627-99

Ontario Superior Court of Justice
Divisional Court

Lane, Mendes da Costa and McCombs JJ.

Heard: April 3, 2001.

Judgment: April 6, 2001.

(16 paras.)

Labour law -- Industrial relations -- Collective agreement, enforcement -- Arbitration -- Jurisdiction or powers of arbitrator or board -- To extend limitation period -- Judicial review -- Scope of review.

This was an application by Natrel Inc. for judicial review of a decision of an arbitrator. Natrel argued that the matter had been referred to arbitration outside the time period prescribed by the collective agreement so that the arbitrator had no jurisdiction. The evidence established that the parties had in the past consistently permitted referrals to arbitration after the time limit had passed. Natrel also sought review of the award itself in which the arbitrator found that Natrel had unfairly distributed overtime.

HELD: Application dismissed. The arbitrator had jurisdiction to deal with the matter. The late referrals had been permitted by the parties for many years and the practice had not been terminated by

either party. The arbitrator's decision was not patently unreasonable and was reasonably founded on the evidence.

Counsel:

Richard J. Charney, for the applicant.

Michael McCreary and Peter **Shklanka**, for the respondent Union.

The Arbitrator was an unrepresented party.

The following judgment was delivered by

THE COURT (endorsement):--

Preliminary Award

1 With respect to the preliminary award, the core issue is whether the arbitrator was correct in holding that she had jurisdiction to hear the matter.

2 It was common ground that any power of the arbitrator must be found under s. 49 of the Act.

3 Under s. 49(2) no request for the appointment of an arbitrator may be made under s. 49(1) "beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration."

4 Article 5.07 of the collective agreement provides that if final settlement of the grievance is not completed under Step 3, the grievance may be referred by either party to a Board of Arbitration as provided in Article 6 at any time within seven (7) days after the decision is given under Step 3.

5 We are all of the view that on established principles of statutory interpretation, the use by the legislature of the disjunctive "or" in the provision "stipulated in or permitted under", displays an intent that the phrases "stipulated in" and "permitted under" have different meanings, each of which must be given efficacy.

6 Although a seven day limitation is "stipulated in" article 5.07 of the collective agreement, the arbitrator found that the parties' longstanding and consistent practice had been to permit referrals to arbitration after the time limit had passed.

7 The arbitrator considered the letters that passed between the parties and found that the employer had not succeeded in terminating that practice by adequate notice in a timely way. These letters are not without their problems, but her conclusion is one that they reasonably bear.

8 Since such late referrals had been "permitted under" the collective agreement by the parties for many years, and the practice had not been terminated at the relevant time, in our view the arbitrator reached the correct result, reasonably founded on the evidence.

Final Award

9 The issue concerned the disparity of overtime awarded to two employees.

10 Article 13.06(c)(iv) of the collective agreement provides that overtime work will be distributed "... as fairly and impartially as possible over a period of time among the employees who are qualified to do the work."

11 While "fairness" does not preclude some inequality, the arbitrator found that the discrepancy was "beyond a reasonable disparity", even having regard to the explanatory evidence. The disparity had broadened steadily over the six-month period despite having been drawn to the employer's attention. So great a disparity, she found, established a prima facie case that a violation had occurred. The employer's evidence did not displace this conclusion.

12 The evidence supports this analysis, and in our view, the arbitrator's conclusion was not only not "patently unreasonable", but rather, was a correct analysis of the situation.

13 The applicant submitted that the arbitrator erred in imposing a monetary payment rather than the in-kind remedy proposed by the applicant. We agree with her disposition in this respect. There was no evidence that the grievor required or would benefit from a training program as suggested. The employer submitted that there was no evidence that the in-kind remedy would affect other employees, but equally, there was no evidence from the employer. Further, an experienced labour relations arbitrator may be expected to have some insight into whether the proposal was likely to generate continued conflict in the workplace. The arbitrator's decision on the appropriate remedy was within her area of competence and was supported by her analysis of the evidence and the jurisprudence. We are all in agreement that she acted reasonably in reaching the conclusion that the in-kind solution was not appropriate.

14 When assessing the quantum of damages, the arbitrator acknowledged that she was dealing with an issue that was unquantifiable with precision, on the basis of the evidence. But, as she was bound to do, she did the best she could with the evidence she had. Bearing in mind the very large differential in hours of overtime worked by the two employees and the gaps in the evidence to which the arbitrator referred, the figure of 100 hours was not patently unreasonable.

15 The application for judicial review is therefore dismissed.

Costs

16 Party and party costs should follow the event, unless either party wishes to make written submissions within fourteen days, seeking a different order.

LANE J.

MENDES DA COSTA J.

McCOMBS J.

cp/s/qlsar

---- End of Request ----

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Time Of Request: Friday, October 02, 2009 00:43:40