NOVA SCOTIA COURT OF APPEAL

Citation: ***Nova Scotia Union of Public & Private Employees, Local 13 v. Halifax (Regional Municipality)***, 2007 NSCA 17

Date: 20070207
Docket: CA 270343
Registry: Halifax

Between:

Nova Scotia Union of Public & Private Employees, Local 13

Appellant

v.

Halifax Regional Municipality

Respondent

Judges:	Bateman, Cromwell and Oland, JJ.A.
Appeal Heard:	January 24, 2007, Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Cromwell, J.A.; Bateman and Oland, JJ.A. concurring.
Counsel:	Ronald A. Stockton and Nancy Elliott, for the appellant Randolph Kinghorne and Scott M. Hughes, for the respondent

Reasons for judgment:

I. INTRODUCTION:

[1] The appellant union and Ms. Chant grieved the termination of her employment with the respondent Halifax Regional Municipality ("HRM"). Arbitrator Susan M. Ashley dismissed the grievance. The union's application to Supreme Court chambers to quash the award was dismissed. The union appeals. At issue is whether the arbitrator committed a reviewable error in dismissing the grievance and whether comments by the judge during submissions in chambers gave rise to a reasonable apprehension of bias.

[2] In my view, the appeal should be dismissed. Even reviewed on the reasonableness standard, as the appellant says it ought to be, the award does not disclose reviewable error and the judge's remarks, viewed in their proper context, do not give rise to a reasonable apprehension of bias.

II. BACKGROUND:

A. Facts:

[3] Ms. Chant unfortunately suffers from a chronic illness which prevented her from continuing her work as a call centre agent. She received Long Term Disability ("LTD") and Canada Pension Plan ("CPP") disability benefits. After having received LTD for two years, Ms. Chant accepted a lump sum payment ending any further claim to monthly LTD payments. HRM took this as recognition that she would not be returning to work and terminated her employment, as it advised Ms. Chant that it would before she accepted the lump sum.

[4] Sadly, it is acknowledged that there is no likelihood of her ever returning to work. Through grieving the termination, the union and Ms. Chant sought to

maintain her status as an employee solely for the purpose of continuing to accrue pension entitlement while disabled.

[5] The pension plan provides that persons who are receiving LTD or a CPP disability pension (as Ms. Chant was) are exempted from making contributions to the plan during the period of disability and this period is included as credited service. Articles A6.01 and A1.02(1)(c)(ii) of the plan provide as follows:

> A6.01 Member Required Contribution During Disability
>
> A Member who becomes Totally Disabled after April 1, 1998 and whose net income while Totally Disabled is less than his net income immediately prior to becoming Totally Disabled, is exempted from the requirement to make contributions to the Plan during a period of Total Disability that is included in Credited Service under Sections A1.02(c)(i) or A1.02(c)(ii)(in this Section A6 referred to as a period of credited Total Disability), except to the extent that the Member is entitled to benefits under a disability income plan for the purpose of providing payment of all or a portion of the Member's contributions to the Plan. ...
>
> A1.02 ***Credited Service*** means:
>
> (1) the years and months and partial months of the following periods of a Member's Continuous Service while a Member of the Plan:
>
> ...
>
> (c) unpaid leaves of absence in respect of a period of Total Disability during which:
>
> ...

> (ii) the Member is entitled to receive disability income benefits under the Workers' Compensation Act or the Employment Insurance Act;

[6] The plan also provides that it should not be interpreted as interfering with the right of the employer to discharge any person. Section 10.04 says this:

> 10.04 **No Right to Employment**
>
> The Plan shall not be construed to create or enlarge any right of any person to remain in the employment of the Municipality, nor shall it interfere in any manner with the right of the Municipality to discharge any person.

B. The arbitrator's award:

[7] The arbitrator found that HRM was entitled to terminate Ms. Chant's employment because there was no prospect of her returning to work now or in the future. Her acceptance of the lump sum payout for her LTD was an acknowledgement of this unfortunate fact. The arbitrator concluded that Ms. Chant's rights under the pension plan are subject to her maintaining her employment status and the employer's decision to terminate her was reasonable given that there was no prospect of her ever returning to work. While acknowledging that entitlement to certain benefits may restrict an employer's ability to terminate a disabled person in some circumstances, the arbitrator found that there was nothing to prevent the employer from exercising its authority to terminate Ms. Chant's employment in this case.

C. Judicial review:

[8] On the union's application to quash the award, the judge found that the appropriate standard of review was patent unreasonableness but also concluded that the award did not disclose reviewable error whether assessed for reasonableness or patent unreasonableness.

III. ISSUES:

[9] The issues are these:

1. Did the judge err in reviewing the arbitrator's award on the patent unreasonableness standard rather than the standard of reasonableness?

2. Did the judge err by not quashing the arbitrator's award?

3. Did comments made by the judge during submissions give rise to a reasonable apprehension of bias?

IV. ANALYSIS:

A. Standard of review:

[10] The appellant says the applicable standard is reasonableness while the respondent says it is patent unreasonableness. The judge found that patent unreasonableness is the right standard but also found that the award should not be disturbed even if reviewed on the reasonableness standard.

[11] As I agree with the judge that the award discloses no reviewable error even if reviewed for reasonableness, I will assume, but not decide, that is the applicable standard as the appellant submits. I would add, however, that there are strong arguments to support the patent unreasonableness standard: **Canadian Union of**

Public Employees, Local 933 v. Cape Breton (Regional Municipality) (2006), 245 N.S.R. (2d) 219 at paras. 28 - 70. I should not be understood as deciding that the reasonableness standard is the applicable one here.

B. Did the arbitrator make a reviewable error?

[12] The arbitrator's award passes review for reasonableness if it provides any line of analysis that could reasonably lead the arbitrator from the evidence to her conclusion: **Law Society of New Brunswick v. Ryan**, [2003] 1 S.C.R. 247 at paras. 55 - 56; **Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)**(2005), 238 N.S.R. (2d) 59 (C.A.). In my view, the award does provide a line of analysis that reasonably led the arbitrator to the conclusion that she reached. It follows that the award meets the reasonableness standard and should not be interfered with on judicial review.

[13] There is no issue that, in general, an employer may terminate the employment of a person who, like Ms. Chant, is unable to perform her job duties and has no prospect of ever being able to do so in the future. The crux of the dispute between the parties is whether, as the union argues, this general authority of the employer to terminate is limited by the pension plan's provisions concerning a disabled employee's exemption from paying premiums and entitlement to accrue credited service.

[14] As noted earlier, the HRM pension plan provides that an employee who, like Ms. Chant, is in receipt of CPP disability benefits (or LTD) is exempt from making pension contributions and continues to accrue credited service in the plan. The union's position is that this provision has the implied effect of precluding the employer from terminating Ms. Chant. This is so, says the union, because termination would take away her right, during her disability, to accumulate pension entitlement until normal retirement age.

[15] The employer, however, rejects this contention. It notes that to imply this limitation would be inconsistent with the express terms of the plan. Reliance is placed on section 10.04 of the plan which I set out earlier. To paraphrase that provision, it stipulates that the plan does not either enlarge the rights of employees

to remain employed or interfere with the employer's rights to terminate an employee.

[16] Notwithstanding Mr. Stockton's able argument, I cannot agree that the arbitrator's award dismissing the grievance was unreasonable. She reviewed all of the facts and the relevant provisions of the collective agreement and the plan and considered all of the submissions and authorities placed before her. In the arbitrator's view, while the employee's vested right to disability benefits was not dependent on her status as an employee once the disability had occurred, this principle did not apply to the employee's right to accrue pension benefits. That right, found the arbitrator, was dependent on employment status. The employer's ability to terminate employment in appropriate circumstances was, therefore, not limited and was reasonably exercised in the circumstances of this case.

[17] The award is supported by a line of reasoning, anchored firmly in the collective agreement and the pension plan text, which it was the arbitrator's role to interpret and to apply. The judge was right not to quash the award.

[18] I would dismiss this ground of appeal.

3. Reasonable apprehension of bias:

[19] The appellant refers to two comments by the chambers judge during submissions that it says give rise to a reasonable apprehension of bias on the part of the judge against disabled persons. I cannot accept this submission.

[20] As the Supreme Court has decided, comments by a judge that are said to give rise to a reasonable apprehension of bias must be assessed in the context of the whole proceeding with an awareness of all the circumstances that a reasonable observer would be deemed to know: **R. v. R.D.S.**, [1997] 3 S.C.R. 484 at para. 112. The test is whether there are substantial grounds upon which bias would be apprehended by a reasonable and right minded person, applying him or herself to the question, knowing the required information, viewing the matter realistically and practically and having thought the matter through: **R.D.S.** at para. 111.

[21] The two remarks referred to by the appellant, considered on their own and out of context, could give rise to concern. However, when viewed in context, it is apparent that no such concern is justified.

[22] The judge, it appears, was “pinch hitting” for the judge originally assigned to the matter. He frankly advised counsel that he had not been able to review the material as fully as he would normally do and that he would have to reserve his decision. The judge’s newness to the file is perhaps reflected in some of his comments which, with a fuller opportunity to become familiar with the case, he would have recognized were not pertinent to the matters in issue.

[23] The judge’s comments must also be read in full. When that is done, my view is that there is no indication at all of bias. After appearing to suggest that some people were receiving CPP disability pensions that they ought not to be getting, the judge immediately added that there was no suggestion that there was any such impropriety in this case. Later, the judge commented that “ a person on long-term disability is far better off than a person that’s working”, but almost immediately he added that he was simply speaking in terms of the pension plan itself and noted that a person was “unfortunate” to have to go on LTD.

[24] These comments assessed in context and from the perspective of a reasonable person fully informed of the relevant circumstances would not, in my view, reasonably give rise to any concern about the judge’s impartiality.

[25] I would dismiss this ground of appeal.

IV. DISPOSITION:

[26] I would dismiss the appeal without costs.

Cromwell, J.A.

Concurred in:

Bateman, J.A.

Oland, J.A.