NOVA SCOTIA COURT OF APPEAL

Citation: ***Foster v. Nova Scotia (Human Rights Commission)***, 2015 NSCA 66

Date: 20150625
Docket: CA 427966
Registry: Halifax

Between:

Douglas Foster

Appellant

v.

Dennis A. James sitting as a Nova Scotia Human Rights Board of Inquiry, Cape Breton Regional Municipality, The Nova Scotia Human Rights Commission, and The Attorney General of Nova Scotia representing Her Majesty the Queen, in Right of the Province of Nova Scotia

Respondents

Judges:	Saunders, Hamilton, Beveridge JJ.A.
Appeal Heard:	February 5, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Hamilton, J.A.; Saunders and Beveridge, JJ.A. concurring
Counsel:	Blair Mitchell, for the appellant Eric Durnford, Q.C., and Amy Bradbury, for the Respondent Cape Breton Regional Municipality Dennis J. James, Q.C., sitting as a Nova Scotia Human Rights Board of Inquiry (not participating) Lisa Teryl for the Nova Scotia Human Rights Commission (not participating) Edward A. Gores, Q.C., for the Attorney General of Nova Scotia (not participating)

Reasons for judgment:

[1] This is an appeal from the April 30, 2014 decision of Dennis James, acting as a Board of Inquiry (Board) under the Nova Scotia **Human Rights Act** (**HRA**), R.S.N.S. 1989, c. 214; Board File No. 51000-30-S11-1908. The issue is whether the Board erred in finding that the Defined Contribution Pension Plan (DCP) of one of the respondents, the Cape Breton Regional Municipality (CBRM), as amended to require mandatory retirement at age 65, was a *bona fide* pension plan within the meaning of s. 6(g) of the **HRA**.

[2] If the DCP is a *bona fide* pension plan, it is excepted from the general prohibition against age discrimination in s. 5(1)(h) of the **HRA**, so that Mr. Foster was not discriminated against when he was required to retire at age 65 and his appeal should be dismissed. If the DCP is not a *bona fide* pension plan, Mr. Foster's mandatory retirement constituted age discrimination under s. 5(1)(h) and his appeal should be allowed.

Background

[3] The CBRM was formed on the amalgamation of several municipal units in Cape Breton in 1995. The amalgamating units had different pension arrangements. These were consolidated by the CBRM into two pension plans, the DCP and the Defined Benefits Pension Plan (DBP). The DBP contained a mandatory retirement clause. The DCP did not. Despite the lack of a mandatory retirement provision in the DCP, the employees covered by it were required to retire at age 65 by virtue of policies, plans, schemes and practices implemented by the CBRM at the time of amalgamation.

[4] In 1991, when age discrimination was first introduced into the **HRA**, exceptions were also introduced for "a *bona fide* retirement or pension plan or the terms or conditions of a *bona fide* group or employee insurance plan" and for "a *bona fide* plan, scheme or practice of mandatory retirement". At that time, ss. 5(1) and 6 of the **HRA** provided:

> 5 (1) No person shall in respect of …
>
> (d) employment; …
>
> discriminate against an individual or class of individuals on account of …
>
> (h) his age; …

> 6 Subsection (1) of Section 5 does not apply …
>
> (g) to prevent, on account of age, the operation of a *bona fide* retirement or pension plan or the terms or conditions of a *bona fide* group or employee insurance plan;
>
> (h) to preclude a *bona fide* plan, scheme or practice of mandatory retirement; …

[5] No one challenged the mandatory retirement of employees covered by the DCP while the **HRA** contained this wording.

[6] In April 2007, the Nova Scotia Legislature passed the **Mandatory Retirement Act** (**MRA**), S.N.S. 2007, c. 11, which took effect on July 1, 2009.

[7] The **MRA** changed s. 6 of the **HRA** to read:

> **6** Subsection (1) of Section 5 does not apply …
>
> (g) to prevent, on account of age, the operation of a *bona fide* pension plan or the terms or conditions of a *bona fide* group or employee insurance plan;
>
> (h) *repealed 2007, c. 11, s. 1* …

[8] *Bona fide* retirement plans and *bona fide* plans, schemes and practices no longer qualified as exceptions to the age discrimination provisions of s. 5(1). The exceptions continued for *bona fide* pension plans and *bona fide* group or employee insurance plans.

[9] Considering the CBRM history of mandatory retirement at age 65 for all employees covered by the DCP and the DBP, and the coming changes to the **HRA** that would continue the exception from the age discrimination provisions of s. 5(1)(h) for *bona fide* pension plans, but remove it for retirement plans and *bona fide* plans, schemes and practices, the CBRM officials concluded that the DCP should be amended to provide for mandatory retirement. The motivation for the amendment was to maintain the equal treatment of the CBRM employees covered by both the DCP and the DBP, with all being subject to mandatory retirement at age 65. These amendments to the DCP were effective June 16, 2009.

[10] The appellant was covered by the DCP and was mandatorily retired at age 65 on June 30, 2012. After finding the amended DCP was a *bona fide* pension plan under s. 6(g), the Board dismissed his complaint of age discrimination made under the **HRA**.

Board's Decision

[11] The Board reviewed the evidence in depth and made a number of factual findings which are not disputed. He noted the many common grounds between the parties, such as their agreement that (1) the DCP was a *bona fide* pension plan prior to the amendment, exempt from the age discrimination provisions of s. 5(1); (2) the sole reason the DCP was amended was to continue the requirement that all employees, except crossing guards, would retire at age 65; (3) the motivation of the CBRM senior management was to maintain equal treatment of the CBRM employees; and (4) mandatory retirement was not required for the operation of the DCP.

[12] He recognized that the only issue before him was whether the June 16, 2009 amendments to the DCP, adding the mandatory retirement provisions, changed its *bona fides*.

[13] The Board referred to the seminal Supreme Court of Canada case setting out the principles to be applied when deciding whether a pension plan is *bona fide* for the purpose of determining if it is exempt from age discrimination under similar human rights legislation in New Brunswick:

> 53. The Supreme Court of Canada decision in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.* 2008 SCR 45 sets out the determinative principles for analyzing whether the DCP is a *bona fide* pension plan. While the decision considered *bona fide* within the language of the New Brunswick Human Rights legislation, it is accepted the decision is applicable to the language in ss. 6 (g) of the *Act*.
>
> 54. Justice Abella, writing for the majority, rejected the argument advanced by the New Brunswick Human Rights Commission that the modifying phrase *bona fide* was intended to introduce a reasonableness analysis. Rather she concludes that the intention of *bona fide* was to determine whether the plan is genuine. She writes at paragraphs 32 and 33:
>
> > [32] I agree with Robertson J.A. too that the *bona fides* test is one with both subjective and objective components. The subjective requirements of "*bona fides*" are not difficult to define—they relate to motives and intentions. It is more difficult to explain what makes a pension plan, objectively, *bona fide*. In my view, a number of sources direct us to a relatively basic conclusion: a *bona fide* plan is a legitimate or genuine one.
> >
> > [33] Section 3(6)(a), notably, states that the age discrimination provisions do not apply to the terms or conditions of any "*bona*

> *fide* pension plan". The placement of the words "*bona fide*", it seems to me, is significant. What this immunizes from claims of age discrimination is a legitimate pension plan, including its terms and conditions, like mandatory retirement. It is the plan itself that is evaluated, not the actuarial details or mechanics of the terms and conditions of the plan. The piecemeal examination of particular terms is, it seems to me, exactly what the legislature intended to avoid by explicitly separating pension plan assessments from occupational qualifications or requirements. This is not to say that the *bona fides* of a plan cannot be assessed in relation to terms which, by their nature, raise questions about the plan's legitimacy. But the inquiry is into the overall *bona fides* of the plan, not of its constituent components. [Emphasis in original]

55. The clear direction in *Potash* is seen at Paragraph 41 and 42:

> [41] In my view, for a pension plan to be found to be "*bona fide*" within the meaning of s. 3(6)(a), it must be a legitimate plan, adopted in good faith and not for the purpose of defeating protected rights.
>
> [42] Pension plans today are complicated and have, in many ways, evolved from the structures and options available in 1973 when s. 3(6)(a) was enacted. But this does not change the purpose of what was meant to be generic protection for all legitimate pension plans. Unless there is evidence that the plan as a whole is not legitimate, therefore, it will be immune from the conclusion that a particular provision compelling retirement at a certain age constitutes age discrimination. [Emphasis in original]

[14] The Board applied the **Potash** principles, interpreted s. 6(g) of the **HRA** and found the amended DCP met the objective and subjective tests and was thus a *bona fide* pension plan:

> 62. For the purpose of assessing this challenge the Board accepts that the DCP meets the objective test of the assessment set out in *Potash*, supra. Registration of the amendment under the *Pension Act* is only one consideration. The DCP is a *bona fide* plan from all other measures. It is well-funded, registered for purposes of the *Income Tax Act* and has a significant number of members. As mentioned, the roots of the plan extend into various municipalities before the incorporation of CBRM. The Board rejects the suggestion the registration issues of the amendment is evidence that the DCP is "a sham". There is considerable evidence of sloppiness on the part of Sun Life and CBRM, but that is not enough to cause the Board to question the *bona fide* plan as amended. The

Superintendent has approved the amendment with full disclosure of its effect.

63. The most contentious aspect of this case is the subjective aspect of the *Potash* test. What does it mean in the context of an amendment to an otherwise *bona fide* plan? What does it mean when CBRM acknowledges that the amendment was to avoid the effect of the *MRA*?

64. It is useful to review the language of Justice Abella in paragraph 32 of *Potash*, *supra*:

> [32] I agree with Robertson J.A. too that the *bona fides* test is one with both subjective and objective components. The subjective requirements of "*bona fides*" are not difficult to define —they relate to motives and intentions. It is more difficult to explain what makes a pension plan, objectively, *bona fide*. In my view, a number of sources direct us to a relatively basic conclusion: a *bona fide* plan is a legitimate or genuine one. [Emphasis in original]

65. I agree with CBRM counsel that it is significant that Justice Abella incorporated intent within the discussion of subjectivity but I do not think it is novel to the discussion of subjective intent within human rights law. In *Large v. Stratford*, [1995] 3 SCR 733 the Court confirmed there is a subjective element to a *bona fide* occupational requirement. Although it is a different context, Justice Sopinka describes that the intent of the subjective test is to ensure that the employer is imposing the requirement in good faith, for a valid reason and not for any "ulterior motive that would be contrary to the purposes of the Code." This is consistent with the direction of Justice Abella in paragraph 41 of *Potash*, *supra* where she discussed good faith and not for the intent of defeating a protected right.

…

70. **In this case there is no doubt that CBRM imposed the condition to its DCP in good faith for a valid work place policy reason, which is concern for the equal treatment of its employees. I find that the motivation of ensuring equal treatment among the employees to have been done in good faith in the context of *Sibeca* [*Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61]. However, it is also true that the motivation was to avoid the impact of the removal of the protection of the mandatory policy or practice that would have occurred effective July 1, 2009.** [Bolding added]

71. **Does this mean that it does not meet the test of a *bona fide* plan because of an ulterior motive to defeat the protection against age discrimination?** [Bolding added]

72. The [Human Rights] Commission argues thusly:

> 18. The Commission submits that the legislative context within which CBRM is trying to justify their actions is one which has the goal and/or purpose of eliminating mandatory retirement but for a very few exceptional situations. The only exception applicable to CBRM that permits mandatory retirement is when the elimination of mandatory retirement provisions "prevent, on account of age, the operation of a pension plan." CBRM is trying to justify the change to their plan under an exception that has not been proven to apply to their circumstances. Their actions are therefore not legislatively sanctioned; they defeat the spirit, purpose and goal of the amended Act. [Emphasis in original]

73. The Commission does not elaborate on what it means by the "spirit, purpose and goal of the *Act* referring to the *MRA*. Nor does it provide any specific reference within the *MRA* that articulates that "spirit, purpose and goal."

74. In answering that submission, it is important to recognize that within the Human Rights legislative framework in Nova Scotia, there is both the protection against discrimination by virtue of age and preservation of a *bona fide* pension plan as an exception to the discrimination against age. [Emphasis in original]

75. CBRM's decision to add the condition to the plan is in keeping of the human rights framework of Nova Scotia. The *MRA* did not attempt to limit amendments to a *bona fide* pension plan. In fact, the *MRA* was never intended to introduce any changes to the portion of ss. 6 (g) dealing with pension plans.

76. In the records of Hansard for April 3, 2007, the Minister responsible for the *MRA* made the following comments on second reading:

> Bill No. 163 - ***Human Rights Act***.
>
> MR. SPEAKER: The Honourable Minister of Environment and Labour.
>
> HON. MARK PARENT: Mr. Speaker…This is a bill that is brought forward basically as a labour bill to allow workers who want to continue to work beyond the mandatory retirement
>
> [Page 4198]
>
> age to have that option and freedom to do so. It touches on human rights because it amends the *Human Rights Act*, but also upon seniors…
>
> …
>
> Anyway, many seniors want to contribute their expertise in the job force beyond the mandatory age of retirement and others do not. I want to make it very clear that this bill in no way forces anyone to

> work beyond the age that they want to retire. It doesn't affect pension arrangements in any way. What it simply does is allow people who are 65 to continue working if they choose to do so. Others may opt to retire at earlier ages and contribute to society through volunteer activities, but that is their choice and this bill then allows them that choice.
>
> In 2004, we gave this option to civil servants and it's only fair that we extend this option to other people…. [Emphasis in original]

77. Under the *Act*, even after the effective date of the *MRA*, a pension plan can be amended at any time including an amendment to add a term to include mandatory retirement. There is nothing in the legislation that limits the scope of ss. 6 (g) to pension plans that contained mandatory retirement language as of July 1, 2009. The argument advanced by the Commission assumes that there was some larger purpose of the *MRA* that limited the right to amend a pension plan to include a mandatory retirement provision but the legislation does not support that contention nor has the Commission given the Board any authority to support its proposition. Had the legislature wished to restrict the protection to pension plans that contained a mandatory retirement provisions as of July 1, 2009, it could have done so.

78. This balance between the right not to be discriminated against on the basis of age and the protection of pension plans is not a trifling matter. The Minister responsible spoke about it in his comments on the *MRA* and so too did Justice LaForest in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229. In particular at page 302:

> What we are confronted with is a complex socio-economic problem that involves the basic and interconnected rules of the workplace throughout the whole of our society. As already mentioned, the Legislature was not operating in a vacuum. Mandatory retirement has long been with us; it is widespread throughout the labour market; it involves 50 per cent of the workforce. The Legislature's concerns were with the ramifications of changing what had for long been the rule on such important social issues as its effect on pension plans, youth employment, the desirability of those in the workplace to bargain for and organize their own terms of employment, the advantages flowing from expectations and ongoing arrangements about terms of employment, including not only retirement, but seniority and tenure and, indeed, almost every aspect of the employer-employee relationship. ….

79. **In this case, despite the clumsy manner in which CBRM addressed the issue of the amendment, its decision was not made in a vacuum and should be understood from a larger perspective. As Mr. Ryan**

> **indicated, CBRM built an organization based on mandatory retirement and in that process developed an involved inter-connected set of rules that included pension rights. In almost all aspects of its management of the workplace, CBRM embraced mandatory retirement as a management tool This was not just created on June 16, 2009 rather the amendment was an extension of an approach that started in August 1995.** [Bolding added]
>
> 80. **To arrive at the conclusion the Commission advances that the spirit, purpose and goal of the *MRA* was violated by CBRM, one would have to ignore ss. 6 (g). One would also have to ignore the complexity of the issue as it has been discussed and debated for a long time. In this instance, the Board fails to see how CBRM's exercise of a right contained within the *Act* can be seen as an attempt to defeat the *Act*. The Board sees that CBRM exercised a right that is available to it under the legislative framework and was not focused on thwarting Mr. Foster or other employees situated like him.** [Bolding added]
>
> 81. In order to invalidate the June 16, 2009 amendment one would have to introduce some assessment of its merit. For example, it may be of some concern to the Board that there was no offsetting compensation or benefit to employees like Mr. Foster who had this new term introduced to the DCP. However, that level of analysis is what the *Potash* decision directs ought not to be done. The analysis does not change simply because it is an amendment to the Plan. It is not the role of the Board to review each term and condition as to its merit, rather the Board must look only at the pension plan in its totality. From the larger perspective, the DCP was a *bona fide* pension plan as of June 30, 2012 and is a full answer to Mr. Foster's complaint.
>
> 82. In conclusion, it is the view of the Board that the DCP as it existed on June 30, 2012 constituted a *bona fide* pension plan as contemplated by ss. 6 (g) of the *Act*. Accordingly, the mandatory retirement provision in the DCP is a proper exception to the prohibition against age discrimination pursuant to Section 5 (h) of the *Act* and Mr. Foster's complaint must be dismissed.

Issue

[15] I am satisfied the single issue before us is whether the Board misapplied the **Potash** principles and unreasonably interpreted s. 6(g) of the **HRA**, when reaching its conclusion that the amended DCP pension plan was a *bona fide* pension plan.

Standard of review

[16] This Court recently held in **Tri-County Regional School Board v. Nova Scotia (Human Rights Board of Inquiry)**, 2015 NSCA 2, that the standard of review to be applied in a case like this is reasonableness:

> [11] Justice Saunders described the standard of review respecting a decision by Human Rights Boards of Inquiry in *C.R. Falkenham Backhoe Services Ltd. v. Nova Scotia, (Human Rights Board of Inquiry)*, 2008 NSCA 38.
>
> > [19] In *Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission*, 2006 NSCA 63, this Court considered the appropriate standard of review in matters involving complaints launched pursuant to the *Human Rights Act*. We observed:
> >
> > > [50] Accordingly, different aspects of the Board's decision in this case will be subject to different standards of review. If the nature of the problem is a strict matter of law, or statutory interpretation, the standard of review will be one of correctness. If, on the other hand, the issue arises as a result of the Board's findings of fact, I will apply a standard of review of reasonableness. If the issue triggers a question of mixed fact and law, my analysis will call for greater deference if the question is fact-intensive, and less deference if it is law-intensive. Finally, if the issue concerns the Board's application of law to its findings of fact, I will apply a reasonableness standard of review. (Authorities omitted)
> >
> > […]
> >
> > [26] In respect of the matters before the Board of Inquiry appointed to consider Mr. Gough's complaint, if the nature of the problem being considered by the Board was strictly a matter of law, the required analysis will attract a standard of correctness. On the other hand, if the issue arises as a result of the Board's findings of fact, or inferences drawn from those facts, we will recognize the appropriate deference and margin of appreciation that is to be accorded such decisions and will apply a standard of reasonableness in our review.
>
> [12] *Falkenham* must now be read in light of a series of Supreme Court decisions that apply a reasonableness standard of review to questions of law involving interpretation of a tribunal's home statute or statutes closely related: *Alberta (Information and Privacy Commissioner) v. Alberta Teacher's Association*, 2011 SCC 61, (¶34, 39, 41); *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67. Nevertheless, a reasonableness standard may be rebutted if that is inconsistent with legislative intent: *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35

(¶15). *Rogers* was recently applied by the Federal Court of Appeal in *Johnstone v. Canada (Border Services)*, 2014 FCA 110.

[13] **For purposes of this case where the Board is primarily interpreting and applying the *Human Rights Act*, a reasonableness standard of review is appropriate.**

[14] In *Izzak Walton Killam Health Centre v. Nova Scotia (Human Rights Commission)*, 2014 NSCA 18, this Court summarized Supreme Court descriptions of the reasonableness standard of review:

> 14 Reasonableness is "... concerned mostly with the existence of jurisdiction, transparency and intelligibility within the decision making process. But it is also concerned with whether a decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, para. 47). The reviewing court should not conduct two separate analyses -- one for reasons and another for result. Rather the exercise is "organic"; the "reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes, (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board*), 2011 SCC 62, para. 14). [Bolding added]

Analysis

[17] This appeal is made pursuant to s. 36(1) of the **HRA**, which limits appeals to a "question of law". The parties recognize that findings of fact are not appealable to this Court. Thus the appellant does not question any findings of fact made by the Board, including the Board's finding that the CBRM's decision to amend the DCP was made in good faith, for a valid workplace policy reason (equal treatment among employees), and "was not focused on thwarting Mr. Foster or other employees situated like him".

[18] The appellant makes similar arguments on appeal as were made before the Board. He says:

(1) the amendment cost the DCP its *bona fides* because it was not required for the operation of the plan;

(2) the amended DCP is not *bona fide* because the amendment was made to defeat the purpose of the Legislature in amending s. 6(g); and

(3) the Board erred in treating the two purposes arising from the interplay between ss. 5(1) and 6(g) as equal, when the prevention of age

> discrimination trumps that of the protection of *bona fide* pension plans.

[19] The excerpts from the Board's very thoughtful and comprehensive decision set out above, indicate he carefully and correctly analyzed the principles **Potash** directs are to be applied in determining whether the DCP is a *bona fide* pension plan under s. 6(g). He considered both the subjective and objective elements of that determination. He was satisfied the DCP was well funded, registered under the **Income Tax Act**, had significant numbers, was not a sham, and that the amendment had been approved by the Superintendent of Pensions.

[20] He considered the history of mandatory retirement at CBRM and found the amendment to the DCP was made in good faith and for a valid workplace policy reason (that employees would be treated equally). He then went on to consider the appellant's arguments that the amendment requiring mandatory retirement cost the DCP its *bona fides* because it was not required for the operation of the DCP and that the DCP's *bona fides* was lost when the amendment was made because it was made to defeat the purpose of the Legislature in amending s. 6(g).

[21] After careful consideration, the Board rejected these arguments. He found that if the Legislature had intended to restrict amendments to those necessary for the operation of the DCP, it would have said so (para 77). He found there were two important purposes that arise from ss. 5(1) and 6(g), protection against age discrimination **and** preservation of *bona fide* pension plans, and that the balancing of these two purposes was "not a trifling matter" (para 78).

[22] The balancing of these two purposes was favourably referred to in this Court's reasons in **Tri-County**:

> [39] Nor does the Board's decision accord with the obvious legislative purposes of balancing age discrimination against preserving the integrity of *bona fide* pension plans, as Justice Abella reminds us in *Potash*, (¶36 above).

[23] In light of the dual purposes, he found that the CBRM's decision to add the mandatory retirement provisions to the DCP was in keeping with the human rights framework in Nova Scotia and that the **MRA** was never intended to introduce any changes to the portion of s. 6(g) dealing with pension plans (para 75). Again, this conclusion is echoed in paragraph 38 of **Tri-County**.

[24] Thus, the Board concluded that even after the effective date of the **MRA**, pension plans can be amended at any time, including amendments to add a term of mandatory retirement. Given the ability to make such amendments within the **HRA**, the Board found the amendment to the DCP made by the CBRM, was not done "for the purpose of defeating protected rights", the third element referred to for a *bona fide* pension plan to exist in paragraph 41 of **Potash**.

[25] I am satisfied the Board's decision has a reasoning path that is intelligible and transparent and that its conclusion is within the range of possible, acceptable outcomes given the facts and the law. Hence, I am satisfied it is reasonable and would dismiss the appeal.

[26] This is an appeal from a Nova Scotia Human Rights Board of Inquiry. There is nothing in the case which would cause me to depart from this Court's usual practice that generally costs are not payable by or to a party in a tribunal appeal. See **Conseil Scolaire Acadien Provincial v. Nova Scotia (Human Rights Commission)**, 2009 NSCA 31; **Green v. Nova Scotia (Human Rights Commission)**, 2011 NSCA 47; **Izaak Walton Killam Health Centre v. Nova Scotia (Human Rights Commission)**, 2014 NSCA 18.

Hamilton, J.A.

Concurred in:

Saunders, J.A.

Beveridge, J.A.