NOVA SCOTIA COURT OF APPEAL
Citation: McPhee v. Canadian Union of Public Employees,
2008 NSCA 104

Date: 20081031
Docket: CA 280391
Registry: Halifax

Between:

Janice McPhee, Mary Hill and Sharon MacLean

Appellants

v.

Canadian Union of Public Employees and
Canadian Union of Public Employees, Local 2094

Respondents

Judges:	Cromwell, Saunders and Oland, JJ.A.
Appeal Heard:	September 29, 2008, in Halifax, Nova Scotia
Held:	Appeal dismissed and notice of contention allowed per reasons for judgment of Cromwell, J.A.; Saunders and Oland, JJ.A. concurring.
Counsel:	appellants in person Susan Coen, for the respondents

Reasons for judgment:

I. INTRODUCTION:

[1] The respondent unions were sued by the appellants for harassment and intimidation, intentionally and negligently causing them psychiatric damage and for failing to represent their interests fairly. The trial judge, Warner, J., found that the unions had not breached any duty they owed to the appellants; all of their claims were dismissed. The judge refused, however, without giving reasons, to order that the appellants pay the unions' trial costs.

[2] The appellants appeal the dismissal of their action; the respondent unions, by notice of contention, say that the judge was wrong to deprive them of costs. In my view, the appeal should fail but the notice of contention should succeed.

[3] On their appeal, the appellants, in effect, ask us to retry the case. But that is not our function. We can intervene only if the judge made a legal error or a clear and determinative factual error in reaching his central conclusions. The appellants have not shown any such error. I would, therefore, dismiss the appeal.

[4] Turning to the notice of contention, my view is that the judge made a reviewable error in depriving the successful respondents of their costs. The general principle is that successful parties should receive costs from unsuccessful ones. The judge gave no reasons for departing from this general principle and my review of the record does not disclose a proper basis for doing so. I would, therefore, order the appellants, jointly and severally, to pay the costs of the trial, assessed as one bill, to the respondents.

[5] I should add that no issue was raised about the propriety of challenging the judge's costs order by notice of contention rather than by notice of cross-appeal and I will say nothing further about this procedural question.

II. BACKGROUND:

[6] The story at the root of this case started to unfold on Easter Monday (April 5th, 1999). At the time, the appellants were members of CUPE Local 2094 and

employed at Seaview Manor, a nursing home in Glace Bay. The union was in a legal strike position, but it had decided not to go out in order to keep solidarity with a province-wide approach to bargaining. However, on April 5th, one of the shifts at Seaview went out on strike. By doing so, those members broke ranks with the province-wide bargaining effort and acted contrary to membership votes in their local to hold off walking out. While this technically may not have been a "wildcat" strike (to use the judge's word), it was nonetheless a breach of union solidarity. The appellants, among others, were blamed by some for instigating the walk out, although the appellants strongly deny that they did.

[7] The strike ended about a week later when the provincial bargaining effort succeeded. The appellant, Ms. MacLean, testified that she returned to work following the strike. She found the situation difficult and after a few days she went on sick leave because of the stress. Ms. MacLean returned to work at Seaview about the middle of July, 1999. In December, 2002, Ms. MacLean again went off on sick leave as a result of stress. She returned to work in early 2003. At the time of trial, she continued in her employment at Seaview. The appellants, Ms. McPhee and Ms. Hill, never returned to work at Seaview.

[8] The appellants claim that from the time they joined the picket line on April 5th, 1999, they were subjected to intimidation by members of the local and its executive, falsely accused of initiating the strike, threatened with punishment and verbally harassed. As a result of this exceedingly stressful situation, they took sick time from work. Only Ms. MacLean was able to return to work at Seaview; Ms. McPhee and Ms. Hill did not return to work and were eventually dismissed. The union, after a long delay, decided not to take their dismissal grievances to arbitration. No formal disciplinary action with respect to the strike or anything else was taken against the appellants by the local or national union, although the possibility of such action had been discussed.

[9] The appellants sought redress by several means:

> They complained to CUPE National, making some 18 allegations of threats, harassment, illegal voting and other such claims, committed or condoned by the local executive.

- They filed a grievance with Seaview alleging that they were being harassed and intimidated by fellow members of the union. This grievance was denied by the employer and not pursued further.
- They filed a complaint of discrimination with the Nova Scotia Human Rights Commission, but the Commission rejected it.
- They filed a complaint of unfair labour practice against the local with the Nova Scotia Labour Relations Board alleging, among other things, that the local had taken disciplinary action against them. The Board dismissed the complaint and the appellants' application for judicial review of the Board's decision was also dismissed.

[10] The appellants started this action in October of 2001. They sued the local and national union for harassment and intimidation, intentional infliction of nervous shock, negligent infliction of nervous shock (psychiatric damage) and breach of the common law duty of fair representation. The first two of these claims were dismissed at the conclusion of the appellants' case at trial and are no longer in issue. The trial judge, as noted, dismissed the other two claims in a reserved decision following the trial.

[11] In oral argument, the appellants raised in support of their claims submissions made at trial, on behalf of the defendants, during a motion for non suit. This does not assist the appellants. In those submissions, counsel conceded that the local union owed a duty of fair representation and that there was some evidence upon which a properly instructed jury could find that it had breached the duty of fair representation in relation to Ms. McPhee and Ms. Hill. This was not an admission of liability; counsel was clear that the defendants' position was that liability should not be found. He stated:

> ... the Defendant [local] acknowledges that there is evidence upon which a properly instructed jury could find for ... the two Plaintiffs, Hill and McPhee, against [it]. Now we disagree that that ought to be a finding. ...
>
> (Emphasis added)

[12] I should add this. The judge found that, in the particular circumstances of this case, the national union could be vicariously liable for any breach of the duty of fair representation committed by its employee, Mr. Neeley, to whom the local had delegated certain decision-making authority. Whether or not this holding is correct is not raised on appeal and I will not comment on it one way or the other.

III. ISSUES:

[13] The appellants state 12 issues in their factum which I have set out in the appendix to my reasons. The respondents raise one issue by their notice of contention. For purposes of analysis, I have found it helpful to reorganize and restate the issues on the appeal and notice of contention as follows.

[14] The issues on appeal are:

1. What standards of appellate review apply to the points raised by the appellants?

2. Did the judge make reviewable errors of fact? In particular, did the judge err by failing to find that the unions:

   (a.) did not show due respect to the appellants?
   (b.) took inadequate steps to counteract rumours that the appellants had instigated the strike?
   (c.) did not properly investigate or pursue the dismissal grievances?
   (d.) had been negligent?

3. Was the trial unfair?

[15] The issues raised by the respondents' notice of contention are:

1. What is the applicable standard of appellate review?

2. Did the judge err by refusing to order the appellants to pay the respondents trial costs?

IV. ANALYSIS:

A. The Appeal:

1. First issue: standards of appellate review:

[16] The main role of the Court of Appeal is to make sure that the trial judge applied correct legal principles: see, for example, **Housen v Nikolaisen**, [2002] 2

S.C.R. 235 at para. 9. If the trial judge misstates the law, or applies it in such a way as to show that he or she relied on a wrong legal principle, the appellate court must intervene and find that a legal error has been committed.

[17] With respect to questions of fact and mixed questions of fact and law that do not reveal any underlying error of legal principle, the role of the appellate court is entirely different. An appeal to the Court of Appeal is not an opportunity for three judges to retry the case on the basis of a written transcript. Finding facts and drawing evidentiary conclusions from them are roles of the trial judge, not the Court of Appeal: see **Toneguzzo-Norvell (Guardian *ad litem* of) v. Burnaby Hospital**, [1994] 1 S.C.R. 114 at 121. An appellant cannot challenge a trial judge's findings of fact simply because the appellant does not agree with them: **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010 at paras. 88 and 90. Findings of credibility are "... a vital aspect of the trier of fact's role." : see A.W. Mewett & Peter J. Sankoff, *Witnesses*, vol. 1 (looseleaf updated to Rel. 1 - 2008) (Toronto: Thomson Canada Limited,1991) at page 11- 2.

[18] Appellate intervention on questions of fact is permitted only if the trial judge is shown to have made a "palpable and overriding error": see, e.g. **Housen, supra** at para. 10. Sometimes the standard has been expressed in different words, such as "clear and determinative error", "clearly wrong" and "hav[ing] affected the result." (emphasis added): see, e.g. **H.L. v. Canada (Attorney General)**, [2005] 1 S.C.R. 401 at para. 55; **Delgamuukw v. British Columbia**, **supra** at paras. 78 and 88. However expressed, courts of appeal must accept a trial judge's findings of fact unless the judge is shown to have made factual errors that are clear and which affected the result.

[19] This deferential approach on appeal applies to all of the trial judge's findings of fact, whether or not based on the judge's assessment of witness credibility and whether based on direct proof or on inferences which the judge drew from the evidence: see, e.g. **Housen, supra** at paras. 10 - 25; **H.L., supra** at para. 54.

[20] This deferential approach also applies to the judge's findings which apply the law to the facts – that is, to questions of mixed law and fact – unless the finding can be traced to a legal error: **Housen, supra** at paras. 26 - 37.

[21] The trial judge, as the trier of fact, must sort through all the evidence and decide which to accept and which to reject so as to piece together the more plausible view of the facts. Many considerations properly influence this decision, including the nature of any unreliability found in a witness's testimony, its relationship to the significant parts of the evidence, the likely explanation for the apparent unreliability and so forth. The trial judge may find that some apparent errors of a witness have little or no adverse impact on that witness's credibility. Equally, the judge may conclude that other apparent errors so completely erode the judge's confidence in the witness's evidence that it is given no weight.

[22] Making these judgments is the job of the trial judge. The Court of Appeal should not and will not substitute its own judgment on these matters. An appellant alleging an error of fact must show that the trial judge's finding is clearly wrong.

[23] Not every error in findings of fact permits appellate intervention. As Lamer, C.J.C. said in **Delgamuukw**, **supra** at para. 88:

> ... it is important to understand that even when a trial judge has erred in making a finding of fact, appellate intervention does not proceed automatically. **The error must be sufficiently serious that it was "overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue".** (emphasis added)

Where credibility is in issue, only errors that fundamentally shake the appeal court's confidence in the trial judge's findings of fact justify appellate intervention.

[24] I have gone on at length about the standard of review of factual findings. I have done this because most of the appellants' submissions on appeal relate, not to any misstatement by the judge of the relevant legal principles, but to his findings of fact or his application of correct legal principles to those facts.

[25] The points which the appellants number as issues 2, 3, 5, 7, 8, 10, 11 and part of 6 on their face, fall into this category. Other points, such as issues 4, 8, 9 and 12, seem at first glance to raise legal questions. However, when they are examined more closely, it becomes clear that they too are challenges either to the judge's findings of fact or his application of the law to the facts.

[26] For example, the appellants say that the judge erred with respect to the duty of fair representation and its breach. However, with respect to the duty of fair representation, the appellants do not point to any specific legal error in the judge's reasons. The judge referred to the leading cases in the Supreme Court of Canada, this Court and elsewhere: see reasons of the trial judge at paras. 98 - 118; 120 - 127.

[27] The appellants also submit that the judge was wrong to find that the union handled the dismissal grievances of Ms. McPhee and Ms. Hill in good faith, objectively and honestly and that the union failed to conduct a proper investigation and make a proper assessment of the merits of the grievances. These are questions of how the judge applied the legal principles to the facts as he found them and therefore are questions of mixed law and fact.

[28] The appellants also submit – and in fact refer to this as "... the most important issue concerning breach of unfair representation ..." – that the Local "... completely ignored Article 13 of the Collective Agreement the procedure to be followed for discharge, suspension and discipline..." (Appellants' Factum, page 71). This is one aspect of the appellants' argument that the union did not properly process the grievance and is really a factual rather than a legal argument. It is a question of fact or of mixed law and fact.

[29] I turn to the appellants' issues 4, 9 and part of 12 all of which relate to their negligence claim. These too raise questions of fact or mixed fact and law.

[30] The judge dismissed the appellants' claim for negligent infliction of psychiatric damage in part because there was no evidence that the local or CUPE conducted themselves separately or together so as to cause the appellants' medical conditions: reasons of the trial judge, para. 193. The appellants challenge this conclusion as a matter of fact, but not of law.

[31] The appellants' submissions about trial fairness raise questions of law which are reviewed on appeal for correctness.

2. Second issue: alleged errors of fact or mixed law and fact:

[32] The appellants allege that the judge made a host of factual errors. I have grouped them together under four headings which I will address in turn.

(a.) Whether the union failed to show due respect to the appellants:

[33] Warner, J. found that Ms. Mae Smith, the president of the local, did not fail to treat the appellants with due respect. As he put it at para. 140:

> My impression of the conduct of Mae Smith ... was that she acted in a respectful and fair manner towards all members of the Local including the [appellants]. That is not to say that she did not attempt to head off the walkout (unsuccessfully), or subsequently defend herself and the Local from the multiple complaints and grievances filed by the [appellants] against the Local.

[34] The judge made similar findings with respect to the conduct of the local's executive and various officials of the national union. He said at para. 144 that:

> ... at no time relevant to the proceeding in this action did the Local's executive or the representatives of CUPE National show any intent to harm or any malicious, fraudulent, spiteful or hostile conduct towards the [appellants].

[35] The appellants submit that these findings are wrong and that the judge ought to have concluded that Ms. Smith, the executive and officials of the national union failed to show them due respect and reacted with spite, intimidation and discrimination. I cannot accept these submissions. The appellants, in my view, have not pointed to any palpable and overriding error that would permit us to interfere on appeal with the judge's critical findings.

[36] In support of their submissions, the appellants state that Ms. Smith worked on some 16 other grievances but did not deal with the dismissal grievances of the appellants, Ms. McPhee and Ms. Hill. This, they suggest, should have persuaded the judge that Ms. Smith failed to treat them with the same respect and concern as shown to other union members. However, the judge did not make any reviewable error in failing to draw this inference. There was evidence that Ms. Smith submitted grievances on their behalf on 31 May 2000, the very day that they sought her assistance. Moreover, in December 2000, she wrote to Seaview Manor to confirm that the union intended to pursue the grievances. This is clear from the

grievance forms filed on behalf of Ms. McPhee and Ms. Hill as well as a follow-up letter written by Ms. Smith.

[37] It is admitted that the local later delegated the authority to make decisions with respect to the termination grievances of Ms. McPhee and Ms. Hill to Roger Neeley. The judge found, in my view reasonably, that this was done in order to ensure that the process was fair given the numerous complaints and accusations levelled at the local executive by the appellants. Ms. Smith testified that, given the adversarial position of the parties as a result of the various complaints and proceedings initiated by the appellants, it was not fair to any of the parties for the local to retain direct control of the grievance process. The judge was entitled to accept this evidence and did so; he found that the delegation was an attempt by the local to ensure a fair process and this conclusion is one reasonably supported by the evidence.

[38] The appellants make other submissions concerning what they allege to be errors by the judge in refusing to find that the union and the local failed to treat them properly. The appellants assert, for example, that they were subject to personal animosity on the picket line and afterwards and argue that the judge should have recognized that these were examples of the union's improper treatment of them.

[39] However, Warner, J. found that the appellants "gave as good, if not better, than they "got" from members who disagreed with the ... strike" (para. 205). This finding is supported by the record and does not exhibit any palpable and overriding error. The appellants' own testimony, not to mention the evidence of other witnesses, provided ample support for the judge's conclusion. The appellant, Ms. MacLean, testified that she had cursed at members of the executive when they informed the strikers that they would be crossing the picket line to offer essential services. Ms. McPhee also testified about an argument on the picket line which she had with Ms. Smith, an argument in which Ms. McPhee was an equal participant, rather than a passive recipient of invective. Ms. Hill also testified concerning a confrontation she had on the picket line with Ms. Smith. Like the others, Ms. Hill was not a mere bystander but took part in an angry confrontation on the picket line.

[40] The appellants say that they were singled out by the union, but the judge's findings to the contrary are supported by the record.

[41] Following the strike, during the meeting of 12 May, 1999, a question was asked whether something could be done to those members who caused the local to be on strike contrary to the decision of the membership. Names of those responsible were given. The names mentioned were Sherri Simm, Grace MacPherson, Susan MacAuley, Gayle Allison (all of whom were in the Manor) and Janice McPhee, Mary Hill and Linda Simm (who were said to have been waiting in a car parked in the hospital parking lot). There is no indication in the minutes of the meeting that the appellants were somehow singled out or subjected to treatment different from the others who were accused of initiating the strike. The local was considering potential action against all those who walked out. This included two of the three appellants. As the judge found at para. 139 of his reasons, the executive did not encourage such action and in fact took none.

[42] At a meeting on 14 June, 1999 a question was raised about naming the appellants "members in bad standing". The difficulty with this example of "different treatment" is that the statement was not made in relation to the strike but arose during a discussion of the appellants' complaints against the local (as is apparent from the Minutes of the 14 June meeting). The different treatment the appellants complain of was an attempt by the local to respond to their complaints rather than an attempt to single out the appellants as a result of the strike.

[43] I am not going to examine every small detail on which the appellants claim the judge misstated or misunderstood the evidence. His critical findings were that Ms. Smith, the local executive and the national union's officials did not treat the appellants with disrespect, spite or discrimination. These findings were reasonably open to him on the evidence in the record. The appellants have not pointed to any clear error of fact which would undermine these findings.

(b.) Whether the union failed to take adequate steps to counteract the rumours about the appellants and violated its own constitution:

[44] The appellants take issue with the judge's findings concerning their claims that the unions failed to counteract the rumours that the three appellants were instrumental in starting the strike. This claim ties in to the appellants' assertions

that CUPE failed to follow its own constitution by not invoking the trial process provided for in it. The appellants also allege that the failure to take the grievances to arbitration and the local's delegation of decision-making authority to Mr Neeley were contrary to CUPE's constitution.

[45] With respect to the complaint about the union's alleged inaction with respect to the rumours, the short answer with respect to the appellants Ms. Hill and Ms. McPhee is that the judge found as a fact, on the basis of his assessment of the evidence, that they had been "prime movers" in the walk-out. There was no duty on the part of the union to attempt to stop "rumours" that were true. The judge preferred the evidence of Sherri (Simm) Clements to that of these two appellants: see Reasons, para 31 - 32. The assessment of the credibility and weight of these and other witnesses' testimony were matters for him, not for us, to decide.

[46] As for the appellant Ms. MacLean, her evidence was that she maintained a professional working relationship with the local president, Ms. Smith. Ms. MacLean did not in her evidence point to any action that she felt the union could or should have taken to stop the ostracization by some of her co-workers that she experienced following the walk-out. There is no basis in her evidence for any finding of a breach by the union of its duties towards her.

[47] The answer to the appellants' argument concerning failure to invoke the trial process is that there was evidence before the judge, which he was entitled to accept, that they were fully apprised of their rights under the constitution but failed to pursue them. For its part, the executive took no formal action against the appellants. Mr. Neeley testified about all of this extensively. The record does not support a finding that the union failed to adhere to the provisions of its constitution.

[48] With respect to the failure to take the grievance to arbitration and the delegation by the local to Mr. Neeley, we were pointed to no provisions in the CUPE constitution that either prevents delegation at the request of the local or which requires all dismissal grievances to be taken to arbitration.

[49] The appellants refer to the decision of Cacchione, J. in **Romard v. Canadian Union of Public Employees, Local 3264** (2000), 188 N.S.R. (2d) 31 (S.C.) in support of their argument that the delegation by the local to Mr. Neeley

was inappropriate. In **Romard**, Cacchione, J. accepted that a local must have autonomy from the national union but he did so in the context of determining that the national union did not owe a duty of fair representation to a local member. Nothing in the case suggests that a local can not choose to delegate authority to a national representative or that such delegation is incompatible with the autonomy of a local.

(c.) The unions' handling of the dismissal grievances:

[50] As noted, the local delegated its decision-making authority with respect to the dismissal grievances to Mr. Neeley. Ms. Gatchalian, a member of a Halifax labour law firm, was retained by the unions to investigate and provide an opinion concerning the grievances. Her conclusion was that "... the grievances of Ms. McPhee and Ms. Hill would have no reasonable chance of success at arbitration." She pointed out that an arbitrator would likely uphold the terminations on the ground of innocent absenteeism. She noted that Ms. McPhee and Ms. Hill had both been absent from work for over one year prior to their terminations and that "... neither had any reasonable prospect of returning to work on a regular basis in the foreseeable future at the time they were terminated."

[51] The judge found that Ms. Gatchalian's report and opinion were "... thorough and well-reasoned" and that her investigation was conducted in a way that, "... did not fail the standards imposed by the ... duty of fair representation." (Reasons, paras. 156 - 7)

[52] Whether Ms. Gatchalian's opinion was right or wrong is at this point irrelevant. It was a thorough and careful investigation and legal analysis by a highly respected law firm. The union was entitled to rely on such an investigation and advice in exercising its discretion as to whether or not to proceed to arbitration. While the appellants can point to various factual arguments, they have no answer to the judge's fundamental conclusion: the Gatchalian report was a solid piece of work on which the union could reasonably rely in reaching its decision. As the judge put it:

> 173 I conclude from the whole of the evidence that:
>
> ...

> (d) The October 9, 2002, Gatchalian report and November 27, 2002 supplementary opinion, which conclude that there was no reasonable prospect of success of the grievances at arbitration, together with his own interviews and investigations, was a proper foundation upon which Mr. Neeley, could prudently and reasonably exercise his discretion to decide against referring the grievances to arbitration;
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> . . .
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> 175 The exercise of discretion by the defendants in the decision respecting the two dismissal grievances was made in good faith, objectively and honestly, after a thorough investigation. It was carried out in a fair, genuine, and competent manner, taking into account the seriousness of the grievances, without serious negligence and without hostility towards the plaintiffs. If failure to refer the matters to arbitration quickly after the employer's set out its position was an error (which I am not satisfied it was), it did not amount to major or gross negligence, since there was no reasonable chance that the grievances would succeed in any event. Ms. Gatchalian's reports do not appear to have been influenced by the "time limit" issue.
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> (Emphasis added)

[53] Much was said in the judge's reasons and in the appellants' submissions about the delay in processing the grievance. I will not address all of the specific points in detail because in my view it is not necessary to do so. Ms. Gatchalian's view was that the union should have taken the decision much sooner as to whether the grievance would be sent to arbitration. However, as the trial judge noted, there was no evidence that this delay prejudicially affected the likelihood of the grievances' success: para. 175.

[54] The judge also considered the delay in the context of what else was happening between the parties. There was no error in doing this. The appellants Ms. McPhee and Ms. Hill were dismissed effective in June of 2000 and their dismissal grievances were dated at the end of May of that year. They had previously, in August of 1999, filed their unfair labour practice claim against the union with the Labour Relations Board. The proceedings before the Board and the ensuing judicial review application by the appellants were ongoing until January of 2002 when the Supreme Court of Nova Scotia dismissed, in oral reasons, the judicial review application. In October of 2001, the appellants started the present action. These ongoing adversarial proceedings between the parties played a

significant part in the delay that occurred in the processing of the dismissal grievances. As the judge put it, the " ... multiple actions and complaints by the [appellants] against the local, caused the local to be defensive and more hesitant in their dealings with [them]." (Reasons, para 173 (b)).

[55] The judge also found that Mr. Corsano, who was at the time Ms. McPhee's and Ms. Hill's solicitor for the Labour Board matter, agreed that moving the grievances forward would best await final disposition of the Labour Board proceedings: Reasons, para. 62. This finding is based, in part, on Mr. Corsano's testimony that he understood that the grievances were more or less on hold pending the resolution of the proceedings against the union at the Labour Relations Board:

> Q. Okay. And would you say that that would, that that position of the union was as a result of your position as communicated to Lionel Clarke, that you were waiting for the decision of the Labour Board before going forward with the fact finding?
>
> A. Would you repeat the question?
>
> Q. That you were waiting for the disposition of matters with the Labour Board before moving forward with the fact finding.
>
> A. That's what I think the final disposition of those matters probably would relate to moving the grievance forward, right. (AB 2386)

[56] When viewed in the full factual context, the arguments about who failed to meet with whom and when and why are beside the point. The critical finding, well supported by the evidence, is that the delay, in the unusual circumstances of this case, neither weakened the merits of the grievances nor supported an inference of negligence, bad faith or discrimination on the unions' part.

[57] The issue of compliance with Article 13 of the Collective Agreement was addressed in detail in the Gatchalian opinion. Based on the legal opinion which it had received, the union was entitled to consider that if Article 13.01 applied, it had been respected.

[58] To sum up, the appellants have not shown any clear and determinative error in the judge's critical conclusions that: (a.) the Gatchalian report was thorough and

along with other investigations, provided a proper basis for the union's decision not to proceed; (b.) there was no evidence that the delay compromised the merits of the grievances; and, (c.) the delay, in the context of the adversarial proceedings between the parties and the understanding between counsel, did not support any inference of negligence or bad faith on the union's part.

(d.) The appellants' negligence claim:

[59] The judge found that there were no acts of negligence on the part of the unions or those for whom in law they were responsible: Reasons, paras. 193 - 197. This is a finding of mixed law and fact. The appellants have pointed to no error in legal principle on which the finding is based and to no clear and determinative error in the judge's findings of fact or application of the legal principles to the facts. In short, the appellants have not shown any basis for appellate interference with the judge's findings.

3. Third issue: was the trial unfair?

[60] The appellants submit that the judge exhibited bias, unduly intervened by preventing them from leading evidence and erred by not allowing them to recall Mr. Neeley for further examination in connection with the newly produced documentation. In my view, none of these points has any merit.

[61] There is not the slightest whiff of bias in this record. The judge on the contrary was scrupulously fair and did everything one could reasonably expect to assist these self-represented appellants during the trial. The claim of bias on the trial judge's part is groundless.

[62] The judge had to intervene from time to time during the trial to apply the rules of evidence and trial procedure. But he invariably did so with restraint and provided helpful explanations. Far from impeding the appellants from presenting their case, he provided precisely the sort of guidance that the appellants required.

[63] The appellants point to the underlined sentences in the following passage as demonstrating "overt hostility" on the part of the trial judge. Respectfully, no reasonable person could conclude that the trial judge's words evidenced any such attitude:

> I'm going to ask in a moment, Ms. McPhee, how it's intended that the Plaintiffs will be involved in asking questions. I don't know if you have sat in to watch how civil trials are conducted, and you're shaking your head no. So I'm assuming you haven't. People who come to court who are self-represented create a unique situation for all courts. On the one hand, the judge is not the lawyer for the self-represented person. On the other hand, the judge is required, regardless of what either side says, to apply only the law, to listen only to evidence that should be heard that's admissible in court, and to that extent regardless of whether an objection is raised in a timely manner or not, the Court will still apply the laws and rules of procedure of evidence and of the courts. It causes problems for yourselves, it causes problems for Mr. MacDonald who has gone to school and trained himself and got his ticket in order to appear in courts, and it causes problems for the Court. I assure everyone in the room that I will listen to the evidence, the evidence that's admissible, and at the end of the day, on the assumption parties don't resolve the matter before the end of the day, and quite candidly it's always better to live with the peace that you can make between you than sometimes taking chances on both sides with what the imposition may be at the end of the day from a stranger like me who knows none of you. But if it comes down to that, I will do it based solely on what I've heard here that was admissible. It may slow down the proceedings a little bit. The bottom line is that the Court wants to hear all the relevant evidence and it doesn't want to hear the irrelevant evidence. Neither side should be surprised by anything that takes place in court. The Courts are there to resolve, not to win by ambush or by trickery, to win on the basis of full disclosure by both parties beforehand of what's likely to happen on the stand. (AB, vol. 8, pp. 2163-64)
>
> (Emphasis added)

[64] As for the recall of Mr. Neeley, the short answer is that the appellants did not request that Mr. Neeley be recalled even though the judge gave careful assistance to them and time to reflect on this matter. The circumstances were these.

[65] At the beginning of the second week of the trial, while the appellants were presenting their evidence, the trial judge raised with the parties whether there had been an additional letter authored by Ms. Gatchalian that ought to have been produced by the defendants to the appellants. A letter dated October 18 was located, the judge reviewed it to address the claim by the defendants that it was subject to solicitor-client privilege and decided that certain portions of the letter were relevant and should be disclosed. It was. The judge then left it to the parties to decide whether any of them wanted the letter entered as an exhibit and further

whether that would be done by consent or by recalling a witness. The appellants asked and were granted overnight to consider their position. The next morning they advised the judge that they wished to have the letter entered as an exhibit. It was entered with the consent of the defendants. The appellants did not request that Mr. Neeley, or anyone else, be recalled to testify concerning the letter.

[66] In short, the judge provided suitable assistance to the appellants, gave them an opportunity to consider their position and then proceeded as they indicated they wished to proceed. This did not make the trial unfair.

4. Conclusions concerning the appeal:

[67] In my view the appellants have not shown any reversible error by the trial judge. I would therefore dismiss the appeal.

B. Notice of Contention - Trial Costs:

[68] The respondents contend that the judge erred by failing to award them the costs of their successful defence of the appellants' action.

[69] As noted, the trial judge dismissed the appellants' action in a reserved decision, but it did not address the question of costs. After the respondents had sent in written submissions concerning costs, the judge issued an order dismissing the action, but deleting from the draft order the paragraphs which would have awarded costs to the respondents. The effect of his order is that neither the appellants nor the respondents were awarded costs of the trial. No reasons were given for this aspect of the order.

1. First issue: standard of appellate review:

[70] Costs are within the discretion of the presiding judge: **Civil Procedure Rule** 63.02(1). Like all discretionary decisions, the judge's discretion with respect to costs will not be disturbed on appeal unless a wrong principle of law has been applied or an injustice would result: **Binder v. Royal Bank of Canada**, 2005 NSCA 84, (2005), 234 N.S.R. (2d) 109 (C.A.) at para. 52.

[71] The general rule is that costs should follow the event: see **Rule** 63.03(1). While of course a judge has discretion to depart from this general rule, it is an error in principle not to award a successful party costs unless there are sound reasons for doing so: see, for example, **Bent v. Nova Scotia Farm Loan Board, Horsnell and Horsnell** (1978), 30 N.S.R. (2d) 552 (S.C.A.D.); **Kelly et al. v. Wawanesa Mutual Insurance Co. et al.** (1979), 30 N.S.R. (2d) 294 (S.C.A.D.); **Griffin v. Corcoran**, 2001 NSCA73, (2001), 193 N.S.R. (2d) 279 (C.A.) at para. 83.

[72] In this case, the absence of reasons complicates appellate review of the judge's decision. It has been said that failing to give reasons for denying a successful party its costs is, itself, an error in principle: see, for example, the dissenting reasons of Lambert, J.A. in **British Columbia v. Worthington (Canada) Inc.**, [1988] B.C.J. No. 1214 (Q.L.)(C.A.). This Court, however, has not gone that far.

[73] When the issue has arisen in the past, the Court has reviewed the trial record and the trial judge's reasons for judgment to determine if there were facts and circumstances which justified the judge's decision to deprive the successful party of its trial costs even though the judge had not specifically stated them: see **Zinck v. Attorney General of Nova Scotia et al** (1979), 34 N.S.R. (2d) 12 (SCAD) at para. 27 and **Bent, supra**. If the judge gives no reason for departure from the general rule and none is apparent from a review of the record, the Court of Appeal is entitled to intervene.

[74] This approach, in my view, is consistent with recent jurisprudence on appellate review of the adequacy of reasons for judgment. The leading cases from the Supreme Court of Canada are clear that the judge's failure to give adequate reasons for a decision is not a free-standing basis for appeal: see, e.g. **F.H. v. McDougall**, 2008 SCC 53 at para. 99. In other words, one cannot infer simply from the absence of stated reasons that the judge made an error. The appellate court is entitled to intervene only where effective appellate review is precluded because the basis of the judge's decision is not apparent when considered in light of the record, the issues and the submissions at trial: see, e.g., **R. v. Sheppard**, [2002] 1 S.C.R. 869 at para. 28 and **R. v. R.E.M.**, 2008 SCC 51 at para. 37, the principles of which have also been applied in civil cases as in **F.H. v. McDougall, supra**.

[75] When these principles are applied to appellate review of a costs order, one is led to the approach taken in **Bent, supra** and **Zinck, supra**. Where the record discloses a proper basis for the judge's exercise of discretion, the absence of reasons, on its own, does not justify appellate intervention.

2. Second issue: did the judge err by denying the successful parties costs?

[76] The reasons why costs should generally be awarded to the successful party were set out by Saunders, J. (as he then was) in **Landymore v. Hardy** (1992), 112 N.S.R. (2d) 410 (S.C.):

> [17] Costs are intended to reward success. Their deprivation will also penalize the unsuccessful litigant. One recognizes the link between the rising cost of litigation and the adequacy of recoverable expenses. Parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement is encouraged. ...

[77] My review of this record does not disclose a sound basis for the judge's refusal to deprive the successful parties of their costs. I acknowledge the very sympathetic personal circumstances of the appellants. However, one must not lose sight of the fact that they made and persisted in very serious allegations of misconduct against the respondents. These included allegations of harassment, intimidation, discriminatory treatment and failure to act in good faith. After 15 days of discovery and 9 days of trial – which, I should add, were taken up entirely by the appellants' own witnesses – not one of these allegations was proved. Two of the claims were dismissed on the basis that there was not even a case to answer. If costs were not awarded to the successful parties in these circumstances, it is hard to know when they would be.

[78] It might be suggested that this was a David and Goliath contest. But that is an oversimplification. It misses the point that the defence of these claims was ultimately funded by people much like the appellants themselves – working people who belong to a union. Their dues fund union activity. According to the record, the unions paid their lawyer just over $100,000 to defend the appellants' action. I see no reason in law or justice why the membership should have to fund completely the costs of successfully defending against the appellants' allegations.

[79] The appellants submit that their case was a “social and public issue.” Respectfully, I do not accept the view that this case was of such public importance that the successful parties should be deprived of their costs. This case was heavily fact-driven. Pursuing these claims to trial did not, in my view, further any larger public interest beyond that inherent in justly resolving a dispute among the parties.

[80] In my view, costs should follow the event and the trial judge erred by failing to so order.

[81] The respondents submitted that costs should be the basic allowance in the tariff for an amount involved of between $25,000 and $40,000. That would be costs of $6250 plus $2000 for each day of trial as determined by the trial judge.

[82] The trial took nine days. However, I would not award the respondents their costs of all of those days. The respondents had failed to disclose the existence of the additional Gatchalian letter which I discussed earlier. It was only disclosed half-way through the trial. Sorting this out consumed a certain amount of trial time unnecessarily. There should also, in my view, be some costs consequences for this failure to disclose. I would, therefore, limit the number of days of trial to seven. I would order that the appellants jointly and severally pay to the respondents trial costs in the amount of $20,250.00 assessed as one bill for both respondents. The respondents should also recover their disbursements from the appellants in an amount to be agreed upon or determined by taxation.

V. DISPOSITION:

I would dismiss the appeal with costs and allow the notice of contention also with costs. I would fix the costs of the appeal and the notice of contention at $2000.00 plus disbursements in an amount to be agreed upon or determined by taxation. I would dismiss the respondents’ application to quash the appeal. In light of the respondents’ success on both the appeal and the notice of contention, I would make no further award of costs for the application to quash.

Cromwell, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.

APPENDIX

1. What are the applicable standards of review and standard of reasonableness?
2. Did the learned trial judge commit a palpable and overriding error in ignoring or misunderstanding relevant and uncontradicted evidence regarding the facts?
3. Did the learned judge err in failing to follow the requirements of natural justice in that he did not provide adequate reasons for accepting and or rejecting evidence to support findings as provided within the decision?
4. Did the learned judge err in failing to interpret the law of remoteness and foreseeability?
5. Did the learned judge err in failing to consider evidence?
6. Did the learned judge err in the standard or patent unreasonableness and interpret evidence in a negative way? Further it should be noted that the substance and the tone of the cited material is evidence of an overt hostility on the part of the Court.
7. Did the learned judge err in his deference in terms of weight of the evidence? Lack of consideration of the medical notes and exhibits? Lack of consideration of impact of family and medical Doctors as to the medical condition of the Appellants?
8. Did the learned judge err in his interpretation of the law of correctness?
9. Did the learned judge err in his interpretation of the negligent tort?
10. Did the learned judge err ignore or misunderstand uncontradicted evidence regarding the Appellants ability to work?
11. Did the learned judge err in making findings of fact or drawing inferences from such facts such that is factual determination can be shown to be unreasonable?
12. Did the learned judge err in his interpretation of the Duty of Fair Representation and breach of duty of fair representation and standard of care and breach of standard of care?