NOVA SCOTIA COURT OF APPEAL

Citation: Myra v. Nova Scotia (Labour Standards Tribunal), 2007 NSCA 127

Date: 20071219
Docket: CA 283510
Registry: Halifax

Between:

Lucy Myra

Appellant

v.

Labour Standards Tribunal (Nova Scotia)
and Nova Scotia Power Incorporated

Respondents

Judge(s):	Cromwell, Oland and Fichaud, JJ.A.
Appeal Heard:	December 11, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons of Oland, J.A.; Cromwell and Fichaud, JJ.A. concurring.
Counsel:	Douglas Livingstone, for the appellant Richard M. Dunlop and Melissa Grant, for the respondent, NSPI Edward Gores, Q.C. and/or Stacey Gerrard, for the respondent, LST (NS) (not participating)

Reasons for judgment:

Background

[1] The appellant, Lucy Myra, was employed by Nova Scotia Power Incorporated ("NSPI") for approximately 30 years. At the Tufts Cove Power Plant in Dartmouth, her duties as an administrative assistant included management of the $3,000 petty cash fund. The petty cash box was kept in a safe behind her desk which was located at the plant entrance. Union member employees would submit vouchers or meal chits to her personally, or by leaving them on her desk. The appellant would use the monies in the petty cash fund to reimburse the employees. As the cash was depleted, she would periodically prepare and submit an expense report to Thomas McCarthy, the business manager at the plant. The vouchers would be attached to it. After he approved her report, a cheque would be issued in her name to replenish the petty cash fund.

[2] NSPI concluded that the appellant had engaged in the resubmission of petty cash vouchers; that is, a number of vouchers previously submitted for cash were resubmitted on subsequent expense reports. On November 28, 2005 it terminated her employment for just cause.

[3] The appellant appealed the Director of Labour Standards' dismissal of her complaint of failure to comply with s. 71 (dismissal without just cause) of the *Labour Standards Code (Nova Scotia)* (the *"Code"*), to the Labour Standards Tribunal (Nova Scotia). The Tribunal heard evidence *inter alia* of the lengthy investigation by NSPI which included Mr. McCarthy, after consulting with the NSPI security officer, using invisible ink to mark vouchers with the date and his initials; that NSPI had initially suspected the appellant and two other employees handled petty cash when she was not there, all of whom had the combination to the safe where the petty cash box was kept; that as its investigation progressed, NSPI eliminated the other two as suspects; that the petty cash, safe, and filing cabinet that contained the expense reports were in a high traffic area; that Mr. McCarthy also knew the combination to the safe; and that there were shortfalls in the petty cash fund after the appellant's last day of work. In its June 22, 2007 decision which comprised 324 paragraphs which recounted and analysed the evidence and set out its findings, the Tribunal decided that her termination for cause was

justified by NSPI, dismissed her appeal, and upheld the order of the Director. The appellant appeals to this court.

Issues

[4] The appellant raised the following issues on this appeal:

(a) Did the Tribunal err in its consideration of the evidence and its resulting findings as to credibility?

(b) Did it err in its application of the burden of proof?

(c) Did it err in its finding that the grounds for dismissal put forward by NSPI amounted to just cause?

(d) Did it err in its finding that the appellant received the cash for the vouchers?

Standard of review

[5] Appeals from the decision of the Tribunal to this court are governed by s. 20(2) of the *Code*. It provides for appeals on a question of law or jurisdiction.

[6] The standard of review to be applied by this court to decisions of the Tribunal was considered in *Coleman v. Sobey's Group Inc.* 2005 NSCA 142. Fichaud, J.A. for the court stated:

> 19 Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence, or the wording of a privative clause or statutory appeal provision; the comparative expertise of the Tribunal and the court of the appealed issue; the purpose of the **Labour Standards Code**; and the nature of the question, fact, law or mixed. From this the court selects, for each issue, a standard of review of correctness, reasonableness or patent unreasonableness. **Dr. Q. v. College of Physicians and Surgeons of British Columbia**, [2003] 1 S.C.R. 226 at paras. 26-35; **Law Society of New Brunswick v. Ryan**, [2003] 1 S.C.R. 247 at para. 27; **Baker v Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817 at paras. 55-62.

20 In a series of cases, this court has reviewed the relevant factors to determine the appropriate standard of review on an appeal under the **Code**. I will not repeat all the details of the analyses. Briefly, in terms of comparative expertise and statutory purpose, the Tribunal is in a similar position to the Labour Relations Board, and is entitled to significant deference. The **Trade Union Act**, R.S.N.S. 1989, c. 475, s.19(1), however, protects the Labour Relations Board with a full privative clause. The **Labour Standards Code**, on the other hand, prescribes a statutory appeal on grounds of law or jurisdiction from a decision of the Tribunal. This suggests judicial restraint, but less deference than accorded to the Labour Relations Board. This court has directed a correctness standard on issues of law, including interpretation of the Code, and a patent unreasonableness standard for issues of fact. A patently unreasonable error in the fact finding process is an error of law or jurisdiction which is appealable under s. 22(2). **Halliday v. Michelin North America (Canada) Inc.**, [2003] N.S.J. No. 128, 2003 NSCA 40, at paras. 332-33; **Sutton v. Halifax Developments Limited** (1995), 142 N.S.R. (2d) 264, at p. 267; **Conrad v. Scott Maritimes**, [1996] N.S.J. No. 226, at para. 25; **Scott Maritimes Limited v. Labour Standards Tribunal (N.S.)** (1994), 135 N.S.R. (2d) 58 at p. 63; **Nova Scotia v. Ottens**, [1997] N.S.J. No. 11 at paras. 25-27; **Ben's Limited v. Decker** (1995), 142 N.S.R. (2d) 371, at 375-6.

21 To this I would add the following. There are conclusions of mixed law and fact for which it is practically impossible to separate the legal standards from the factual findings. In my view, such issues include: (1) whether an employer "reasonably" could conclude that Mr. Coleman had abandoned his claim of reinstatement, (2) whether it was "appropriate" that Mr. Coleman be reinstated, given the deterioration of his relationship with Sobeys and, (3) whether Mr. Coleman acted "reasonably" to mitigate his damages. For these three issues, absent any error in legal principle, the standard of review should be reasonableness simpliciter. In this respect, I bear in mind the comments of Justice Major in **Voice Construction Ltd. v. Construction & General Workers' Union, Local 92**, [2004] 1 S.C.R. 609, at para. 18:

> … A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard. By its nature, the application of patent unreasonableness will be rare.

In the absence of a full privative clause, reasonableness simpliciter is appropriate here for indivisible questions of mixed fact and law.

[7] The appellant's first and fourth issues alleging error in the Tribunal's consideration of the evidence and its findings as to credibility, and in its finding that she received cash for the vouchers, relate to the fact-finding process and issues of fact. These types of alleged errors attract the most deferential standard of review, that of patent unreasonableness and not the standard of reasonableness as contended by the appellant. The patent unreasonableness test sets a high standard of review and will be met when the decision under review was "clearly irrational, that is to say evidently not in accordance with reason": *Canada (Attorney General) v. Public Service Alliance of Canada,* [1993] 1 S.C.R. 941 at p. 963. In *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)* 2005 NSCA 141, this court considered that standard of review and when a court reviewing findings of fact may intervene. It stated:

> 39 In *Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 S.C.R. 487 Justice Cory considered the application of patent unreasonableness to findings of fact:
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> > 44 It has been held that a finding based on "no evidence" is patently unreasonable. However, it is clear that a court should not intervene where the evidence is simply insufficient. ...
> >
> > 45 When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact." [Citing Lester]
>
> . . .
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> 40 In *Toronto Board of Education*, Justice Cory commented on the necessity that the reviewing court review the relevant evidence before ruling that a finding is patently unreasonable (¶ 48):
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> > Therefore, in those circumstances where the arbitral findings in issue are based upon inferences made from the evidence, *it is necessary for a reviewing court to examine the evidence that formed the basis for the inference*. I would stress that this is <u>not</u> to say that a court should weigh the evidence as if the matter were before it for the first time. It must be remembered that even if a court disagrees with the way in which the tribunal has weighed the evidence and reached its conclusions, it can <u>only</u> substitute its opinion for that of the tribunal where the evidence viewed

> reasonably is incapable of supporting the tribunal's findings. [emphasis in italics added]

> Justice Cory (p. 60) adopted the statement of Lamer, J. (as he then was) in *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, at 499 that one reason for deference is:

> > ... the administrative "judge" is better trained and better informed on the area of his jurisdiction, and has access to information which more often then not does not find its way into the record submitted to the court. To this must be added the fact that the arbitrator saw and heard the parties.

[8] The appellant's second and third issues claiming error by the Tribunal in its application of the burden of proof and in determining that NSPI's grounds for dismissal amounted to just cause, are issues of mixed fact and law. These issues attract the less deferential reasonableness simpliciter standard of review. In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, Iacobucci, J. stated at ¶ 56:

> . . . An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. . . .

Findings of fact and credibility

[9] I begin by examining the appellant's first and fourth issues, for which the standard of review is patent unreasonableness. It is useful at this point to set out the appellant's position and theory. She agrees that there were resubmissions, but maintains that someone else is the culprit. The appellant points out that she was not the only person with the combination to the safe where the petty cash box was kept. She suggests that someone else could have taken vouchers from approved expense reports, opened the safe, placed the vouchers in the box, extracted the cash equivalent, and locked the safe. The vouchers and remaining cash would balance, so there would be no apparent discrepancy.

[10] In its decision, the Tribunal stated that it accepted the evidence of Mr. McCarthy in regard to the investigation that he conducted over many months and

his findings as to resubmission of vouchers with the expense reports. It found that where the evidence of the appellant differed from that of the NSPI witnesses, it gave more weight to the evidence of the latter, and found them more credible than her for reasons which it detailed. The appellant argues that NSPI had the onus to prove just cause for dismissal, that the case against her was circumstantial, and that the Tribunal's finding that Mr. McCarthy was credible was not reasonable. She submits that the evidence of NSPI's chief witness contained crucial inconsistencies and inaccuracies which the Tribunal overlooked in assessing credibility.

[11] The appellant points out that although he testified that he had never opened the safe containing the petty cash box, Mr. McCarthy also testified that on November 22, 2005, after the appellant's dismissal, he counted the petty cash to determine if there was a shortfall. The appellant says that if he had never opened the safe, it was impossible for Mr. McCarthy to have counted the petty cash that day.

[12] The appellant argues that Mr. McCarthy's evidence regarding the events of November 7 and 8, 2005 was inaccurate and untrue. He testified that on the afternoon of November 7th he confirmed the voucher count for the two most recent petty cash reports and put them in the filing cabinet. The next morning he received another report from the appellant which contained slips from those previous packages. Mr. McCarthy said that this quick turnaround time allowed him to conclude that only the appellant had access and opportunity during that period. She however emphasizes that, according to the evidence, that morning Dean Glibbery, another employee who knew the combination to the safe, had arrived at work 39 minutes before she did.

[13] According to the appellant, Mr. McCarthy's evidence regarding events on November 17, 2005 was also inaccurate and untrue. On November 15th, she submitted an expense report for approval. Mr. McCarthy found attached to it ten vouchers with, in invisible ink, his initials and the November 8, 2005 date of an earlier report. On November 17th, around noon, he asked the appellant to have the October 26, November 8 and November 15, 2005 expense reports available to him around 1:30 p.m. The appellant delivered them around then. Mr. McCarthy found that the vouchers for the November 8, 2005 report had been reaffixed to it. The Tribunal found that neither of the other employees who had anything to do with the

petty cash fund and knew the safe combination overheard his request to the appellant for those reports and the accompanying vouchers.

[14] Mr. McCarthy's evidence was that for the first time in his two years and seven months at the plant, the appellant did not come into the lunch room with other employees or go out to lunch, and that she had never before stayed at her desk to work. Under cross-examination, Mr. McCarthy acknowledged that he wasn't at the plant during the lunch hour a fair number of times. The appellant characterizes his statement that she had never before stayed at her desk to work as reckless and unreliable or untrue. She argues that in finding this witness credible, the Tribunal ignored inconsistencies and discrepancies in Mr. McCarthy's evidence.

[15] With respect, the appellant's submissions are without merit. It is apparent from the Tribunal's lengthy and detailed decision that it was attentive to the evidence of the NSPI witnesses and of the appellant, and to the arguments of counsel for the parties. NSPI's position that it had just cause to terminate the appellant's employment rested heavily on Mr. McCarthy's evidence. Before the Tribunal, the appellant had strenuously attacked his credibility. She had made these same submissions regarding his counting the cash on November 22nd, the other employee's earlier arrival on November 8th, and in regard to her lunch hour habits, before the Tribunal.

[16] The alleged inconsistencies and inaccuracies in Mr. McCarthy's evidence, which are the basis of the appellant's first issue, which concerns the Tribunal's finding that he was credible are, at best, speculative. Quite simply, Mr. McCarthy was never asked whether it was he or someone else who opened the safe on November 22, 2005. He testified that since Mr. Glibbery, who arrived before the appellant on November 8th, would have no reason to be into the previous expense reports, it would have struck him as extremely unusual if he had seen him with them. Furthermore, Mr. Glibbery, whom the Tribunal found to be credible, testified he did not know where the reports were filed. As to the evidence concerning the appellant's lunch routine, there was no inconsistency in Mr. McCarthy's evidence. He could only testify as to when he was at the plant at lunch hour to observe her behaviour, and his evidence was clarified on cross-examination. I am far from satisfied that the Tribunal made any error in assessing

credibility which approaches the strict standard of review of patent unreasonableness.

[17] I turn then to the appellant's fourth issue, where she submits that the Tribunal erred by stating in the course of its decision that she received cash for the resubmitted vouchers. She says that where NSPI did not provide evidence of any amount taken by her, this amounted to a patently unreasonable error in the fact finding process. I disagree. According to the evidence, when her expense reports were approved, NSPI issued cheques payable to the appellant to top up the petty cash fund. Accordingly, any resubmission of vouchers by her would lead to the receipt of cash. In any event, even if this were an error of fact, it is not of the magnitude or quality that would constitute a patently unreasonable error which would allow this court to intervene. I would dismiss this ground of appeal.

[18] In concluding my examination of these issues on findings of fact and credibility by the Tribunal, I find it appropriate to reiterate here the position of this court as set out in the recent decision of *Neary v. Hoot ATV Manufacturing Ltd.*, 2007 NSCA 96. There the appellants argued that their termination date was not as provided by the employer and had claimed resultant entitlements to wages and vacation. Hamilton, J.A. for the court stated at ¶ 13:

> In essence the appellants are asking us to retry the case. That is not the function of this Court: **Crossman v. Labour Standards Tribunal (N.S.)** (1991), 109 N.S.R. (2d) 274 at p. 277. There was conflicting evidence before the Tribunal as to what happened at the meeting on January 23. The Tribunal accepted the evidence presented on behalf of the respondent. That determination was clearly within the Tribunal's function. The Tribunal was in the best position to decide credibility and find facts having presided over the hearing. My review of the record satisfies me that there was evidence before the Tribunal supporting its conclusion and reasons. I am not satisfied the Tribunal failed to consider any relevant evidence or misunderstood the evidence in any way that would undermine its decision.

Application of the burden of proof

[19] The appellant submits that the Tribunal erred in its application of the burden of proof. The Tribunal correctly set out that burden:

> The Tribunal finds the onus is on the employer to prove cause on the balance of probabilities and often it is done on the basis of circumstantial evidence. The Tribunal also recognizes the Complainant is a long term employee of over 30 years of service to the Respondent.

Nor does the appellant question the case law cited by the Tribunal in this regard, such as *Mackin v. Kings Regional Rehabilitation Centre*, 95 N.S.R. (2d) 238 (NSSC).

[20] The appellant's arguments on the application of the burden of proof are founded on shortfalls discovered in the petty cash fund after November 18, 2005, the last day the appellant worked at the Tufts Cove plant. According to Mr. McCarthy's testimony, on November 22nd he counted approximately $2,400 in the petty cash fund instead of $3,000. On December 5th, he found that it was light by about $1,800. The appellant submits that either someone else must have taken the money or that the NSPI management of the petty cash process was defective.

[21] The Tribunal heard these arguments. In its decision, it stated:

> The Tribunal agrees . . . that any inconsistencies in the counting of the cash box on November 22, and later on December 5, 2005, by Mr. McCarthy, did not affect in any material way the credibility of Mr. McCarthy's evidence in that he admitted he could not find an explanation. The Tribunal finds the issue is not the amount of cash taken by the Complainant for cause of her termination, but that she was terminated for systematically resubmitting vouchers over a period of time for repayment which constitutes, not only a breach of trust, but a fraudulent act on the company to eventually obtain funds from the Respondent for petty cash that had been previously paid to her.

There was no evidence that NSPI considered these shortfalls as missing money rather than, for example, accounting errors arising from the petty cash fund having been left in disarray. I am not persuaded that the Tribunal's application of the civil "balance of probabilities" burden of proof to the evidence before it fails to meet the standard of review of reasonableness.

Dismissal for just cause

[22] According to the appellant, NSPI changed the grounds for her dismissal. She notes that in its initial and rebuttal written submissions to the Director, NSPI

claimed that she had committed theft and that her stealing constituted just cause. Before the Tribunal, Don Berringer, NSPI's senior plant manager at Tufts Cove, testified that the reason for termination was the resubmission of previously approved expense chits and that the amount of money that was stolen was not why her employment was terminated.

[23] According to the appellant, this was a fundamental change in the reason for termination. She submits that NSPI could not prove that she had committed theft, and stresses that it offered no evidence to the Tribunal that she had stolen a specific amount. She questions how, in these circumstances, the Tribunal could find her guilty of serious misconduct and habitual neglect of duty by resubmission of petty cash vouchers "on numerous occasions" and that her actions constituted a "severe breach of trust" which defrauded NSPI of monies. The appellant also argues NSPI's supervision of the petty cash process had been insecure and lax, and underlines that she had been an employee for over 30 years. In her view, even if resubmission were proven, this does not necessarily amount to cause for termination; at most, it would be a disciplinary matter.

[24] The evidence does not substantiate the appellant's submission that NSPI changed the grounds for her termination. It was undisputed that before NSPI advised her by letter of termination of her employment for cause, Mr. Berringer informed her by telephone that her termination was due to irregularities in the petty cash and meal chit processes. Her narrow focus on whether the reason was resubmission of vouchers or whether it was theft of a certain amount is misplaced. Quite simply, a monetary benefit would flow from a wrongful resubmission of vouchers. In any event, it was the breach of trust that the resubmission represented that grounded dismissal for just cause. The Tribunal found that the evidence led to no other conclusion than the appellant having breached her responsibilities and that trust, and her having committed fraud on her employer.

[25] I am not persuaded that the Tribunal's conclusion that the appellant's conduct constituted just cause for dismissal was unsupported by any reasons that can stand up to a somewhat probing examination and therefore unreasonable.

Disposition

[26] I would dismiss the appeal. There will be no award of costs.

Oland, J.A.

Concurred in:

Cromwell, J.A.

Fichaud, J.A.