Date: 19981217 Docket: C.A. 149135

NOVA SCOTIA COURT OF APPEAL
Cite as: Dartmouth Police Association, Local 191 v. Dartmouth (City), 1998 NSCA 217
Glube, C.J.N.S.; Chipman and Cromwell, JJ.A.

BETWEEN:

THE DARTMOUTH POLICE ASSOCIATION LOCAL 191, OF THE POLICE ASSOCIATION OF NOVA SCOTIA Appellant	)	Ronald A. Pink, Q.C. and David J. Roberts for the Appellant
- and -	)	W. Augustus Richardson for the Respondent
CITY OF DARTMOUTH Respondent	)	Appeal Heard: December 7, 1998 Judgment Delivered: December 17, 1998

THE COURT: Appeal allowed and a new trial ordered per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Chipman, J.A. concurring.

CROMWELL, J.A.:

I. Introduction:

In early 1992, the Union and the City signed a document amending the terms of the collective agreement between them. The document made two main changes to the collective agreement. First, it modified the stated hours of work for officers in the Criminal Investigation Division (C.I.D.). Second, it deleted the exemption of these officers from the general provisions in the collective agreement relating to stand-by pay; in other words, it had the effect of entitling them to stand-by pay. Several months later, when a grievance was filed by a C.I.D. officer claiming stand-by pay, the City's attention was directed to the effect of this change. It commenced an action for rectification asking the Court to add words to the amendment making it clear that C.I.D. officers were not entitled to stand-by pay.

In a written decision, following a three day trial, Nathanson, J. of the Supreme Court, found there had been a unilateral mistake by the City and awarded what he referred to as an "equitable optional remedy" whereby the Union, as the non-mistaken party, was required to elect between rectification, which would add the exempting words to the amended collective agreement, or rescission , which would delete the whole amendment.

The Union appeals.

Different entities have succeeded to the rights of the named parties. We

were advised that nothing in this case turns on the change and I will say nothing more about it.

II. Issues and Positions of the Parties:

The principal issue on appeal is whether the trial judge made certain errors of fact. The Union points to several alleged errors which, in its submission, require appellate intervention. The City seeks to uphold the result reached by the trial judge. Although no notice of contention has been filed, the City apparently does not accept all of the trial judge's findings. In particular, it challenges his finding that the mistake was unilateral rather than mutual.

The scope of appellate intervention with respect to findings of fact at trial is well-known and has often been repeated. To justify appellate intervention, there must be a "palpable or overriding error": **Toneguzzo-Norvell v. Burnaby Hospital**, [1994] 1 S.C.R. 114 at 121. It is not every error that leads to appellate intervention. As Lamer C.J.C. said in **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 10110 at para 88:

> 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'.

Simply put, the issue on this appeal is whether there are such errors here.

III. Analysis:

The City, in this case, claimed the remedy of rectification. Fundamental to that claim is proof of an agreement between the parties which is not reflected in the written instrument which they signed. Courts do not rectify agreements, they rectify instruments recording agreements: see I.F.C. Spry, **The Principles of Equitable Remedies** (5th, 1997) at 607. Professor Fridman put this point succinctly: "Rectification is not used to vary the intentions of the parties, but to correct the situation where the parties have settled upon certain terms but have written them down incorrectly": G. H. L. Fridman, **The Law of Contract in Canada** (3d, 1994) at 822; see also **Tobias and Triton Alliance Ltd. v. Nolan** (1987), 78 N.S.R.(2d) 271 (N.S.S.C.A.D.) at 287 and ff.

The existence of the agreement must be clearly proved. As McLachlin, J.A. (as she then was) said in **Bank of Montreal v. Vancouver Professional Soccer Ltd.** (1987), 15 B.C.L.R. (2d) 34 (C.A.) at 36, "The standard of proof of these elements is a stringent one because of the danger of imposing on a party a contract which he did not make."

Clear proof of an agreement between the parties which the instrument fails to embody is, as noted, fundamental to the claim for rectification. Unfortunately, on this fundamental question, the trial judge appears to have made conflicting findings. The trial judge found, at one point in his reasons, that there had,

in fact, been an agreement for the change in hours alone. He said:

> In summary, the totality of the evidence comes down to this: There probably was a previous agreement or a manifested common intention that the hours of work of investigators in the Investigation Section would be changed; but there is no evidence of a previous agreement or manifested common intention that the investigators would receive stand by pay.
>
> The foregoing facts are capable of two different interpretations. They may be interpreted as indicating that there was no agreement or manifested intention with respect to all matters at issue between the parties - hours of work and stand by pay. If this interpretation were accepted, any claim for rectification must necessarily fail. On the other hand, the facts may be interpreted as indicating that there was an agreement or manifested intention with respect to something, namely, hours of work. If this interpretation were accepted, the Court must next decide whether rectification should be granted in the particular circumstances. This Court believes that the latter interpretation of the facts is the proper one. (emphasis added)

Elsewhere in his reasons, the trial judge refers to, and does not reject, the Union's evidence that it did not and would not agree to an amendment to the collective agreement respecting hours of work unless there was also agreement to pay stand-by pay. For example:

> Fisher [the Union's in-house counsel] met with the Union executive to discuss the proposed amendment. During the meeting, he raised the issue of stand by pay. The executive indicated that the position of the Union was that the stand by pay exception should be eliminated. .....
>
> .....Murray testified that the executive would not agree to a change of hours unless stand by pay was paid. .....
>
> Fisher's revised draft contained a few typographical errors which were subsequently corrected in the Union's copy by members of the Union executive. That final draft was then signed by Robert Kennedy and Timothy Matheson on behalf of the Union. Kennedy testified that he would not have signed had the stand by pay exemption not been removed. ..... (emphasis added)

At another point in his reasons, the trial judge appears to accept the position of the Union that it, in fact, agreed and would agree only to changes

addressing both stand-by pay and the change of hours --- that it always considered that the agreement with the City concerned both hours of work and stand-by pay. In short, the learned trial judge appears to have accepted the Union's position, which it was open for him to do on the evidence, that the Union agreed and would only agree to "a package" which included both changes. As mentioned, the signed document provided for both. The trial judge said:

> The evidence discloses that the Union, at and at all times after March, 1990, believed that it had an agreement for stand by pay as well as for a change of hours. Counsel on behalf of the Union submitted in closing that it always considered that the agreement with the City concerned hours of work, including all matters dealt with under Article 8 Hours of Work of the Collective Agreement, and that one of the matters covered by Article 8 was stand by pay. In short, the Union asserts that it always intended to include in the proposed amendment of the Collective Agreement an entitlement to stand by pay. This intention is reflected in various draft proposed amendments exhibited in evidence. There were no face to face negotiations regarding contract terms between the parties and, therefore, particular terms and language were never discussed between them.
>
> For its part, the City believed that the proposed amendment concerned only hours of work strictly construed, that is, it did not include any aspect of stand by pay. On the only occasion when it was clearly aware of a Union proposal to include entitlement to stand by pay, it corrected the draft proposal so as to exclude any such entitlement. When Muzzin, on behalf of the City, sent the corrected amendment to Fisher on May 14, 1990, and asked whether the parties were ready to sign, the Union never responded to Muzzin's letter. I find that at all times prior to February 11, 1992, the City did not believe that it was dealing with a proposal to entitle certain officers to stand by pay.
>
> I find that the actions of the City and the Union as disclosed in the evidence do not amount to a mutual mistake. (emphasis added)

This finding, that the Union believed the agreement related to both hours of work and stand-by pay, seems to me to be fundamentally at odds with the earlier finding that there was an agreement respecting hours of work only. It is not possible that the Union could have agreed both to "the package" and to half of "the package" in the same agreement or that its clear position could be that it would agree only to

that whole package but, in fact, agreed to half of it. The Union could only agree to one or the other.

Counsel for the City notes in his factum that "[t]he learned trial judge appears to have found that the Union, at all times after March 1990, 'believed that it had an agreement for standby pay as well as for a change of hours'", but suggests that there is some uncertainty as to whether or not this was his finding. It is true, as counsel for the City submits, that the finding in question introduces a paragraph that, in part, summarizes the Union's submissions. However, that paragraph and the one following it appear to be directed to making findings as to what the parties had agreed to which then leads to the trial judge's conclusion that the mistake was unilateral rather than mutual. I think the only fair reading of the reasons is that the trial judge, at this point, found that the Union believed the agreement related to both issues.

Counsel for the City also points out that the trial judge erred in his finding that the Union at all times after March 1990 thought it had agreement for stand-by pay as well as for a change of hours. The Union agrees with this submission. On this point the trial judge is, with respect, clearly wrong. The evidence was clear that the Union delivered a proposed amendment to the collective agreement to the employer in January of 1990. The proposed amendment included a change to the 12 hour shift schedule favoured by the Union and had the effect of giving the C.I.D. officers stand-by pay. In May of that year, the City returned the document with

changes making it clear that the City would agree to the shift changes only on a trial basis and that it would not agree to stand-by pay. It is, therefore, clear that in the spring of 1990, the Union knew that the City was not agreeing to a permanent change to 12 hour shifts and was not agreeing to stand-by pay for these officers. The fact that the trial judge was in error about the Union's knowledge of the City's position in May of 1990, however, does not undercut his apparent finding that the Union's agreement was to "the package", not to half of it.

This difficulty is compounded by the trial judge's apparent misunderstanding of the evidence on a related point. He found that, in May of 1990, there was an agreement as to hours of work, but not as to stand-by pay. He said:

> On May 14, in response to Fisher's earlier request that the City sign the proposed amendment, Muzzin replied to Fisher stating that the proposed amendment was ready for final review prior to signing, and that all necessary corrections had been made. Those necessary corrections included the insertion of the words "will not receive stand by" which Fisher had omitted from the Union's proposed amendment. <u>This indicates that, at that point in time, there was an agreement or manifested intention of the parties as to hours of work but not as to stand by pay.</u> This is confirmed by the fact that, by the letter dated May 24, Fisher pointed out to Inspector Murray the differences between the Union's draft and the City's re-draft.

There are two problems with this. First, it is inconsistent with the earlier erroneous finding that "... the Union at all times after March, 1990, believed it had an agreement for stand-by pay as well as for a change of hours." If that is so, it cannot be the case that there was an agreement only with respect to hours of work. Moreover, the evidence does not support the conclusion that agreement was reached in May of 1990 on the amendment <u>to the collective agreement</u> respecting

hours of work. The exchange of correspondence at the time shows that, even with respect to hours of work, the City wanted a trial period included in the agreement which the Union did not accept as part of the collective agreement amendment.

This is not mere quibbling with the words used by the trial judge. Even if, contrary to my conclusion, there is in fact uncertainty about whether the trial judge did or did not make a finding that the Union agreed and would only agree to an amendment containing both changes, the resolution of this question is fundamental to this case and the parties are entitled to a clear finding one way or the other. The evidence on this point was conflicting. On one view, developed by counsel for the City on appeal, the events, correspondence and actions of the parties leading to the signing of the amendment could have supported a finding that there was an agreement for half of "the package". As mentioned, at one point in his reasons, the trial judge accepted this view, commenting that " there probably was a previous agreement or a manifested common intention that the hours of work of investigators in the investigation section would be changed." On the other hand, there was unequivocal evidence called on behalf of the Union at trial that the Union agreed to "the whole package" and did not and would not agree to anything else. As mentioned, the trial judge also appears to have accepted this position at another point in his reasons. In order to reach the conclusion that there was agreement for "half the package", this evidence would have to be rejected. The trial judge refers to but does not reject this evidence in his reasons.

In the result, we are left, at worst, with conflicting findings and, at best, with uncertain findings on the fundamental issue in the case. To resolve the issue, certain evidence would have to be either accepted or rejected. No finding of acceptance or rejection of this evidence was made by the trial judge. The failure to make a clear finding on the fundamental issue in the case is an error requiring appellate intervention. Making the required finding necessitates factual findings which were not made by the trial judge and which require the acceptance of some and the rejection of other evidence. This is not an exercise which an appellate court can undertake on this record.

There are other complaints made respecting the findings of the trial judge. In my view, a number of them are well-founded. I will deal with two of them briefly.

(i) The trial judge found "... that at all material times prior to February 11, 1992, the City did not believe that it was dealing with a proposal to entitle certain officers to stand-by pay".

This, with great respect, is clearly wrong for the reasons mentioned earlier. The City received exactly such a proposal in January of 1990 and rejected it in May of 1990. It knew at that time that it was dealing with a proposal to entitle certain officers to stand-by pay.

(ii) The trial judge found that following an employer-employee meeting held in January of 1992, Mr. Fisher, the in-house counsel for the

Union, "... volunteered to draft for both sides ...".

In my respectful view, this is clearly wrong as evidence of the City's witnesses Cole and Muzzin makes clear. Chief Cole clearly understood that Mr. Fisher was never drafting on behalf of the City. Mr. Muzzin agreed that the document prepared by Mr. Fisher was a Union proposal which the City was free to accept, reject or amend.

In summary, I conclude that these errors taken cumulatively, require the intervention of this Court, and the decision and order of the learned trial judge should be set aside.

I would add that, in my opinion, it is unfortunate that the word "fraud" was employed in relation to the dealings between the parties. Many of the cases, particularly the older ones, speak of rectification being available in cases of unilateral mistake only if the conduct of the non-mistaken party is "akin to fraud". However, it is clear that the trial judge ascribed no ulterior motive to Mr Fisher and specifically found that his conduct did not amount to fraud. In finding that the equitable remedy of rectification was called for, the trial judge relied on more recent cases which stand for the proposition that rectification in cases of unilateral mistake is available where it would be inequitable in all of the circumstances for the non-mistaken party to insist on the enforcement of the written agreement. It was in this context that the trial judge reached the conclusion he did. Indeed, the City's position

on this appeal was that Mr Fisher had simply forgotten about the impact on stand-by pay of the language used in his draft. In view of the disposition I propose, I will not comment on the trial judge's interpretation or application of the authorities. I think, though, that fairness demands this clarification of the nature of the issue, as the trial judge saw it, and his ruling on it.

Counsel for the appellant invites us to make an order dismissing the action. Having reviewed the record and considered the submissions of counsel, both written and oral, I have concluded that the Court ought not to accede to this request. In order to do so, this Court would have to resolve significant conflicts in the evidence in areas in which the trial judge made no clear findings. I do not think that it is appropriate for an appellate court to attempt to do so in the circumstances of this case. The only alternative is to direct a new trial, and that is what should be done in this case.

IV. Disposition:

I would allow the appeal and order a new trial. The parties should bear their own costs of the trial giving rise to this appeal. The Union should have its costs of this appeal which I would fix at $4,000.00 (that is, 40% of the costs awarded by the trial judge) plus disbursements.

Cromwell J.A.

Concurred in:

Glube, C.J.N.S.

Chipman, J.A.

C.A. No.149135

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

THE DARTMOUTH POLICE ASSOCIATION, LOCAL 191 OF THE POLICE ASSOCIATION OF NOVA SCOTIA	)	
Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
CITY OF DARTMOUTH	)	
	)	CROMWELL, J.A.
Respondent	)	