NOVA SCOTIA COURT OF APPEAL

Citation: Cape Breton-Victoria Regional School Board v. Canadian Union of Public Employees, Local 5050, 2010 NSCA 60

Date: 20100709
Docket: CA 325296
Registry: Halifax

Between:

Cape Breton-Victoria Regional School Board

Applicant

v.

Canadian Union of Public Employees, Local 5050
on behalf of the Grievor, H.D.

Respondent

Judge:	The Honourable Justice M. Jill Hamilton
Application Heard:	June 9, 2010, in Chambers
Held:	Application for a stay of proceedings pending the outcome of the appeal is granted with costs in the cause in the amount of $750
Counsel:	Robert F. Risk, for the applicant Susan D. Coen, for the respondent

Decision:

[1] The applicant school board applies to have the dates set for the hearing of its appeal and for a stay. Until its appeal is decided, it does not want to reinstate Harold Douglas Delaney, the grievor, on whose behalf the respondent union is acting, or to pay him any back pay. The terms of the stay proposed by the school board would require it to continue paying Mr. Delaney his pay and benefits as if he was employed, until its appeal is decided, at which time Mr. Delaney would be required to repay the school board if the appeal is allowed. The school board has been paying Mr. Delaney on this basis since July 9, 2009 when the arbitrator ordered Mr. Delaney's reinstatement and payment of back pay. For both parties the important issue is Mr. Delaney's reinstatement, not the payment of back pay, perhaps because there would be little advantage to Mr. Delaney of receiving back pay given his support obligations to his family.

[2] The facts are set out in the school board's brief:

> 1. The Grievor H.D. was employed at all material times as a custodian at several schools within the jurisdiction of the Appellant Cape Breton-Victoria Regional School Board ("the Board").
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> 2. On or about August 21st of 2007, Board Members were advised of a complaint that H.D. had become sexually involved during "off duty" hours with a young teen-aged female student who attended one of the Board's schools, albeit not one of the schools where H.D. was presently employed.
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> 3. Following an on-going investigation into the matter which culminated with a Board interview on November 16th of 2007, H.D. was initially suspended and then formally dismissed from his employment with the Board effective November 23, 2007.
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> 4. H.D. is a member of CUPE Local 5050 (the "Union") and subsequently grieved his dismissal to Arbitrator Susan M. Ashley pursuant to the provisions of his Union's current Collective Agreement with the Board.
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> 5. In her decision dated July 9th of 2009, Arbitrator Ashley determined that discharge was too severe a penalty in the circumstances and ordered that H.D. be reinstated to his employment. ... [and paid his back pay].

> 6. The Board filed an application for judicial review of Arbitrator Ashley's decision with the Nova Scotia Supreme Court on August 14th, 2009.
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> 7. The Board also filed a Notice of Motion for an order staying the enforcement of the Arbitrator's decision pending the determination of the judicial review.
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> 8. On or about September 21st of 2009, Justice Cindy A. Bourgeois of the Nova Scotia Supreme Court at Sydney granted a partial stay of the Arbitrator's decision pending completion of the judicial review proceedings. In short, the Stay Order provided that H.D. was not to return to his employment with the Board, however, he was otherwise entitled to receive all wages and benefits reinstatement would have afforded him, subject to repayment forthwith to the Board should its application for judicial review be allowed.
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> 9. On or about February 4, 2010, Justice Bourgeois dismissed the Board's application for judicial review. ...
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> 10. On or about March 5th of 2010, the Board filed a Notice of Appeal of Justice Bourgeois' decision and now seeks a further stay pending determination of the Appeal.

[3] While Justice Bourgeois used a pseudonym for the griever in her decision and order, the parties agree this is unnecessary.

[4] **Civil Procedure Rule** 90.41(2) permits a judge in Chambers to grant a stay pending the disposition of an appeal:

> 90.41 (2) A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.

[5] The test governing motions for stays in this court was set out in **Fulton Insurance Agencies Ltd. v. Purdy**, [1990] N.S.J. No. 361 (N.S.C.A.), and has been consistently followed since:

> In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either

> (1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience.
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> OR
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> (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[6] The parties agree that the first factor in the primary test is met – there is an arguable issue. I accept this position, as the threshold for an arguable issue is low.

[7] The Board argues that it has also met the second factor in the primary test, that it will suffer irreparable harm if the stay is not granted. The irreparable harm it says it will suffer is damage to its reputation if it reinstates Mr. Delaney before it has exhausted all appeals. It points to the Board's obligation to ensure the safety and well-being of its students and suggests the public will be outraged with the Board, irreparably harming its reputation, if it reinstates a man who was 44 years of age, a husband, father of four and a grandfather, at the time he commenced a sexual relationship with a then 15 year old student, with whom he now lives.

[8] The Union argues that the Board's reputation will not be irreparably harmed if it explains the reason why he is being reinstated; namely, that his grievance was submitted to binding arbitration in accordance with the then current collective agreement, that the arbitrator found dismissal was too severe a penalty for his actions and ordered that he be reinstated, and that the arbitrator's decision was upheld on judicial review.

[9] I agree with the Union that the Board would not suffer irreparable harm if the stay was not granted. If the Board ensured the reason for Mr. Delaney's reinstatement was available to the public, including the process followed after his dismissal as outlined in the Union's argument, the Board's appeal of the judicial

review order to this Court and my refusal to stay that order, any outrage at Mr. Delaney's reinstatement would be directed at the Court, not the Board, and thus would not irreparably harm the Board's reputation.

[10] The third factor of the primary test is balance of convenience. The Board argues the balance of convenience favours granting the requested stay because it will suffer harm to its reputation if it reinstates Mr. Delaney, and Mr. Delaney will not suffer harm because he will receive the same pay and benefits during this period that he would receive if he was reinstated. The Board recognizes that there is little likelihood Mr. Delaney will be able to repay any money paid to him.

[11] The Union argues that the balance of convenience favours Mr. Delaney because the Board's reputation will not be damaged but Mr. Delaney will be harmed if the stay is granted. It argues that he will be harmed because he will continue to lose the respect one gains from working and will have to repay any amounts he receives between now and the determination of the appeal, if the appeal is successful. It agrees he is unlikely to be able to repay the Board if required.

[12] As previously indicated, I am satisfied the Board would have within its power the means to avoid any harm to itself from reinstating Mr. Delaney, if it were to explain the legal process that led to his reinstatement. Thus, there would be no harm to the Board if the stay is refused. On the other hand, Mr. Delaney may suffer some harm if the stay is granted as he will have to repay the Board if its appeal is successful.

[13] However, the deciding factor for me does not arise from the primary test but from a consideration of whether there are exceptional circumstances that make it fit and just that the stay be granted. In her decision Arbitrator Ashley states:

> 43. [Counsel for the Board] noted that Parliament passed an amendment to the *Criminal Code* concerning the age of consent to sexual activity, raising the age from fourteen to sixteen. While the Bill was passed in May 2007 it was not proclaimed until spring 2008. Though not in force in August 2007, the changes reflect the accepted view that sex with a person that age is wrong.
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> ...

60. The Grievor was forty-four years old in August 2007 and the young girl had turned fifteen four months earlier. The Grievor was married, a father of four, and a grandfather. The young girl had a troubled background with no apparent father figure, and her grandmother had been appointed legal guardian less than a year before the sexual incident occurred.

61. **Sexual activity between two people such as the Grievor and this young girl is difficult to contemplate. Regardless of whether the act was consensual or who initiated it, the age and experience differences make such conduct repugnant.** However, it is not appropriate to impose discipline on the basis of moral outrage alone, or to punish the Grievor for behaviour which we find offensive. The legal tests must be met.

62. The Grievor was a caretaker at several schools under the jurisdiction of this Employer, and the girl was a student in a Board school, but not at one of the Grievor's schools. They met outside of school, at a barn where the Grievor kept horses, close to where the girl lived with her grandmother. There is no suggestion that they carried on their relationship while she was at school or while he was at work except perhaps for his occasional use of the phone at work.

63. I do not accept the Grievor's evidence that the incident on August 9 came out of the blue and that there had been nothing leading up to it. I have not detailed the precise circumstances of the sexual activity in my recital of the facts, but suffice it to say here that it occurred very quickly, in order to take advantage of a very short period of time when they would be alone, and it took place in a situation which was likely uncomfortable. While it may have been 'spur of the moment' in that the moment arose and they took advantage of it, I find that there must have been some build-up to that event. I do accept that it was consensual.

...

75. I accept that the [Board] takes its responsibilities for the protection and safety of its students very seriously, and that it must openly be seen to do so. As a public educational institution, its responsibilities are much broader than those of a normal private sector employer, and flow not only from common sense but from statute. A public perception that the [Board] condoned an employee having a sexual relationship with a student would be negative in terms of the Board's interests. However, the fact that the relationship began and grew not at the school but at the barn, that the conduct was consensual, that the Grievor and the girl are still together, and that there has been no suggestion that the Grievor has ever engaged in inappropriate conduct in his twenty years of service with the Board, would mitigate against such negative public perceptions.

> ...
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> 77. The Grievor's behaviour has no real connection to his ability to perform his duties satisfactorily. There is no suggestion something like this ever happened before. The nature of the conduct is such that the risk of repetition is remote. **After having considered and given careful thought to all of the evidence, There is no reason to have reservations about the Grievor working close to children in the future**. ...
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> 78. The [**Re Millhaven Fibres Ltd. And Ontario O.C.A.W. Local 9-670** [1967] 18 L.A.C. 324] test requires consideration of whether the Grievor has been guilty of a serious breach of the *Criminal Code*, thus rendering his conduct injurious to the general reputation of employer and its employees. Here, no charges were laid because the girl was over the age of consent (then, fourteen) and the act was consensual. The age of consent in the *Criminal Code* has since been raised to sixteen. **If the incident had occurred today, the Grievor would likely be found guilty, since the consensual nature of the act would not be relevant.** However, it is not appropriate to impute a criminal conviction where none exists. (Emphasis added)

[14] I find that the interests of the students, as opposed to the interests of the parties themselves, are exceptional circumstances here. Arbitrator Ashley satisfied herself that there was no reason to have reservations about Mr. Delaney working close to children (para. 77). However, she also clearly found that while his behaviour did not warrant dismissal, it was repugnant (para. 61) and that had the sexual relationship commenced less than a year after it did, Mr. Delaney would likely have been found guilty of a criminal offence (para. 78). Weighing these findings, the fact that Justice Bourgeois granted a similar stay prior to conducting her judicial review and the minimal harm to Mr. Delaney of granting the stay, I am satisfied I should exercise my discretion to grant the requested stay.

[15] Accordingly, I grant a stay on the following terms:

1. The Board shall not reinstate Mr. Delaney to his employment with the Board or pay him any back pay pending disposition of the Board's appeal; and
2. The Board shall continue to pay Mr. Delaney all wages and benefits he would otherwise be entitled to receive if he was reinstated, pending disposition of the Board's appeal.

[16] I also fix costs of this application at $750, but order that they be costs in the cause as requested by the parties.

[17] The Board's appeal will be heard at 10:00 a.m. on Tuesday, November 23, 2010. The Board is to file the appeal book on July 30 and its factum on August 30. The respondent is to file its factum on September 27.

Hamilton, J.A.