

NOVA SCOTIA COURT OF APPEAL

Citation: *Murphy v. Unifor Local 4606*, 2023 NSCA 4

Date: 20230119

Docket: CA 512028

Registry: Halifax

Between:

Kim Murphy

Appellant

v.

Unifor Local 4606 and Labour Board

Respondents

Judges: Wood, C.J.N.S.; Fichaud and Bourgeois, J.J.A.

Appeal Heard: November 29, 2022, in Halifax, Nova Scotia

Held: Appeal dismissed without costs, per reasons for judgment of Wood, C.J.N.S.; Fichaud and Bourgeois, J.J.A. concurring

Counsel: Kim Murphy, appellant in person
Ronald Pizzo and Mary Rolf, for the respondent Unifor Local
4606

Reasons for judgment:

[1] Kim Murphy is a member of Unifor Local 4606 (“Unifor”) and an employee of Compass One Health Care – A Division of Compass Group Canada (“Compass”). In 2019, Compass, acting as an independent contractor, provided housekeeping services to the IWK Health Centre (“IWK”). One of the Compass employees providing these services was Ms. Murphy.

[2] On May 29, 2019, Ms. Murphy received a letter from Compass which stated, in part:

This letter is written to advise you that we have received a formal complaint from our client with your behaviour and conduct while you were at the IWK Hospital on Monday and Tuesday of this week.

As a result of receiving this complaint I want to inform you that the IWK Hospital has restricted your site ID access for work. As a result of this situation we want to inform you that you are being suspended without pay pending the outcome of an investigation into your conduct and you are not to return to the IWK to work.

[3] As a result of this letter, Ms. Murphy met with Angela Downey, Business Agent of Unifor, who filed a grievance on her behalf with Compass.

[4] On September 3, 2019, Ms. Murphy received another letter from Compass which stated, in part:

Following an interaction you had with various staff members inside the main IWK campus on May 28, 2019, protection services issued the Protection Property Act [*sic*] against you on May 28, 2019. This Protection Property Act [*sic*] has been in place since that time and essentially means that the IWK will not allow you on their property to attend work.

This letter is to advise you that Compass Group Canada – Compass One Healthcare (‘Compass’) has completed the investigation into the incident and have reviewed your completed Treatment Memorandum where you have indicated a requirement for accommodation in the workplace.

We are willing to allow for reasonable accommodation in the work place however due to the Protection Property Act [*sic*], we are unable to schedule you to work at IWK and there are no other positions available for you at this time at other site locations. Therefore, the decision has been made to place you on an unpaid administrative leave of absence effective immediately.

[5] Ms. Murphy had previously advised Compass that she was diagnosed with a learning disability as well as ADHD and her disability affected her ability to focus and communicate.

[6] On September 20, 2019, Ms. Murphy filed a complaint against Unifor with the Labour Board under s. 54A(3) of the *Trade Union Act*, R.S.N.S. 1989, c. 475 which provides:

No trade union and no person acting on behalf of a trade union shall act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in a bargaining unit for which that trade union is the bargaining agent with respect to the employee's rights under a collective agreement.

[7] Ms. Murphy's complaint alleged discriminatory representation on the part of Unifor. She said she received unfair treatment because she was never given an explanation concerning the events which led to her suspension from employment at the IWK. The remedy which she sought from the Labour Board was described as "looking for proper answers".

[8] By letter dated October 7, 2019, Unifor advised Ms. Murphy that its grievance committee felt her grievance had no merit and it would be withdrawn. She was informed of her right to have a review of the decision under the Unifor Constitution. Ms. Murphy requested a review; however, Unifor advised her the request had been received outside of the time limit set out in the Union Constitution and, therefore, it was not considered.

[9] Section 56A of the *Trade Union Act* provides that where the Labour Board receives a complaint alleging contravention of s. 54A(3), a review officer shall be appointed to determine whether there is "sufficient evidence of a breach of the duty of fair representation". If so, Unifor would be required to provide a formal response to the substance of the complaint.

[10] In Ms. Murphy's case, a review officer was appointed. They were to consider the information provided and determine whether Ms. Murphy's complaint should be allowed to proceed.

[11] The review officer considered the information presented by Ms. Murphy and dismissed her complaint. The officer's report stated, in part:

There is no evidence to support a finding that the Union failed to take sufficient account of Ms. Murphy's disability or that the processes and procedures followed by the Union in handling the Grievance had a discriminatory effect on Ms.

Murphy. In addition, the subject matter of the Grievance does not relate to the refusal of an accommodation. It does appear that Ms. Murphy did request an accommodation for support for her disability following the filing of the Grievance, with which the Union assisted, and in their letter of September 3, the Employer stated that they were willing to allow for reasonable accommodation in the workplace. The evidence suggests that the Union were in regular contact with Ms. Murphy whilst the Grievance was being processed and offered her assistance 'in any area she needed'. Ms. Murphy was in contact with the Union on September 3, 10 and 16 and then filed her Complaint on September 20, 2019.

To the extent that Ms. Murphy's underlying concern may be that she did not receive an explanation of the circumstances concerning the complaint made against her by the doctor's assistant to the IWK Health Centre (resulting in the IWK Protection Services Office's decision to issue a *Protection of Property Act* Notice against her if she returned to the IWK because of the May, 2019 incident), to her satisfaction, the Union would not be required to take a grievance to arbitration, where it had previously arbitrated a similar case and lost, as the Union had assessed it would be unlikely to succeed just so that questions could be asked of those involved with the incident as to why the complaint had been made.

...

Based upon my careful review of the file, I am not satisfied that there is sufficient evidence to potentially permit the Board to find, on the balance of probabilities, that the Union may have failed to comply with their duty of fair representation. For the reasons stated above, the Complaint is dismissed.

In my view of the file, the Union actively assisted Ms. Murphy in relation to the Grievance, considered her Grievance and made a reasoned assessment as to its possible success at arbitration and its decision was communicated to Ms. Murphy.

[12] Ms. Murphy was not satisfied with the outcome of the Labour Board process and filed an application for judicial review with the Supreme Court of Nova Scotia. Her notice of application listed the following grounds for the review:

1. She disagreed with the review officer's decision.
2. Her case is unique and should not be affected by other grievances.
3. Unifor was wrong in its letter of September 3, 2019 to say the IWK had given notice under the *Protection of Property Act*, R.S.N.S. 1989, c.363.

[13] After considering the record and written submissions and hearing from Ms. Murphy and counsel for Unifor, Justice Scott C. Norton issued a written decision dismissing the application (2021 NSSC 323). The reasons for the dismissal are outlined in the following passage from his decision:

[30] The Review Officer considered the evidence of Ms. Murphy's communications with the Union and the Union's explanation for why it determined it would not proceed with the grievance (having unsuccessfully arbitrated similar grievances with the IWK in the past).

[31] The Review Officer weighed and analyzed the evidence and determined on a balance of probabilities that there was insufficient evidence to find that the Union may have failed to represent Ms. Murphy fairly. Although the complaint was based on the allegation that the Union had violated the duty of fair representation by representing her in a discriminatory manner, the Review Officer also considered whether the Union's representation was arbitrary or in bad faith and concluded there was no evidence on which to make such a finding. The Review Officer concluded that the decision to withdraw the grievance was not connected to Ms. Murphy's personal characteristics or any human rights protected grounds. The Review Officer found that there was no evidence that the Union had failed to sufficiently account for Ms. Murphy's disability or that the process had a discriminatory effect on her.

[32] Having considered the directions provided by *Vavilov*, *Carroll* and *Alexion*, I find that the decision was internally coherent and reflected a rational chain of analysis. I found no shortcomings in the decision. It was extremely well written. It correctly identified the legal and factual issues to be determined by the Review Officer and provided a clear and detailed analysis of each. On the critical points of whether there was sufficient evidence to allow the Board to potentially find that the Union represented the complainant in a discriminatory or arbitrary manner, I find that the decision was logical and exhibited no gaps in its rational chain of analysis.

[33] As to adequacy, it provided the complainant with enough information to assure her that her concerns had been heard and addressed. It was in all respects a reasonable decision. It meets the requirements of justification, transparency and intelligibility. To paraphrase *Alexion*, I am satisfied that the Review Officer's reasoning 'adds up'.

[14] Ms. Murphy has appealed the decision of Norton, J. Her Notice of Appeal alleges his decision was not reasonable, he failed to consider evidence, and she had insufficient time to respond to the arguments of counsel for Unifor.

[15] Ms. Murphy does not mention any concerns about not having time to consider the Unifor arguments in her factum or her oral submissions on appeal. I have reviewed the transcript of the hearing before Norton, J. and it is clear he explained the process for the hearing and asked if she had any questions. Ms. Murphy said she did not. After the submissions of counsel for Unifor, Norton, J. asked Ms. Murphy if she wanted a break to consider her response to what she heard. She did and was given 15 minutes. At no point did she advise Norton, J. she

needed additional time to consider the Unifor arguments. This ground of appeal has no merit.

[16] I am satisfied the only potential ground of appeal which we need to consider is the allegation Norton, J.'s decision was unreasonable.

[17] Ms. Murphy also made an application to introduce fresh evidence on the appeal. The affidavit setting out this evidence includes information which is already in the appeal record as well as additional materials concerning her efforts to obtain an explanation for the events leading to her suspension from employment at the IWK. This includes correspondence between Ms. Murphy and the IWK, Nova Scotia Human Rights Commission and the Ombudsman. These materials do not meet the test for admission as fresh evidence because they are not relevant to the issues on appeal.

[18] Since this is an appeal from an application for judicial review, we must assess Norton, J.'s decision and determine if he identified and applied the proper standard in assessing the review officer's decision (*Northern Regional Health Authority v. Horrocks*, 2021 SCC 42).

[19] Norton, J. chose the correct standard of review to apply. The question he had to answer was whether the review officer's decision was reasonable. I agree with Norton, J. that the decision was reasonable in light of the information provided by Ms. Murphy and the principles applicable to a complaint under s. 54A(3) of the *Trade Union Act*.

[20] As she did before the Labour Board and Norton, J., Ms. Murphy's submissions on appeal emphasized the IWK had not given her a notice under the *Protection of Property Act* in May, 2019. She is correct and the September 3, 2019 Compass letter is not accurate when it suggests otherwise. This inaccuracy was clarified during the Labour Board proceeding. As noted in the review officer's decision, the IWK said such a notice would be given to Ms. Murphy if she returned to the premises. Despite the forceful submissions of Ms. Murphy to the contrary, this issue was not material to the Unifor decision to withdraw the grievance which led to the review officer decision, the judicial review, and this appeal.

[21] Most of Ms. Murphy's submissions to this Court related to her continued search for an explanation of the IWK action taken in May 2019. This is not an issue which is relevant to the judicial review of the decision which assessed

whether Unifor had acted in a discriminatory fashion in withdrawing Ms. Murphy's grievance nor is it within the scope of this appeal.

[22] Ms. Murphy, in the materials provided to us and in her oral submissions, raised concerns about the fact Compass has not yet found her a position at another site. As counsel for Unifor advised at the hearing, Ms. Murphy continues to be an employee of Compass and has a right to be recalled under the terms of the applicable collective agreement.

[23] Ms. Murphy is unhappy that Compass has not found employment for her over the last three years. However, examining events after Unifor withdrew the grievance in 2019 is not part of this judicial review proceeding. Any issues related to Ms. Murphy's ongoing search for an employment placement must be addressed with Unifor and Compass.

[24] In light of my conclusion with respect to the correctness of Norton, J.'s decision, Ms. Murphy's appeal and motion to adduce fresh evidence must be dismissed. Unifor is not seeking costs and none are awarded.

Wood, C.J.N.S.

Concurred in:

Fichaud, J.A.

Bourgeois, J.A.