C.A. No. 114281

NOVA SCOTIA COURT OF APPEAL

Cite as: Halifax Developments Ltd. v. Sutton, 1995 NSCA 117
Clarke, C.J.N.S., Freeman and Flinn, JJ.A.

BETWEEN:

HALIFAX DEVELOPMENTS LIMITED	)	Karin McCaskill
	)	for the Appellant
Appellant	)	
	)	
	)	
- and -	)	
	)	
	)	Peter McLellan, Q.C.
	)	for the Respondent
	)	
PHYLLIS DELLA SUTTON	)	
	)	
Respondent	)	
	)	
	)	Appeal Heard:
	)	May 25, 1995
	)	
	)	Judgment Delivered:
	)	June 13, 1995
	)	
	)	
	)	

THE COURT: The appeal is allowed and the matter remitted to the Labour Standards Tribunal per reasons of Freeman, J.A., Clarke, C.J.N.S. and Flinn, J.A. concurring.

FREEMAN, J.A.:

This is an appeal from an order of the Labour Standards Tribunal requiring the appellant, Halifax Developments Limited, to reinstate the respondent Phyllis Sutton, a 21-year employee, to a position the appellant purported to eliminate in a corporate restructuring in 1992.

Factual background

Following an earlier discharge found to be without cause, Ms. Sutton had been reinstated to her position as residential property manager in 1990. With a staff of two fulltime and one part-time employees, she looked after leasing 638 apartments in five buildings owned by the appellant. This involved showing the units to prospective tenants, arranging leases and collecting rent with some responsibilities for advertising, parking and maintenance. Two maids and a doorman also reported to her.

The company lost some $7,000,000 on operating revenues of $33,000,000 in 1991, when William Perkins took over as president. By a memo to the board of directors dated February 10, 1992, Mr. Perkins advised:

> An ongoing complete review of almost every facet of HDL's operations has been completed, resulting in the following recommendations for a significant restructuring of the company. The primary motivations for this are twofold: the creation of a more streamlined organization to meet the challenges ahead of us, and the elimination of excessive overhead costs. The proposed changes directly impact more than 15% of the Company's employees, eight will have their jobs changed significantly, and 9 1/2 will no longer be employed by HDL.
>
> Gross annual savings in salaries and benefits will be over $350,000. . . As it is proposed, the terminated employees will remain on payroll for their severance periods; therefore, we do not anticipate any significant impact on cash flow for 1992.

. . . .

> The most significant terminations will be Rex MacLaine (15 years with HDL), Ron Roberts (13 years), Roy Taylor (21 Years), and Phyllis Sutton (20 years, including four years unemployed prior to her court-ordered reinstatement). **Also significant is the elimination of the entire residential leasing group.** This function will be merged with John Walker's commercial and retail leasing group. (Emphasis added.)

Ms. Sutton was advised by letter of February 19, 1992, that as a consequence of the restructuring she was relieved immediately of her job responsibilities but would remain on the HDL payroll receiving her salary and other benefits until August 19, 1993.

As a result of the reorganization the company was structured according to three basic functions or areas of responsibility: accounting, operations and leasing. Previously it had been more loosely structured according to the type of asset being managed: residential property, commercial property and retail property. The three main functional divisions were managed by a small team consisting of the comptroller, vice-president of operations, and the president who took charge of both residential and commercial leasing with two leasing representatives and two support staff. The accounting division looked after rents and prepared leases; operations included building superintendents, cleaning staff and doormen.

The two leasing representatives were Bonnie Langley and Liz Germaine, whose work included "fielding calls, qualifying prospects, showing apartments, credit checks, concluding deals, paper work, and advertising as needed." They reported directly to Mr. Perkins. In her evidence Bonnie Langley said that prior to 1992 the residential office under Ms. Sutton did everything in relation to running the apartments, while after the reorganization she and Ms. Germaine focused on leasing.

Losses were substantially reduced in 1992 and 1993, and the company expected a profit in 1994.

The Main Issue

The main issue to be determined by the Labour Standards Tribunal was whether Ms. Sutton was laid off pursuant to s. 2(i) of the **Labour Standards Code**, R.S.N.S. c. 246 or discharged as defined in s. 2(c).

Under s. 2(c) of the **Labour Standards Code**:

> "discharge" means a termination of employment by an employer other than a lay-off or suspension;

Under s. 2(i):

> "lay-off" means temporary or indefinite termination of employment because of lack of work and includes a temporary, indefinite or permanent termination of employment because of the elimination of a position, and "laid off" has a corresponding meaning.

The Standard of Review

Under s. 20(2) of the **Code** a decision by a Tribunal as to whether an employer or other person is doing or has done anything prohibited by the Code is "final and conclusive and not open to question or review" by this court except "on a question of law or jurisdiction." The standard of review which this court applies to decisions of the Labour Standards Tribunal on questions of law or jurisdiction, which are not protected by the partial privative clause, is that of correctness; this follows the reasoning of the Supreme Court of Canada in **Pezim v. British Columbia (Superintendent of Brokers)**, [1994] 2 S.C.R. 557. The correctness standard was recently applied to Tribunal

decisions by this court in **Murphy v. Halifax**, (C.A. No. 104443, February, 1995--Unreported) and **Ben's Limited v. Decker**, a case in which the issues are similar to the present one, which has just been released.

The determination of what constitutes a lay-off or a discharge involves interpretation of the **Labour Standards Code** and jurisprudence and is a question of law to which the standard of correctness applies. Whether a particular set of circumstances is a lay-off or a discharge is a question of fact within the core jurisdiction of the Tribunal. The standard of review of factual findings by the Tribunal involves a high degree of deference and Tribunal decisions on issues of fact will be interfered with only when they are patently unreasonable.

The Tribunal's Key Finding

The Tribunal reached the conclusion that Mrs. Sutton's position had not been eliminated and that she therefore had been discharged and not laid off:

> Having considered the facts in the case before us, the Tribunal can easily conclude that there has been no elimination of a position. The work done by Phyllis Sutton prior to February, 1992, is, with some fairly minor exceptions, the work that was done by Bonnie Langley after February 19, 1992. While the reductions in the residential leasing operations resulted in an overall loss of one position, this is not so significant a change as to justify the termination, in economic terms.

With respect, the relevant consideration is the good faith of employer. While economic factors will figure in an assessment of good faith, an employer is not required to show that an individual lay-off is economically justified, particularly if it occurs in the context of a broader reorganization undertaken in good faith.

The Tribunal's conclusion results from an analysis flawed by its misdirection of itself as to the law. The Tribunal followed the Tribunal decision in **Ben's Limited v. Decker** which has just been reversed on appeal by this court (C.A. No. 112076 released June 5, 1995 - unreported). In **Decker** the Tribunal did not follow **Flieger v. New Brunswick** (1993) 48 C.C.E.L. I (S.C.C.), distinguishing it without reasons, and concluded that a position was not eliminated if the work was being done by others, in that case Mr. Decker's immediate superior and the maintenance staff.

The Tribunal in this appeal attempted to distinguish **Flieger** as follows, but, with respect, the analysis is not persuasive:

> The language being discussed - "discontinuance of a function" - is clearly different from that in our **Code**. Moreover, the legislative framework is entirely different, and is similar to the wording in the **Canada Labour Code** and the **Nova Scotia Civil Service Employment Act**. We must conclude that the words used in the **Labour Standards Code** were used with a particular intent. The conclusion reached in **Flieger** is specific to the wording in the legislation, which is different from that being considered here.

The appellant submits that failure to apply the reasoning in **Flieger** was an error of law leading the Tribunal to the erroneous conclusion that Ms. Sutton's position had not been eliminated. The appellant also argued that the Tribunal's decision was erroneous in law in that it was premised on the concept that elimination of a position requires disappearance of work from an organization, rather than redistribution of the work associated with a position among other employees.

The latter submission refers to an error of law also identified by this court in the appeal from the Tribunal decision in **Ben's Limited v. Decker**, on which the Tribunal in

the present matter relied for authority. In the **Decker** appeal Justice Hallett, writing for the court, stated:

> Although the Tribunal's finding that the respondent's job did not disappear is a finding of fact, in reaching this conclusion the Board obviously rejected the reasoning of the Supreme Court of Canada in **Flieger v. New Brunswick** (1993) 48 C.C.E.L. I. Although that decision dealt with an interpretation of the words "discontinuance of a function" in my opinion the reasoning of Cory J. is equally applicable to making a determination of what constitutes the elimination of a position. As was recognized by the Tribunal, there cannot be a reinstatement where there has been an elimination of a position as the job had disappeared. (**Town of Yarmouth v. Manser** (1977), 18 N.S.R. (2d) 353; **Porter v. C-I-L Inc.** (1980), 42 N.S.R. (2d) 624). These two cases held that s. 71(1) simply does not apply as there cannot be a discharge from a position that has ceased to exist. The effect of these decisions appears to have been codified by the amendment to the definition in the Code of the word lay-off to which I have previously referred.
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> In **Flieger** two sergeants in the New Brunswick Highway Patrol were given one month's notice that their services were no longer required because of the discontinuance of a function, the Province having decided to disband the patrol and to contract out those duties to the R.C.M.P. Section 26(1) of the **Civil Service Act**, S.N.B. 1984, c. C-5.1 states:
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> > 26(1) When the services of an employee are no longer required because of lack of work or because of the discontinuance of a function, the deputy head, in accordance with regulations made by the Board, may lay off the employee.
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> M. Justice Cory, writing for the majority (Madam Justice L'Heureux-Dubé dissenting), analyzed the meaning of the phrase "discontinuance of a function." He reviewed relevant Canadian decisions and obviously approved of the approach taken in **Mudarth v. Canada (Minister of Public Works,** [1989] 3 F.C. 371 (T.D.). He concluded as follows at p. 13:
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> > How then should "discontinuance of a function" be defined? "Discontinuance" obviously refers to the termination of something that is termed a function. A "function" must be the "office" that is to say the bundle of responsibilities, duties and activities that are carried out by a particular employee or group of employees.

> It is this definition of "function", in the sense of "office" which best comports with the environment of the workplace. The very word "employment" indicates the existence of an employee and an employer. A term such as "office" or "function" must have a meaning for both these parties. For example, a person may have the "office" of plant superintendent. A person functioning as a plant superintendent carries out a regime or set of activities and duties that forms the office of plant superintendent. Both the employer and the employee understand what is required in order to perform or to carry out that particular office. Similarly, the "office" of secretary or punch press operator carries with it a particular set of activities and duties. A particular bundle of skills is required to perform the duties and activities required by each of these offices. Once again, both employer and employee will know exactly what is required to perform the activities of the particular office.
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> Therefore, a "discontinuance of a function" will occur when that set of activities which forms an office is no longer carried out as a result of a decision of an employer acting in good faith. For example, if a particular set of activities is merely handed over in its entirety to another person, or, if the activity or duty is simply given a new and different title so as to fit another job description then there would be no "discontinuance of a function." On the other hand, if the activities that form part of the set or bundle are divided among other people such as occurred in **Mudarth**, supra, there would be a "discontinuance of a function". Similarly, if the responsibilities are decentralized, as happened in **Columbe**, supra, there would also be a "discontinuance of a function."

After making these general statements Mr. Justice Cory applied those definitions to the facts of the case and concluded at p. 14:

> The decision of the province to terminate its own highway patrol and enter into a contract with the R.C.M.P. to provide the service was a legitimate management decision. That decision terminated the "office" of the New Brunswick Highway Patrol personnel. It meant that the "function", that is to say the set of duties and activities, of the appellants as sergeants in the New Brunswick Highway Patrol had been discontinued. Their office had ceased to exist.

> It is clear from a review of the Tribunal decision that it is founded on the premise that as the work that had been done by Mr. Decker as Maintenance Supervisor was still being done by others the respondent's position did not disappear; in other words the Tribunal found his position was not eliminated. That is the approach the Tribunal took in **Byrne v. Central Guaranty Trust Company,** L.S.T., No. 846 (October 22, 1991); That decision was not interfered with on appeal to this court.

Justice Hallett found that in **Byrne** the employee had been discharged subsequent to the **Town of Yarmouth** and **Porter** decisions but prior to the amendment of the definition of layoff in the Code. He concluded:

> In my opinion the discontinuance of a function by an employer as interpreted by Cory J. in **Flieger** and the elimination of a position are virtually the same thing. Therefore, where the activities of Maintenance Supervisor (the respondent's position) were divided among other staff, as is clear from the evidence, his office as maintenance supervisor had ceased to exist. In short, his position was eliminated. The fact that the work still existed but had been divided up amongst others does not mean that his job did not disappear as found by the Tribunal. The approach employed by the Tribunal on this aspect of its decision is no longer correct in view of the decision in **Flieger**. Counsel for the respondent has argued that the interpretation in **Flieger** involved different words in a different statute in a different province but, with respect, the concept of whether a function has been discontinued or whether a position has been eliminated is essentially the same. In my opinion, as a result of the **Flieger** decision, the Tribunal should no longer follow the approach it took in Byrne when trying to determine if a position has been eliminated. There is, of course, a requirement that the employer acted in good faith in eliminating the position. The Tribunal erred in failing to follow and apply the reasoning of Cory J. in **Flieger.** It erred in its interpretation of the plain meaning of the words "elimination of a position" in the definition of layoff in the **Code** and as a consequence it erred in its interpretation of s. 71(1). Therefore its finding of fact that the position had not been eliminated cannot stand.

I agree with Justice Hallett's analysis. In my view the reasoning of Cory J. in **Flieger** in seeking the meaning of the term "discontinuance of a function" applies equally to "elimination of a position" in s. 2(i) of the **Labour Standards Code**. Both

"function" as defined by Mr. Justice Cory and "position" are synonymous with "office". The public sector statutes referred to by Cory J. and the **Labour Standards Code** are all talking about the same thing: loss of employment resulting from the economic necessity of reducing the size of work forces. The words are not terms of art; they retain their ordinary dictionary meanings. The common legislative intent appears to be to permit legitimate reorganization in the interests of efficiency and economy in both the public and private sectors within certain guidelines to ensure fairness and subject to the overriding requirement of good faith.

When the "bundle of responsibilities, duties and activities" constituting an office or position are redistributed, eliminating the position, the effect upon the employee who loses his or her job may be devastating, but the alternative in many reorganizations could be the insolvency of the company and the loss of all positions. However, a discharge or suspension cannot be masked as a lay-off, and it is clear from the reasoning of Cory J. that a position is not eliminated merely by being renamed or reassigned to another person with its bundle of functions intact.

The **Flieger** case, read in conjunction with s. 2(i) of the **Code**, defines the elimination of a position as a matter of law and the standard of correctness applies. Whether a former employee's position has been eliminated within the meaning of that definition is a matter of fact within the core jurisdiction of the Tribunal, to which this court will pay deference. In the present appeal there is evidence that the work formerly done by Mr. MacLaine, Mrs. Sutton and the residential leasing group is still being done on behalf of the employer, but that the bundle of functions that characterized her

position, and those of the others, may have been broken up. The evidence also suggests that while Bonnie Langley and Liz Germaine do much of her day to day work, decision making rests with Mr. Perkins; the accounting branch deals with leases, rents and collections, operations with cleaning and maintenance.

However it is not the function of this court to make findings of fact. The evidence must be assessed by the Tribunal in light of s. 2(i) of the **Code** as interpreted with the assistance of Justice Cory's reasoning in **Flieger**.

Reinstatement and notice

Having found that Ms. Sutton was discharged rather than laid off, the Tribunal ordered her reinstatement pursuant to s. 71 (1). That section, which does not apply to employees who have been laid off, makes it unlawful for an employer to discharge or suspend ten-year employees without just cause. It has been interpreted to permit reinstatement as a remedy. (See **Sobeys v. Yeomans** [1989] 1 S.C.R. 238.). The definition of lay-off was amended to include permanent elimination of positions only in 1991. The legislature obviously intended that s. 71 of the **Code** should not apply so as to provide the remedy of reinstatement to laid off employees whose positions were eliminated, only those who have been "discharged" or "suspended" as defined in the **Code.**

Laid off employees, however, are included with discharged or suspended employees in s. 72 which provides for eight weeks' notice for employees with ten or

more years of service except in certain circumstances enumerated in subsection (3).

Section 72 (3) provides that subsections (1) and (2) of s. 72, which set forth the notice periods which apply in various circumstances, do not apply to

> (d) a person who is discharged or laid off for any reason beyond the control of the employer including complete or partial destruction of plant, destruction or breakdown of machinery or equipment, unavailability of supplies and materials, cancellation, suspension, or inability to obtain orders for the products of the employer, fire, explosion, accident, labour disputes, weather conditions and actions of any governmental authority, if the employer has exercised due diligence to foresee and avoid the cause of discharge or lay-off.

When any of those enumerated circumstances exist, the employer is relieved of the duty to give notice to employees who have been discharged, laid off or suspended. Section 71 refers to the same exceptions with respect to the reinstatement of employees who have been discharged or suspended. Thus there are two standards relevant to layoffs. When an employer meets the standard of good faith it may eliminate a position and permanently lay-off an employee, who is not entitled to reinstatement under s. 71, but reasonable notice must be provided pursuant to s. 72. An employer can escape the requirement to pay notice under s. 72 only if it can meet the more rigorous standards of s. 72(3).

If an employer is unable to establish that an employee has been permanently laid off by elimination of position, for example by failing to establish that it acted in good faith or that the position was genuinely eliminated, then the employee will be seen to have been discharged pursuant to s. 2(c) rather than laid off, and therefore will be eligible for reinstatement under s. 71. In that case the employer may attempt to show that the

employee was discharged for one of the reasons in s. 72(3), but having failed to meet the lower standard of s. 2(i) it may find difficulty in meeting the higher one.

In **Ben's Limited v. Decker** this court overturned a Tribunal decision on which the Tribunal in the present case relied as an authority. After dealing with the meaning of lay-offs Justice Hallett, writing for the court, considered the effect of ss. 71(1) and 72(3). He stated:

> I am of the opinion that the Tribunal misinterpreted the meaning of Clause (d) of s. 72(3). The Tribunal concluded that it was satisfied from the evidence that some re-organization of the appellant was necessary if the company was to remain viable. However it went on to state (as set out in the Tribunal decision previously quoted herein) that it was not satisfied that it was necessary to terminate Mr. Decker.
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> . . .
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> In my opinion, the Tribunal was required to direct its attention to the underlying cause of the discharge and whether or not it was beyond the control of the employer and whether the employer had exercised due diligence to foresee and avoid that cause. The Tribunal did not do that in this case but simply concluded that the appellant did not exercise due diligence to either foresee or avoid the respondent's termination. That is not the issue it was required to determine and in so doing it misinterpreted s. 71(1)
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> . . . .
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> If a position is eliminated on a re-organization there is nothing in the Code that compels an employer to offer a long term employee another position, therefore the employer was not compelled to do so. In fact the 1991 amendments to the definition show a legislative intent to deprive a ten-year employee of the protection of s. 71(1) if that employee's position is eliminated. However the law requires that in such reorganization the employer must act in good faith in deciding whether to eliminate a particular position.

If Ms. Sutton's position has been eliminated within the meaning of s. 2(i) of the **Code**, she may be considered for other employment by the employer, but neither ss. 71(1) nor 72(3) create a duty in the employer to find her a place once her position has

been eliminated. Section 72(1) requires that she receive eight weeks' notice, but the notice she actually received, as the Tribunal noted, was far in excess of that.

Sections 71 and 72 will only be relevant if the Tribunal, upon assessing the facts in light of s. 2(i) interpreted following **Flieger**, again concludes that Ms. Sutton's position was not eliminated.

I would allow the appeal and remit the matter to the Tribunal to be decided in accordance with the principles set forth in this decision.

Freeman, J.A.

Concurred in:

Clarke, C.J.N.S.

Flinn, J.A.

C.A. No. 114281

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HALIFAX DEVELOPMENTS LIMITED Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
	)	FREEMAN, J.A.
PHYLLIS DELLA SUTTON Respondent	)	