C.A. No. 103849

NOVA SCOTIA COURT OF APPEAL

Freeman, Roscoe and Pugsley, JJ.A.
Cite as: Dartmouth District School Board v. Nova Scotia Union of Public Employees, Local 2, 1994 NSCA 213

BETWEEN:

THE DARTMOUTH DISTRICT SCHOOL BOARD, THOMAS S. KUTTNER, ERIC DURNFORD, Q.C. and JOHN D'ORSAY Appellants - and - THE NOVA SCOTIA UNION OF PUBLIC EMPLOYEES, LOCAL 2 Respondent	Philip M. Chapman for the Appellant Ronald A. Stockton for the Respondent Appeal Heard: September 30, 1994 Judgment Delivered: November 17, 1994

THE COURT: The appeal is allowed with costs which are fixed at $2,000.00 plus disbursements per reasons for judgment of Pugsley, J.A.; Freeman and Roscoe, JJ.A. concurring.

PUGSLEY, J.A.:

The issue in this appeal is whether a Chambers judge erred in severing and quashing the remedial portions of a decision of a consensual arbitration board.

BACKGROUND

After a six day hearing, the majority of the Board determined that David Laing, the grievor, had been unjustly dismissed from his employment as a carpenter, in the Construction Services Division of the Dartmouth District School Board (the "Employer").

Notwithstanding the finding that Mr. Laing had a clearly established record of undue absenteeism, as well as a finding that he would be unable to perform his regular duties in the future on a "consistent, uninterrupted and acceptable" schedule, the Board found that the Employer's failure to warn Mr. Laing that his job was in jeopardy, vitiated the action of termination.

The Board then stated:

> " Our task is to fashion a remedy appropriate in the circumstances. Here we are constrained by the grievor's own actions. For reasons known only to himself he determined to forego Long Term Disability benefits and attempted to return to work in the face of the clear medical evidence that he was incapable of resuming the total job requirements and full duties required of a Carpenter with the School Board. Had he not done so he would have remained on LTD and the Employer by its own admission would have not taken the step of terminating his employment. Rather, it would have exercised its right under Article 13.11(b)(2) upon expiration twenty-four months after the first day on which he was eligible for LTD benefits to have declared his position vacant and filled it in the normal manner. The grievor himself would have maintained his employment status and the right to apply for any posted position upon establishing medical fitness to the satisfaction of the Employer.
>
> In our view, the appropriate remedy in the circumstances of this case is to put the grievor as close as possible in the same position he would have been in had he not abandoned his eligibility for LTD benefits and sought to return to his employment, although to his own knowledge

> unable to fully perform the duties required of the job. Accordingly, the Employer's termination of the grievor by letter dated April 3, 1992 is declared to be null and void. The grievor is to be deemed to be an employee eligible for benefits under Article 13.11(b) of the Agreement. The twenty-four month period after which the Employer was entitled to have declared his position vacant and to fill it in the normal manner expired June 12, 1993. The Employer is to compensate the grievor in an amount equal to the lost LTD benefits as of the date of improper termination of employment to the expiry of the said twenty-four month period, subject to mitigation. The grievor retains his right to apply for any posted position as if he were regularly working in the position he held prior to his illness, provided that the Employer may require a medical report as specified in Article 13.03(a) to show medical fitness for the position the grievor would fill, if he were the successful applicant.
>
> On the foregoing terms, this grievance is sustained."

An appeal was brought by the Union pursuant to **s. 15(2)** of the **Arbitration Act**, R.S.N.S. 1989, chapter 19 which provides:

> " 15 (2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set aside the award."

The Chambers judge concluded that the "decision of the Board with regard to upholding of the grievance with regard to the unjust dismissal is valid and will continue."

After referring to the decision of Mr. Justice Hallett of this Court in **Canada Post Corp. v. Canadian Postmasters and Assistants Association** (1993), 121 N.S.R. (2d) 112, the Chambers judge commented:

> " In my opinion this is not a matter of determining whether the decision is patently reasonable or patently unreasonable. It is a matter of whether or not the Board had the jurisdiction to enter upon the inquiry as to whether or not the grievor was medically fit to return to work. In my view that was not the issue that was put before them in the grievance. It was not a question that was necessary to determine in order to fashion some imaginative remedy, if that's what the Board

had chosen to do."

He also concluded that by determining the remedy in the manner that it did, that is, by reference to the medical condition of Mr. Laing, the Board may very well have offended the notion .... that

> "an arbitrator must comply with the recognized tenets of procedural fairness ....
> By moving into the area of medical fitness to return to work, the Board deprived the grievor of his right to know and prepare for the question being determined, a very different question than that raised by the grievance. If I am wrong on that I still would indicate that the essence of my decision is that there was a lack of jurisdiction in the Board, as it considered a question which was not put to it at all. It would be unjust dealing with fashioning a remedy. It made a determination under provisions of the Agreement that had nothing to do with the grievance that was filed."

THE TEST

The Chambers judge has correctly set forth the principles upon which arbitration awards should be reviewed. The question in this appeal is whether the Chambers judge erred in setting aside the remedial aspect of the award, and that issue will be determined by considering whether the Arbitration Board had the jurisdiction to consider the question of Mr. Laing's medical fitness.

ANALYSIS

The details of the grievance outlined by Mr. Laing provide as follows:

> " The Grievor had been off work on long term disability and when he was ready to return to work he wanted to ask the employer if there was a form or any special documentation wanted from his doctor before he returned. The Director of Maintenance and Operations informed him that it was not necessary as he was being dismissed as the Director felt he would be facing the same problem in a short time.
>
> The Grievor requests re-instatement with reimbursement

> and compensation for any and all loss including, but not limited to, wages, benefits and seniority. Violations: such Articles and Violations as may become apparent including: 1.07; 1.08; 2.17; 13.11." (emphasis added)

Section 13.11 of the Collective Agreement relates to benefits available to an employee under long term disability.

The references in the grievance to Mr. Laing's ability to return to work and the reliance on s. 13.11 very clearly place Mr. Laing's medical condition in issue.

It is noteworthy that the Union called in support of the grievance, Dr. Fraser, a general practitioner who had treated Mr. Laing for many years to give evidence concerning Mr. Laing's ability to perform his work.

The determination of the issue of unlawful dismissal could not be determined in a vacuum, but only in the context of the factual background that embraced Mr. Laing's absences from work in the past, the reasons for those absences, and his ability to continue to perform his job as a carpenter.

This was recognized by the union in the wording of the grievance, the reference to s. 13.11, and the decision to call Dr. Fraser.

In fashioning an appropriate remedy, the Board was required to consider Mr. Laing's physical ability to perform his job. It made little sense to re-instate Mr. Laing to his former position if he was physically unable to carry out all aspects required by the job description.

The Board's finding that the likelihood was that Mr. Laing would "be unable to perform his regular duties in the future on a consistent, uninterrupted and acceptable schedule "was a critical finding and obviously influenced the Board in its choice of remedy".

A remedy that would have ultimately resulted in a further termination of

employment because of a physical inability to carry out the work would have undoubtedly led to a further grievance and not have been of real assistance to the parties.

The words of Dickson J. (as he then was) in **Heustis v. New Brunswick Electric Power Commission** (1979), 98 D.L.R. (3d) 622 at 631 are apposite:

> " There is a very good policy reason for judicial restraint in fettering adjudicators in the exercise of remedial powers. The whole purpose in establishing a system of grievance adjudication under the Act is to secure prompt, final, and binding settlement of disputes arising out of interpretation or application of the collective agreement, or disciplinary action taken by the employer, all to the end that industrial peace may be maintained."

With respect to the concern raised by the Chambers judge of a violation of "procedural fairness" it is relevant that this issue was not raised by the Union in the application for judicial review nor in the argument advanced to the trial judge.

It is clear that the Union anticipated the issue would be raised - both as evidenced by the wording in the grievance as well as the manner in which the case was conducted.

I am of the opinion that the Chambers judge erred in concluding that the question of whether the grievor was medically fit to return to work was not an issue that was placed before the Board.

This issue was placed before the Board by the grievor, and the Board clearly possessed the jurisdiction to consider this issue in the course of fashioning a remedy.

I would allow the appeal with costs both here and below which I would fix at the total sum of $2,000.00 plus disbursements.

J.A.

Concurred in: Freeman, J.A.

Roscoe, J.A.

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Appellants	)	
- and -	)	R E A S O N S FOR
	)	JUDGMENT BY:
THE NOVA SCOTIA UNION OF PUBLIC EMPLOYEES, LOCAL 2	)	PUGSLEY, J.A.
Respondent	)	