NOVA SCOTIA COURT OF APPEAL

Citation: *Halifax (Regional Municipality) v. Canadian Union of Public Employees, Local 108*, 2014 NSCA 19

Date: 20140221
Docket: CA 417281
Registry: Halifax

Between:

Halifax Regional Municipality

Appellant

v.

Canadian Union of Public Employees, Local 108

Respondent

Judges:	Beveridge, Hamilton and Scanlan, JJ.A.
Appeal Heard:	February 3, 2014, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Scanlan, J.A.; Hamilton and Beveridge, JJ.A. concurring.
Counsel:	Randolph Kinghorne and Rebecca C. Druhan, for the appellant Susan D. Coen, for the respondent

Reasons for judgment

[1] This matter was heard on February 3, 2014 and the Court dismissed the appeal with reasons to follow. These are the written reasons.

[2] This is an appeal of a decision of Nova Scotia Supreme Court Justice Gerald R.P. Moir in which he upheld the decision of an arbitrator reinstating an employee who had been dismissed by Halifax Regional Municipality (HRM). On December 2, 2011, that employee, Mr. Jeffery, was suspected of having consumed drugs at the workplace that day. That suspicion was based on a supervisor having detected what he thought was the smell of marijuana coming from a truck in which Mr. Jeffery was a passenger. By letter dated January 9, 2012 HRM terminated Mr. Jeffery's employment after he failed to cooperate in a risk assessment, intended to assess his risk of impairment by drugs at the workplace. The termination was grieved and the arbitrator reinstated Mr. Jeffery to his position with pay. That award was challenged by way of judicial review. Justice Moir upheld the arbitrator's decision.

[3] HRM says it is concerned that Mr. Jeffery may present a risk to other employees and the public if he consumes drugs at the workplace. HRM suggests the authority to require a risk assessment stems from the employer's obligations as mandated by the *Occupational Health and Safety Act*, S.N.S. 1996, c.7, s.1. (*OHSA*). HRM is no longer asking that Mr. Jeffery face the prospect of termination.

[4] I am not convinced this Court can deal with this matter in the way HRM suggests. By framing the question as it has, HRM is now asking this Court to deal with a case that is, in essence, different than the case that was before the arbitrator. The issue before the arbitrator was whether, based on the facts as determined by the arbitrator, the suspension and termination of Mr. Jeffery were appropriate under the terms of the collective agreement and applicable HRM policies.

Background

[5] On December 2, 2011, two HRM employees, including Mr. Jeffery, were approached by a supervisor as they sat in a HRM truck. As the supervisor stood beside the open driver's window he smelled what he believed was the odor of

marijuana. The supervisor believed the driver was not a marijuana user and therefore was of the belief that the passenger, Mr. Jeffery, had been using marijuana. Both employees denied the presence of the odor. They were allowed to leave in the truck but told to "be safe". The supervisor then contacted his supervisor and the two HRM employees were summoned to the HRM depot. At the depot the employees were asked to provide urine samples for the purpose of testing for the presence of drugs or alcohol. The driver was prepared to provide a sample but Mr. Jeffery refused. He explained, saying he knew he would fail because he was a recreational drug user and that the drugs would still be in his system.

[6] Initially both employees were suspended with pay pending investigation. They were again called in to meet with the employer . During that second meeting the employer considered neither employee to be cooperative. Both Mr. Jeffery and his co-worker were suspended, without pay for two days, for failing to cooperate in the investigation of the matter. That two day suspension for failure to cooperate was eventually upheld by the arbitrator.

[7] Mr. Jeffery was then put on leave with pay and directed by HRM to meet with a substance abuse professional for the purpose of having a risk assessment prepared. The substance abuse professional reported that a risk assessment could not be done due to what he viewed as the guarded responses of Mr. Jeffery regarding his marijuana use.

[8] By letter dated January 9, 2012 HRM terminated Mr. Jeffery's employment. That letter of termination included the following passages:

> …you refused to submit to a drug test *and it was explained that a refusal is considered a positive test*. As a result of the refusal and to ensure the safety of both yourself and the other employees, you were suspended… In accordance with the HRM "Substance Abuse Prevention Policy", *based on your deemed positive test* you were sent to a "Substance Abuse Professional"… Unfortunately you would not cooperate...
>
> During the course of the investigation, you advised that you use marijuana for pain relief, although you refused to provide either a Health Canada certificate or a doctor's prescription supporting such use. In refusing to submit to a drug test you indicated a belief that the test would be of no value because of the drug's presence in your system from your illegal and un-prescribed pain relief usage. Clearly accepting such a reason to avoid testing would preclude an employer from taking

> appropriate safety measures in responding to *employees with drug related performance impairment*...
>
> Your actions have compromised the HRM's ability to fulfil its Workplace Occupational Health and Safety responsibilities. When I contacted you today to schedule a meeting, you refused to attend, leaving HRM with no option but to terminate your employment. Accordingly, given your lack of cooperation and direct violation of the HRM Substance Abuse Prevention Policy, HRM is terminating you employment effective today… (Emphasis added)

Arbitration proceedings

[9] The January 9, 2012 termination was grieved and after a three day hearing the arbitrator made an award dated May 2, 2012. That award allowed the termination grievance and ordered the reinstatement of Mr. Jeffery with full pay and benefits. As noted above, the two day suspension for failure to cooperate was upheld.

[10] There were a number of findings by the arbitrator which were relevant to the judicial review before Justice Moir and the present appeal:

> ¶87 *The Grievor has been terminated, not for drug use on the job but for failure to cooperate with the Employer in exploring his admitted drug use off the job…* The letter of termination refers to his refusal to take the drug test as requested, and his lack of cooperation with regards to Mr. Cashman, the Substance Abuse Professional… both of which allegedly compromised the Employer's ability to fulfill its health and safety obligations….*In my view, the suspension and termination were disciplinary actions.*
>
> ¶89 The Employer referred in argument to several decisions involving prosecutions under the **Occupational Health and Safety Act,** which emphasize the significance of workplace safety and the primacy of safety legislation in the workplace. While efforts to improve safety and to prevent accidents are necessary in every workplace, *the suggestion that the Grievor was terminated because he impeded the Employer's obligation to comply with the spirit or letter of the statute must be seen as arising in the context of the Employer's actions at the time of the event… The supervisor who allegedly smelled the marijuana in the City van allowed the two employees to drive away.*
>
> ¶103 The consequence of the Grievor's refusal to take the drug test was that he was referred to …the Substance Abuse Professional. This was described as the necessary result of the deemed positive test result, as per the Policy. That point …appears … in the letter of termination. *I can find nothing in the Policy which states that failure to take a drug test will be taken as a deemed positive result, or*

> *that the employee must be assessed by a Substance Abuse Professional on failure to take the test or on an admission of recreational drug use that is not work-related.*
>
> ¶107 *A key component of the "assessment/rehabilitation" portion of the Policy is that it applies to employees who are alcohol or drug dependent. ...There is no evidence here of any drug dependency.* There is no evidence before me that the Grievor's admitted off-duty drug use impacted on his job performance or had negative life consequences.
>
> ¶109 *...there is no evidence of "drug related performance impairment"...it is known that a positive drug test does not indicate when drugs were used, only that evidence of the drug is in the system*. (Emphasis added)

[11] HRM took the position at arbitration that this was not a disciplinary action but an attempt by them to fulfill their *OHSA* obligations. The arbitrator determined that the suspension and termination were disciplinary actions (¶87).

[12] HRM applied for a judicial review of the arbitrator's decision and Justice Moir (2013 NSSC 164) dismissed HRM's application.

Analysis

Standard of review

[13] As a court of appeal, this Court reviews Justice Moir's choice of the standard of review on the standard of correctness. (*Communications, Energy and Paperworkers' Union, Local 1520 v. Maritime Paper Products Ltd.* 2009 NSCA 60, ¶18)

[14] Justice Moir held (¶11) that the applicable standard of review he was to apply in reviewing the decision of the arbitrator was one of reasonableness saying: "This court must track the arbitrator's reasoning path and decide whether the result fell within the range of reasonable outcomes.." (referencing *Dunsmuir v. New Brunswick*, 2008 SCC 9 and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62). I am satisfied that Justice Moir correctly identified the standard of review.

Justice Moir's decision

[15] Justice Moir noted that the adjudicator had determined that she was dealing with a disciplinary matter (¶ 23) . The evidence of drug use or impairment was weak and the supervisor allowed the employees to continue with their work. In fact they were directed to **drive** to the depot so the employer could make further inquiries. The only indication of drug use at that time was the supervisor, in the first instance, believing the employees smelled of marijuana. After the employees returned to the depot as directed, a different supervisor believed Mr. Jeffery had dilated pupils. There was no other evidence on the issue of impairment or drug use. Even that evidence was disputed by the employees. Both employees denied that there was the smell of marijuana in the truck.

[16] The arbitrator refused to accept the suggestion by HRM that a refusal to take a drug test constituted a "deemed positive test result", noting there was nothing in the Policy which stated that failure to take a drug test would be taken as a deemed positive result. As pointed out by Justice Moir (¶28) none of the references in the policy applied to Mr. Jeffery except possibly the section on "Assessment/ Rehabilitation".

[17] Justice Moir referenced the collective agreement and noted article 15.08 which establishes that an employee is considered innocent until the Employer has proven just cause. He also referenced article 23.01 which provides that, in cases of discharge, the burden of proof of just cause shall rest with the Employer.

[18] That is the context in which Justice Moir reviewed the decision of the adjudicator. He held that the decision of the arbitrator was reasonable in light of the limited evidence on the issue of impairment. He referenced the arbitrator's decision (¶110) where she was critical of the Employer's failure "…to exercise due diligence in terms of the suspected drug usage, and therefore failed to prove that the suspected drug usage warranted a drug test." Justice Moir said of the arbitrator's decision:

> [29] The reasons are clear and detailed. They lead logically to two main conclusions, *that the employer failed to prove impairment at work and failed to make a case for a drug test or assessment under the terms of its own policy…* Therefore, reinstatement is within the range of reasonable outcomes, *unless one takes a new approach to review of arbitral decisions on disciplinary grievances involving allegations about public or occupational safety.* (Emphasis added)

[19] I am satisfied that Justice Moir appropriately recognized the importance of the terms of the collective agreement in a disciplinary matter. He correctly considered the arbitrator's balancing of safety and privacy within the context of the workplace and larger public areas. It is clear that the Employer was making up policy or rules as the case proceeded. In this regard I have already noted there was nothing in the policy or collective agreement that suggested that a refusal to submit to drug testing was a deemed positive result or that it would entitle the employer to then demand an assessment. Those types of provisions should be the subject of negotiations as contemplated in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34.

[20] HRM now urges this Court, on appeal, to consider the fact that HRM is no longer asking for termination or discipline of the employee. The suggestion is that this Court is to consider only the *OHSA* issues. With the greatest respect to HRM, that is not the case that was before the arbitrator. This Court must review the decision of Justice Moir wherein he considered the reasonableness of the arbitrator's decision. This Court is not to embark on a different inquiry based on a different scenario as now proposed by the appellant. The change in relief requested by the appellant would change the entire context of the case. This Court would no longer be adjudicating the issue that was before the arbitrator. In effect, the appellant is now asking this Court to consider a case which was never considered or decided by the arbitrator.

[21] A similar request was made in *Ayangma v Prince Edward Island Eastern School Board*, 2008 PESCAD 10, and the court said:

> ¶38 …It was well beyond the scope of the jurisdiction of the applications judge in reviewing the panel's exercise of jurisdiction pursuant to the *Judicial Review Act*, to assess either the reasonableness or the correctness of the Panel's decision with respect to a remedy the Panel never considered, never decided and was never asked to decide. ...

[22] Mr. Jeffery had his employment terminated. The arbitrator was asked to decide if that termination was in accordance with the collective agreement and within the employer's rights. The proceeding was in the context of a disciplinary matter where the employer had imposed a harsh penalty, termination of employment, when dealing with an employee suspected of having consumed drugs

on one occasion at work. The employer attempted to justify the termination using non-existent rules and policies.

[23] The arbitrator never considered, never decided, and was never asked to decide a non-disciplinary matter dealing with the extent of an employer's rights under the *OHSA*.

[24] It is important that the parties understand that this decision is not a pronouncement on the rights and duties of HRM in the context of *OHSA* issues. HRM was faced with a situation where a supervisor had, what he thought was, the proverbial "smoking gun" , or in this case "smoking truck". If HRM had concerns about public or workplace safety then I acknowledge that HRM was obliged under the provisions of the *OHSA* to take steps to ensure those safety concerns were addressed. HRM now says it is concerned that Mr. Jeffery may drive a HRM vehicle while under the influence of intoxicating substances. Mr. Jeffery was an authorized driver of HRM vehicles. Mr. Jeffery had at least turned a HRM vehicle around on the day in question.

[25] The case before this Court is substantially different than the *Irving* case where the employer was seeking to impose a random drug testing program on all employees in a part of their operations. The right to conduct random testing was not a part of the collective agreement. The Supreme Court of Canada rejected the random testing scheme as proposed.

[26] In the present case there was nothing random. HRM had evidence that led them to suspect that an employee in a designated, high risk position had consumed drugs. That fact distinguishes the present case from the *Irving* case.

[27] In situations where there is evidence of drug use or evidence of intoxication of an employee working in high risk positions, employers have far greater rights and indeed obligations. HRM may be able to prohibit the driving of HRM vehicles in certain circumstances until a risk assessment is completed. That being said, HRM cannot apply non-existent rules and policies to justify a termination after the fact.

[28] The arbitrator in this case was not asked to review a grievance about whether a worker should be prohibited from operating a vehicle prior to a risk assessment. The arbitrator was asked to consider a disciplinary action in the context of an existing collective agreement.

[29] I find no reversible error in the decision of Justice Moir. As indicated on the date of the hearing, the appeal stands dismissed. The respondent is entitled to costs, inclusive of disbursements, in the amount of $2,500.

Scanlan, J.A.

Concurred in:

Hamilton, J.A.
Beveridge, J.A.