SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia Teachers' Union v. Nova Scotia (Education), 2011 NSSC 426

Date: 20111028
Docket: Hfx. No. 336640
Registry: Halifax

Between:

Nova Scotia Teachers Union

Applicant

v.

The Minister of Education of the Province of Nova Scotia

Respondent

D E C I S I O N

Revised decision:	The date in the right hand corenr has been corrected from 20111013 to 20111028. This decision replaces the previously released decision.
Judge:	The Honourable Justice Suzanne M. Hood
Heard:	September 13, 2011
Written Decision:	December 6, 2011 (*Written release of Oral Decision of Oct. 28, 2011)*
Counsel:	Gail Gatchalian for the Applicant Dale Darling for the Respondent

By the Court:

[1] A teacher whose probationary contract was terminated filed a grievance pursuant to the Teachers' Provincial Agreement. She alleged that the mandatory hearing process was flawed. The arbitrator concluded that she did not have jurisdiction to deal with the grievance. The issue is the jurisdiction of the arbitrator.

FACTS

[2] The grievance was filed pursuant to the Teachers' Provincial Agreement. It alleged the Annapolis Valley Regional School Board failed to provide the probationary teacher with the procedural rights mandated by the collective agreement and the *Education Act*, S.N.S. 1995-96, c. 1, before terminating her probationary contract.

[3] Article 20.05 of the Teachers' Provincial Agreement ("TPA") provides for termination of probationary contracts. It provides as follows:

> 20.05 The employer may:

> (i) by notice in writing given to the teacher not later than the fifteenth (15th) day of May, terminate a probationary contract at the end of the first (1st) or second (2nd) year;

[4] That article mirrors s. 34 (2) (a) of the *Education Act.* Article 20.06 provides for a hearing before termination.

> 20.06 An employer shall not terminate a probationary contract pursuant to (i) of 20.06 until:
>
> (i) the employer has given the teacher written notice of the reasons upon which the termination is to be based, and
>
> (ii) within fourteen (14) days but not before seven (7) days after the employer has given notice to the teacher pursuant to (i) of 20.06 an opportunity has been given the teacher by the employer to appear before the employer in person, with or without counsel to present comments upon the notice and reasons upon which the termination is to be based.

That article mirrors s. 34(3) of the *Education Act.*

[5] The grievance filed stated in part:

> The alleged grievance contends that the process followed by the Annapolis Valley Regional School Board on May 13, 2009 to terminate my probationary contract was contrary to Articles 3, 5, 20.05 and 20.06 of the Teachers' Provincial

Agreement, Section 34 of the *Education Act*, Sections 1 and 7 of the *Canadian Charter of Rights and Freedoms* and breached the Board's duty to provide procedural fairness and actual justice.

My concerns include but are not limited to the following:

1. The failure of the board to disclose to me the reasons upon which the termination of my probationary contract was to be based;

2. The time limit that was imposed on my comments to the Board;

3. The limitation on my right to appear before the Board with Counsel that was initially imposed;

4. The order of proceeding before the Board that required me to proceed first, before I heard the reasons upon which the termination of my probationary contract was to be based;

5. The refusal by the board to allow me to comment on the reasons upon which the termination was based after they were provided in the oral submission to the Board by the Board's Director of Human Resources. The reasons provided by the Board's Director of Human resources included new information that was not previously disclosed to me and information that the Board's Director of Human Resources stated would not be relied upon;

6. That persons other than the members of the Board remained in the closed door meeting of the Board when it deliberated on my termination including the Superintendent of the Board and the Regional Education Officer; and

7. Any other matters that may arise during the grievance and arbitration process.

[6] The arbitrator, Susan Ashley, rendered her decision on August 31, 2010. She concluded that she had "no jurisdiction to decide the grievance." The Nova Scotia Teachers Union ("NSTU") seeks judicial review of the arbitrator's decision. The Minister of Education (the "Respondent") says the application for judicial review should be dismissed.

Standard of Review

[7] The parties agree that, pursuant to *Dunsmuir v. New Brunswick*, 2008 SCC 9, the standard of review of an issue of jurisdiction is correctness. I agree.

Analysis

[8] The *Teachers' Collective Bargaining Act*, R.S.N.S. 1989 c. 460 ("TCBA") provides in s. 29 for all disputes relating to the collective agreement to be resolved by arbitration. Section 29 provides as follows:

> 29 (1) Every professional agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.

(2) Where a professional agreement does not contain a provision as required by this Section, it shall be deemed to contain the following provision:

> Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has ben violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration. If the parties fail to agree upon an arbitrator, the appointment shall be made by the Minister of Labour for Nova Scotia upon the request of either party. The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any teacher or employer affected by it.

[9] The arbitrator therefore has exclusive jurisdiction over disputes relating to "the interpretation, application or administration of a collective agreement including "whether a matter is arbitrable." An arbitrator has no jurisdiction to deal with a grievance where there is a statutory exclusion from the grievance process. In this case, s. 34 (4) of the *Education Act*, mirrored by Article 20.07 of the Teachers' Provincial Agreement, provides there is no grievance procedure available with respect to termination of a probationary contract.

[10] Section 34(4) provides:

> (4) Where a school board terminates a probationary contract, the termination is not subject to any grievance procedure provided in a contract relating to the employment of the teacher nor to any appeal.

Arbitrator Ashley relied on that section of the *Act* in concluding she did not have jurisdiction to deal with the grievance.

[11] The NSTU focuses on the process leading to the Board's decision to terminate the probationary contract. The Respondent focuses on the remedy sought by the grievance, a declaration that the termination was invalid. The grievance stated:

> As a remedy, I seek, among other things, a declaration that the Board violated the Teachers' Provincial Agreement, the *Education Act*, the *Canadian Charter of Rights and Freedoms* and my right to procedural fairness and natural justice, and an order that the termination of my probationary contract was void and a nullity and, therefore, of no force and effect. I also ask to be compensated for any and all losses.

[12] The NSTU says if the proper procedure was not followed, it is up to the arbitrator to determine the remedy. The NSTU says that s. 34(4) and Article 20.07 mean that the merits of termination are not subject to the grievance procedure. It says that, if the proper process is followed, the termination of a probationary contract is final.

[13] The Respondent says the arbitrator has no jurisdiction because of the wording of s. 34(4) of the *Act*. It says, however, this does not leave the grievor without a remedy as she can seek judicial review of the Board's decision.

[14] The Respondent says that *Hunter v. The Inverness School Board*, [1991] N.S.J. No. 350 (T.D.) is authority for its position. It says that, because the same issue arose and the teacher sought judicial review rather than filing a grievance, this is evidence of the proper interpretation of s. 34(4).

[15] The NSTU says that the decision pre-dated *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 and the exclusive jurisdiction model of labour arbitration. It also says that the issue was not raised and, therefore, the decision is not authority for the proposition that judicial review of the Board's decision is the appropriate procedure to follow. I agree. Although an employee (Hunter) took one route in 1991 that does not necessarily mean that the NSTU, on behalf of a teacher, does not have the right to grieve in 2011.

[16] The first issue in deciding if the arbitration decision is correct is whether the dispute falls within the exclusive jurisdiction of the arbitrator.

[17] In W*eber*, the Supreme Court of Canada concluded that statutory provisions providing for the settlement of disputes by arbitration oust the court's jurisdiction over disputes arising under a collective agreement. In para 50, the court said in Weber:

> 50 The final alternative is to accept that if the difference between the parties arises from the collective agreement, the claimant must proceed by arbitration and the courts have no power to entertain an action in respect of that dispute. There is no overlapping jurisdiction.

[18] The Nova Scotia Court of Appeal in *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 38, reviewed the history of the exclusive jurisdiction model. In paras. 16-18, Cromwell, J.A. said:

> [16] Since at least the mid 1980's, the Supreme Court of Canada has recognized that the courts should be cautious not to undermine ' ... a comprehensive statutory scheme designed to cover all aspects of the relationship of the parties in a labour relations setting.'... To avoid doing 'violence' to such a scheme, the courts ought to show 'judicial deference' by not routinely hearing cases that fall within it. ... This hands-off policy applies not only where there are clear legislative provisions which expressly oust court jurisdiction. It also applies where the scheme as a whole makes it clear that the courts were intended to have ' ... but a small role if any to play in the determination of disputes covered by the statute.'... (citations omitted)

> [17] **Weber v. Ontario Hydro** (1995] 2 S.C.R. 929 is still the leading case. Its holding was summarized in the *Morin* case ... at para. 11:
>
> > (i) **Weber** holds that the model that applies in a given situation depends on the governing legislation, as applied to the dispute viewed in its factual matrix. In **Weber**, the concurrent and overlapping jurisdiction approaches were ruled out because the provisions of the Ontario **Labour Relations Act**, R.S.O. 1990, c. L.2, when applied to the facts of the dispute, dictated that the labour arbitrator had exclusive jurisdiction over the dispute.
> >
> > (ii) **Weber** does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction. ...
> >
> > (iii) Because the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator.
>
> [18] To carry out the required analysis, the court must address two main questions. The first concerns the ambit of the dispute resolution scheme and the second concerns whether the dispute falls within it. The court must look at the essential character of the dispute, determined according to its full factual context, and not at the legal characterization which the parties have chosen to place on it: ...

[19] The Court of Appeal in *Cherubini* said that giving exclusive jurisdiction to arbitrators respects the objective of labour legislation to minimize the role of courts in workplace disputes. Cromwell, J.A. said in para. 41:

> [41] ... A significant objective of this comprehensive scheme is to minimize, if not eliminate entirely, the involvement of the courts as first instance decision-makers with respect to workplace disputes.

[20] The question therefore is "whether the dispute viewed with an eye to its essential character, arises from the collective agreement." (*Weber*, para. 67) In *Frayne v. Quinlan*, 2008 NSSC 63, the Court concluded that the final settlement provision in the *TCBA* requires disputes arising under the TPA and local agreements to be resolved by arbitration. The court said in para. 27:

> [27] The combined effect of the *Teaching Profession Act*, the TCBA and the two collective agreements is to provide for the settlement by arbitration of all disputes between teachers and their employers with respect to the meaning and violation of a collective agreement.

[21] The Court concluded that the intent was that disputes go to arbitration. The Court said in para. 30:

> [30] I conclude that the ambit of the legislation in the two collective agreements is such that the intent is that disputes are to be resolved by arbitration.

[22] In this case, determining whether the dispute arises from the collective agreement requires an interpretation of the *Education Act*. The leading authorities

on statutory interpretations are *Rizzo v. Rizzo Shoes, Ltd.* [1998] 1 S.C.R. 27 and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42. In both decisions, the Supreme Court of Canada quoted the following passage from Driedger's Construction of Statutes (2nd ed. 1983):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (quoted in para. 21 of Rizzo and para 26 of Bell)

[23] Furthermore, s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235 deals with the interpretation of statutes. It says:

> (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

[24] As the applicant pointed out in her brief, there are additional principles arising from these authorities. I quote from para. 58 of the applicant's brief and have inserted the relevant case authority:

- Every act "shall be deemed to be remedial" and 'receive such fair, large and liberal' construction and interpretation as will best ensure the attainment of the object of the *Act* according to its true intent meaning in spirit. (*Rizzo*, para. 22)

- When interpreting legislation that protects employees, for example, notice of termination provisions in employment standards legislation, the Court should favour an interpretation that extends protection for employees over one that does not. *(Rizzo, para. 24)*

- Benefits-conferring legislation, such as legislation providing minimum standards and benefits to protect the interests of employees, should be interpreted in a broad and generous manner. *(Rizzo, para. 36)*

- Any doubt arising from difficulties in interpreting the language of benefits-conferring legislation should be resolved in favour of the employee or claimant to the benefit. *(Rizzo, para. 36)*

- A statute should be interpreted to foster harmony, coherency and consistency with other statutes where the statutes form part of a larger statutory scheme. *(Bell, para. 27)*

- The court should strive to interpret a legislative provision in a way that is compatible with both the object of the legislation as a whole as well as with the object of the provision itself, and should avoid an interpretation that produces absurd or illogical consequences. *(Rizzo, paras. 27-29)*

- The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. *(Rizzo, para. 31)*

- Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of the legislation. *(Rizzo, para. 35)*

[25] Applying these principles to s. 34(4) of the *Act*, I conclude that when the word "termination" is used it should be narrowly defined. If so, it refers to the act of termination in s. 34(2) which follows the notice and hearing provisions referred to in s. 34(3).

[26] Before the enactment of the predecessor to s. 34(3) in 1981, there was no provision for a hearing for probationary teachers before their contracts were terminated. Section 76 of the *Education Act*, R.S.N.S. 1967 c. 81 was amended in 1969 to provide that the contracts of probationary teachers could be terminated as follows.

> (3) In the case of a probationary contract, the school board may,
>
> (a) by notice in writing given to the teacher prior to the thirtieth day of April, terminate the contract at the end of the first or second year; or
>
> (b) by notice in writing suspend or dismiss the teacher at any time during the year for incompetency, persistent neglect of duty, immoral conduct or unsatisfactory performance of the probationary contract.

[27] In 1981, that section was further amended to provide for a hearing before a probationary contract was terminated. The amendment provided:

(5A) An employer shall not terminate a probationary contract pursuant to clause (a) of subsection (5) until

(a) the employer has given the teacher written notice of the reasons upon which the termination is to be based; and

(b) within ten days after the employer has given notice to the teacher pursuant to clause (a) an opportunity has been given the teacher by the employer to appear before the employer in person, with or without counsel, to present his comments upon the notice and reasons upon which the termination is to be based.

(5B) Where an employer terminates a probationary contract, the termination is not subject to any grievance procedure provided in a contract relating to the employment of the teacher nor to any appeal.

[28] When the amendments were introduced into the House of Assembly, the Minister of Education, The Honourable Terence Donahoe, said on June 16, 1981 at p. 4461:

> ... this legislation . . .represents an agreement on the part of the government to provide a situation whereby if a school board proposes to terminate a probationary teaching contract, the school board would provide notice to the probationary teacher to the effect that it is indeed the intention of the board to do that, and that the board would provide to the probationary teacher some explanation as to why it is that the contract not be renewed, or not be made permanent; and, further, that upon receipt of that information from the board the school teacher have the opportunity to have his or her say, or make reaction or response to the school board, in regard to the sufficiency or adequacy or, indeed, accuracy of the information upon which the proposal by the board to terminate is based.
>
> Following that opportunity being made available to the teacher, the school board then meets, concludes the issue one way or the other, yes, we will terminate

> the contract and not rehire that probationary teacher or, on the strength either of any representations made by or on behalf of the teacher, or for any other reason that might ensure in the interim, the school board is at liberty, obviously, to change its intention and act on a different course, and renew the contract, if that is their desire.
>
> There is, as all members will see, a provision in the legislation which again is agreed to by the union, that where an employers does, in fact, terminate a probationary contract, that termination is not, in any way, shape or form, subject to any grievance procedure provided for in any collective agreement, in any contract relating to employment of that individual teacher, or of teachers generally, nor is it subject to and available as a subject of appeal under the Education Act itself.

[29] After hearing from several other honourable members, the Minister continued at p. 4469:

> The honourable member from Cape Breton South suggests to me, that if I am going to provide that notice of termination should be given and contain reasons for the termination, then I should not include the principle that is set out in subsection (5E), to the effect that it is, the final decision of the school board is neither grievable nor may it be the subject of an action.
>
> It is my view that if this Legislature is to pass, does indeed pass this piece of legislation, and says in the legislation that that decision is not grievable, nor is that decision not able to be the subject of an appeal under the terms of the Education Act then, as far as I am concerned, no arbitrator, or, nor any judge would be able to be seized of jurisdiction, because they would be flying in the face of legislation which states that they have not, there is no matter on which they are entitled assume jurisdiction, to hear evidence and to ultimately render a decision.

[30] He continued at p. 4470:

> The sufficiency of reasons because it is specifically addressed is handled, but whether or not from a procedural point of view the appropriate notice at the appropriate time giving the possibility of a response for the teacher, whether that was done in accordance with the legislation is a matter which could be the subject of litigation. We felt that the words, the notice of termination, may indicate that it may be misconstrued by some or in some situation as indicating that the board had the authority to send a notice saying you are terminated and here are the reasons you are terminated. You can come to talk to us about it if you like, but we have made our decision, you are terminated. We did not want that to happen.
>
> What we want to have happen is a notice that goes to the teacher and says we intend to terminate on the basis of the following reasons, if you wish the opportunity to be afforded you to come and say, give us a reaction or a response to those reasons, you are entitled to do so within a 10 day period.
>
> AN HON. MEMBER: Before they are terminated?
>
> MR. TERENCE DONAHOE: Before the termination is a final termination exactly.

[31] In my view, the intent of the *Act* was to give probationary teachers an opportunity to try to convince the School Board not to terminate their contracts. The interpretation above will allow for the attainment of that objective. It is a benefit conferred on probationary teachers and, for that reason, should be interpreted, in case of doubt, in a “fair, large and liberal” way so as to ensure the benefit is given.

[32] Although I do not give a lot of weight to the Hansard Report, it does, in my view, support this interpretation.

[33] The Minister distinguished between the hearing process and the act of termination. He referred to the possibility of flaws in the process leading to what he termed as "litigation." One cannot be sure what meaning the Honourable Minister intended when he referred to litigation. That is one of the reasons why it is difficult to give enormous weight to Hansard. He did not explain further.

[34] The Respondent says that, if the matter is remitted back to the arbitrator, she cannot give the remedy sought, that is, is to declare the termination invalid, because of s. 34(4) of the *Act*. The Respondent therefore says it would be an absurd result to have a successful grievance, if that occurs, about the process followed by the Board and have no remedy.

[35] In my view, the remedy should not be the focus. It is clear from decided cases that arbitrators have a broad range of powers. In *Cherubini*, Cromwell, J.A. said in paragraphs 70-72:

> [70] Consideration of this issue must take account of the Supreme Court's expansive view of arbitral authority. As the Court noted in **Bisaillon v. Concordia University,** [2006] 1 S.C.R. 666, 'grievance arbitrators have very broad powers, both explicit and implicit' whereas the exercise of residual court jurisdiction is 'exceptional': see paras 42 and 55.

> [71] For example, **Weber** confirmed that arbitrators have the power and the duty to apply common law and statutes and to grant Charter remedies where the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed: ...

Continuing in that same paragraph:

> ... Arbitrators have the authority to award damages and, as mentioned earlier, to fashion remedies to correct and to prevent abuse of the collective agreement.
>
> [72] Thus, where a dispute otherwise falls within the exclusive jurisdiction of arbitrators, their remedial powers will be interpreted broadly and courts should intervene to provide additional remedies only in exceptional cases to prevent a real deprivation of an ultimate remedy.

[36] I therefore do not conclude that, if the grievance were successful, there would be no remedy available to the grievor. Thus, there is no absurdity.

[37] The NSTU points to two possible absurdities if the Respondent's position prevails. It says that only a probationary teacher who has a hearing and whose contract is not terminated would have the right to grieve the process followed. A probationary teacher whose contract is terminated would not have the right to grieve.

[38] It seems unlikely that a probationary teacher who has successfully convinced the School Board not to terminate his or her contract would grieve the process. However, the NSTU points out that it has a broader interest in ensuring that procedural rights of all probationary teachers are safeguarded.

[39] Secondly, the NSTU says that there would be a right to grieve the process in the event the decision to terminate was not made immediately after the hearing. In such a case, a grievance could be filed in the interim and the arbitrator would have jurisdiction. If the decision to terminate was made immediately following the hearing, another probationary teacher would have no right to grieve the process.

[40] In my view, these examples show the absurdity of an interpretation which denies jurisdiction to grieve the hearing process. An interpretation which does not result in such an absurdity is to be preferred over one that does.

[41] For these reasons, I conclude that the meaning of s. 34(4) does not prevent the process leading to termination from being grieved. It is the reasons for, or the merits of, the termination which cannot be grieved pursuant to s. 34(4).

[42] There are two separate sections of the *Act* and the collective agreement which deal with the subject. The first is the one giving procedural rights to a probationary teacher, so he or she has the benefit of an opportunity to be heard. It is only after that proper hearing has been conducted that the second section comes into play: the ability of the Board to terminate probationary contracts with no opportunity for that decision to be grieved.

[43] The procedural protections granted by s. 34(3) would be rendered valueless if the process is not followed. The remedy, if the NSTU is successful, will be up to the arbitrator. That is not the issue before me.

[44] The Respondent argues that there is a conflict between s. 29 of the *TCBA* and the provisions of the *Education Act*. The Respondent therefore says that s. 76 of the *TCBA* applies. It provides:

> 76. Where there is a conflict between the provisions of this *Act* and the *Education Act*, the provisions of the *Education Act* shall prevail.

[45] In my view, there is no conflict between the *TCBA* and the *Education Act.* This is a dispute which in its essential nature arises from the collective agreement, the provisions of which mirror the wording of the *Education Act*. The subject

matter of the dispute is the procedure followed by the Annapolis Valley School Board and, therefore, there is no conflict between the arbitration provision in the *TCBA* and the no grievance provision of the *Education Act* which deals with the actual termination of probationary contracts.

[46] The motion is granted and the matter is remitted back to the arbitrator to determine the grievance as originally filed.

COSTS

[47] The NSTU is entitled to its costs. If the parties cannot agree, I will accept written submissions by November 30, 2011.

Hood, J.