IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia Union of Public and Private Employees, Local 13 v. Halifax (Regional Municipality)*, 2006 NSSC 247

Date: 20060808
Docket: SH 263902
Registry: Halifax

Between:

Nova Scotia Union of Public and Private Employees, Local 13

Applicant

v.

Halifax Regional Municipality

Respondent

Judge:	The Honourable Justice Walter R.E. Goodfellow
Heard:	June 14, 2006 in Halifax, Nova Scotia
Counsel:	Ronald A. Stockton and Nancy L.Elliott for the applicant Randolph Kinghorne, solicitor the respondent

By the Court:

[1] Nova Scotia Union of Public and Private Employees represents approximately 685 administrative, technical and professional workers, (also known as “inside workers”) at the Halifax Regional Municipality (HRM). One of these members, Patricia Chant (Grievor), was a Call Centre Agent for HRM having commenced employment in June 2000 and ceased employment April 22, 2002 and apart from a few days work in August 2002 she has not worked since. In August 2002, she started receiving both long-term disability (LTD) benefits and Canada Pension Plan disability (CPP) benefits.

[2] Ms. Chant suffered from total disability and there is no likelihood of her being able to return to work.

[3] In August 2004 after Ms. Chant had been in receipt of LTD benefits for two years, the LTD insurer approached her about paying her a lump sum in full settlement of her LTD claim. Ms. Chant was aware that if she accepted the lump sum, HRM would terminate her employment on the ground that the buy-out was evidence that it was highly unlikely Ms. Chant would ever return to work. Ms.

Chant also knew when she accepted the lump-sum settlement that NSUPE disagreed with HRM's position and was prepared to grieve such a termination.

[4] In February 2005, Ms. Chant accepted a lump-sum settlement from the LTD insurer. HRM terminated her employment for all purposes. The termination meant that Ms. Chant was no longer entitled to participate in the pension plan provided under the collective agreement. Ms. Chant continued to receive Canada Pension Plan disability benefits.

[5] NSUPE filed a grievance that stated:

> The Grievor has been in receipt of LTD and CPP disability benefits because of a total disability resulting in her inability to return to any kind of work. She has accepted a settlement package from the LTD insurer and the employer has deemed this to be a termination of her employment. The termination of her employment resulted in her termination as an active member of the pension plan and the ineligibility for group benefits. [Affidavit of Ronald A. Stockton, Tab 1]

[6] Arbitrator Susan M. Ashley rendered a written decision on February 1, 2006, dismissing the grievance. She states in the final paragraph of the decision:

> If everyone agrees that the Grievor will not be returning to work now or in the future, which they do, the Employer must be entitled to accept that the employment relationship is at an end. I find that the Employer's termination in

> these circumstances was reasonable and not in violation of the collective agreement or the dictates of fairness. [Ibid, Tab 3, para. 80]

[7] Ms. Chant testified that if she were deemed to be an employee she was not in a position to return to work in any capacity and said there was “no chance” of her returning to work.

[8] NSUPE is seeking judicial review of Arbitrator Ashley’s decision. The material before the court includes the various exhibits attached to the affidavit of Ronald A. Stockton, solicitor for the Union.

COLLECTIVE AGREEMENT:

1.07 RECOGNITION OF EMPLOYER:

(a) The union recognizes that the Employer retains all rights not specifically taken away by this agreement.

(b) All rights reserved to the Employer are subject to the provisions of this collective agreement and shall be exercised in a manner consistent with the provisions of this collective agreement.

(c) The functions of the Employer within the scope of this collective agreement shall be exercised in a fair and reasonable manner.

(d) The Employer shall not discipline or dismiss an employee except for just cause. [Ibid, Tab 2, p. 6]

13.09 JOB PROTECTION WHILE ILL:

(a) An employee who is or will be eligible for benefits under a Group Long Term Disability Plan (LTD) shall retain her/his right to her/his position for twenty-four (24) months after the first day on which she/he is eligible for LTD benefits. The Employer may fill the employee's position on a temporary basis during this time and any employee temporarily placed in a position because of the temporary arrangement shall return to his/her regular position upon the return of the employee from her/his illness.

(b) The Employer, after the expiration of such twenty-four (24) months, may declare the position vacant and fill it in the normal manner. This shall be deemed not to be a termination of employment and the employee shall retain the right for a further one year to apply for any posted position as if she/he were regularly working in the position she/he held prior to the illness, provided that the Employer may require a medical report from the employee's qualified medical doctor to show medical fitness for the position the employee would fill if she/he were the successful applicant.

(c) Exhaustion of sick leave credits will not warrant termination. [Ibid, Tab 2, p. 38 to 39]

17.06 PENSION PLAN:

(a) The Employer shall continue to provide a pension plan for all eligible employees.

> (b) The pension plan shall be the Halifax Regional Municipality Pension Plan as properly amended by the Pension Committee from time to time.
>
> (c) The Employer agrees that the pension plan of the Halifax Regional Municipality shall not now or at any time be modified or changed in any respect as it affects directly or indirectly the interests of the employees without the express written consent of the Union or Pension Committee as provided by the terms and conditions of the plan. [Ibid, Tab 2, p. 54]

HRM PENSION PLAN:

[9] The collective agreement provides for the establishment of an employee pension plan. The parties agree that the pension plan is incorporated by reference into the collective agreement and that it was appropriate for the arbitrator to treat the same as being part of the contractual relationship between the parties.

[10] The collective agreement provisions 17.06 (a) provides for the continuation of the pension plan for all eligible employees.

> 2.18 Member means an Employee or former Employee who has become a Member of the Plan and who continues to be entitled to benefits under the Plan.
>
> 3.04 Termination of Participation Not Permitted

A Member's participation in the Plan must continue while he remains an Employee. A Member does not cease to be a Member merely because he earns less than 25% of the YMPE in a calendar year.

10.04 No Right to Employment

The plan shall not be construed to create or enlarge any right of any person to remain in the employment of the Municipality, nor shall it interfere in any manner with the right of the Municipality to discharge any person.

A6.01 Member Required Contribution During Disability

A member who becomes Totally Disabled after April 1, 1998, and whose net income while Totally Disabled is less than his net income immediately prior to becoming Totally Disabled, is exempted from the requirement to make contributions to the Plan during a period of Total Disability that is included in Credited Service under Sections A1.01(c)(i) or A1.02(ii) (in this Section A6 referred to as a period of credited Total Disability), except to the extent that the Member is entitled to benefits under a disability income plan for the purpose of providing payment of all or a portion of the Member's contributions to the Plan.

...

For the purposes of this Section A6.01, "disability income plan" shall include disability income plans sponsored by the Municipality or a bargaining unit of the Municipality, the Canada Pension Plan, or the Workers Compensation Board [Ibid, Tab 4, p. A-21]

A1.02 Continuation and Termination of Continuous Service

During a period of credited Total Disability a Member's Continuous Service is deemed to continue until the earlier of:

(1) his Normal Retirement Date; and

(2) the day on which he ceases to receive benefits from a disability income plan as defined in Section A6.01 [Ibid, Tab 4, p. A-22]

A1.02 Credited Service Means:

(1) the years and months and partial months of the following periods of a Member's Continuous Service while a Member of the Plan:

...

(c) unpaid leaves of absence in respect of a period of Total Disability during which:

> (i) the Member receives disability income benefits from a plan sponsored by the Municipality or the Member's respective bargaining unit; or
>
> (ii) the Member is entitled to receive disability income benefits under the Workers' Compensation Act or the Employment Insurance Act; ... [Ibid, Tab 4, p. A-1]

*** All parties at the arbitration agreed that the reference to Employment Insurance Act should read Canada Pension Plan Act**

CASE LAW:

[11] The determination of the Standard of Review applicable in this case is to be determined by application of the directions set out by the Nova Scotia Court of Appeal in *Nova Scotia Government and General Employees Union v. Capital District Health Authority*, [2006] N.S.J. No. 153; and *Nova Scotia Teachers Union v. Nova Scotia Community College*, [2006] N.S.J. No. 64. Justice Fichaud, who wrote both decisions, states that a court must determine the standard of review under a pragmatic and functional approach and then apply that standard to the arbitrator's award *(NSGEU* case at para. 35). He summarized the pragmatic and functional approach as follows:

> Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence or wording of a private clause or statutory appeal; the comparative expertise of the tribunal and the court on the appealed or reviewed issue; the purpose of the governing legislation; and the nature of the question, fact, law or mixed. The ultimate question is whether the legislature intended that the issue under review be left to the arbitrator. From this analysis the court selects, for each issue, a standard of review of correctness, reasonableness, or patent unreasonableness. (*NSGEU* case at para. 36]

At paragraph 47 and 48 the Court stated:

> In the circumstances of this case, **the interpretation of article 1.02, admission of extrinsic evidence, and consideration of testimony respecting negotiating history and past practice are not discrete topics to be slotted at different levels of judicial intervention.** They are a continuum of analysis bearing on an overall question. The overall question - to determine the true intention of the parties as represented in their collective agreement - is the *raison d'être* of labour arbitration. The Legislature intended that this core question be determined by the arbitrator with minimal judicial intervation.
>
> For these reasons **I would apply patent unreasonableness**. As I will discuss, had the standard been simple reasonableness, I would reach the same conclusion on the appeal.

[12] Both counsel referred to the Supreme Court of Canada decision in *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230, 1993 CanLII 144 (S.C.C.). It is noted that on the general standard of review of arbitration awards LaForest, J. at page 14 for the majority of the court again endorse the patently unreasonable test and he stated:

> ... The Court was not asked to review the arbitrator's interpretation of the agreement at hand. Had that issue properly been before this Court, I have no doubt that the scope of our review of that aspect of the arbitration award would have been a narrow one – we would have embarked on a patent unreasonability enquiry.
>
> ...
>
> This Court has stated in previous cases that courts should, as a matter of policy, defer to the expertise of the arbitrator in questions relating to the interpretation of collective agreements;

...

> It is clear that an arbitrator has jurisdiction *stricto sensu* to interpret the provisions of a collective agreement in the course of determining the arbitrability of matters under that agreement. In that case the arbitrator is acting within his or her "home territory", and any judicial review of that interpretation must only be to a standard of patent unreasonableness. But this is a different case. Here, the viability and subsistence of the collective agreement is challenged. The company alleges that regardless of the interpretation of the agreement, it cannot survive to serve as the basis for this arbitration. The collective agreement is the foundation of the arbitrator's jurisdiction, and in determining that it exists or subsists the arbitrator must be correct.

[13] In her decision the arbitrator noted in paragraph 2 that she was appointed by the consent of the parties and that there were no objections to her jurisdiction or any preliminary matters raised.

[14] Under the *Nova Scotia Trade Union Act*, collective agreements are to contain a provision for "final settlement" of all differences concerning the agreements meaning of violation and there is no statutory appeal. The Union takes a different position with respect to the expertise of the arbitrator at the same time acknowledging that an arbitrator has expertise in interpreting the provisions of a collective agreement. It is worthwhile to examine what the arbitrator did in this arbitration. During her review of the grievance and as set out in her award, the

arbitrator heard extrinsic evidence on the formation of the pension plan. Ms. Ashley heard the evidence of Donna Wheaton for the Union. Ms. Wheaton has been employed by the HRM since 1984 and a member of the Union throughout at high levels at the Local and Parent Body level and is currently a member of the Joint Pension Committee. Ms. Wheaton testified that she was involved in devising the Employee Pension Plan on amalgamation of the various municipal units into HRM. Her evidence appears to have been fairly extensive and she agreed that a small part of the employee's premiums pays for the pension benefit provision. This opinion was considered by the arbitrator. Ms. Wheaton acknowledged that when the Pension Committee addressed various issues, there were no discussions as to what would transpire if an employee took a buy-out of the LTD entitlement and if such would result in a right to waiver of contributions being cancelled. Ms. Wheaton did agree that in order to participate in the pension plan it was necessary to be an "employee". The grievor herself gave evidence as did Paul Flemming, the manager of Total Compensation for HRM since 2003 and he outlined the pension plan is administered by a Joint Committee of employees and management of which he is a member and that the Committee utilized Mercers to administer the plan.

[15] The arbitrator had the evidence before her to weigh in reaching her ultimate determination that the employee's termination in the circumstances was reasonable and not in violation of the Collective Agreement or the dictates of fairness. Deference should be shown to the expertise of the arbitrator chosen by both parties and in this particular case her decision is a reasoned and reasonable one. The purpose of the governing legislation when you are dealing with mandatory labour arbitration is to provide a speedy and final determination of disputes in the workplace. The arbitrator heard evidence on the past practice on the treatment of disabled employees and she had an opportunity to take into account the evidence of the grievor and the clear admission of the grievor that she had no chance of returning to employment and that she knew that prior to acceptance of the LTD buy-out.

CONCLUSION:

[16] My reading of the entire record before me and in particular the arbitration award of February 1, 2006 leads to the conclusion that the appropriate standard of review is one of patent unreasonableness and applying that standard there is no basis whatsoever to interfere with the arbitrator's award. I would also add, having

taken a somewhat probing analysis, I have no reservations in concluding that had the standard of review been one of reasonableness that the arbitrator's award should stand. The arbitrator specifically found the grievor was aware that if she took the buy-out of her LTD her employment would be terminated and her further entitlement to pension waiver would end. The arbitrator quite appropriately concluded that the grievor was not in a position to return to work and would not in the future return to work particularly within the three year time frame of Article 13.09 of the Collective Agreement. The grievor effectively put herself in a position that she was no longer an employee and it is my view that it was entirely reasonable for the arbitrator to conclude that the employer must be entitled to accept in the circumstances existing here that the employment relationship had come to an end.

[17] Application dismissed.

J.