SUPREME COURT OF NOVA SCOTIA

Citation: Halifax (Regional Municipality) v. Canadian Union of Public Employees, Local 108, 2013 NSSC 164

Date: 20130528
Docket: Hfx No. 400019
Registry: Halifax

Between:

Halifax Regional Municipality

Plaintiff

v.

Canadian Union of Public Employees, Local 108

Defendant

Decision

Judge: The Honourable Justice Gerald R. P. Moir

Heard: January 10, 2013

Counsel: Randolph Kinghorne, for applicant
Susan Coen, for respondent

Moir J.:

Introduction

[1] Mr. Jeffery works as a labourer for the Halifax Streets Department. The municipality asked him to submit to a drug test. It told him the request was "based on evidence and suspicion that you may have been under the influence of an illegal substance." That is to say, a supervisor thought he smelled marijuana in a city truck in which Mr. Jeffery was a passenger and a co-worker was the driver.

[2] Mr. Jeffery refused to cooperate. He said he used marijuana when not at work and, "it is none of your business what I do when I'm not here." (Evidence of cannabis ingestion remains in one's system for a long time, and testing will not tell whether there was impairment during work hours.)

[3] The Superintendent of Municipal Operations suspended Mr. Jeffery for his lack of cooperation. Later, the superintendent terminated Mr. Jeffery's employment because of "your lack of cooperation and direct violation of the HRM Substance Abuse Prevention Policy".

[4] Mr. Jeffery grieved both the initial suspension and the final termination. Arbitrator Susan Ashley heard evidence and gave an award last spring. She allowed the termination grievance and ordered reinstatement with full pay and benefits.

[5] The municipality seeks review of the decision on termination. It contends that the award should be reversed, but it does not propose termination. The remedy it now seeks is suspension without pay until Mr. Jeffery cooperates with a professional who will assess his drug use and give an opinion on whether it impairs his ability to safely operate vehicles at work.

Standard of Review

[6] The municipality submits that the award is to be reviewed for its correctness, that this court owes no deference to the arbitrator's decision.

[7] The argument against deference turns on the premise that the municipality has "a legal obligation to require the employee to attend for a risk assessment". It must protect public safety under the *Occupational Health and Safety Act.* It has

no choice but to take measures against the risks of marijuana use by an employee who operates a motor vehicle. The *Occupational Health and Safety Act* is not within a labour arbitrator's special expertise, and obligations under that statute supercede the collective agreement. So the argument goes.

[8] The issue before the arbitrator was whether the discipline imposed by the municipality upon Mr. Jeffery was justified. Public safety was part of the factual background in light of which the arbitrator had to decide justification, but the involvement of public safety obligations in this case did not give rise to a question of law separate from the core question: was the termination justified? On that issue, a reviewing court owes deference to the judgment of an arbitrator: *C.U.P.E. Local 963 v. New Brunswick Liquor Corp.,* [1979] 2 S.C.R. 227. And see, *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 54; and *Canada Post Corporation v. Canadian Union of Postal Workers*, 2011 NSSC 147 at paras. 14 - 15, to which the union referred.

[9] The municipality referred me to *Irving Pulp & Paper Ltd. v. Communications Energy and Paperworkers Union of Canada, Local 30*, 2011 NBCA 58. That decision does not assist the municipality's position. There the

question was whether the employer's alcohol and drug testing policy was legal. Arbitrator Ashley dealt with the entirely factual question of compliance, or proof of non-compliance, with the employer's policy.

[10] The municipality also argued that "HRM requiring [Mr.] Jeffery's attendance for a risk assessment ... is not disciplinary". The municipality chose a disciplinary response instead of the non-disciplinary options referred to in a decision of Arbitrator Peter MacKeigan, upon which the municipality relies: *Re. Tupper*, [1997] NSLAA 15 (MacKeigan, N.S.L.A.) at para. 38. The question was not whether the municipality should have referred Mr. Jeffery for assessment. The question for the arbitrator was whether his refusal constituted just cause, and an arbitrator's decision on that subject calls for deference.

[11] Therefore, the decision is to be reviewed for its reasonableness. This court must track the arbitrator’s reasoning path and decide whether the result fell within the range of reasonable outcomes: *Dunsmuir* as modified by *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

Reasoning Path

[12] The decision begins by briefly setting out the chain of events:

> There is no significant dispute in the facts. On December 2, 2011 the Grievor and Steve Grantham were in their city truck, with Mr. Grantham in the drivers seat. Supervisor Wyatt George came to the side of the truck, where the window was open, and said he smelled marijuana. The Grievor and Mr. Grantham denied there was a smell of marijuana. Mr. George let them go and told them to drive safely.
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> Approximately an hour later the two employees were called to a meeting at headquarters, and in another half hour they arrived. They were asked to take a drug test. The Grievor refused, saying that he was a recreational user of marijuana and that the test would be positive anyway. Mr. Grantham tried unsuccessfully to do the test. Both men were suspended with pay pending further investigation.
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> The two employees were called to another meeting on December 12. The Grievor was asked questions about his drug use, and was considered non-cooperative by the Employer. Both employees were suspended without pay for two days. The Grievor was referred to a Substance Abuse Professional, but would not answer questions about his off-duty drug use, which he considered to be none of the Employer's business. The consultant reported back to the Employer, saying that he could not assess the Grievor's risk because of his guarded responses. The Employer terminated the Grievor.

[13] The decision reproduces the suspension and termination letters and, then, reviews the evidence.

[14] The municipality had adopted a substance abuse policy. The policy was put in evidence. It is intended "not to be inconsistent with collective agreements". The

decision reproduces much of the policy at para. 10. It includes a set of rules about impairment and having drugs at work, which lead to this: "Employees must cooperate with the implementation of this Policy including the submission to testing as required under this Policy."

[15] The part of the policy on testing applies to "Safety Sensitive Positions". The decision refers to evidence that the position of labourer had been identified as safety-sensitive.

[16] The provisions about testing that were essential to the case before the arbitrator provide that "testing may be performed" if "a supervisor ... determines there is reasonable cause to suspect an employee of alcohol or other drug use ... in violation of this Policy". The determination must be based on "the supervisor's specific observations" such as "observed use or evidence of use of a substance", "Erratic...behaviour", "...uncoordinated walking, staggering, weaving", "Changes in speech patterns".

[17] Evidence given by witnesses called for the municipality, and the policy itself, made it clear that the provisions for testing are not engaged by off-duty

behaviour or casual drug use rather than drug dependency (see paras. 12, 15, and 18).

[18] The municipality called the co-worker. He said Mr. Jeffery does not drive the truck (para. 20). He smokes nothing in the truck (para. 22). The co-worker has never seen Mr. Jeffery impaired (para. 26).

[19] On the day in question, the supervisor confronted the co-worker about what the supervisor thought was the smell of marijuana in the truck. The co-worker denied there was such a smell, and he said the supervisor parted with "have a good day" (para. 22).

[20] The supervisor also testified. He said he went up to the truck, the windows were down, and he smelled marijuana coming from the cab area. He confronted the men and the co-worker denied they had marijuana. He was confused about what to do. So, he let them drive away with "Be safe" (para. 27).

[21] The decision provides a detailed review of the evidence about Mr. Jeffery's meetings with municipal officials leading to the demand that he submit to an

assessment and it reviews the assessor's testimony. The officials did not have enough information to form any conclusion about impairment or dependancy (paras. 29 to 57). The review of Mr. Jeffery's testimony is at paras. 59 to 68.

[22] After reviewing the submissions, the decision provides the arbitrator's reasons.

[23] Arbitrator Ashley dealt directly with the municipality's argument that the dismissal was in compliance with the *Occupational Health and Safety Act* rather than an exercise of disciplinary powers under the collective agreement. "In my view, the suspension and termination were disciplinary actions" (para. 87). And, at para. 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, around noon on December 2.

[24] As the arbitrator saw it, evidence suggesting drug use or impairment on the job by Mr. Jeffery was very weak. None of the indications of likely impairment provided in the policy were observed by the supervisor (para. 94). Arbitrator Ashley gave little weight to the evidence of one official that Mr. Jeffery's eyes were glassy and pin-pointed, because others made no such observation (para. 95). She gave no weight to evidence about Mr. Jeffery's demeanor and attitude when encountered that day. It "likely illustrates his usual temperament, in a stressful situation" (para. 96).

[25] Having assessed the evidence, the arbitrator made this finding:

> I find that reliance on the mere smell of marijuana, in the absence of any other indicia of impairment, and particularly without making further inquiries, was unreasonable in the circumstances.

[26] The refusal to take a drug test was not a ground for termination. "There is no information the drug test could give the Employer which could confirm whether the Grievor smoked marijuana at work on December 2" (para. 101). This finding was supported by evidence that marijuana smoked on the weekend could test positively on the work days that follow.

[27] As for referral to a substance abuse professional, the municipality's assertion that refusal to take a drug test is a "deemed positive test result" was rejected by the arbitrator. She said, at para. 103

> 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.

[28] Arbitrator Ashley then reviewed the "few references in the Policy to the Substance Abuse Professional". None could apply to Mr. Jeffrey except, possibly, the section on "Assessment/Rehabilitation". In that connection the arbitrator said, at para. 107 and 108

> A key component of the "assessment/rehabilitation" portion of the Policy is that it applies to employees who are alcohol or drug dependent. Mr. Cashman's evidence of the difference between drug usage and drug dependency, i.e. that the latter would result in negative life consequences while the former would not, is relevant. 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.
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> The Employer is entitled to have concerns about an admitted drug user. However, in the absence of reliable evidence of impairment on the job – which I find is the case here – testing will not assist. In the Grievor's case, the suspicion of smoking marijuana on duty should have assessed on its own merits, by a proper investigation.

Range of Reasonable Outcomes

[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. Arbitrator Ashley put it this way at para. 110:

> In all of the circumstances presented to me, I find that the Employer failed 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. In these circumstances the Grievor's refusal to submit to a drug test and to submit to the further assessment was reasonable and understandable.

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.

[30] The municipality argues for such a new approach. It says,

> The arbitrator's review of a managerial action is essentially the first rung of a judicial review of an employer workplace decision ... .

Occupational health and safety obligations demand that the arbitrator conduct the review with great deference to management. "[A]n employer's safety concern must be considered legitimate unless it can be clearly showing to be unfounded."

[31] The arbitrator must defer to"precautionary efforts to create a safe workplace". Arbitrator Ashley "substituted her own opinion for that of the employer on whether it was reasonable to require a risk assessment of Jeffery", that is to say Mr. Jeffery. So the argument goes.

[32] An employee who is aggrieved by any disciplinary decision of the employer may start a grievance and, failing satisfactory resolution, the union may refer the dispute to arbitration: Collective Agreement article 15.08. The employee "is considered innocent until the Employer has proven just cause": Article 23.01. "In cases of discharge ... the burden of proof of just cause shall rest with the Employer": Article 23.03.

[33] The Legislature was free to override the effects of the collective agreement when an employer has safety concerns. It did not do so. Nothing in the *Occupational Health and Safety Act* diminishes the worker's right not to be

dismissed without just cause or the municipality's onus to prove just cause. The municipality cannot dismiss Mr. Jeffery just because it has safety concerns about him.

[34] Arbitrator Ashley had to be satisfied there was just cause in order to uphold the municipality's termination of Mr. Jeffery's employment. She found the municipality failed to prove just cause. That finding was within the range of reasonable outcomes. It precluded termination. It precluded substitution of a lesser penalty.

Conclusion

[35] The challenge to the arbitrator's decision will be dismissed. The respondent will have costs against the applicant in the amount of $2,000 plus disbursements.

J.