



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Burke v. Newfoundland and Labrador
(Labour Relations Board)*, 2018 NLCA 32

Date: May 28 2018

Docket: 201601H0115

BETWEEN:

KEVIN BURKE

APPELLANT

AND:

NEWFOUNDLAND AND LABRADOR
LABOUR RELATIONS BOARD

FIRST RESPONDENT

AND:

NEWFOUNDLAND AND LABRADOR
ASSOCIATION OF PUBLIC
AND PRIVATE EMPLOYEES

SECOND RESPONDENT

AND:

MEMORIAL UNIVERSITY
OF NEWFOUNDLAND

THIRD RESPONDENT

Coram: White, Harrington and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and
Labrador, General Division 201601G1607

Appeal Heard: October 26, 2017
Judgment Rendered: May 28, 2018

Reasons for Judgment: Harrington J.A.
Concurred in by: White and Hoegg JJ.A.

Counsel for the Appellant: Self Represented
Counsel for the First Respondent: Matthew Moulton
Counsel for the Second Respondent: Paula M. Schumph
Counsel for the Third Respondent: Chris King

Harrington J.A.:

BACKGROUND

[1] Kevin Burke, the appellant, commenced employment in 1998 as a custodian at Memorial University of Newfoundland (MUN) and became a member of the Newfoundland and Labrador Association of Public and Private Employees (NAPE). Problems with the employment relationship arose in April 2003 when MUN issued a non-disciplinary letter to the appellant regarding his excessive usage of paid sick leave. NAPE filed a grievance on behalf of the appellant which ultimately led to arbitration hearings, proceedings before the Labour Relations Board (LRB) and court proceedings. MUN advised the appellant of the possibility of termination of employment. Negotiations between NAPE and MUN took place in an effort to resolve the impasse with the appellant. However, the appellant's chronic absences continued, leading to his employment being terminated for cause in 2005.

[2] A series of grievance arbitration hearings took place in 2006, 2007 and 2013 which addressed the conditions under which the appellant could be reinstated to his position with MUN. The appellant did not return to work, maintaining the position that no conditions ought to be attached to his continued employment. He has maintained this position through various court and arbitration proceedings since 2005.

[3] By agreement of MUN and NAPE, two arbitrators conducted hearings and rendered decisions in an effort to resolve the continuing impasse by fashioning terms of last chance agreements among the employer, MUN, and the

appellant. The appellant steadfastly refused to accept the terms of such agreements proposed by the arbitrators notwithstanding that NAPE, his bargaining agent, had taken an active role in negotiating a resolution between the appellant and MUN in conjunction with the arbitrators. NAPE urged the appellant to accept an arrangement so he could return to work. However, the appellant reaffirmed his resolve not to return to work with conditions regarding future absenteeism.

[4] All told, this troubled employment relationship has involved three arbitration hearings, three judicial review proceedings, three hearings before the LRB, and three appeals to this Court prior to the one currently before this Court. A summary of the history of the proceedings is set forth in the reasons of this Court in *Burke v. Newfoundland and Labrador Association of Public and Private Employees*, 2010 NLCA 12, 294 Nfld. & P.E.I.R. 230 at paras. 2-48.

THE APPEAL

[5] This appeal stems from a complaint the appellant filed with the LRB pursuant to section 130 of the *Labour Relations Act*, RSNL 1990, c. L-1 on March 17, 2015 alleging NAPE acted in a manner that was arbitrary, discriminatory or in bad faith in the handling of the 2005 grievance against MUN from the date of an LRB order of March 2012.

[6] The March 2012 LRB order originated from a prior complaint filed by the appellant on December 12, 2007, also pursuant to section 130 of the *Act*, alleging that NAPE processed his grievance in a careless or superficial manner. The LRB dismissed this complaint on February 18, 2008. The appellant sought judicial review of the LRB's decision to dismiss the complaint and his application was dismissed in a decision dated December 12, 2008. The appellant appealed the decision dismissing the judicial review application to the Court of Appeal. In a decision dated February 18, 2010, the Court of Appeal allowed the appellant's appeal on the basis that the LRB failed to engage in any analysis of the specific allegations that the appellant claimed demonstrated his grievance had been improperly handled. The Court remitted the matter to the LRB for reconsideration.

[7] Pursuant to the order from the Court of Appeal, the LRB conducted a 17 day hearing. On March 6, 2012, the LRB found that NAPE failed in its duty to fairly represent the appellant pursuant to section 130 of the *Act* and ordered NAPE to meet with MUN to attempt to resolve the grievance. The LRB noted that it did not have jurisdiction to make monetary awards or to order MUN to

action. In light of that, the LRB ordered NAPE to meet with MUN to attempt to resolve the grievance. In the event that NAPE and MUN were unable to reach an agreement, the LRB ordered MUN and NAPE to proceed to arbitration to resolve outstanding issues.

[8] NAPE met with MUN but MUN maintained its position that there were no outstanding issues to be resolved – all issues had been conclusively dealt with in the earlier arbitration decisions. Consequently, NAPE sought further arbitration. The parties again agreed to arbitration and, in a decision dated May 24, 2013, the arbitrator found that the appellant needed to provide MUN with a medical certificate 30 days before he could return to work, so long as a last chance agreement, on the same terms as the last chance agreement as outlined in the 2007 arbitration award, had been executed by that time.

[9] On July 22, 2013, MUN filed an application seeking judicial review of the 2013 arbitration decision and requested that the court quash the award. On August 12, 2013, the appellant filed an application to be added as a party to the proceedings, amongst other relief. His application was heard on October 22, 2013 and was dismissed. MUN's application was heard on February 19, 2014. In a decision dated October 22, 2014 the reviewing judge dismissed MUN's application to quash the 2013 arbitration award.

[10] On November 18, 2014, Mr. Burke, though not a party to the decision under appeal, filed a notice of appeal of the decision of the reviewing judge. NAPE filed an application to dismiss the appeal on the ground that Mr. Burke had no standing to bring the appeal. In a decision dated January 27, 2015, the Court of Appeal did not dismiss the appeal but found that "the notice of appeal should be struck out on the ground that no appeal by Mr. Burke lies to this Court ...and that to allow it to go forward would be to allow an appeal that is frivolous, vexatious or without merit to proceed" (2015 NLCA 4, at para. 22).

[11] The appellant filed the complaint at the center of this appeal with the LRB on March 17, 2015 pursuant to section 130 of the *Act* alleging NAPE acted in a manner that was arbitrary, discriminatory or in bad faith in the handling of the 2005 grievance against MUN since the LRB order of March 2012. The LRB ruled that the appellant's application was out of time by virtue of section 130 of the *Act* which reads in material part:

- (1) An employee in a bargaining unit, who claims to be aggrieved because his or her bargaining agent has acted in a manner that is arbitrary or discriminatory or in bad faith in the handling of a grievance that he or she has filed or attempted to file with

that bargaining agent in accordance with a procedure that has been established by the bargaining agent may make a written complaint to the board.

(2) A complaint made under subsection (1) shall be made within 90 days from the date on which the complainant knew or, in the opinion of the board, ought to have known, of the action or circumstances, giving rise to the complaint.

(3) The board shall investigate a complaint made to it under subsection (1) and determine whether the bargaining agent acted in a manner that was arbitrary or discriminatory or in bad faith.

[12] The LRB set out its reasons and conclusions in its decision of March 11, 2016 dismissing the appellant's complaint as follows:

75. It is apparent from the evidence that NAPE did its utmost, through supplying its ERO and legal counsel to present the arbitration, and through regular and meaningful communication with Mr. Burke, to ensure that Mr. Burke's grievance was vigorously pursued at arbitration. There was no evidence that Mr. Burke was treated in a manner that was discriminatory in the handling of his grievance. Likewise, there was no evidence to support any allegation that the union acted in bad faith in the handling of his grievance.

(Emphasis added.)

76. It is clear from the multitude of applications to this Board, the Supreme Court, the Court of Appeal, and the three arbitration awards, that Mr. Burke's opinion of the outcome of his 2005 grievance is not satisfactory to him. Essentially, he has a different opinion of what the arbitrator ought to have awarded and wants the arbitration appealed. NAPE, on the other hand, did not appeal the decision, having made a measured consideration of the positive and negative outcomes such an appeal could bring. NAPE and Mr. Burke are entitled to have a difference of opinion. However, such a difference of opinion does not mean that NAPE acted in a manner that was arbitrary, discriminatory, or in bad faith in how it handled the grievance.

The LRB concluded:

77. As was discussed above, Mr. Burke's complaint was untimely. He was notified by registered mail on July 19, 2013 of the union's final position with respect to the resolution his 2005 grievance. Even if he was not aware on that date of the circumstances that could have given rise to the within complaint, he knew or ought to have known of the circumstances giving rise to his complaint by July 30, 2013 and therefore ought to have filed his complaint with the Board no later than October 28, 2013. By filing on March 17, 2015 the complaint was untimely and the Board dismissed it.

78. Notwithstanding the finding that the complaint was out of time, the Board provided its reasons above for determining that, in any event, had the complaint been timely the Board would have dismissed the complaint pursuant to section 130 because the evidence does not support any allegation that NAPE acted in a way that was arbitrary, discriminatory, or in bad faith in how it handled Mr. Burke's grievance from March 2012 to the date this matter was considered by a panel of this Board on February 3, 2016. For those reasons, the Board made its order of February 3, 2016.

[13] The appellant applied to the Supreme Court of Newfoundland and Labrador for judicial review of the LRB's decision. The applications judge, in an oral decision on November 9, 2016, dismissed the appeal. It is this decision that Mr. Burke now appeals.

STANDARD OF REVIEW

[14] The standard of appellate review was addressed by Green C.J.N.L. in *Burke v. Newfoundland and Labrador Association of Public and Private Employees*, 2010 NLCA 12, 294 Nfld. & P.E.I.R. 230 at paras. 49-50:

[49] The standard of review by this Court of the decision of the applications judge on the choice of standard applicable on judicial review, or the application of that standard, is one of correctness. See, *Carpenters and Joiners of America, Local 579 v. Northland Contracting Inc.* (2006), 2006 NLCA 11, 261 Nfld. & P.E.I.R. 256 per Mercer J.A. at paras 14, 23; *Macdonald v. Mineral Springs Hospital*, 2008 ABCA 273, per Hunt J.A. at para. 19.

[50] In the current context, that means that this Court will examine the decision of the applications judge to determine whether the judge was correct in her choice of the applicable standard of review and the application of that standard in dismissing the application for judicial review. In other words do we agree, applying the appropriate standard of judicial review (determined by the applications judge to be a reasonableness standard), that the decision reached by the applications judge is one that this Court would have reached? If not, we will substitute our decision for that of the applications judge.

[15] On judicial review the applications judge found that the appropriate standard of review is reasonableness. I agree with the parties that the applications judge chose the appropriate standard of review. Thus what must be considered on this appeal is whether, in concluding that the LRB's decision was reasonable, the applications judge correctly applied the reasonableness standard.

ANALYSIS

[16] The applications judge, having determined the standard of review was reasonableness, cited the test in *Dunsmuir v. New Brunswick*, 2008 SCC 9,

[2008] 1 S.C.R. 190 which he stated required him to analyze the LRB's reasons for decision to determine whether they satisfy the requirements of justification, transparency and intelligibility and then to address whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law.

[17] The applications judge also referred to the decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 where Abella J. stated at para. 16:

...In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[18] The applications judge described the issue before him as,

...whether or not having concluded that the 90 days is mandatory, whether or not the Board's decision, or conclusion, that Mr. Burke knew, or ought to have known, of the circumstances of his complaint as early as the 17th of July, and no later than the 30th of July, 2013, whether that conclusion falls within the range of reasonable alternatives available to the tribunal, whether or not it is a decision which falls within the range of possible acceptable outcomes, which are defensible in respect of the facts in law.

[19] In determining whether the LRB's decision to dismiss the complaint as untimely was reasonable, the applications judge reviewed in detail the LRB's reasons for its conclusions. The applications judge held that the LRB's finding that a complaint pursuant to section 130 "shall" be brought within 90 days and that the LRB did not have discretion to consider a complaint made outside the 90 days was reasonable. The applications judge referred to paragraph 40 of the LRB's decision which states:

[40] To begin, the Board notes that section 130 contains the provision "shall". This is imperative. It means that an employee "shall" file a complaint within 90 days from the date on which he knew or in the opinion of the Board ought to have known of the action or circumstances giving rise to the complaint. The Act does not use the term "may" and does not contain any provision granting the Board discretion to allow a complainant more than 90 days from the date on which he knew or ought to have known he had a complaint to file that complaint.

(Emphasis in original.)

[20] The applications judge held that the Board treated “shall” in the context of [section] 130(2) as being mandatory, not directory, and it is certainly within the Board’s jurisdiction to reach that view of section 130 which falls within the range of reasonable interpretations that might be given to section 130(2).

[21] The applications judge then considered the LRB’s application of the facts to the case before it, which included a detailed chronology of events leading up to the complaint, and cited the reasons for the LRB’s conclusion as found at paragraphs 46 and 47 of the LRB’s decision:

[46] On July 22, 2013 the employer filed an application for judicial review of Browne Arbitration award #2. On July 30, 2013 Mr. Burke wrote NAPE and alleged that NAPE had acted in a way that was arbitrary, discriminatory or in bad faith in how it handled his grievance at Browne arbitration #2. He requested that NAPE hire independent counsel to represent him at Memorial’s judicial review hearing and to seek party status on his behalf. Having written this allegation to NAPE it is the opinion of the board that Mr. Burke ought to have known of the circumstances giving rise to his complaint against the union under s. 130. His allegation in his correspondence to NAPE on July 30, 2013 was exactly that he thought NAPE acted in a manner that was arbitrary, discriminatory or in bad faith in how NAPE presented his grievance at Browne arbitration #2 and thereafter in his judicial review request.

[47] Mr. Burke knew or ought to have known of the circumstances leading to his complaint by the date he was served via registered mail with the Browne award, namely July 17, 2013. Even if it could have been said that Mr. Burke did not know or could not have known that the union was taking no further steps on his behalf in the furtherance of his grievance following the Browne award (which the Board denies), Mr. Burke definitively knew when he alleged on July 30, 2013 that NAPE acted in an arbitrary, discriminatory or bad faith manner in the handling of his grievance, of the circumstances upon which he was basing his complaint to the Board. Ninety (90) days from that date is October 28, 2013. Therefore, the Board found that in order for this current complaint pursuant to s. 130 to have been timely it must have been made (at the latest) within 90 days of his July 30, 2013 allegation, which was October 28, 2013. Mr. Burke did not bring his complaint to the Board until March 17, 2015, some 15 months after making his allegation to NAPE and nearly 5 months outside the prescribed time limit contained in the *Act*.

[22] The applications judge concluded that the LRB “set forth in considerable detail its reasons for reaching the conclusion that Mr. Burke knew, or ought to have known, of the circumstances of his complaint as early as the 17th of July, and no later than the 30th of July, 2013 and I’m satisfied that the Board’s decision falls within the range of acceptable outcomes available to it”.

[23] The appellant argued on this appeal that the applications judge erred by not undertaking an analysis of a December 17, 2014 letter to the appellant from NAPE containing the last chance agreement; it was from the date of this letter, the appellant argues, that the 90 day clock should have started to run. However, the applications judge found that the LRB “was aware of the existence of this letter. It refers to it expressly in paragraph 35 of its reasons for decision, and nevertheless, concluded that...the circumstances of [Mr. Burke’s] complaint were known to him...in July of 2013”. The applications judge had to determine whether the LRB’s decision was reasonable. The applications judge did analyze the LRB’s detailed reasons for decision for determining that the appellant knew or ought to have known the circumstances of the complaint in July of 2013 and concluded that the LRB’s decision fell within the range of acceptable outcomes. The applications judge did not err by not undertaking an analysis of the contents of the letter.

[24] The applications judge applied the standard of reasonableness correctly and did not err in finding that the decision of the LRB was reasonable.

[25] It should be noted that, although the LRB dismissed the complaint on the basis that it was untimely, the LRB went on to hold at paragraph 78 of its decision that even if the complaint was not untimely there was no evidence that NAPE had acted in a manner that was arbitrary, discriminatory or in bad faith. The applications judge stated that “it is not the Court’s intention to weigh into the merits of the complaint because [the LRB’s] comments in that regard were obiter”.

[26] Having determined that the applications judge correctly applied the reasonableness standard in his finding that the decision of the LRB that the appellant’s complaint was untimely, it is not necessary to consider whether the applications judge’s treatment of the LRB’s *obiter* decision regarding the merits of the complaint, or the respondent’s argument that the appellant’s complaints regarding NAPE’s treatment of his 2005 grievance from the date of the LRB’s March 2012 order, are *res judicata*.

[27] In regard to whether a remedy may lie against the employer in light of a complaint pursuant to section 130 of the *Act*, it should be noted that a complaint by the appellant was permitted by the wording of section 130 of the *Act* solely against NAPE. There was no remedy permitted against the employer, MUN. The LRB had no jurisdiction to make an order requiring the employer to take any action in the circumstances of this proceeding regarding a return to work. These were matters for arbitrators under the collective agreement to address

given that the appellant's sole remedy was the last chance agreement which the employer proposed and the appellant continues to reject.

SUMMARY AND DISPOSITION

[28] I conclude that the applications judge did not err in his decision that the LRB's decision that Mr. Burke's complaint was untimely was reasonable. There is no need to consider the issues of whether the reasons given in *obiter* were reasonable or whether Mr. Burke's complaint is *res judicata*. Mr. Burke's appeal is dismissed.

[29] I would make no order regarding costs.

M. F. Harrington J.A.

I concur: _____

C. W. White J.A.

I concur: _____

L. R. Hoegg J.A.