

Date: 20150127

Docket: 14/93

Citation: *Burke v. Newfoundland and Labrador Association of Public and Private Employees, Local 7804*, 2015 NLCA 4

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

**BETWEEN:**

KEVIN BURKE

APPELLANT

**AND:**

NEWFOUNDLAND AND LABRADOR  
ASSOCIATION OF PUBLIC AND  
PRIVATE EMPLOYEES, LOCAL 7804

FIRST RESPONDENT

**AND:**

MEMORIAL UNIVERSITY OF  
NEWFOUNDLAND

SECOND RESPONDENT

**AND:**

NEWFOUNDLAND AND LABRADOR  
LABOUR RELATIONS BOARD

THIRD RESPONDENT

Coram: Green C.J.N.L., Welsh and White JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador  
Trial Division (G) 201301G3530

Application Heard: January 23, 2015  
Decision Rendered: January 27, 2015

Reasons for Decision by Green C.J.N.L.  
Concurred in by Welsh and White JJ.A.

Counsel for the Appellant: Kevin Burke, Self-Represented  
Counsel for the First Respondent: V. Randell J. Earle Q.C.  
Counsel for the Second Respondent: Christopher E. King  
Counsel for the Third Respondent: Genevieve M. Dawson

**Green C.J.N.L.:**

## **INTRODUCTION**

[1] This is an application by the respondent, Newfoundland and Labrador Association of Public and Private Employees, Local 7804 (union), to dismiss an appeal filed by the appellant, Kevin Burke, on the ground that he has no standing to bring the appeal.

## **BACKGROUND**

[2] The core issue lurking in the background to this appeal – Mr. Burke’s belief that he was improperly treated by his employer, Memorial University of Newfoundland (employer), and by his union in representing him in relation to his dismissal from his employment – has been festering for over a decade. It has involved three arbitration hearings, three judicial review proceedings, not to mention other legal applications, three hearings before the Labour Relations Board and one appeal to this Court. It is not necessary to recite the history in any detail. Much of the background is described in this Court’s decision in *Burke v. Newfoundland and Labrador Association of Public and Private Employees et al.*, 2010 NLCA 12, 294 Nfld. & P.E.I.R. 230, at paragraphs 2-48. It is sufficient to pick up the story from that point.

[3] This Court ordered that the Labour Relations Board rehear Mr. Burke’s complaints under s. 130 of the *Labour Relations Act*, RSNL 1990, c. L-1 that the union had acted in a manner that was arbitrary, discriminatory or in bad faith in the handling of his grievance. Pursuant to that decision, the Board conducted a rehearing and, in fact, ruled that the union had failed in its duty to fairly represent Mr. Burke. The Board ordered that the union

“pursue a meeting with [the employer] in an attempt to resolve all issues pertaining to Mr. Burke’s grievance” and that if that meeting did not resolve things, any outstanding matters should be referred to arbitration. The meeting contemplated by the Board took place but nothing was resolved. The union and the employer then referred the issues to arbitrator Dennis Browne, Q.C. Mr. Burke did not agree with the choice of arbitrator Browne. Mr. Burke made application to the Supreme Court (File 2012 O1G 5993) claiming previous arbitration awards had not been properly implemented. Although it is not clear from the application, Mr. Burke claims that he was also objecting, on grounds of conflict of interest, to arbitrator Browne’s being appointed, and he so stated in Court. However, that application was ultimately adjourned *sine die*.

[4] The Browne arbitration proceeded. The parties were the employer and the union. Mr. Burke was not separately represented although he did attend. The employer objected to the arbitrator’s jurisdiction, arguing that no outstanding issues remained to be determined. This was the same position it took at its meeting with the union following the Labour Relations Board’s order. The arbitrator ruled against the employer, concluding that he had jurisdiction and that three issues remained outstanding (need for a medical certificate; terms of a last chance agreement governing return to work; and effective date of reinstatement). He ruled on each of these issues (the Browne award). He concluded a medical certificate was required before Mr. Burke could return to work, that the terms of the last chance agreement should be as determined in a previous arbitration award in 2007, and that Mr. Burke’s effective date of reinstatement would be thirty days from the date of medical clearance and execution of the last chance agreement.

[5] Although the arbitrator’s ruling was favourable to Mr. Burke in that it allowed him to get his job back – something the employer had been opposing – Mr. Burke nevertheless felt that the result was not entirely in his best interests. His main concern was that the operative terms of the last chance agreement, which arbitrator Browne affirmed from the 2007 arbitration, were unfavourable in terms of how allowable absences were to be calculated before he would be deemed to be terminated for absenteeism. The agreement, he argued, left open the possibility that the employer could act arbitrarily against him in the future without any recourse. He also took the position that a last chance agreement could not contract out of his rights under the collective agreement. He has consistently maintained that the union’s poor representation of him at that earlier arbitration contributed to

the determination of the unfavourable last chance agreement terms. In that sense, he says that the union's failure to fairly represent him under s. 130 of the *Labour Relations Act* is therefore still relevant to, and explains at least in part, his dissatisfaction with the Browne ruling. He now reasserts that the union has continued to represent him unfairly and improperly because his arguments respecting the unfavourable impact of the terms of the last chance agreement were not explained by the union to Arbitrator Browne properly or perhaps at all. He did not, however, seek judicial review of the Browne award.

[6] I note in passing that, in general, even though a person is not a party to a proceeding before a consensual or statutory administrative body, he or she may nevertheless be regarded as having standing to seek judicial review if he or she is aggrieved or affected by the decision in question: Jones & de Villars, *Principles of Administrative Law*, 5<sup>th</sup> ed (Toronto: Carswell, 2009), pp. 646-647; *Rules of the Supreme Court*, 1986, rule 54.03(4).

[7] In the labour relations context, however, that principle has to be assessed and applied in a given case by reference to the underlying policies of the labour relations scheme which is based on *collective* bargaining with the union having a virtual monopoly on representation of individual grievors. Thus, a sufficient interest to justify separate proceedings by an individual union member will not normally be established on the sole ground that the union refuses to institute judicial review proceedings of an arbitration award deemed unfavourable by the affected member: *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 267, paragraphs 41-42, 45, 58, and 62-64. It may be otherwise, however, where the member additionally alleges improper performance of the union's mandate or collusion between the employer and the union or bad faith on the part of the union, or a violation of the principles of natural justice (*Noël*, paragraphs 39, 58, and 68-69) or conflict of interest on the part of the union as between the complaining member and other union members (*Newfoundland (Treasury Board) v. N.A.P.E.* (2002), 210 Nfld. & P.E.I.R. 148 (NLSC TD(G)).

## **DECISION UNDER APPEAL**

[8] The employer, however, did seek judicial review of the Browne award, arguing that the arbitrator erred and made an unreasonable decision in concluding he could deal with the matters referred to arbitration and by conducting arbitration in respect of matters that had already been decided by

previous arbitrators. The union, as respondent, took the position that the arbitrator's decision was reasonable and should not be overturned. It took this position notwithstanding the fact that it knew Mr. Burke was also dissatisfied with the Browne award and was arguing that it inappropriately reaffirmed, without hearing from him, the terms of the last chance agreement that had been defined in the previous arbitration.

[9] Mr. Burke applied to the Trial Division for "standing and/or party status" with respect to the employer's judicial review application. Notwithstanding the fact that the union and Mr. Burke were at odds with respect to their positions concerning the award, that the union had been found not to have represented Mr. Burke fairly with respect to other hearings on this matter, and that Mr. Burke could possibly have tried to commence his own judicial review application, Burrage J. dismissed the application. He was influenced by a concern that allowing an individual employee to participate in a grievance process instead of or in addition to the union would upset the collective nature of the employer-union relationship and undermine the union's position as the bargaining representative of all employees. He reasoned:

With the greatest respect to Mr. Burke, the fact that [the Union] will be arguing a position contrary to that which ... he wishes it to argue ... and will not be seeking relief he wishes to see sought, is not grounds to grant him standing. To do so would be to make a complete mockery of our labour relations regime, founded, as it is, on the principle of ... union representation. Indeed, such representation would be meaningless if every employee who felt aggrieved by an arbitration ruling could individually seek to challenge that ruling by way of judicial review over the objections of the union. ...

[10] It seems that Burrage J. was of the view that the fact that the union had been found to have violated s. 130 of the *Labour Relations Act* in respect of past arbitration hearings relating to the matter and even though Mr. Burke appears to be asserting the same point in respect of the union's handling of the Browne arbitration (an alleged failure to explain why the wording of the last chance agreement placed him in jeopardy) was not a sufficient basis for departing from the general rule that the union monopoly on representation should have primacy in respect of the judicial review application relating to the current award.

[11] Mr. Burke did not appeal Justice Burrage's ruling nor did he seek an extension of time to do so. As against Mr. Burke, the order denying standing is a final order: *Kent v. Kent*, 2010 NLCA 53, 301 Nfld. & P.E.I.R.

152, paragraphs 22-37 and the time for appealing it would, absent an order for extension, have expired in late 2013. The judicial review application proceeded in front of Paquette J. without any separate representation by Mr. Burke. Paquette J. found that arbitrator Browne did not commit reviewable error and dismissed the employer's application. As a result, the Browne award remained effective.

[12] Because Mr. Burke was also not satisfied with the Browne award and wanted it set aside, though for different reasons than those of the employer, he purported to file a notice of appeal of Paquette J.'s ruling in this Court even though he was not a party in the proceeding below. One of the grounds of appeal is that Paquette J. allegedly denied him procedural justice by not hearing his point of view in support of the argument why the Browne award did not properly address the terms of the last chance agreement appropriately and why the arbitrator did not identify all issues that remained outstanding and deal with them, amongst other things. Mr. Burke named as respondents in the notice of appeal the union, the employer and the Labour Relations Board.

[13] The union applied, supported by the employer and the Board, for an order under rule 57.17 dismissing the appeal.

## **ANALYSIS**

[14] I start by observing that there is no basis for including the Board as a party-respondent on this appeal. No decision of the Board is subject to review. The Board was not a party or participant in the Browne arbitration. It was not a party to the judicial review hearing and did not seek to intervene. No relief that could be granted on this appeal, even if it were to move forward, could affect the Board in any way. Counsel for the Board asked that it be removed as a party. That request should be granted.

[15] The employer essentially adopted the submissions of counsel for the union that the appeal should be dismissed. The question that therefore remains is whether the union has presented sufficient argument to justify dismissal at this stage.

[16] In essence, the union submits that Mr. Burke has no standing to proceed with this appeal, as he was not a party to the proceeding below and in fact was specifically denied the right to participate. It also says that this is an impermissible attempt by Mr. Burke to re-litigate many of the issues that

had already been dealt with in the numerous other forums in which the parties have been engaged in the past. Although not put this way in his written materials, counsel for the union submitted in oral argument that in reality Mr. Burke's appeal is an attempt to appeal Burrage J.'s order, an order he did not appeal directly and which he is out of time to appeal now. He says that if Mr. Burke is allowed to bring this appeal under the guise of appealing Paquette J.'s decision, this Court will in effect be allowing him to appeal Burrage J.'s ruling. Unless Burrage J.'s order is reversed, Mr. Burke is a "stranger" to this appeal and should not be allowed to proceed with it.

[17] It is not without significance that the party who lost at the initial judicial review hearing – the employer – is not seeking to appeal. This is not a case, therefore, of another party wishing to intervene and be heard, perhaps from a different perspective, on an appeal that is going forward in any event. It is necessary for Mr. Burke to have full standing as an appellant for this appeal to proceed.

[18] While there are circumstances where a person may be permitted to appeal an order made in a lower court even though the person affected by the order was not a party in the original proceeding (see *Kent*) those circumstances are usually limited to situations where the party seeking to appeal is directly subject to and bound by the order being appealed.

[19] In the current case, although Mr. Burke could certainly be said to be indirectly affected by the decision of Paquette J. (since it upheld the Browne award which did relate to Mr. Burke's employment) the order itself was not aimed directly at him and did not bind him except in the sense that it bound his bargaining agent who was acting in his stead.

[20] It is not necessary, as union counsel suggested, to characterize Mr. Burke's notice of appeal as an appeal against Burrage J.'s order and to strike it out as being out of time. It is sufficient to conclude that if Mr. Burke were to be allowed to proceed with his proposed appeal of Paquette J.'s decision, it would effectively amount to an impermissible collateral attack on the order previously made by Burrage J. since it is an attempt to avoid the consequences of the previous order denying him separate status to argue the merits of the case. Whether I might agree or disagree with the original decision not to accord Mr. Burke standing in the judicial review application, the fact is that was the decision that was made and it must stand unless reversed on appeal. It would be incongruous and inappropriate in the extreme to allow Mr. Burke to proceed now under the aegis of a purported

appeal of Paquette J.'s decision to achieve his participation indirectly when he was denied the opportunity to do so directly.

[21] I recognize that Mr. Burke feels he should have had the opportunity to appear and speak on his own behalf in the hearing conducted by Paquette J. because his position and that of the union were inconsistent and that, accordingly, in his view the union did not fairly or properly represent him. That however, is not a sufficient reason in itself to allow him to proceed with his appeal in circumstances where he was specifically denied separate representation and he did not appeal that order or seek an extension of time for appeal. If he feels the union acted in a manner that was arbitrary, discriminatory or in bad faith with respect to the current chapter of the handling of his grievance, he might have a further right to bring that matter before the Labour Relations Board under s. 130. The proper forum at this time is not this Court.

[22] In the circumstances the notice of appeal should be struck out on the ground that no appeal by Mr. Burke lies to this Court (rule 57.17(1)(c)) and that to allow it to go forward would be to allow an appeal that is frivolous, vexatious or without merit to proceed (rule 57.17(1)(d)), it being obviously unsustainable in its present form: *Stacey v. Seabright, et al.*, 2010 NLCA 72, 302 Nfld. & P.E.I.R. 189. I recognize rule 57.17 contemplates dismissal of an appeal on these grounds as well as a striking out of the notice of appeal and that the consequences may be different: *Walsh v. Johnson, et al.*, 2010 NLCA 6, 293 Nfld. & P.E.I.R. 101, at paragraphs 16-17. Dismissal of the appeal is treated as a disposition on the merits. Here, the better course is to strike the notice of appeal.

## **DISPOSITION**

[23] The application should be granted and, the notice of appeal struck out.

[24] In the circumstances, there should be no order as to costs.

[25] Although it is not necessary for this decision, it is appropriate to underscore for Mr. Burke's benefit that although he has not received all that he has sought – and is still faced with having to sign a last chance agreement, the wording of which he feels does not fully protect him from arbitrary termination by the employer – he has in fact prevailed and obtained a ruling that he is entitled to return to his job. So long as he persists in what now appears to be a quixotic pursuit of a perfect resolution, he is depriving

himself of the benefits of a continuing income flowing from what he has won, all in the hope of addressing a risk (future arbitrary termination based on the wording of (to him) an unacceptable last chance agreement) that may not in fact occur.

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J. D. Green C.J.N.L.

I Concur: \_\_\_\_\_

B. G. Welsh J.A.

I Concur: \_\_\_\_\_

C. W. White J.A.