SUPREME COURT OF NOVA SCOTIA

Citation: *Halifax (Regional Municipality) v. Amalgamated Transit Union, Local 508*, 2020 NSSC 361

Date: 20201210
Docket: Hfx 498739
Registry: Halifax

Between:

Halifax Regional Municipality

Applicant

v.

Amalgamated Transit Union, Local 508

Respondent

DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: December 3, 2020, in Halifax, Nova Scotia

Counsel: Randolph Kinghorne, for the Applicant
Andrew Nielsen, for the Respondent

[1] Halifax Regional Municipality is seeking judicial review of the arbitration award of Arbitrator J.A. MacLellan involving a grievance brought by the Amalgamated Transit Union, Local 508. The arbitrator ordered the reinstatement of a bus operator who had been fired. HRM has argued that the arbitrator made several legal errors. In summary they say that the arbitrator failed to apply the doctrines of progressive discipline and culminating incident. They say that the arbitrator improperly applied only a disciplinary standard of review to HRM's actions and that nothing in the arbitration award suggests that the arbitrator turned his mind to the safety of the public and the employer's obligations under the *Occupational Health and Safety Act*, S.N.S. 1996, c. 7.

The Arbitration Award

[2] The case dealt with the termination of the employment of the grievor, Jill Webb, a Halifax Transit bus operator. The job is, of course, safety sensitive. Bus operators carry passengers and operate buses on public streets. The letter terminating her employment is dated September 17, 2018 and summarizes four culminating incidents.

[3] The first incident took place on June 28, 2018. The arbitrator found that the grievor had been driving a bus and stopped to let off a passenger with a bicycle. There was a single line of traffic in the direction that the bus was travelling. The passenger had disembarked and was taking his bicycle off the front of the bus. The grievor, Ms. Webb, could see another cyclist passing on the left side of the other vehicles that were already stopped behind the bus. She then pulled out as the cyclist was approaching the bus. The bus had been in the kneeling position when it was stopped. The four-way flashers were engaged and when the left turn signal was used it was overridden by the four-way flashers. So, from the outside of the bus a person would not know that the driver of the bus was signalling an intention to enter traffic.

[4] The video showed that the cyclist was beside the window near the front of the bus when Ms. Webb pulled out. The arbitrator found that what the cyclist saw upon passing the bus was the four-way flashers and not the signal light.

[5] Ms. Webb said that she saw the cyclist drop back and give her the finger. At the next stop she was confronted by the cyclist who told her that she had her four-way flashers on and not her signal light when he proceeded to pass the bus.

[6] The arbitrator concluded that Ms. Webb did not properly signal to the cyclist that she was moving into the lane.

[7] After that encounter, the cyclist followed the bus to the next stop. The grievor said that the cyclist confronted her, shouted, yelled at her, and began lecturing her. The arbitrator found that video showed the cyclist speaking to Ms. Webb in a calm and reasoned manner. He was telling her that her hazard lights were on when he proceeded to pass her and there was no signal light to demonstrate that she was going to pull into the lane. The arbitrator noted that the video showed the grievor speaking in a loud and defensive manner.

> At the time she was arguing with the cyclist I am satisfied from the evidence that she believed she had her signal light on and had forgotten that the hazard lights may still have been on at the specific time that the cyclist began his passing manoeuvre. She made an error that could have caused a serious accident. She was argumentative with the cyclist. She also spoke to him in a disrespectful manner. This incident is clearly deserving of discipline. (Award para. 27)

[8] The second incident took place on July 8, 2018. It arose from an incident report filed by Ms. Webb herself. Ms. Webb said that a person got on the bus. She was a regular passenger who often did not have the full fare. Ms. Webb said that she told the person that she could get on the bus, but that Ms. Webb would not give her a transfer. Ms. Webb said that the person became very loud and asked her friend for the 50 cents required to make the full fare. As she was moving to the back of the bus the woman said "I don't care. I'll slap her. I'll get off the bus." Ms. Webb pulled the bus over at the next stop and called Operations.

[9] Ms. Webb said that she believed that calling the supervisor when she had been threatened was the right thing to do.

[10] The letter of termination said that Ms. Webb has escalated the situation by excessively and arbitrarily enforcing the requirement for full fare in exchange for a transfer. The arbitrator concluded that the incident did not warrant discipline. "I find it ironic that the grievor was the one who was threatened, filed a complaint and ends up being disciplined." (Award para. 36)

[11] The third incident took place on July 9, 2018. A director of Halifax Transit reported that one of the buses did not stop at a railway crossing. He noted the number of the bus and the time of the incident. Ms. Webb was the driver. She was questioned about it and said that she always slows down, but on that day had a van following the bus and did not stop because she wanted to avoid an accident with

the van. Operators are required to use four-way flashers and come to a full stop at railway crossings.

[12] The arbitrator noted that the video evidence showed that the bus driven by Ms. Webb was travelling at about 50 km/hour and her speed slowed to 30 km/hour while her flashing lights were on when approaching the crossing. The video shows a Canada Post van stopped at an intersection shortly before the railway crossing. The van pulled up behind the bus and was travelling close to the bus when the bus had its lights activated. The van pulled out from behind the bus and passed it about 2 seconds before the bus arrived at the tracks. The gates at the crossing were not down and the flashing lights at the crossing were activated. The grievor could see that there was no train coming.

[13] The arbitrator concluded that Ms. Webb was accurately describing what she was observing at the time and that the employer did not have justification to discipline her for that incident.

[14] The fourth incident was from July 11, 2018. The grievor, Ms. Webb was seen eating while driving the bus. She had a red plastic container in her left hand that she was balancing on the steering wheel while using a fork with her right hand. She was also using her right hand to steer the bus. The grievor acknowledged that the way she was driving was not safe. That serious incident was found to be deserving of discipline.

[15] Having found that discipline was justified regarding two of the four incidents, the arbitrator went on to consider whether the termination of Ms. Webb's employment was an extreme remedy and if so, what alternate penalty would be fair and reasonable. The two incidents found to justify some level of discipline were the incident with the cyclist passing the bus and the incident involving eating while driving the bus.

[16] Ms. Webb had been disciplined before. She had received a letter of reprimand on November 8, 2017 for failing to yield. That incident resulted in a serious collision and the issuance of a traffic ticket. On November 7, 2017 she received a thirty-day suspension for misuse of her position as a platform to voice her personal opinion and the use of offensive, disrespectful and embarrassing comments. She received a 12-day suspension on July 12, 2017 for the same kind of action. On May 31, 2016 she was issued a 9-day suspension for "unacceptable behaviour, poor judgement and disrespect with passengers." On January 30, 2015 she was given a 5-day suspension for repeated unacceptable behaviour "with a

passenger requesting you to wait until they were seated before you proceeded." On December 9, 2014 Ms. Webb was suspended for 2 days for "unacceptable, unprofessional, disrespectful and discriminatory behaviour with passengers." She was issued a letter of reprimand on August 28, 2014 for unacceptable and unprofessional behaviour with passengers.

[17] The arbitrator noted that there was only one disciplinary letter on file that related to Ms. Webb's driving behaviour. That was the one that resulted in her getting a ticket for failing to yield to a vehicle that was already in the intersection. When she received that discipline, she was told that if she went to court on that ticket and was successful the discipline would be withdrawn. Following her termination, she went to Summary Offence Court and the prosecution offered no evidence. So, at the time of her termination the grievor had no other discipline for driving behaviour on her record.

[18] The arbitrator noted several factors to be considered. The first was the discipline record of the grievor. He noted that the grievor did not have a good discipline record and that was an aggravating factor. She did not however have any previous driving incidents on her record. The length of service of the grievor was a factor. Her seven years of employment was significant but not enough to make her a long service employee. Another factor was whether the offence was committed on the spur of the moment or was premeditated. The first incident involving the cyclist was not premediated while the second offence, involving eating while driving was. That was an aggravating factor. The economic hardship for the grievor is a consideration. In this case Ms. Webb was able to get another job as a bus driver but at a reduced rate of pay. The seriousness of the offences in terms of the employer's policies and procedures is a factor. The arbitrator specifically noted that the grievor's conduct had the potential to cause serious injury and damage. He acknowledged the employer's expectation that employees perform their jobs in a safe and courteous manner. The grievor did not meet those expectations because of the two incidents and that was an aggravating factor.

[19] The arbitrator considered that prior to her termination Ms. Webb was named one of three top drivers in a contest conducted by the Coast. In 2017 the trainer employed by Halifax Transit referred to the grievor's driving ability and overall performance as "good". And the grievor had personal problems and was dealing with her father's death just before these incidents took place. The arbitrator did not say how much if any weight he placed on that information.

[20] The arbitrator noted that had he found that the grievor was subject to discipline in the third incident involving the railway crossing he would have upheld the employer's decision to terminate Ms. Webb's employment. In the circumstances however, the termination was held to be excessive. The termination was set aside and the grievor was reinstated, with no backpay. She had been off work for about 20 months.

Standard of Review

[21] The decisions of labour arbitrators are generally reviewed on a reasonableness standard. That involves some degree of deference. The reviewing court must pay respectful attention to the reasons provided and try to understand the reasoning process that was used. Those reasons are not assessed against a standard of perfection and courts, in reviewing those decisions must respect the distinct role of the administrative decision maker. The mandate of a labour arbitrator in a case like this one, is to apply the principles of arbitral jurisprudence to decide whether there was just cause for the grievor's dismissal. Justice Fichaud in *Cape Breton-Victoria Regional School Board v. Canadian Union of Public Employees, Local 5050*, 2011 NSCA 9, at para. 25, said that was the core function of an arbitrator and was within "the court's zone of deference, attracting a reasonableness standard of review".

[22] The reasoning process for the decision itself must be reasonable and the outcome must be reasonable having regard to the "relevant factual and legal constraints that bear on it." *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. The arbitrator must express an understandable and transparent reasoning path and the conclusion itself must occupy "the set of reasonable outcomes." *Halifax (Regional Municipality) v. Canadian Union of Public Employees, Local 108*, 2011 NSCA 41. The reasonableness standard of review ensures that courts intervene in the decisions of administrative tribunals, like arbitrators, only when that is required to safeguard the legality, rationality, and fairness of the process.

[23] On questions of general law, where the issue is both of central importance to the legal system as a whole and outside the arbitrator's specialized area of expertise, labour arbitrators are held to a standard of correctness. In those areas the questions raised require uniform and consistent answers.

A Wide-Angled Perspective

[24] In *Canadian Union of Public Employees, Local 3912 v. Nickerson*, 2017 NSCA 70, at para. 35, Justice Fichaud described the reviewing judge's perspective as properly being "wide-angled, not microscopic." The concerns put forward by HRM in this case tend toward a more fine-grained analysis of the arbitrator's reasoning. To the extent HRM has taken a wide-angled view it can be described as being a firm view that the arbitrator got it really wrong.

[25] The arbitrator was required to answer whether HRM had reasonable cause to discipline Ms. Webb, whether that discipline was excessive and if it were excessive, what alternative approach could be substituted that was fair and reasonable. The arbitrator reviewed the four incidents set out in the letter of termination and reviewed the evidence. He concluded that two of the incidents justified discipline and two did not. His review of the evidence was not in the least incoherent. Even if one disagreed with the conclusions reached, they could not at all fairly be characterized as being irrational. There is nothing to indicate that the arbitrator's conclusions were unjustifiable on the evidence that he had before him.

[26] The arbitrator concluded that the incidents involving the cyclist and eating while driving justified discipline. The others were not supported by the evidence. The question then was whether those two incidents justified the termination of the grievor's employment. The arbitrator considered the law of progressive discipline and set out his reasoning. He noted that HRM had argued that it had lost confidence in the grievor's ability to operate a bus safely and that she was not capable of acting properly with passengers and other members of the public. He cited the employer's view that Ms. Webb had not been forthright when the matter was being investigated and the view that the relationship had been irrevocably broken.

[27] The arbitrator acknowledged the union argument that Ms. Webb had no previous driving offences on her record and that based on the principle of progressive discipline she should not be terminated.

[28] The arbitrator noted the many arbitration cases regarding progressive discipline and proportionality. He said that the analysis is a contextual one. Then he set out the factors that were to be considered and how they applied in this case. Based on his consideration of those factors he determined that the termination of Ms. Webb's employment was overly severe. He weighed the severity of the penalty and the severity of the conduct. He specifically considered the safety issues implicated in the case.

[29] The arbitrator's reasoning path was clear. It was rational, coherent, and transparent. The conclusion "occupied the set of reasonable outcomes."

[30] A person stepping back to take a "wide-angled" view of the decision would conclude that the grievor had rather narrowly avoided having her employment terminated. Had the incident involving failing to stop at a railway crossing not been shown to have been caused by the van following the bus, she would not have been reinstated. Given the two incidents that were proven to justify discipline, what was in effect a 20-month unpaid suspension was imposed. That serious penalty, along with the arbitrator's comment that the railway crossing incident would have justified termination, would put the grievor on notice that she had no room for further error.

Progressive Discipline

[31] HRM says that the purpose of employment based discipline is directed not so much at punishment, but rather at changing the employee's behaviour. HRM made an assessment that further discipline would be futile. They argue that what the arbitrator does not say in the decision is as telling as what he did say. The arbitrator did not specifically say that HRM did not have just cause for termination. And the arbitrator never specifically says that the unpaid absence that he substituted for termination was an unpaid disciplinary suspension. The arbitrator never specifically expresses the belief that there is a reasonable expectation that the grievor will follow traffic laws and Halifax Transit safety policies because of the substituted discipline.

[32] Those arguments invite the court to adopt a microscopic perspective in the review of the arbitrator's decision. They suggest that the arbitrator must address each point made by both parties and state clearly and specifically those conclusions that should be intuitively obvious to a reader. In reviewing the factors to be considered and noting that the analysis is a contextual one, the arbitrator said that the analysis was to determine "whether the grievor's misconduct is reconcilable with continued employment with the Employer." (Award para. 73) He did not accept that the grievor's conduct was incompatible with her continued employment.

[33] And no, he did not specifically say that HRM did not have just cause for termination. But he did not uphold the termination. And he substituted a lengthy period of unpaid absence. And he said that had one of the other incidents been proven that would have justified termination. So, the reasonable reader can infer

that the arbitrator found that on the facts proven, there was not just cause for termination. And no, the arbitrator never said, specifically, that the period when the grievor was away from work, and was not getting paid, was to be considered a disciplinary suspension or a time served suspension. But, she was away from work, she was not getting paid, she had received a letter of termination and had been the subject of an arbitration in which the arbitrator found, specifically, that she should be subject to some discipline. It certainly looks a lot like a disciplinary suspension. And no, the arbitrator never specifically says that he believes that there is a reasonable expectation that Ms. Webb will follow traffic laws and Halifax Transit Safety policies. But he acknowledges that she is a bus driver and that bus drivers are employed in positions that are safety sensitive. He notes the fact that safety issues were involved was an aggravating factor. He notes the principles of progressive discipline. He says that if during the first 6 months of her reinstatement she is subject to discipline concerning driving she may be subject to termination. He says that during that 6 month period she must participate in any training or coaching recommended by Halifax Transit. He does not explicitly connect the dots by saying that it is reasonable to expect that now Ms. Webb will learn from the 20 months away from her job, without pay. A reasonable reader of the award understands that. Or at least should.

[34] Courts are called upon to review arbitrator's decisions against a standard of reasonableness. That means that the court should read the decision as a reader who can infer the writer's obvious intent. The court does not act as a pedantic editor who assumes that a decision must be expressed like a written version of a mathematical proof for the benefit of readers who cannot or will not make necessary reasonable inferences. When the arbitrator reinstated the grievor, one can infer that he concluded that HRM did not have just cause to terminate her employment and that the grievor's misconduct was not irreconcilable with the reinstatement that he was ordering. When the arbitrator said that she should not be paid for the 20 months when she was off work, one can infer that this was a "time served suspension".

Occupational Health and Safety Act

[35] HRM says that this arbitral award runs counter to promoting the spirit and intent of the *Occupational Health and Safety Act* and the court should be very cautious about supporting it. They argue that workplace safety should not be compromised by inadvertence on the part of an arbitrator or improper use of an arbitrator's discretion. The HRM brief states,

> Even if the arbitrator is not prepared to err on the side of caution in these safety situations, (sic) doesn't mean the court shouldn't. The court should try to avoid becoming a party to the creation of a dangerous workplace.

[36] HRM argues that Ms. Webb's termination was non-disciplinary and was undertaken to comply with what the employer believed to be the requirements of the *Occupational Health and Safety Act*. HRM says that three of the four incidents involved breaches of the *Occupational Health and Safety Act*. If a violation of the *Occupational Health and Safety Act* is proven HRM says that it was justified in terminating Ms. Webb's employment unless she could establish the defence of necessity.

[37] That argument does not appear to have been made before the arbitrator. Both parties before the arbitrator focused on whether the employer had reasonable cause to impose some form of discipline, whether that discipline was an excessive response and, if so, what alternative measure could be imposed that was fair and reasonable. Safety concerns were acknowledged as being important considerations. The *Occupational Health and Safety Act* and the employer's obligations under that legislation inform the context and the analysis relating to the severity of the conduct that gave rise to the discipline.

[38] The argument relates to both how offences are proven and the response to them. HRM argues that the case should not be considered only through a "disciplinary lens". To begin with, the termination of Ms. Webb's employment was, most certainly, disciplinary. In the letter terminating her employment, HRM referred to "previous discipline", provided a record of "progressive discipline", and said that this was in support of "the disciplinary action encapsulated in this letter." Terminating Ms. Webb's employment was a disciplinary action.

[39] HRM has argued that once the employer has proven the *actus reus* of such an offence on the part of the employee the employee is then required to establish that they were not negligent. That is the same as the way offences are proven in prosecutions under the *Occupational Health and Safety Act.* The incident at the railway crossing was not considered in that way by the arbitrator. But there is no authority for that.

[40] Occupational Health and Safety violations are important factors to be considered. The employer has statutory obligations in that regard, so safety violations are serious workplace offences. They are important considerations, but they do not change the fundamental framework that relates to assessing just cause

for termination. The employer must justify discipline even when safety is a central consideration.

[41] HRM's argument that the arbitrator, and the court, should "err on the side of caution" when safety is a concern would be a fundamental shift in the law relating to workplace discipline. The jurisprudence makes clear that safety violations must be considered as serious workplace violations. That does not mean that employers, arbitrators, and courts are relieved of the obligation to weigh the circumstances and the context and are free to apply a "better safe than sorry" standard. In any situation in which an employee has breached a safety rule and potentially put either fellow employees or members of the public at risk, it might be said that the only way to eliminate the risk of any further violation is to fire the employee. That brings the risk to zero. Upholding HRM's decision to terminate Ms. Webb's employment would save all involved, HRM, the arbitrator and the reviewing court, from ever having to answer a question later, if the grievor's behaviour is repeated and someone is injured, as to why the risk of allowing her to continue to drive a bus was justified. The decision to fire the employee when there is any evidence of a safety concern avoids risk. But those who make such decisions are responsible for making hard decisions. Hard decisions involve weighing, assessing, and managing risk. The hard decisions involve weighing the circumstances and the rights of employees against the safety concerns. Decision makers are not allowed to avoid the responsibility imposed by presence of nuance. Erring on the side of caution and firing people just to be sure and just to reduce the risk to zero ignores nuance. And it ignores the rights of employees. Every person employed in a safety sensitive position is a risk at some level. It is part of being human.

[42] The arbitrator considered the issues of safety that were raised by HRM. He was aware of the importance of that issue to HRM and was aware of the safety implications of the incidents at the centre of the case. He considered the aggravating nature of the safety aspects of the incidents. He concluded that the incidents, even having regard to their safety implications, did not justify termination of Ms. Webb's employment.

Conclusion

[43] From the "wide-angled' perspective, the arbitrator's decision was reasonable. The reasoning path was internally coherent, rational, and transparent. The conclusion that he reached was reasonably supportable on the facts and the law.

[44] Even if one were to feel compelled to venture into the weeds on this one, finding fault with the decision would require a willful suspension of ability to reasonably infer the minutely detailed analytical steps from the coherent, rational and transparent reasoning path set out by the arbitrator.

[45] The decision of the arbitrator is upheld.

[46] Costs are awarded to the respondent in the amount of $1,000.

Campbell, J.