Miramar Giant Mine Ltd. v. National Automobile et al., 2005 NWTSC 75 Date: 2005 08 25
Docket: CV 2005000002

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MIRAMAR GIANT MINE LTD.

Applicant

-AND-

NATIONAL AUTOMOBILE, AEROSPACE,
TRANSPORTATION AND GENERAL WORKERS UNION
OF CANADA (CAW-CANADA) LOCAL 2304 and
HUGH JAMIESON

Respondents

MEMORANDUM OF JUDGMENT

[1] This is an application for judicial review of the decision of an arbitrator made with respect to a grievance referred to the arbitrator under a collective agreement between the applicant Company and the respondent Union.

[2] The Giant gold mine in Yellowknife operated for over fifty years. It shut down operations last year. The applicant Company only assumed ownership and operation of the mine in 1999 and from that date mined ore there but transported that ore to another nearby mine site for processing. In early 2004 the number of employees working at the Giant mine (i.e., members of the Union) was approximately 50.

[3] At the time of negotiating the collective agreement in 2002, it was understood by all concerned that the mine was embarking on its final years of operation.

[4] Article 22 of the collective agreement reads as follows:

Article 22
Severance Pay

22.01 An employee whose, employment is terminated by the Company shall, receive severance pay in the amount of forty (40) hours pay at his basic hourly rate for each year of continuous service up to a maximum of three hundred and twenty (320) hours pay.

(i) Employees eligible for severance pay under this Article, and who desire to relocate out of Yellowknife will be eligible for a maximum reimbursement of $1200 for the purpose of relocating household belongings. To receive reimbursement for the move out of Yellowknife the former employee will be required to provide the appropriate receipts. The relocation cost must be submitted within six (6) months from the date of severance, unless the former employee has children in school and in such case this period may be extended to the end of the current school year.

(ii) Eligible employees will have their basic life insurance maintained for a period of six (6) months following the date of severance.

The number of years of continuous service shall be calculated from the date of the employee's last entry into the Company's service as shown on the last seniority list posted under the terms of this Agreement. A year of continuous service, for purposes of calculating severance pay, is a complete year.

<u>The Company will notify the Union six (6) months prior to any permanent shutdown of the Mine, or parts of the Mine.</u>

An employee shall not be entitled to severance pay under this above formula if he quits or is discharged for just cause or is laid off temporarily. Temporary layoffs shall be a layoff of six months or less and shall include an expected date of return to work at the time of layoff.

(emphasis added)

[5] On June 9, 2004, the Company gave the following written notice to the Union:

> As we discussed verbally today, Miramar Giant Mine Ltd. has announced plans to terminate underground mining operations at the Giant Mine effective July 7th, 2004. As a result of this decision Miramar Giant Mine, Ltd. will be reducing our workforce by approximately 52 hourly employees.
>
> The group layoff provisions of s.14.07 of the Labour Standards Act will govern some of the terminations. Reductions will be carried out in a step process with approximately 42 employees being terminated effective July 8th, 2004 and an additional 8 employees will be terminated effective August 6th, 2004 and 2 employees being terminated effective September 10th, 2004.
>
> Please regard this letter as notice of the termination of underground mining operations at Miramar Giant Mine as per Article 22.01, of the collective bargaining agreement.

[6] The Union says that this one month notice of the shutdown of mining operations was a breach of Article 22.01 of the collective agreement. This was the subject matter of the grievance referred to the arbitrator under the provisions of the collective agreement.

[7] At the arbitration hearing, the Company took the position that the "termination of underground mining operations" (the wording of the June 9, 2004 notice) is not the same thing as "permanent shut down of the mine, or parts of the mine" (the wording of Article 22.01). The arbitrator viewed this as a specious submission, and, given the clear wording of the June 9, 2004 notice and its reference to Article 22.01, he found that the Company had breached that article of the collective agreement. He then went on to consider what appropriate remedy ought to follow.

[8] The arbitrator considered the submissions of the parties, the evidence placed before him, and the circumstances of the case, including the terms of the collective agreement. In his analysis he concluded that, had the Company fulfilled its obligation under Article 22.01 to give the six months notice of the shutdown of mining operations, in the normal course the employees would have had the opportunity to work throughout the six month period and earn their regular wages and benefits. Accordingly he ordered the Company to compensate each of the affected employees in an amount equal to the wages and benefits he/she would have earned but did not earn

during the six month period after June 9, 2004 (some of the employees indeed worked more than the 30 days), the specific amount in each case to "be calculated with the normal rules of mitigation being applied".

[9] It is the arbitrator's choice of this particular remedy that is under attack by the Company on this application for judicial review.

[10] The collective agreement between these parties was made pursuant to the *Canada Labour Code*. That statute provides, *inter alia*:

> s.57(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.
>
> (2) Where any difference arises between parties to a collective agreement that does not contain a provision for final settlement of the difference as required by subsection (1), the difference shall, notwithstanding any provision of the collective agreement, be submitted by the parties for final settlement
>
> (a) to an arbitrator selected by the parties ...
>
> s.58(1) Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed in any court.
>
> (2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain an arbitrator or arbitration board in any of their proceedings under this Part.
>
> (emphasis added)

[11] This "final and binding" nature of the arbitrator's decision on any grievance submitted to him is confirmed in Article 10.05 of the collective agreement signed by the parties on November 22, 2002:

> 10.05 The arbitrator's award shall be published to the parties as promptly as possible, and shall state the arbitrator's conclusions and reasons as briefly as possible. The

> arbitrator's award is final and binding on the Union, its members, the employee(s) involved and the Company.
>
> (emphasis added)

[12] Yet, the Company on this application seeks a judicial review of this arbitrator's remedial award.

[13] The Company submits that a labour arbitrator's role is confined to the resolution of grievances under the collective agreement and an arbitrator cannot add terms to the collective agreement or alter the terms of the collective agreement. The Company submits that in dealing with the instant grievance, this arbitrator implied terms of the collective agreement that the parties had not expressly agreed to, e.g. a) that the Company was required to consult with the Union in an attempt to find an alternative to the permanent shutdown and b) that the Company was required to continue to employ all employees and to maintain full operations during the six month notice period.

[14] Upon a careful consideration of the arbitrator's decision, I disagree that he added such terms to the collective agreement by way of implication or otherwise.

[15] In my view the arbitrator merely made the declaration that the Company had breached the collective agreement (and this is part of the arbitrator's role/jurisdiction to interpret the collective agreement) and then he looked for a remedy to address that breach. If he used language such as "implied "or "implicit", in my view his use of such terminology was unnecessary in reaching the result he did. It is wrong, on a judicial review, to focus on each and every phrase or sentence in an arbitrator's decision. See *Halifax Employers Association v. I.L.A. Local 269* (2004) 243 D.L.R. (4th) 101 (N.S.C.A.) at para. 80.

[16] While the Company's submissions on this application seem to suggest otherwise, I note that the arbitrator did not have before him a grievance of employee X complaining that he was entitled to but had not received six months notice of termination of employment, and hence the arbitrator made no ruling on that specific topic.

[17] On this application for judicial review I find that the standard of review which guides me is a standard of patent unreasonableness. This standard imports a very high level of deference to the arbitrator's decision. I ask myself "is there within the

arbitrator's reasons a line of analysis which rationally leads the arbitrator to the result he arrived at?", or, conversely "is the arbitrator's decision clearly irrational, does it border on the absurd?"

[18] I find that this is the standard of review in this particular matter after considering the pragmatic and functional analysis mandated in *Pushpanathan v. Canada* [1998] 1 S.C.R. 982 and in particular the four factors: (1) presence of a full privative clause, (2) expertise of the labour arbitrator (3) purpose of the *Canada Labour Code* and (4) nature of the problem, i.e. the fashioning of a remedy consequential upon the finding of a breach of a provision of the collective agreement.

[19] Applying the standard of patent unreasonableness to this arbitrator's decision, I find that there is no reason for the Court to interfere. Upon reviewing the record that was before the arbitrator, it is clear that there was indeed a breach of the collective agreement, as stated by the arbitrator. In fashioning a remedy the arbitrator drew reasonable inferences in ascertaining the meaning and purpose of the six month notice requirement and what were the consequences of a breach of that requirement. He made a reasoned analysis of the circumstances of the grievance that was referred to him. Case law indicates that when an arbitrator's decision on an issue the parties refer to him under a collective agreement is reasonable, the Court ought not to interfere. Indeed, even if the standard was reasonableness simpliciter, I would not set aside this decision as requested by the Company.

[20] The Supreme Court of Canada has held that the form of an appropriate or effective remedy is a matter that is within the special expertise of a labor arbitrator. See *Royal Oak Mines Inc. v. C.L.R.B.* [1996] 1 S.C.R. 369; *Voice Construction Ltd. v. Construction and General Workers Union* (2004) 238 D.L.R. (4th) 217; *A.U.P.E. v. Lethbridge Community College* (2004) 238 D.L.R. (4th) 385.

[21] The arbitrator in the case under review saw a rational connection between the breach of Article 22.01, its consequences, and the remedy he fashioned. There is such a connection. This in my view confirms the reasonableness of his decision.

[22] The parties had agreed that the arbitrator's decision would be final and binding. This Court, as a superior court, can intervene or interfere by way of judicial review notwithstanding the presence of a strong privative clause. The "pragmatic and functional analysis" now mandated by *Pushpanathan* tends to emphasize this

supervisory function of the superior court. Yet, as stated by the Supreme Court of Canada in another of its decisions in *Union des employés de service, local 298 v. Bibeault* [1988] 2 S.C.R. 1048:

> "... the importance of judicial review implies that it should not be exercised unnecessarily, lest this extraordinary remedy lose its meaning".

[23] For these reasons, I deny the Company's application to set aside the arbitrator's decision.

[24] If the parties are unable to agree on costs, counsel may make written submissions to me within 30 days of the date of filing of these reasons.

J.E. Richard
J.S.C.

Dated at Yellowknife, NT
this 25th day of August 2005.

Counsel for the Applicant: Richard Lester
Counsel for the Respondents: Lisa Kelly