Employment and Labour Law Reporter

VOLUME 27, NUMBER 12 Cited as (2018), 27 E.L.L.R. MARCH 2018

• CAN EMPLOYERS REQUIRE MANDATORY UNPAID STANDBY DUTY? •

Michèle Brown-Gellert, Associate, and Jessica Bungay, Partner, Cox & Palmer

The recent decision of the Supreme Court of Canada (SCC), *Association of Justice Counsel v. Canada (Attorney General)*, [2017] S.C.J. No. 55, 2017 SCC 55, addressed the issue of whether a unionized employer can unilaterally introduce a policy requiring employees to provide unpaid standby duty.

FACTS

For two decades, the Immigration Law Directorate in the Quebec Regional Office of the Department of Justice had a voluntary standby system in place to deal with emergency immigration matters. The standby period was from 5:00PM to 9:00PM on weeknights and from 9:00AM to 9:00PM on weekends. While on standby, the lawyers were required to carry an employer-issued pager and cell phone and to report to work within one hour of an emergency call. Lawyers who were on standby were compensated with paid leave. Lawyers received compensation whether or not they actually performed services while on standby.

As a result of budgetary constraints, a change was introduced by the employer as to how employees were compensated for standby duty. The change provided that lawyers on standby would only be paid for work actually performed while on standby. If a lawyer was on standby but was not required to perform any work, they would receive no compensation. Unsurprisingly, most lawyers stopped volunteering for standby duty.

Relying upon the management rights provision in the collective agreement, the employer unilaterally introduced a policy making uncompensated after-hour standby duty mandatory for all lawyers.

GRIEVANCE

The union grieved the employer's mandatory unpaid standby duty policy. The arbitrator concluded that the employer's policy was not a reasonable or fair exercise of its management rights and violated the liberty interests of the lawyers protected under section 7 of

• In This Issue •

LexisNexis®

EMPLOYMENT AND LABOUR LAW

Employment and Labour Law Reporter is published monthly by LexisNexis Canada Inc., 111 Gordon Baker Road, Suite 900, Toronto ON M2H 3R1 by subscription only.

ISBN 0-409-91093-7 (print) ISSN 1183-7152
ISBN 0-433-44669-2 (PDF)
ISBN 0-433-44383-9 (Print & PDF)

Subscription rates: $605.00 per year (Print or PDF)
$705.00 per year (Print & PDF)

Please address all editorial inquiries to:

General Editor
Edward Noble, B.A., LL.B.
Content Development Associate
LexisNexis Canada Inc.
E-mail: edward.noble@lexisnexis.ca

LexisNexis Canada Inc.
Tel. (905) 479-2665
Fax (905) 479-2826
E-mail: ellr@lexisnexis.ca
Web site: www.lexisnexis.ca

the *Canadian Charter of Rights and Freedoms*. The policy was found to be unenforceable.

JUDICIAL REVIEW

The employer applied for judicial review of the arbitrator's decision. The Federal Court of Appeal ("FCA") allowed the application for judicial review, set aside the decision of the arbitrator and directed another arbitrator to consider the grievance. The decision of the Federal Court of Appeal was appealed to the SCC.

DECISION OF THE SUPREME COURT OF CANADA

On appeal, the majority of the SCC upheld the decision of the arbitrator with respect to the issue of mandatory unpaid after-hour shifts and confirmed that the policy was unfair and unreasonable. The SCC explained that, in a unionized workplace, when determining whether a policy unilaterally introduced by an employer is a reasonable exercise of management rights, arbitrators must adopt the "balancing of interests" approach, otherwise known as the *KVP* test.[1] The "balancing of interests" approach requires arbitrators to consider the totality of the circumstances and determine whether the employer's policy strikes a reasonable balance between the interests of both the employer and the employees.

In the case at bar, the arbitrator balanced the interests by weighing the benefit of the policy to the employer against the impact of the policy on the private lives of the employees.

The collective agreement was silent on the issue of standby duty. There was also no mention of standby duty in the employment contracts or job descriptions of the employees. The SCC emphasized that this did not grant the employer free reign to impose a policy in relation to standby duty. The SCC highlighted the inherent unfairness of the policy to stop providing compensation for standby duty, when the provision of such compensation had been a long-standing practice of the employer. The directive adversely impacted the private lives of the employees and resulted in the

employer controlling their whereabouts and activities during off-hours. For these reasons, the employer's policy violated the requirement of the employer to act reasonably, fairly and in good faith under the collective agreement.

With respect to the constitutional rights of the lawyers, the SCC held that the mandatory unpaid standby duty policy did not limit the ability of the lawyers to make the type of fundamental personal choices guaranteed under section 7 of the *Charter*. There was no violation of the employees' *Charter* rights.

WHAT THIS MEANS FOR EMPLOYERS

This decision reminds employers that management rights must be exercised reasonably and in compliance with the collective agreement. Whether the unilateral imposition of the policy is reasonable and fair will depend on the circumstances and the terms of the particular collective agreement. Employers in unionized environments must be aware of the added difficulty of introducing a policy that attempts to change a long-standing practice of the employer. Employers must also ensure that new workplace policies are the result of a reasonable "balancing of interests". Where policies intrude on the personal lives of employees or restrict their personal interests, those policies are invalid unless the employer demonstrates a competing management interest that overrides the interests of the employees.

---

[1] *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd.*, [1965] O.L.A.A. No. 2, 16 L.A.C. 73.

• COURT STRIKES DOWN NON-COMPETE WHICH WOULD HAVE PREVENTED EMPLOYEE FROM STARTING A BAND IN MEXICO AND PLAYING AT A STAFF RETREAT IN CANCUN •

Andy Pushalik, Partner, Dentons Canada LLP.

A recent case from the Ontario Superior Court of Justice may cause some employers to reconsider the scope and application of their non-competition covenants. In *Ceridian Dayforce Corp. v. Daniel Wright*, [2017] O.J. No. 6156, 2017 ONSC 6763, the Plaintiff employer brought a summary judgment motion for a declaration that the non-compete clause in its former employee's employment contract was binding and enforceable.

The Judge summarized the key provisions of the non-compete provisions as follows:

1. The non-competition period, defined as the "Restricted Period" means the period up to 12 months from the date the employee ceases to be employed by the Company as determined by the Company in its sole unfettered discretion, provided that the Company informs the Employee of the length of the period within 5 business days of the Employee ceasing to be employed by the Company.
2. The Employee shall not, "directly or indirectly provide services, in any capacity, whether as an employee, consultant, independent contractor, owner,

or otherwise, to any person or entity that provides products or services or is otherwise engaged in any business competitive with the business carried on by the Company or any of its subsidiaries or affiliates at the time of his termination (a "Competitive Business") within North America".

3. The Employee shall not "be concerned with or interested in or lend money to, guarantee the debts or obligations of or permit his name to be used by any person or persons, firm, association, syndicate, company or corporation engaged in or concerned with or interested in any Competitive Business within North America".
4. Nothing restricts the Employee from holding less than 1 % of the issued and outstanding shares of any publicly traded corporation.
5. During the Restricted Period, the Company is to pay the Employee his or her base salary, less applicable deductions.

In striking the clause down, the Judge ruled that the non-compete was overly broad for a number of reasons, the most important being that it prevented the employee from providing services in any capacity to any competitive business. To make her point, the Judge noted that the clause, if upheld, would prevent the employee from working as a janitor for a competing business or starting a band in Mexico and being engaged as an independent contractor by a competitor to play at a staff retreat in Cancun. In the Judge's view, this was a complete restraint of trade which went far beyond what was necessary to protect the Plaintiff employer's proprietary interest. The fact that the prohibition stretched to include affiliate companies which were engaged in lines of business that were completely unrelated to the Plaintiff employer's business and prevented the employee from holding 1 per cent or more of the issued and outstanding shares of any publicly traded corporation was cited as additional protections which were unreasonable.

With respect to the clause's temporal scope, the Judge ruled that the evidence did not support the need for a 12-month period. Moreover, the clause was ambiguous because it did not set the time period of the restriction until after the employee's employment was terminated.

Lastly, it is important to note that none of the problems with the non-compete clause that were identified by the Judge were cured by the fact the company had intended to pay the employee his salary for the duration of the restricted period.

This decision serves as a good reminder to employers about the need to draft non-competition clauses as narrowly as possibly and tailor them to the job in question. As this case demonstrates, a blanket prohibition which blocks a departing employee from pursuing any activity with a competitor is unlikely to withstand judicial scrutiny.

• AN UNREASONABLE REINSTATEMENT •

Edward Noble.

A recent appellate court decision out of Saskatchewan considers the limits of an arbitrator's discretion to substitute a lesser penalty in favour of termination for employee misconduct. Faced with a situation in which an employee who was found to have: (a) committed time theft; (b) instructed a subordinate to falsify his time sheet; (c) and lied about it, was reinstated by an arbitration board, the Saskatchewan Court of Appeal, in *Yorkton Cooperative Association v. Retail Wholesale Department Store Union*, [2017] S.J. No. 540, 2017 SKCA 107, determined that, given the seriousness of the employee's conduct, the decision to substitute her termination with a suspension was unreasonable.

BACKGROUND

Denise Osbourne worked as a supervisor for the Yorkton Cooperative Association (the "Co-op").

She was terminated from her employment for time theft and dishonesty. Specifically, following an investigation, the Co-op concluded that on two occasions Osbourne closed the Co-op store early, and falsified her time sheets to indicate that she was working when she was not. Further, the Co-op determined that Osbourne had instructed a subordinate employee to falsify his own time sheet. In addition, the Co-op alleged that Osbourne stole time during a period that she was filling in for a manager who was on vacation. When faced with these allegations, Osbourne denied wrongdoing.

The Retail, Wholesale Department Store Union (the "union"), which represented Osbourne, grieved her termination. An arbitration board determined that the allegations of time theft while filling in for the manager were not proven on a balance of probabilities. However, the arbitration board was satisfied that Osbourne closed the store early on two occasions and falsified her time sheets. Moreover, the arbitration board determined that Osbourne had instructed a subordinate to falsify his time sheet and leave work early. This conduct was compounded by the fact that Osbourne was dishonest when confronted by her employer, and that this dishonesty continued into her testimony during the arbitration. Notably, the arbitration board wrote that Osbourne "took no ownership of her wrongdoing, leaving the Board with little confidence that her conduct would not be repeated".

Despite these findings, the arbitration board exercised its discretion, codified at subsection 6-49(4) of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1 (the "SEA"), to substitute a penalty that it "considers just and reasonable in the circumstances" for Osbourne's termination. Instead of upholding her termination, the arbitration board determined that she should be reinstated, subject to a four-month suspension.

The Co-op's application for judicial review was allowed by Justice Kalmakoff in *Yorkton Cooperative Association v. Retail Wholesale Department Store Union*, [2016] S.J. No. 501, 2016 SKQB 296. Justice Kalmakoff determined that the appropriate standard of review of the arbitration board's decision was reasonableness. He found that the arbitration board's decision was clear and intelligible, and that the end result fell within a range of possible outcomes; however, he went on to find the decision unreasonable since, based on the facts as found by the arbitration board and the applicable law, the outcome was not defensible.

At paras. 54 and 55, the Court wrote:

> The Board found that Ms. Osbourne was not trustworthy in circumstances under which the Co-op had the right to expect her to be trustworthy. Having perpetrated a serious wrong by committing time theft, Ms. Osbourne compounded her wrongdoing by lying when she was confronted by her employer. In addition to that, Ms. Osbourne directed at least one other employee over whom she had supervisory authority to falsify his time records and leave work early (para. 214). The Board found that there was no provocation for Ms. Osbourne's actions. Her actions were not spur-of-the-moment, nor were they isolated. Her actions were intentional and they were serious, especially given the position she occupied, and given that she had recently received training relating to the very rules she violated. The Board found that Ms. Osbourne did not suffer economic hardship as a result of being terminated (para. 216). The Board also found that Ms. Osbourne continued to lie, both during the investigative stage, and during her testimony (para. 217), and that she took no ownership of her wrongdoing, leaving the Board with little confidence that her conduct would not be repeated (para. 218).
>
> All of those findings are factors which, according to the common law and the applicable arbitral jurisprudence, weigh very heavily in favour of dismissal. Section 6-49(4) of the SEA gives the Board broad powers to substitute a penalty that it considers just and reasonable in the circumstances, but a just and reasonable penalty must take into account the applicable common law and arbitral jurisprudence.

The Court was not satisfied that the arbitration board identified any mitigating factors sufficient to justify the reduction of the penalty from termination to a suspension. Nor did the Court believe that the arbitration board had identified anything in its decision that was "indicative of a viable employment relationship going forward". As a result, Justice

Kalmakoff opted to quash the arbitration board's decision. Instead of sending the matter back for redetermination, he chose to restore the termination of Osbourne's employment.

THE COURT OF APPEAL'S DECISION

On appeal, the union contended that the Court erred in finding the original decision unreasonable and in restoring the termination. Writing for a unanimous panel of the Saskatchewan Court of Appeal, Chief Justice Richards disagreed with the union on both issues.

Firstly, the Court of Appeal confirmed that the arbitration board's decision was unreasonable. According to the Court, "[t]he key flaw in the Board's decision was the one identified by the Chambers judge — a failure to relate its own findings of fact to the relevant jurisprudence". Justice Richards identified what he termed the "root question" in adjudicating if a termination for dishonesty was warranted: "whether the trust crucial to the employment relationship can be restored".

To that end the Court of Appeal observed that the arbitration board found that Osbourne had been dishonest, first in committing the time theft, falsifying her timesheets, and instructing a subordinate to do the same, and then in lying during the employer's investigation and while under oath at the hearing. However, it was this statement from the arbitration board that really galvanized the Court of Appeal: "**The fact that the Grievor continued to lie up to and including her examination-in-chief does not give the Board a great deal of comfort that she has taken ownership of her wrongdoing and will not repeat it**" [emphasis added]. Justice Richards noted that, it light of its own factual findings, he was "at a loss at a loss to understand how the Board could have reasonably decided that a viable working relationship between the Grievor and the Co-op could be rebuilt." To the Court of Appeal, the arbitration board's statement that it was not convinced that the wrongdoing would not be repeated was tantamount to a finding that the trust necessary for a continuing employment relationship between Osbourne and the Co-op could not be restored. Said the Court: "Given that fact, the only reasonable course of action for the Board was to confirm the Co-op's decision to terminate the Grievor's employment".

Justice Richards addressed a variety of issues raised by the union on Osbourne's behalf, finding them all wanting. For instance, the union argued that the amount of time stolen was insignificant. However, the Court observed that the impugned conduct wasn't limited to closing the store early, but also included influencing a subordinate and continuing dishonesty. The union observed that the majority of the time theft alleged by the Co-op was not proven — the Court pointed out that the issue was whether the sanction of termination was justified in light of the misconduct that was made out. The union took issue with the chambers judge's statement that "although the reasons given by the Board are clear and intelligible, and the end result falls within a range of possible outcomes, the end result is, in my view, an outcome that is not defensible in respect of the facts found by the Board and the applicable law." To this, Justice Richards stated:

> The Chambers judge's comments to the effect that the Board's decision fell within a range of "possible outcomes" or "possible acceptable outcomes" can only be taken to mean he thought that, in an abstract or generalized sense, a four-month suspension without pay could be a reasonable sanction for the misconduct of closing a store early on a couple of nights. But, the Chambers judge's whole point was that the Grievor's conduct had to be seen in the context of the facts as found by the Board – facts that included the Grievor's instructions to a subordinate to falsify his time sheet, the Grievor's lying both to the Co-op during the investigation and at the arbitration hearing and, critically, the lack of any assurance that the Grievor's conduct would not be repeated.

On the second issue — whether the lower court erred by reinstating the termination instead of sending the matter back to the arbitration board from redetermination — the Court of Appeal was unequivocal:

> … given the factual findings of the Board and given the applicable arbitral jurisprudence, there is only

one reasonable outcome in this case. The Grievor took no ownership of her wrongdoing and the Board found as a fact that there could be no comfort she would not repeat that wrongdoing. In other words, the trust necessary to sustain the employment relationship between the Grievor and the Co-op had been fractured in circumstances where the Co-op could have no confidence it would or could be repaired. As a consequence, the termination of the Grievor's employment was the only reasonable bottom line at which the Board could have arrived. It follows that the Chambers judge did not err by reinstating the Grievor's termination.

CONCLUSION

Typically, where a collective agreement does not prescribe a specific penalty for a workplace offence, labour arbitrators have broad discretion to substitute a lesser penalty for the discipline imposed by the employer. However, as the Court's decision in *Yorkton Cooperative Association v. Retail Wholesale Department Store Union* makes clear, that discretion is not without limit and sometimes reinstatement is an unreasonable outcome.