

DATE: 20061208
DOCKET: C44872

COURT OF APPEAL FOR ONTARIO

FELDMAN, MACPHERSON and BLAIR J.J.A.

B E T W E E N :)
)
LAPOINTE-FISHER NURSING) Douglas K. Gray
HOME) for the appellant
)
Applicant (Appellant))
)
- and -)
)
UNITED FOOD & COMMERCIAL) Paul Cavalluzzo and
WORKERS INTERNATIONAL) John L. Stout
UNION, LOCAL 175/633) for the respondent
)
Respondent (Respondent))
)
) Heard: September 8, 2006

On appeal from the order of the Superior Court of Justice (Divisional Court) (Justice John G. J. O’Driscoll, Justice Tamarin M. Dunnet and Justice John R. R. Jennings) dated October 17, 2005, with reasons reported at (2005), 203 O.A.C. 198.

MACPHERSON J.A.:

A. OVERVIEW

[1] Prior to 1990, the Ontario Health Insurance Plan (“OHIP”), which covers Ontario residents for medical and hospital insurance, was made available to Ontario residents upon payment of a prescribed premium. In unionized workplaces, the parties could bargain for the employer to pay all or part of the premium on behalf of employees.

Throughout the 1970s and 1980s, many collective agreements in unionized workplaces across Ontario contained provisions that achieved this result.

[2] In 1989, the legislature enacted the *Employer Health Tax Act, 1989*, S.O. 1989, c. 76 [now R.S.O. 1990, c. E.11], which eliminated the requirement that OHIP premiums be paid by Ontario residents. Instead, the legislature imposed a “payroll tax” on employers, effective January 1, 1990. The payroll tax regime rendered irrelevant the many provisions in collective agreements relating to an employer’s obligation to pay OHIP premiums on behalf of its employees.

[3] Interestingly, as the pages on the calendars turned in the 1990s and early 2000s, and as collective agreements expired and were renegotiated, the provisions relating to OHIP premiums were retained in many collective agreements, even though they had no current application.

[4] This picture changed in 2004 with the enactment of the *Budget Measures Act, 2004 (No. 2)*, S.O. 2004, c. 29 (“Bill 106”), which amended the Ontario *Income Tax Act*, R.S.O. 1990, c. I.2 (the “*ITA*”), by adding a new s. 2.2(1):

2.2(1) Every individual shall pay a tax, called the Ontario Health Premium, for a taxation year ending after December 31, 2003 if the individual is resident in Ontario on the last day of the taxation year.

The tax or premium imposed by s. 2.2(1) is based on a person’s taxable income and can be up to \$900 per year for those with taxable incomes of \$200,000 or more.

[5] The effect of s. 2.2.(1) of the *ITA* was to awaken the provisions in collective agreements relating to various employers' obligations to pay OHIP premiums on behalf of their employees. These provisions had slumbered, Rip Van Winkle-like, for 14 years. Now unions dusted them off and, focusing on the word 'Premium' in s. 2.2(1) of the *ITA*, contended that employers were obligated to pay the new Ontario Health Premium ("OHP") on behalf of their employees. The employers continued to pay the employer health tax, but refused to pay the OHP. They seized on the word "tax" in s. 2.2(1) and said that there was a fundamental difference between a tax and premium. Since the old collective agreements covered premiums only, the unions were wrong to try to stretch them to apply to the new OHP.

[6] Throughout 2004 and 2005, grievances flowered across Ontario. Some arbitrators agreed with the unions, others sided with the employers, depending on the language of the particular collective agreement. Losers on the arbitration stage shifted the spotlight to the Divisional Court through applications for judicial review of the arbitral awards.

[7] In five decisions from October 2005 to February 2006, the Divisional Court upheld all of the arbitral awards. In each case, the court held that the standard of review of the arbitral award was patent unreasonableness and that the award was not patently

unreasonable. In the result, the Divisional Court upheld four arbitral awards in favour of unions and two¹ in favour of employers.

[8] All of the unsuccessful parties before the Divisional Court appealed to this court. The appeals were grouped together and argued on September 8, 2006.

[9] The central issues in all five appeals are: (1) what is the standard of review of the arbitral awards; and (2) applying the proper standard of review, was the Divisional Court correct to uphold the arbitral awards?

[10] I propose to address these issues comprehensively in this appeal, which involves the first arbitral award and the first judicial review decision of the Divisional Court, and which was treated as the anchor appeal in the argument before this court. In separate and briefer reasons, I will then consider the other appeals which involved different collective agreement language and, in some cases, different legal arguments.

[11] In all five appeals, I conclude that the standard of review is patent unreasonableness and that the various panels of the Divisional Court were correct in concluding that the arbitral awards did not fall afoul of this standard.

¹ One decision of the Divisional Court related to two arbitral awards.

B. FACTS

(1) The parties and the events

[12] For a quarter of a century, a collective agreement has governed the employment relations between the employer, LaPointe-Fisher Nursing Home, and the union representing the employees, United Food & Commercial Workers International Union, Local 175/633.

[13] Article 24.01 has been in the collective agreement since the early 1980s and provides:

24.01(a) The Employer agrees to pay 100% of the O.H.I.P. premiums for all full-time employees who are regularly scheduled to work seventy-five (75) hours in a bi-weekly pay period on a permanent basis.

(b) The Employer agrees to pay 50% of the O.H.I.P. premiums for all employees who work in excess of forty-eight (48) hours but less than seventy-five (75) hours in a bi-weekly pay period on a permanent [basis]. The employee shall pay 50% of the O.H.I.P. premiums through payroll deductions.

(c) To be eligible for (a) or (b) above, the employee must be the [principal] breadwinner in their family.

[Emphasis added.]

[14] Pursuant to this provision, until December 31, 1989 the employer paid OHIP premiums on behalf of its employees. Effective January 1, 1990, the employer ceased to

pay OHIP premiums; instead, it paid a payroll tax pursuant to the *Employer Health Tax Act*.

[15] After the new s. 2.2(1) of the *ITA* was enacted in 2004, the employer refused to reimburse its employees for the tax or premium imposed by that provision. The union filed a grievance.

(2) **The litigation**

(a) **The arbitral award**

[16] Arbitrator Anne Barrett heard the case simply on the basis of submissions.

[17] She noted that, in light of the legislative changes in 1990, Article 24.01 of the collective agreement had been rendered nugatory for the past 14 years. However, throughout those years, when the collective agreement was renegotiated, Article 24.01 was retained so that, if OHIP premiums returned, the costs would be shared or paid in full by the employer for some employees. The most recent collective agreement had a term of April 1, 2004 to March 31, 2006.

[18] The arbitrator reviewed the history relating to the 2004 amendment to the *ITA* and reached this conclusion:

The government has now decided to impose a special tax, called the Ontario Health Premium, specifically and solely for the purpose of providing additional funding to the plan. One does not have to stretch the wording of Article 24.01 to find

that this is an O.H.I.P. premium...I do not think the fact that the premium is collected through the tax system robs it of its character as a premium.

...

In the instant case, the premium/tax is dedicated solely to funding O.H.I.P. and can fairly fit within the wording of Article 24.01.

(b) The Divisional Court decision

[19] The employer applied for judicial review of the arbitrator's award.

[20] The Divisional Court applied the recent decision of this court in *Lakeport Beverages v. Teamsters Local Union 938* (2005), 77 O.R. (3d) 543 ("*Lakeport*") and held that the standard of review of the arbitrator's award was patent unreasonableness.

[21] The Divisional Court reviewed the history of the collective agreement and the various laws relating to raising revenue for health services. The court also referred extensively to a recent arbitral award by Arbitrator K. P. Swan which had interpreted wording similar to Article 24.01 in favour of a union's position.

[22] The Divisional Court concluded that the essence of the task facing Arbitrator Barrett was the interpretation of a collective agreement and that her interpretation was not patently unreasonable. Indeed, according to the court, "it cannot be said that Arbitrator Barrett's award is anything short of reasonable."

[23] The employer was granted leave to appeal the Divisional Court decision to this court.

C. ISSUES

[24] The appeal raises two issues:

(1) Did the Divisional Court err by applying the wrong standard of review?

(2) Did the Divisional Court err by not quashing the arbitrator's award?

D. ANALYSIS

(1) **Standard of review**

[25] In Ontario, it is firmly established that the standard of review with respect to the decisions of labour arbitrators interpreting collective agreements is patent unreasonableness: see *Lakeport, supra.*²

[26] The appellant concedes that the general standard of review for Ontario arbitral decisions is patent unreasonableness. However, the appellant asserts that there is an important exception to the general standard, namely, that an arbitrator's interpretation of

² In the companion appeal, *National Steel Car Limited v. United Steelworkers of America, Local 7135*, the appellant challenges the continuing validity of *Lakeport* in light of the decisions of the Supreme Court of Canada in *Voice Construction Ltd. v. Construction & General Worker's Union, Local 92*, [2004] 1 S.C.R. 609, and *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, holding that the awards of arbitrators in Alberta are subject to review on a reasonableness standard. I will consider this issue in the companion appeal.

a statute of general application is reviewable on a standard of correctness. Bill 106, which added s.2.2(1) to the *ITA*, is, the appellant submits, a statute of general application. Arbitrator Barrett's interpretation of Bill 106 must, therefore, be assessed on the correctness standard. On that standard, her analysis fails.

[27] In my view, the exception advanced by the appellant is acknowledged and described by Iacobucci J. in the leading case *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)* (1995), 121 D.L.R. (4th) 385 (S.C.C.), at paras. 48 - 49:

As a general rule, I accept the proposition that curial deference need not be shown to an administrative tribunal in its interpretation of a general public statute other than its constituting legislation, although I would leave open the possibility that, in cases where the external statute is linked to the tribunal's mandate and is frequently encountered by it, a measure of deference may be appropriate. However, this does not mean that every time an administrative tribunal encounters an external statute in the course of its determination, the decision as a whole becomes open to review on a standard of correctness. If that were the case, it would substantially expand the scope of reviewability of administrative decisions, and unjustifiably so

While the board may have to be correct in an isolated interpretation of external legislation, the standard of review of the decision as a whole, if that decision is otherwise within its jurisdiction, will be one of patent unreasonableness. Of course, the correctness of the interpretation of the external statute may affect the overall reasonableness of the decision. Whether this is the case will depend on the impact of the statutory provision on the outcome of the decision as a whole.

[28] In the present case, the arbitrator considered the legislative regime, including Bill 106. However, she did so in the context of interpreting Article 24.01 of the

collective agreement, which was her principal focus. Indeed, in all five of these grouped appeals, all six arbitrators regarded their essential task as the interpretation of the relevant provision in the collective agreement. The interpretation of Bill 106 and of previous health revenue laws was very much a secondary and contextual exercise.

[29] In the present case, the Divisional Court essentially affirmed the arbitrator's approach. The court reviewed Article 24.01 and its history as well as Bill 106 and previous statutes. The court's conclusion was that "Arbitrator Barrett was interpreting a collective agreement."

[30] I agree with the Divisional Court on this issue. I also observe that its approach was replicated in the other four grouped appeals. In my view, the shared approach was particularly well-stated by Epstein J. in *Toronto Transit Commission v. Amalgamated Transit Union, Local 113*, [2006] O.J. No. 583 at para. 11 ("The arbitrator's task ... [is] one of interpretation of a collective agreement with the relevant legislation providing background."), by Lane J. in *The Corporation of the City of Hamilton v. Hamilton Professional Fire Fighters, Local 288, International Association of Fire Fighters* (2006), 208 O.A.C. 191 at para. 7 ("The arbitrator was interpreting the [collective bargaining agreement], clearly within his expertise, and the Act was simply background."), and by the court in its endorsement in *National Steel Car Limited v. United Steelworkers of America, Local 7135* 149 L.A.C. (4th) 142 at para. 3 ("This was an arbitrator's decision

under a collective agreement and the nub of the decision, we believe, was an interpretation of a clause in the agreement, albeit against a statutory backdrop.”).

[31] For these reasons, I conclude that the Divisional Court did not err by applying the patent unreasonableness standard of review to the arbitrator’s award.

(2) The merits of the arbitrator’s award

[32] The appellant contends that the arbitrator’s award was patently unreasonable.

[33] I begin my analysis on this issue with the observation that there is an aura of serious rebuke associated with the label “patently unreasonable”: see *Toronto Catholic District School Board v. Ontario English Catholic Teachers’ Assn. (Toronto Elementary Unit)* (2001), 55 O.R. (3d) 737 at para. 34 (C.A.). In a long line of cases, the Supreme Court of Canada has cautioned courts against easy resort to the label in the exercise of their judicial review function. As expressed by Cory J. in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963-64:

It is said that it is difficult to know what “patently unreasonable” means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. *Obviously, the patently unreasonable test sets a high standard of review.* In the Shorter Oxford English Dictionary “patently”, an adverb, is defined as “openly, evidently, clearly”. “Unreasonable” is defined as “[n]ot having the faculty of reason, irrational. . . . Not acting in accordance with reason or good sense”. Thus, *based on the dictionary definition of the words “patently unreasonable” it is apparent that if the decision the Board reached, acting within its*

jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test. [Emphasis added.]

See also: *Ryan v. Law Society of New Brunswick* (2003), 223 D.L.R. (4th) 577 (S.C.C.) at para. 52 per Iacobucci J. (“A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.”).

[34] The appellant contends that the arbitrator made two crucial errors that render her award patently unreasonable.

[35] The first alleged error is the arbitrator’s apparent belief that all of the revenue raised under Bill 106 would be dedicated to OHIP. The arbitrator said: “In the instant case, the premium/tax is dedicated solely to funding O.H.I.P. and can fairly fit within the wording of Article 24.01.” The appellant contends that this is clearly wrong because the revenue generated by Bill 106 will be paid into the Consolidated Revenue Fund and can be used for any purpose. According to the appellant, this distinguishes Bill 106 from the pre-1990 regime which collected premiums directly for OHIP premiums.

[36] I disagree. While it is true that the new OHP is not dedicated exclusively to the funding of OHIP insured services, and that its funds go into the Government’s general revenue, this was equally true of revenue from the OHIP premium which also went into the Consolidated Revenue Fund and which was not traceable to any particular expenditures. Indeed, there is, if anything, greater accountability in relation to the use of

the OHP given that the Government is required to report, pursuant to s. 29.1 of the *ITA*, on the use of the revenue from the OHP in the Public Accounts for each fiscal year and has committed to use “every cent” of the OHP to provide better results in health care: see Hon. Greg Sorbara, *2004 Ontario Budget: Budget Speech*, p. 9.

[37] The second alleged error in the arbitrator’s award, according to the appellant, is the arbitrator’s failure to appreciate that, from a legal perspective, the old OHIP premium was fundamentally different from the new OHP tax/premium. Specifically, the arbitrator did not take account of the fact that the old OHIP premium had to be paid in order for OHIP coverage to be in effect, whereas failure to pay the OHP does not result in denial of coverage.

[38] In my view, this factual difference is trivial and, therefore, immaterial. The reality is that under both regimes the vast majority of employers would obey the law and collect and remit the required premiums with the result that their employees would receive the required coverage. From the employee perspective, mandatory membership and payroll deductions under both regimes make the two regimes identical in practice.

[39] I conclude with this observation. In its reasons, the Divisional Court referred extensively to the arbitral award of Arbitrator K.P. Swan in *Ontario Power Generation Inc. v. Power Workers’ Union (Health Premium Grievance)*, [2005] O. L. A. A. No. 312, which involved a collective agreement provision very similar to Article 24.01 of the

collective agreement in issue in this appeal. The court approved of the approach Arbitrator Swan set out in his award (para. 44) and of the result he reached (para. 56):

In my view, the correct way to look at this issue is to consider what reasonable parties in the position of the Employer and the Union must have intended when they renegotiated the language into the current collective agreement. Obviously, that renegotiation took place in a universe where there was no existing OHIP premium, and where OHIP was funded by the employer health tax. At the same time, however, the language chosen must have been informed by the fact that at one time there had been an OHIP premium. In my view, reasonable parties in their position would have intended that, should some government initiative in the future require that a payment for OHIP-insured services be required of individual employees, the Employer would be responsible to pay that on behalf of the individual employees, provided that it was materially and reasonably similar to the OHIP premium payable prior to 1989.

...

Having regard to all of the submissions made to me, and to the considerable amount of energy exerted by other arbitrators in attempting to come to grips with similar issues, I have come to the conclusion that reasonable parties in the position of the present Employer and Union, negotiating for the current collective agreement, must have intended that the language which they use would cover not just the particular OHIP premium in existence before 1989, but any materially and reasonably similar premium to be established in the future. In my view, the OHIP premium was a tax contributed to the consolidated revenues of the province with the intention that it be used to fund the OHIP health care system. I think that the Ontario Health Premium is materially and reasonably similar to that, and the distinctions which are made in how the amount is calculated and how deduction and payment take place are distinctions that do not create a sufficient difference between the two to render the collective

agreement language inapplicable to the Ontario Health Premium.

[40] I am sympathetic to this analysis. It is not the only possible analysis of the collective agreement provision, considered in the context of Bill 106 and the previous statutes. However, in my view, Arbitrator Swan's analysis and award, and Arbitrator Barrett's analysis and award in this case, are reasonable. Crucially, they are far removed from being patently unreasonable.

F. DISPOSITION

[41] I would dismiss the appeal.

[42] The respondent is entitled to its costs of the appeal which, in accordance with the agreement of counsel, I would fix at \$10,000, inclusive of disbursements and GST.

RELEASED: DEC - 8 2006
KRP.

J. O. MacPherson J.A.
I agree K. Lee J.A.
I agree R. Blain J.A.

