NOVA SCOTIA COURT OF APPEAL

Citation: *Abridean International Inc. v. Bidgood*, 2017 NSCA 65

Date: 20170712
Docket: CA 456387
Registry: Halifax

Between:

Abridean International Inc. and/or
Sagecrowd Inc. and/or Ogden Pond
Technology Group

Appellants

v.

Peter Bidgood, Director of Labour
Standards, Nova Scotia Labour Board
(Susan Ashley, Q.C., Vice Chair,
Marinus Van de Sande, and Larry Wark), and
Attorney General of Nova Scotia

Respondents

Judge: The Honourable Justice Jamie W.S. Saunders

Appeal Heard: May 9, 2017, in Halifax, Nova Scotia

Subject: *Labour Standards Code*, R.S.N.S. 1989, c. 246. Termination Without Cause. "Related Business". Remedies. Awarding "Common Law" Damages as Compensation in lieu of Reinstatement. Statutory Authority. Standard of Review.

Summary: An IT specialist with more than 14 years of service with a series of associated companies was terminated and offered eight weeks' working notice of termination. He complained to the Nova Scotia Labour Board saying the employer had violated s. 71 of the *Code* based on his accumulated years of service. The employer defended the claim initially taking the position that it had just cause to fire the complainant, and in any event, only the employee's service with one of the

companies in the group should be taken into account, since the business entities were distinct. The Director rejected the employer's arguments and awarded the complainant damages totaling $104,000, which was subsequently upheld by the Board.

The employer appealed to this Court saying the Board erred by: failing to consider the employee's reinstatement as an appropriate remedy; awarding "common law" damages; and finding that the employment contract between the parties was not binding because it violated the minimum standards in the *Code*.

Held: Appeal dismissed. The group of companies that had employed the complainant were not "separate" but were "associated or related" business entities as defined in s. 11 of the *Code*. Approached as an organic whole, the Board's analysis and conclusions were reasonable. On a fair reading of the decision, the Board *did* deal with the issue of reinstatement. On this record, it was perfectly reasonable for the Board to conclude that reinstatement was not a viable option. In making that finding, the Board did not delegate, or abrogate, the inquiry to others. The Board's interpretation and application of its broad remedial powers to provide fair compensation in lieu of reinstatement, find full support in the leading jurisprudence. The Board's approach in fixing compensatory damages was reasonable. Finally, the Board was reasonable in concluding that the contract of employment negotiated by the parties did not apply because its terms were less favourable than those available under the *Code* and therefore constituted a violation of s. 6.

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Peter Bidgood, Director of Labour Standards, Nova Scotia Labour Board (Susan Ashley, Q.C., Vice Chair, Marinus Van de Sande, and Larry Wark), and Attorney General of Nova Scotia

Respondents

Judges:	Farrar, Saunders and Bourgeois, JJ.A.
Appeal Heard:	May 9, 2017, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs to either party per reasons for judgment of Saunders, J.A.; Farrar and Bourgeois, JJ.A. concurring.
Counsel:	Bradley D.J. Proctor and Caroline Spindler, for the appellants Jennie Pick and David A. Cameron, for the respondent Peter Bidgood Andrew D. Taillon for the respondent, Director of Labour Standards Edward A. Gores, Q.C. for the respondent, Attorney General of Nova Scotia not appearing

Reasons for judgment:

[1] An IT specialist who had been employed for 14½ years by a series of associated companies, was terminated and offered eight weeks' working notice of termination. He filed a complaint with the Nova Scotia Labour Board saying his employer had violated s. 71 of the *Labour Standards Code*, R.S.N.S. 1989, c. 246 based on his accumulated years of service. At the time of termination he was earning a salary of $80,000.00 per year based on a 40-hour work week.

[2] The employer defended the claim saying it had just cause to fire the complainant because he had accused senior management of fraudulent activities and, in any event the offer of eight weeks was generous, because only his latest employment with one of the companies in the group should be taken into account, since the business entities were distinct and not carrying on associated or related activities.

[3] The Director found that the employer had violated s. 71, and that 12 months' pay in lieu of reasonable notice ($79,999.92) constituted an appropriate remedy under the circumstances. This sum together with an undisputed figure representing unpaid wages for work performed during the two years leading up to termination ($23,333.31) together with vacation pay ($1,230.72) led to a total award of $104,563.95.

[4] The Director's order was upheld on appeal to the Labour Board.

[5] The employer now appeals to this Court, saying the Board misapplied the law, misinterpreted material provisions in the *Code*, and exceeded its jurisdiction. We are asked to allow the appeal, reverse the order of the Board, or alternatively, send the matter back to the Board to reconsider and render a decision consistent with our conclusions.

[6] For the reasons that follow I would dismiss the appeal.

[7] I will start by providing a brief summary of the background, adding more detail as may be required during my analysis of the issues and the reasonableness of the Board's decision.

[8] For the purposes of this appeal, most of the material facts are not in dispute. My summary is taken largely from the Director's order, the Board's decision and the facts as determined by the Board.

[9] The hearing before the Board proceeded on affidavit evidence. One was filed by the complainant, Mr. Peter Bidgood; another by Mr. Sean Sears, who is described as being a Director and Chairman of SageCrowd, as well as the President of Abridean International Inc. Besides their affidavits, Messrs. Bidgood and Sears both gave *viva voce* testimony, as did Mr. Michael Mailman, a Director of SageCrowd.

[10] As can be seen in the style of cause, there are three corporate entities described variously and inconsistently as "the Appellant" or "the Appellants". Whether adopting the singular, or the plural, this collection of businesses has always been described both conjunctively and disjunctively throughout the proceedings as:

> Abridean International Inc. and/or SageCrowd Inc. and/or Ogden Pond Technology Group

[11] There is also a difference between "Abridean Inc." and "Abridean International Inc.", the latter (according to the findings of the Board) said to have taken over the assets of the former as a result of a receivership.

[12] For the sake of brevity and to avoid confusion, I will adopt the same abbreviations used by the Board when identifying these companies in my reasons:

> Abridean International Inc. ("AI")
>
> SageCrowd Inc. ("SCI")
>
> Ogden Pond Technology Group ("OPTG").

[13] I will refer to these three corporate entities collectively using the plural "the appellants", unless the context otherwise requires. Finally, I will refer to Abridean Inc. as "Abridean" so as to distinguish it from "AI".

[14] What follows is a brief summary of the background which led to Mr. Bidgood's complaint to the Director and subsequently to the Labour Board.

Background

[15] The hearing before the Board was held in Halifax on April 6, 2016. The Board's decision dated September 8, 2016, written by Vice-Chair, Ms. Susan Ashley, is expressed in the form of a 12-page Order, and now reported as 2016 NSLB 228. In these reasons I will refer to Ms. Ashley's decision (on behalf of the Board) as "the Order".

[16] Peter Bidgood earned an MBA degree and has spent his entire working career holding a series of management and senior management positions in the Information Technology (IT) field.

[17] Mr. Bidgood began employment in August, 2000, as Product Manager with Abridean, a software company. Sean Sears was Director and President at the time.

[18] In January, 2008, Mr. Bidgood was promoted to Vice-President of Service Provisioning Solutions, and then to President. In June, 2011, his employment contract was transferred to AI, as a result of receivership. OPTG paid the receiver to acquire the assets of Abridean. Those assets were then placed into AI.

[19] In 2012, Mr. Sears, who was then the President and Director of AI, created SCI. He asked Mr. Bidgood to assist with certain SCI projects. Mr. Bidgood was named President of SCI in July, 2013, while still being paid by AI. In 2014, Mr. Bidgood began to be paid by SCI, instead of AI.

[20] From the evidence at the hearing it appears that AI and SCI develop cloud-based software intended to assist clients in managing their software applications over the Internet. SCI provides users with online e-learning while AI manages the online services. OPTG operates as a holding company for these various ventures, with cash flow for AI and SCI managed through OPTG. Resources, telephone systems, furniture, computers and administrative personnel are shared at the same location.

[21] On January 2, 2015, Mr. Bidgood's employment was terminated. The letter of termination reads, in part:

> Re: Notice of end of employment Friday Feb 27th
>
> Peter this is notice that your employment with SageCrowd and Abridean will both end on February 27th. This is working notice and your presence and continued work effort are anticipated for the entire period. You are to continue to report to the office for regular hours, …

> Earlier this year, I provided a formal performance review …we outlined four areas we felt were significantly deficient as to affect your role and on-going employment. … We feel you have not made significant enough progress …and that the company efforts to achieve its objectives *are being* thwarted. Effective immediately, you are no longer the President …

The letter was signed by Sean P. Sears "CEO SageCrowd Inc."

[22] The letter did not allege just cause. While continuing to work during this period, Mr. Bidgood did not receive any pay up to February 27, 2015. Neither did he receive any vacation pay owing upon termination. He was not able to find new employment until February, 2016.

[23] In his evidence before the Board, Mr. Sears took the position that these companies were "separate" and not "associated or related" such as to be caught by s. 11 of the *Labour Standards Code* which states:

> **Related Business**
>
> 11 Where, in the opinion of the Director or the Board, associated or related activities or businesses are carried on, concurrently or consecutively, by or through more than one corporation, individual, firm, syndicate or association, or any combination thereof, under common control or direction, the Director or the Board may treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act.

[24] Mr. Sears portrayed these three corporations as being very different in their organization, governance, and business objectives. According to Mr. Sears, it was made clear to Mr. Bidgood at the time he started his new position with SCI that there would be no years of service carried over from his time at Abridean. He testified that a start-up company such as SCI would never agree to take on liability for a long service employee such as Mr. Bidgood.

[25] Mr. Bidgood testified that his employment with Abridean was not terminated when he started with SCI and that as far as he was concerned his employment was continuous from August, 2000 until receiving the appellants' letter dated January 2, 2015, purporting to terminate his employment "…with SageCrowd and Abridean" effective February 27, 2015.

[26] The Board rejected the appellants' assertion that they were separate corporate entities and not associated or related within the meaning of s. 11 of the

Code. Ms. Ashley describes the Board's reasons for reaching that conclusion at ¶37-39 of the Order:

> [37] Whether the businesses are similar is not the test. Rather, it is whether they are "associated or related". Despite the fact that the companies do not share the same work, there is a significant amount of intermingling and cross-pollination between them, and on the face of the evidence, we conclude that they are, in fact, "associated or related". We respect the evidence of Mr. Mailman that the Board of SCI operates independently of the other two. However, with the same person at the helm of each company, it is difficult to conclude that the companies themselves are truly independent of each other.
>
> [38] There are other examples of the extent to which they are related. The Complainant, while still actively working at AI, was doing projects with SCI, which continued while he was President of SCI. When he became President of SCI in 2013, he continued to be paid by AI until 2014. Tellingly, his termination letter purports to end his employment "with SageCrowd and Abridean both", a strong inference that the Complainant was considered to be working for both companies at the same time.
>
> [39] We conclude that the test for the application of Section 11 has been met, that the Complainant's period of service runs from August 2000 to February 2015, and that Section 71 applies.

[27] While that conclusion has not been challenged on appeal here, I think it important to present the background surrounding that finding in order to better understand the Board's reasoning in awarding damages and other relief to the complainant.

[28] Before addressing those issues, I wish to emphasize as well that the fact Mr. Bidgood was terminated without cause is not in dispute on appeal.

[29] I turn now to the issues that are.

Issues

[30] The appellants' Notice of Appeal lists four grounds:

1. The Nova Scotia Labour Board (the "Board") exceeded its jurisdiction under Section 26 of the *Labour Standards Code* in determining that the Board had the authority to award common law reasonable notice.
2. The Board erred in law or fact, or mixed law and fact, or misapplied the law and facts in applying Section 6 of the *Labour Standards Code* in

determining that the employment contract between the parties violated the minimum standards established by the *Labour Standards Code*.

3. The Board erred in law or fact, or mixed law and fact, or misapplied the law and facts in applying Section 71 of the *Labour Standards Code*.
4. Such other grounds as appear from a review of the record.

[31] In their factum the appellants cluster and change the sequence of these grounds so that they are presented as two discrete issues, described in this way:

> **Issue #1**
>
> For the purpose of written and oral argument we will address grounds of appeal 1 and 2 together, which are:
>
> 1. The Nova Scotia Labour Board (the "Board") exceeded its jurisdiction under Section 26 of the *Labour Standards Code* in determining that the Board had the authority to award common law reasonable notice.
>
> […]
>
> **Issue #2**
>
> 2. The Board erred in law or fact, or mixed law and fact, or misapplied the law and facts in applying Section 6 of the *Labour Standards Code* in determining that the employment contract between the parties violated the minimum standards established by the *Labour Standards Code*.

[32] Respectfully, I think the matters raised in this appeal are more clearly identified by tracking the arguments of counsel at the hearing and restating them as three simple questions:

(i) Did the Board err by failing to consider Mr. Bidgood's reinstatement to his former position, as an appropriate remedy?

(ii) Did the Board err in awarding "common law reasonable notice damages"?

(iii) Did the Board err in finding that the employment contract between the parties was not binding in the circumstances because it violated the minimum standards established by the *Code*?

Standard of Review

[33] The appellants say there are certain issues in this case that trigger a standard of correctness. I respectfully disagree. Nothing here raises questions of law that are of central importance to the legal system, or outside of the decision-maker's area of expertise. Nor are there any constitutional questions or questions of jurisdiction. Any points of law that might arise in this case involve the interpretation of the Board's home statute, something for which the Board is particularly experienced and qualified.

[34] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, we learned that reasonableness is a deferential standard which means that administrative tribunals enjoy "a margin of appreciation within the range of acceptable and rational solutions" and that reasonableness "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" (at ¶47-48).

[35] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, we learned that restraint is expected when assessing the decisions of specialized administrative tribunals and that as a reviewing court we are to "…[assess] whether the decision is reasonable in light of the outcome and the reasons…" which "…means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" (at ¶15) and in doing so we must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir* at ¶48). Finally,

> [16] …A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its conclusion …if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes …

[36] In *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, Justice Moldaver provided further guidance on the policy reasons behind extending a deferential level of scrutiny to the work of administrative decision-makers:

> [20] … However, the analysis that follows is based on this Court's existing jurisprudence – and it is designed to bring a measure of predictability and clarity to that framework.
>
> …

> [32] In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations. … The question that arises, then, is *who gets to decide among these competing reasonable interpretations*?
>
> [33] The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in the administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* – not the courts – to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise". [Citations omitted]
>
> [Justice Moldaver's italics]

[37] The recent decision of the Supreme Court of Canada in *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 is instructive. The issue on appeal there was a labour adjudicator's interpretation of ss. 240-246 of the *Canada Labour Code*, R.S.C. 1985, c. L-2. Section 240(1) provides protection against unjust dismissal, similar to the protection found in s. 71 of the *Labour Standards Code* in this province, but to employees with only 12 months of service rather than 10 years. Justice Abella, supported on this point by the majority, held at ¶15:

> [15] …decisions of labour adjudicators or arbitrators interpreting statutes or agreements within their expertise attract a reasonableness standard: …

[38] Accordingly, the applicable standard of review to all issues raised in this appeal is reasonableness. This Court extends a high degree of deference to the Board in matters that call for the Board's interpretation of the *Code*.

Analysis

(i) Did the Board err by failing to consider Mr. Bidgood's reinstatement to his former position, as an appropriate remedy?

[39] Central to the appellants' position is their complaint that the Board failed to address or make a finding concerning Mr. Bidgood's reinstatement, and instead "deferred" to the decision of the Director with respect to reinstatement, such that the Board then erred by exceeding its jurisdiction in awarding damages at common

law, and by incorrectly interpreting and applying the relevant provisions of the *Labour Standards Code*.

[40] To support their argument, the appellants point to ¶40 of the Board's Order which reads:

> [40] There is no question that the Board has the power to reinstate where there is a breach of Section 71 *Re Sobeys Stores Ltd. v. Yeomans* [1989] S.C.R. 238. However, there may be situations where reinstatement is not appropriate, perhaps because the Complainant has found other employment, or because the employment relationship has been irretrievably severed; there may be other situations, like here, where the Complainant is not seeking reinstatement, and nor has the Director ordered it. The Labour Standards Tribunal, and later the Labour Board, has regularly ordered damages in lieu of reinstatement. [See, for example: *Re Van't Hof v. South Shore District Health Authority* (LST 1795), *Re Kilcup v. Crown Fibre Tube Inc*. (LST 2064), *Re Beck v. Hackmatack Farm* (LST 2297), *Re Greenwood v. Richelieu Hardware* (LST 2358)]
>
> (Underlining mine)

[41] During oral argument at the hearing, Mr. Proctor (who was not counsel for the appellants at the hearing before the Board) stressed the excerpts from the Board's decision which I have underlined above, as well as the punctuation included in it. To be precise, he chose to emphasize these words:

> …there may be other situations, like here, where the Complainant is not seeking reinstatement, and nor has the Director ordered it …

as demonstrating the Board's "error" in at least two respects. First, Mr. Proctor says the Board's reference to "other situations, like here" followed by the words "where the Complainant is not seeking reinstatement, and nor has the Director ordered it" shows – in his submission – that the Board never considered, let alone made a finding concerning Mr. Bidgood's reinstatement. Rather, the Board "abdicated" its responsibility with a mere acknowledgement that Mr. Bidgood was "not seeking reinstatement", "nor has the Director ordered it".

[42] Second, the appellants say the Board was obliged to deal with whether Mr. Bidgood's reinstatement ought to be ordered first, and only after answering that question could the Board go on to consider an appropriate remedy under the *Code*, if it were satisfied that reinstatement was not appropriate.

[43] I respectfully disagree with the appellants' position for a number of reasons.

[44] The appellants' argument invites an overly technical and unfair parsing of three lines from the entire decision. A fair reading of the reasons as a whole satisfies me that the Board *did* deal with the issue of reinstatement. Justice Abella's comments (for the majority) in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at ¶54 are especially apt:

> [54] The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (Newfoundland Nurses, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. …

While it is true that the Board did not explicitly declare a finding that reinstatement was not a viable option in Mr. Bidgood's case, that conclusion is implicit and obvious from a review of the entire record.

[45] For example, the Board's reasons are replete with references to the appropriateness or inappropriateness of reinstatement in Mr. Bidgood's case. It identifies the respective positions of the parties on that issue (see for example ¶20, 26 and 29 of the Order). As well, the evidence before the Board, through the affidavits of Mr. Bidgood and Mr. Sears, would be enough to satisfy the decision-maker that reinstatement was "off the table". Mr. Bidgood did not want to be reinstated. Mr. Sears did not want Mr. Bidgood back in their employ. Mr. Sears concluded his affidavit with these statements:

> **Peter Bidgood's Termination of Employment with SageCrowd**
>
> 52. In the fall of 2014, there was a dispute regarding backdating a lay-off notice for a developer. Other concerns regarding Bidgood's performance had also begun to surface. I raised these concerns with Bidgood in the hope that his performance would improve. Unfortunately that did not occur.
>
> 53. In early January 2015, I met with Bidgood and informed him that his role at SageCrowd was terminated. A true copy of this letter is attached as Exhibit "K". The Company provided him eight weeks of notice as Bidgood was the lead on a key file that was months overdue and was critical to be completed.

[46] The fact that the Board makes reference to the "... Complainant … not seeking reinstatement" or "…nor has the Director ordered it" hardly suggests a flawed or incomplete consideration of the record, or an "abdication" of the issue of reinstatement to staff. Given the evidence of both the complainant and the

appellants', which make it obvious that reinstatement was neither sought nor viable, it was perfectly reasonable for the Board to conclude that such was the case, and that there was no need for the Board to concern itself with that prospect any further. Accordingly, the Board (quite properly in my view) then turned its mind to the issue of providing a proper remedy.

[47] Finally, the very wording of s. 26 belies the appellants' complaint that resolving reinstatement is a kind of condition precedent to be disposed of before other types of relief can be considered. I refer to s. 26 which reads:

> **Duty of Board**
>
> 26 (1) The Board, in determining any matter under this Act, shall
>
> (a) decide whether or not a party has contravened this Act;
>
> and
>
> (b) make an order in writing.
>
> (2) Notwithstanding Section 72, where the Board decides that a party has contravened a provision of this Act the Board may order the contravening party to
>
> (a) do any act or thing that, in the opinion of the Board, constitutes full compliance with the provision;
>
> (b) rectify an injury caused to the person injured or to make compensation therefore; and
>
> (c) for greater certainty and without limiting the generality of clauses (a) and (b), reinstate the employee,
>
> but where the Board decides that a complaint under Section 81 is made out the Board shall order the employer to pay over to the Board by a specified date the amount of pay found to be unpaid.
>
> (Underlining mine)

[48] Simply noting the sequence of subsections 2(a), (b) and (c) make it clear that any consideration of the possibility to "reinstate the employee" is listed as the last in a series of options. This suggests to me that it is not the primary consideration that must first be addressed, before other alternatives such as rectification, or compensation, could be ordered. While – depending upon the circumstances – it may be logical for the Board to look at the possibility of reinstatement first, I think the Board is free to address the factors mentioned in s. 26, in any fashion it chooses.

[49] Before leaving this subject of reinstatement, I wish to point out our panel's concern at the hearing that the record on appeal did not include the Director's order, when obviously it had been considered in detail by the Board during the course of its deliberations and is referenced explicitly in the Board's reasons. We wished to know whether and why the Director viewed reinstatement as unsuitable. We invited the parties to make inquiries and provide the Court with a complete copy of the Director's Order, if such a document could be located.

[50] I am grateful that counsel found the Director's Order dated September 21, 2015 to which is attached the 3-page "Reasons for Decision". From my review of this material it is clear the Director did consider the possibility of reinstatement and rejected that option based upon her conclusion that the employer – employee relationship had been irrevocably shattered. For example, the appellants took the position before the Director that they had just cause to terminate Mr. Bidgood's employment because he had effectively accused senior management of fraud. We see this in the Director's Reasons for Decision:

> … The Respondent says although it had just cause to terminate the Complainant's employment it provided the Complainant with eight weeks' working notice of termination because it needed him to complete projects. The Respondent says that it terminated the Complainant's employment because the Complainant recommended that management of Sagecrowd Inc. committed fraud. … The Respondent claims the Complainant's behaviour was determined to be completely intolerable and against the sacred responsibility of caring for employees with professionalism and trust and therefore it terminated the Complainant's employment. … I find the Respondent has not proven just cause and, therefore, the Complainant is entitled to a remedy for a violation of Section 71 of the *Code*.
>
> Because I do not see reinstatement as an appropriate remedy in this case, I must determine an amount of reasonable notice to remedy the violation of Section 71.
> …

(Underlining mine)

To conclude on this first question, the Board did deal with Mr. Bidgood's possible reinstatement. The appellants made it clear that they did not want him back. Mr. Bidgood did not wish to return to his job. After a year of searching, he had found other employment. Based on the evidence before it, the Board concluded that reinstatement was not a viable solution. To have found otherwise would, in my opinion, have been unreasonable.

(ii) Did the Board err in awarding "common law reasonable notice damages"?

[51] As is made clear in the appellants' factum, their position on this second question is inextricably linked to their position on the first. They say:

> 58. It is respectfully submitted that it is an error for the Board to award reasonable notice damages for breach of Section 71 (1) of the Code without first fully considering the applicability of the intended remedy of reinstatement. This approach is inconsistent with the legislative intention and the statutory scheme, including it provision for discretionary remedies available to the adjudicator.
>
> 59. In view of the legislature's intention that Section 71 (1) of the Code is to protect eligible employees from loss of their employment without cause, the Board ought not to order compensation for breach of Section 71 (1) of the Code in substitution for reinstatement unless and until the Board makes a reasoned determination that the intended remedy of reinstatement is inappropriate in the particular circumstances.
>
> 60. Assuming that reinstatement is inappropriate merely on the basis that one party would prefer reinstatement not be awarded imports common law concepts concerning the nature of an employment relationship which are inconsistent with the aim of Section 71 (1) of the Code.
>
> 61. While the Board's broad statutory remedial powers include the power to award compensation rather than reinstatement once it concludes that reinstatement is inappropriate, the Board misapplied the Code in awarding compensation based on common law principles applicable to reasonable notice merely because a party to the employment relationship did not want the remedy of reinstatement, without a reasoned determination about the appropriateness of reinstatement.
>
> 62. In doing so, the Board also commits the error of improperly delegating its remedial decision making powers. The preferences of a party may well be a relevant factor. However, it is the statutory decision-maker who is empowered to determine the appropriate remedy pursuant to the Code, not either party.
>
> 63. An (sic) dismissed employee who wishes to seek only the remedy of common law reasonable notice damages rather than reinstatement may elect to bring a civil action; however, if the dismissed employee elects to make a statutory claim pursuant to Section 71 (1) of the Code, the dismissed employee is not entitled or empowered to select the desired remedy.
>
> …
>
> 65. In a statutory regime providing reinstatement, such as the "Unjust Dismissal" provisions of the Canada Labour Code or the protection against dismissal without just cause pursuant to Section 71(1) of the Code, it is the

> statutory decision-maker who is empowered under the statue to determine the appropriate remedy for non-compliance with the statute. The Code does not confer the ability to delegate this statutory decision-making power to another person, including a complainant or a respondent.
>
> …
>
> 67. With respect to the present case, it is equally an error for the Board not to consider reinstatement and whether or not it is appropriate and to simply defer to the wishes of the employee. To do so equally ignores the legislative intent. In the above-excerpted quote from the Supreme Court of Canada where they noted that the, "idiosyncratic view of the individual employer or adjudicator" were not relevant, in the present case, the Appellant would also add the "idiosyncratic view of the Complainant".

(Underlining mine)

[52] I have already rejected the appellants' complaint that the Board failed to "…make[s] a reasoned determination that the intended remedy of reinstatement is inappropriate …". I will now dispense with their conjoined argument that having "elected" to "…make a statutory claim pursuant to Section 71(1) of the *Code",* Mr. Bidgood "is not entitled or empowered to select the desired remedy".

[53] The simple and complete answer to the appellants' submission is that the Board did consider and rejected the idea that Mr. Bidgood's reinstatement would be appropriate in the circumstances. After coming to that conclusion the Board went on to assess the amount of compensation that would be appropriate. In this, the Board did exactly what it was statutorily empowered to do. There was no "delegation" of the Board's "decision-making powers". In their factum the appellants concede that "…once it concludes that reinstatement is inappropriate", the Board's broad statutory remedial powers include the power to award compensation and that "awarding compensation [is] based on common law principles applicable to reasonable notice…". Respectfully, that is precisely what the Board did. We see this in tracking the Board's reasoning in its Order:

> [20] Even if the Board should find that the original contract violates Section 6 of the *Code*, he argued that the Board has no jurisdiction to award the common law remedy of reasonable notice, where reinstatement is inappropriate. The purpose of the *Labour Standards Code* is to provide a minimum floor of rights; if a complainant wants more than that minimum, they can pursue that remedy through the courts: *Fredericks v. 2753014 Canada Inc.* 2008 NSSC 377; *Re Tibert v. Hage* 2015 CarswellNS 1976 (NSLB).

> [21] He argued that if the Board finds that it has jurisdiction, any award of pay in lieu of notice should be reduced because the Complainant did not make sufficient efforts to mitigate his damages. Further, any amount of notice awarded should also include the eight weeks notice that was given.
>
> …
>
> [26] Counsel for the Complainant argued that the Board's power to award damages where reinstatement is not appropriate under Section 71 is the obvious implication of Sections 21 and 26 of the Code. There is no authority for the proposition that employees who have been discharged contrary to Section 71 only have the right to reinstatement, and any such interpretation would be unreasonable.
>
> [27] She argued that the twelve month notice period ordered by the Labour Standards Officer was reasonable, though fourteen months could have been ordered. The Officer could arguably have factored in the two month notice period in deciding the amount of damages, since the Complainant worked through his notice period. Finally, she argued that the Complainant reasonably mitigated his damages.

[54] Then, after concluding that Mr. Bidgood's employment ran from August 2000 to February 2015 the Board goes on to describe its power to award damages to Mr. Bidgood in lieu of his reinstatement:

> [39] We conclude that the test for the application of Section 11 has been met, that the Complainant's period of service runs from August 2000 to February 2015, and that Section 71 applies.
>
> [40] There is no question that the Board has the power to reinstate where there is a breach of Section 71 *Re Sobeys Stores Ltd. v. Yeomans* [1989] S.C.R. 238. However, there may be situations where reinstatement is not appropriate, perhaps because the Complainant has found other employment, or because the employment relationship has been irretrievably severed; there may be other situations, like here, where the Complainant is not seeking reinstatement, and nor has the Director ordered it. The Labour Standards Tribunal, and later the Labour Board, has regularly ordered damages in lieu of reinstatement. [See, for example: *Re Van't Hof v. South Shore District Health Authority* (LST 1795), *Re Kilcup v. Crown Fibre Tube Inc.* (LST 2064), *Re Beck v. Hackmatack Farm* (LST 2297), *Re Greenwood v. Richelieu Hardware* (LST 2358)]
>
> [41] The Board has wide authority to order damages, pursuant to Section 26 of the *Labour Standards Code*:
>
> …
>
> [43] Having found that the Board has jurisdiction to award damages leaves the question of what constitutes appropriate damages in this situation. …

[55] The soundness of the Board's reasoning cannot be questioned. Even a cursory canvass of this Court's own jurisprudence supports the Board's interpretation and application of its broad remedial powers to craft a fair level of compensation for Mr. Bidgood, by awarding him damages in lieu of his not being reinstated to his former position. See for example, *Deagle v. Shean Co-operative Ltd*, 1996 NSCA 217; *Kaiser v. Dural*, 2002 NSCA 69; *Coleman v. Sobeys Group Inc.*, 2005 NSCA 142; and *Hillside Pines Home for Special Care v. Beck*, 2016 NSCA 85.

[56] Nothing in the record causes me to doubt the reasonableness of the Board's exercise of its statutory jurisdiction to award damages to Mr. Bidgood in lieu of his reinstatement.

[57] This then takes me to the third question which concerns the Board's determination of the *amount* of damages to be awarded. That inquiry also engages the Board's interpretation and application of its home statute.

iii. Did the Board err in finding that the employment contract between the parties was not binding in the circumstances because it violated the minimum standards established by the *Code*?

[58] For convenience I will reproduce the provisions of the *Code* that are relevant to answering this question:

> **Interpretation**
>
> 2 In this Act,
>
> …
>
> (c)"discharge" means a termination of employment by an employer other than a lay-off or suspension;
>
> …
>
> **Effect of Act**
>
> 6 This Act applies notwithstanding any other law or any custom, contract or arrangement, whether made before, on or after the first day of February, 1973, but nothing in this Act affects the rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to him than his rights or benefits under this Act.
>
> **Determination by Board and appeal to court**

20 (1) If in any proceeding before the Board a question arises under this Act as to whether

…

(b) an employer … has done anything prohibited by this Act,

the Board shall decide the question and the decision or order of the Board is final and conclusive and not open to question or review except as provided by subsection (2).

(2) Any party to an order or decision of the Board may, within thirty days of the mailing of the order or decision, appeal to the Nova Scotia Court of Appeal on a question of law or jurisdiction.

Duty of Board

26 (1) The Board, in determining any matter under this Act, shall

(a) decide whether or not a party has contravened this Act; and

(b) make an order in writing.

(2) Notwithstanding Section 72, where the Board decides that a party has contravened a provision of this Act the Board may order the contravening party to

(a) do any act or thing that, in the opinion of the Board, constitutes full compliance with the provision;

(b) rectify an injury caused to the person injured or to make compensation therefor; and

(c) for greater certainty and without limiting the generality of clauses (a) and (b), reinstate the employee,

but where the Board decides that a complaint under Section 81 is made out the Board shall order the employer to pay over to the Board by a specified date the amount of pay found to be unpaid.

Dismissal or suspension without just cause

71 (1) Where the period of employment of an employee with an employer is ten years or more, the employer shall not discharge or suspend that employee without just cause …

(2) An employee who is discharged or suspended without just cause may make a complaint to the Director in accordance with Section 21.

…

Termination of employment by employer

72 (1) Subject to subsection (3) and Section 71, an employer shall not discharge, suspend or lay off an employee, unless the employee has been guilty of wilful misconduct or disobedience or neglect of duty that has not been condoned by the employer, without having given at least

> …
>
> (d) eight weeks' notice in writing to the person if his period of employment is ten years or more.
>
> …

[59] This then provides the backdrop to the Board's consideration of the *amount* of damages it felt was necessary to properly compensate Mr. Bidgood, after concluding that his reinstatement was not a viable option.

[60] Applying the statutory definitions and provisions of the *Code*, the Board concluded that the employer had contravened the *Act*, that Mr. Bidgood had served a period of employment lasting "10 years or more" and that he had been "discharged… without just cause …". The question then became whether Mr. Bidgood's compensation would be limited by his contract of employment, or not, having regard to the operation of s. 6 of the *Code*.

[61] Mr. Bidgood had an employment contract with Abridean that was subsequently assigned to AI in 2011. The contract contained a clause on termination limiting any notice of severance period to a maximum of 26 weeks:

> Abridean may terminate your employment at any time without cause by giving you the following written notice, or pay in lieu of notice, according to your length of employment service in accordance with the following table (based on a start date of August 28, 2000):
>
> | Service | Notice |
> |---|---|
> | Up to 2 years | 4 weeks |
> | Every year thereafter | 2 additional weeks of notice
to a maximum of 26 weeks all inclusive |

[62] As we have seen, s. 6 of the *Code* renders null and void any contractual provisions that result in an employee receiving less than what he or she would receive under the minimum standards of the *Code*.

[63] The gist of this provision is that parties cannot contract out of minimum labour standards (although they can negotiate terms more favourable than the minimum standards and have those rights vindicated before the common law courts). In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, the Supreme Court of Canada confirmed that any contractual provisions that have the effect of avoiding minimum statutory employment standards are null and void (at ¶26):

> The effect of ss. 3 and 4 of the *Act* is to make any attempt to contract out of the minimum employment standards of the *Act*, by providing for lesser benefits than those minimum employment standards, "null and void".

[64] In this case, the effect of applying the termination provision in Mr. Bidgood's contract would be to deprive him of the minimum protection provided to tenured employees under s. 71 of the *Code*. A tenured employee is entitled not to be terminated without just cause (subject to certain exceptions that do not apply in this case). Employers cannot contract out of this protection by providing for any period of notice or pay in lieu of notice for tenured employees dismissed without just cause: such employees are guaranteed continued employment in the absence of cause or an applicable exception under s. 72(3). Thus, applying the termination provision in Mr. Bidgood's contract would violate s. 6 of the *Code*. Recalling the Supreme Court's directions in *Machtinger*, the Board's decision that the provision in issue here is null and void is not only reasonable but correct.

[65] The appellants say that the Board did not explain in what manner the terms of the contract were "less favourable than" those available under the *Code* and because the Board did not consider reinstatement as a remedy, the Board could not have meant his employment contract was less favourable than reinstatement. I respectfully disagree.

[66] In its Order, the Board states:

> The terms of the contract are less favourable than those available under the *Labour Standards Code* for breach of section 71, and we find that the contract does not apply. …

[67] The Board had already decided that damages were available as a remedy in lieu of reinstatement for breach of s. 71 under s. 26, which the Board found gave it a broad range of discretionary remedial powers. Therefore, although the Board did not need to rely upon reinstatement in order to find the employment contract less favourable than the *Code*, its Order is not inconsistent with the Board having made that finding.

[68] In my view, Mr. Bidgood's position on this issue finds support in the Supreme Court of Canada's decision in *Wilson*, *supra*. There, the Court held that an employer cannot abrogate the legislative protection against unjust dismissal for tenured employees by contracting for terms restricting the remedies a labour tribunal can award:

> 68 AECL's argument that employment can be terminated without cause so long as minimum notice or compensation is given, on the other hand, would have the effect of rendering many of the Unjust Dismissal remedies meaningless or redundant. The requirement to provide reasons for dismissal under s. 241(1), for example, would be redundant. And, if an employee were ordered to be reinstated under s. 242(4)(b), it could well turn out to be a meaningless remedy if the employer could simply dismiss that employee again by giving notice and severance pay. These consequences result in statutory incoherence. Only by interpreting ss. 240 to 246 as representing a displacement of the employer's ability at common law to fire an employee without reasons if reasonable notice is given, does the scheme and its remedial package make sense.

(Underlining mine)

[69] As with the unjust dismissal provisions of the *Canada Labour Code*, allowing an employer to dismiss an employee without cause because of a contractual term providing for reasonable notice (or pay in lieu of), would render the protection granted by s. 71 of the *Code* meaningless. Section 71 guarantees that an employee with ten years or more of service cannot be dismissed without cause. Contracting for anything to the contrary is prohibited by s. 6 of the *Code*.

[70] *Wilson* involved the interpretation of similar provisions in the *Canada Labour Code* as are at issue in the current appeal. At ¶65, Abella, J. noted that both the Nova Scotia and Federal schemes "display significant structural similarities" and in particular that:

> …Like the Federal scheme, the two provincial ones [Nova Scotia and Quebec] have been consistently applied as prohibiting dismissal without cause, and grant a wide range of remedies such as reinstatement and compensation.

[71] Justice Abella went on to reject the position taken by the Federal Court of Appeal that the intent of such statutory provisions was to mandate common law remedies. Rather, she made clear that remedies delivered under such schemes are meant to match the broad jurisdiction of a labour arbitrator:

> [67] The remedies newly available in 1978 to non-unionized employees reflect those generally available in the collective bargaining context. And this, as Minister Munro stated, is what Parliament intended. To infer instead that Parliament intended to maintain the common law under the *Code* regime, creates an anomalous legal environment in which the protections given to employees by statute — reasons, reinstatement, equitable relief — can be superseded by the common law right of employers to dismiss whomever they want for whatever reason they want so long as they give reasonable notice or pay in lieu. This

> somersaults our understanding of the relationship between the common law and statutes, especially in dealing with employment protections, by assuming the continuity of a more restrictive common law regime notwithstanding the legislative enactment of benefit-granting provisions to the contrary: *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1003; *Rizzo & Rizzo Shoes Ltd.* (Re), [1998] 1 S.C.R. 27, at para. 36.

[72] In conclusion, the assumption of broad remedial powers by the Board in this case when awarding Mr. Bidgood 12 months' notice as an appropriate amount of damages, was a reasonable interpretation of its home statute.

Conclusion

[73] The Board did not fail to consider Mr. Bidgood's reinstatement. The Board addressed the issue and rejected his returning to the company as not being a viable option. The Board did not err in deciding that to adequately compensate Mr. Bidgood, damages amounting to 12 months' notice was reasonable, or in finding that Mr. Bidgood's contract of employment did not apply because its terms were less favourable than those available under the *Labour Standards Code*. The Board's interpretation and application of the *Code* fell within a range of intelligible and defensible outcomes and was therefore reasonable in the circumstances.

[74] I would dismiss the appeal, but without costs to any party.

Saunders, J.A.

Concurred in:

Farrar, J.A.

Bourgeois, J.A.