

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Bailey v. Canadian Union of Public Employees, Local 759,  
2010 NSSC 21

**Date:** 20100125

**Docket:** Syd 306583/289111

**Registry:** Sydney

**Between:**

John Gabriel Bailey

Plaintiff / Respondent

v.

The Canadian Union of Public Employees, Local 759,  
a trade union

Defendant / Moving Party

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**LIBRARY HEADING**

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**Judge:** The Honourable Justice Frank Edwards

**Heard:** January 18, 2010, in Sydney, Nova Scotia

**Subject:** Motion for Summary Judgment.

**Facts:** Plaintiff/Respondent had sued his union for breach of its duty of fair representation. Specifically, he alleged that the Union had abandoned his arbitration, had failed to provide him with the legal advice and agreeing that he could return to work in a job for which he was medically unfit. The Defendant/Moving Party brought a Motion for Summary Judgment.

**Issue:** Whether the Moving Party has shown that there is no genuine issue for trial.

**Result:** Motion granted. The evidence is clear that the arbitration was settled, not abandoned. The Plaintiff/Respondent had access to the Union's legal counsel. If he wished to have independent counsel, it was up to him to retain same. Further, the Union obtained agreement from the employer that it was accommodate

Mr. Bailey is a position for which he was medically fit. The employer is still awaiting receipt of medical information from Mr. Bailey.

***Cases Noted:***      ***Vaughn v. Hayden***, [2009] N.S.J. No. 364  
***Canadian Merchant Service Guild v. Gagnon*** [1984] 1  
S.C.R. 509

***THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION.  
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January 18, 2010, in Sydney, Nova Scotia

**Counsel:**

Robert Pineo, for the respondent/plaintiff  
Ronald Pizzo, Esq., for the moving party/defendant

**By the Court:**

[1] This is an motion for Summary Judgment on evidence, pursuant to Rule 13.04, made by the Defendant, the Canadian Union of Public Employees, Local 759 ("CUPE, Local 759"). CUPE Local 759 has filed the affidavits of John Evans and Jacquie Bramwell in support of the motion. Mr. Bailey has filed his own affidavit in response. After reading the submitted affidavits, the briefs, and hearing the submissions of Counsel, I am in agreement with the moving party's position which is set out in its brief as follows (with some elaboration by me):

[2] Rule 13.04 (1) provides:

(1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.

[3] In *Vaughn v. Hayden*, [2009] N.S.J. No. 364, Justice McDougall, considered Civil Procedure Rule 13.04. Justice McDougall held (at paragraphs 6 to 8):

6. The initial burden is on the party advancing the motion to show there is no genuine issue for trial. It then falls to the opposing party to establish, on the facts that are not in dispute, that his claim has a real chance of success.

7. The new rule governing summary judgment motions tracks the existing jurisprudence. It does not alter the applicable test in any appreciable way. In *Selig v. Cooks Oil Company Limited*, [2005] N.S.J. No. 69 at para. 10, the Nova Scotia Court of Appeal framed the two-part test under the old Rule 13.01 as follows:

...First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

8. To use a tennis analogy, once the ball is served over the net and provided it has landed in-bounds, it is then up to the opposing side to return it. The return need not be a passing shot but it must, at least, have the potential to be a winner.

[4] Thus, the onus on the moving party (CUPE, Local 759 in this case) is to show that there is no genuine issue of fact to be determined at trial. The burden then shifts to the respondent, Mr. Bailey, to show that, on the facts that are not in dispute, his claim has a real chance of success.

[5] Mr. Bailey's Statement of Claim alleges that the Union, CUPE, Local 759, breached its duty of fair representation. He claims that the Union did this by:

*I.* Abandoning Mr. Bailey's arbitration without a settlement (paragraph 16 of the Statement of Claim);

*II.* Not providing Mr. Bailey with access to legal advice on abandoning the grievance (paragraph 17 of the Statement of Claim); and

*III.* Agreeing that Mr. Bailey would return to work as a bus driver when the Union knew Mr. Bailey was medically unfit for the job. (Paragraph 18 of the Statement of Claim)

[6] CUPE, Local 759 says that it did not do any of the above things (allegations *I* through *III*) that forms the factual basis upon which Mr. Bailey rests his claim.

The documentary evidence clearly supports the Applicant's position.

[7] *I. Did the Union Abandon Mr. Bailey's Arbitration without a Settlement?*

[8] *The Subject matter of the Arbitration:* Mr. Bailey was employed as a bus driver by the Cape Breton Regional Municipality ("CBRM"). On January 19, 2005, Mr. Bailey was suspended from employment pending the outcome of CBRM's investigation into allegations of misconduct by Mr. Bailey. The letter of suspension (found at exhibit "Z" of John Evans' Affidavit) states:

A series of events involving your interaction with CBRM staff, transit patrons, general public and work performance have made this action necessary. You have continuously chosen to show very hostile, combative and disruptive manner in dealing with people even after being advised that disciplinary action would be taken if you persisted with this attitude.

Behaviour of this nature is not expected or accepted and further disciplinary action under the CBRM discipline policy will be considered as part of the investigation process.

[9] The investigation led to Mr. Bailey's termination on February 9, 2005. The termination letter (exhibit "EE" to the Affidavit of John Evans) states:

I have been advised that on a continuous basis you have shown behaviour that is unacceptable to both patrons of CBRM and your fellow employees. I have taken the time to review your personnel file which indicates on numerous occasions you have had altercation with the public as a transit bus operator and with your fellow employees. These incidents have occurred over a lengthy period of time. You have been advised on numerous occasions in the presence of your Union that your behaviour is unacceptable. Based on your latest incident on November 6, 2004, I can see no indication that you have made any effort to improve your attitude. As a result, I can no longer expose either the public or your employees to this behaviour.

[10] CUPE, Local 759 grieved both the suspension and the termination. The suspension grievance is found at exhibit "AA" to the Affidavit of John Evans and the termination grievance is found at exhibit "FF". These two grievances were the subject matter of the arbitration, to be heard by arbitrator Susan Ashley on January 5, and 6, 2006.

[11] *Was the Arbitration Abandoned without settlement as Alleged?* In

paragraph 15 of the Statement of Claim, the Plaintiff alleges that CBRM, on

December 13, 2005 made an offer to settle the grievance on the following terms:

- The plaintiff would return to work without back wages, vacation, pension or any other compensation benefits;
- The suspension would remain on the plaintiff's employment record for two years
- The plaintiff would not return to his most recent position as Utility Service/Transit operator; and
- The Plaintiff would have the option of buying back his pension if he remitted both the employer's and employee's remittances.

[12] The actual CBRM offer is found at exhibit "MM" to the Affidavit of John

Evans. Paragraphs 1 to 4 of the offer read:

1. Mr. Bailey will return to work without payment of back wages, vacation, pension or any other compensation or benefits;
2. Time away from work will be considered a suspension and will remain part of his record for a period of two years. If Mr. Bailey has any similar incidents CBRM will discipline Mr. Bailey and may invoke any step in the disciplining process it seems proper up to and including termination;
3. Because the CBRM has received notification from the Department of Transportation that Mr. Bailey would does not meet the qualifications necessary to occupy the utility job in which he was serving prior to his suspension, he will be

returned to the service position, the particulars of which will be provided;

4. If Mr. Bailey wishes to buy back his pensionable time he can do so by contributing both the Employee and Employer share.

[13] Mr. Bailey agreed to items 1, 2 and 4. In terms of the length of time the suspension remained on record, that was governed by Article 11.03 of the collective agreement which also had a 24 month or two year period before the discipline could be removed (see Exhibit "A" to the affidavit of John Evans.)

[14] Thus, there was full agreement that Mr. Bailey's termination would be rescinded and that he would return to work. Mr. Bailey chose the return to work date of January 9, 2006. This is confirmed in a letter from Mr. Fleming, Director of Human Resources for CBRM to Ms. Bramwell, dated May 18, 2006, and found at exhibit "XX" to the Affidavit of John Evans. At the time there was no indication from Mr. Bailey that he could not return to work as a bus driver.

[15] ***Return to Work Utility Service/ Transit-Regular Full Time Position:*** There was also agreement on how to deal with whether Mr. Bailey should be returned to the position of Utility Service/Transit ("Utility Job") or to his former service

position (i.e. bus driver). On December 21, 2004, Mr. Bailey, as the senior employee, was the successful applicant for the utility job.

[16] The issue with the Utility Job was whether Mr. Bailey had the necessary qualifications to perform the work. The qualification issue arose from the Department of Transportation (not CBRM). The Province was dictating the necessary qualification for the job.

[17] On December 13, 2005 CBRM agreed to provide proof of the qualifications required for the Utility job. It also agreed that if it could not provide proof Mr. Bailey would go back to the Utility Job , the job he held before his termination (see Exhibit "OO" to the Affidavit of John Evans).

[18] ***Settlement v Abandonment:*** Was Mr. Bailey's grievance abandoned or was it settled. Before the settlement discussions with the CBRM, Mr. Bailey was unemployed. He was fired. He had no job. If the grievance had been abandoned without settlement, as alleged, his employment status would not have changed.

[19] After the settlement negotiations in mid December 2005, his employment status did change. He was reinstated as an employee of CBRM. He had a job to report to on January 9, 2006. He was once again gainfully employed. His grievance was settled, not abandoned.

[20] *II. Did Mr. Bailey receive legal advice before agreeing to the December 13, 2005 settlement?*

[21] In December 2005 CBRM and Ms. Bramwell (on behalf of CUPE, Local 759) agreed to meet to discuss settlement of Mr. Bailey's grievances. As noted in paragraph 25 of Ms. Bramwell's Affidavit, before the settlement meetings with CBRM, Ms. Bramwell arranged a meeting between, Mr. Bailey, Mr. Lionel Clarke (CUPE's in house legal counsel) and herself to discuss possible terms of settlement. Mr. Clarke attended the meeting by telephone. During that meeting, the possibility of a settlement offer from CBRM which would have Mr. Bailey's termination rescinded and time from work be reclassified as a suspension without compensation was discussed.

[22] Mr. Bailey did receive legal advice from the Union's lawyer regarding possible settlement offers and possible outcomes from arbitration before the settlement negotiations of December 13, 2005. During oral submissions, Counsel for CUPE made the point that the two parties to the negotiation were CUPE and the employer. Mr. Bailey was not a party. If Mr. Bailey wanted *independent* legal advice, it was up to him to seek it. There was no obligation on the Union to provide him with independent counsel or even to alert him to that option. The Union was obliged to take Mr. Bailey's views on the proposed settlement into account. It was not bound by those views. I concur with that position.

[23] *III. Was Mr. Bailey forced to return to work as a Bus Driver?*

[24] At the time of settlement in December 2005, Mr. Bailey represented that he was able to return to work. He did not represent or provide any information that he could not return work as a bus driver then. It was in between the time Mr. Bailey's grievance was settled in December 2005, and January 9, 2006, that Mr. Bailey gave notice he was not medically fit to return as a bus driver. Mr. Bailey gave this notice by making an application for LTD benefits. This is confirmed in exhibit "XX" of the Affidavit of John Evans.

[25] Once Mr. Bailey indicated that he was not able to return to work to his former position, the Employer undertook the process of attempting to accommodate Mr. Bailey so that he could return to work in a position that he could perform.

[26] Attached as exhibit "A" to the Affidavit of Jacquie Bramwell is correspondence from Agnes Fleming, Director of Human Resources CBRM, dated May 25, 2009. In that letter Mr. Fleming confirms that the CBRM had already offered to place Mr. Bailey in another position. Apparently, this offer did not meet with Mr. Bailey's doctor's approval. CBRM is still awaiting further medical information to see if it can further accommodate Mr. Bailey and place him in a position he can perform.

[27] Mr. Bailey's return to work is dependent on him providing further medical information about the medical nature of his work restrictions. Mr. Bailey is not being forced to return to work as a bus driver.

[28] **Conclusion:** The factual allegations made by Mr. Bailey against the Union are not sustainable. His arbitration was not abandoned – it was settled. Mr. Bailey furthermore was not forced to return to work as a bus driver. He is not working now due to a medical disability which became known after his arbitration was settled. CBRM still has not severed Mr. Bailey's employment and is awaiting medical information from him to find a job that he can do subject to his medical limitations.

[29] Mr. Bailey emphasizes that he was not in agreement (contrary to the assertions by Ms. Bramwell) with some of the key terms of the purported settlement. In paragraphs 10-12 of his affidavit, for example, he states that he did not agree to return to work without compensation for his lost wages, vacation, pension and other benefits.

[30] Whether Mr. Bailey agreed to the settlement or not is irrelevant. As noted, he was not a party to the negotiation. CUPE was. In *Canadian Merchant Service Guild v. Gagnon* [1984] 1 S.C.R. 509, the Supreme Court of Canada (at page 15 of online decision) set out the principles concerning a union's duty of representation in respect of a grievance:

The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

[31] It is clear from those principles (especially number 2) that the union has “considerable discretion” to settle the grievance notwithstanding the employee’s wishes. There is nothing in the evidence (aside from Mr. Bailey’s assertions) to

suggest that the union's decision was "arbitrary, capricious, discriminatory or wrongful". The overwhelming weight of the evidence suggests just the opposite.

[32] I am satisfied that the moving party has proven that, with respect to the factual allegations set out in paragraphs 16 to 18 inclusive of the statement of claim, there is no genuine issue of fact to be determined at trial.

[33] Paragraph 20 of the statement of claim reads as follows:

20. The Plaintiff pleads that his emotional health has been greatly affected by the abandonment of the Arbitration and the lack of continued representation by the Defendant. The Plaintiff further pleads that the actions of the Defendant have caused or greatly contributed to his current emotional health difficulties.

[34] Counsel for Mr. Bailey argued that the moving party has caused the emotional difficulties which prevent his client from returning to work. There is no evidence to support that contention. The mere assertion by Mr. Bailey does not make it a genuine issue for trial. That is especially so in light of my finding that the Union did nothing inappropriate.

[35] I am therefore granting the motion for summary judgment. The moving party shall have its costs in the amount of \$1,000.00 payable forthwith plus reasonable disbursements (not including Counsel's travel to Sydney) to be taxed by me.

Order accordingly.

J.