

CITATION: Canadian Union of Public Employees, Local 79 v. City of Toronto, 2023 ONSC 2031

COURT FILE NO.: CV-22-00684334-0000

DATE: 20230330

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 79, (CUPE 79)
Plaintiff/Moving Party

AND:

CITY OF TORONTO, Defendant/Responding Party

BEFORE: Cavanagh J.

COUNSEL: *Robert M. Church and Sukmani Virdi*, for the Canadian Union of Public Employees, Local 79

Amandi Esonwanne and Stephanie Moutsatsos, for the Defendant/Responding Party

HEARD: January 13, 2023

ENDORSEMENT

Introduction

- [1] The Plaintiff, the Canadian Union of Public Employees, Local 79 (the “Union”), moves for an order that the Defendant, City of Toronto (the “City”) be found in contempt of the award of an arbitrator which was filed with this Court in accordance with the *Labour Relations Act, 1995 S.* 1995, c.1 and entered as an Order of this Court.
- [2] For the following reasons, the Union’s motion is dismissed.

Procedural Background

- [3] The Union is a trade union with status before the Ontario Labour Relations Board. The Union represents members employed by the City.
- [4] On December 1, 2020, the Union filed a grievance under its collective agreement with the City following the termination of its member, Michael Rushton (the “Grievor”). The Union ultimately referred the grievance to arbitration.
- [5] The grievance arbitration proceeded before an arbitrator (the “Arbitrator”) over several days including in July, 2021 and February and March, 2022. On June 8, 2022, the Arbitrator issued his award in which he set aside the Grievor’s termination and substituted

a 30 day suspension. In the award, the Arbitrator ordered the City to reinstate the Grievor to his employment, without loss of seniority, and with compensation for lost wages.

- [6] The Union engaged in correspondence with the City with respect to the award.
- [7] By letter dated June 24, 2022, the City advised the Grievor that it intended to seek judicial review of the Award. The City requested that the Grievor not be reinstated pending the result of the judicial review application with the Grievor retaining the right to full recovery if the judicial review application is unsuccessful. The City asked to be advised if the Union is agreeable.
- [8] On June 27, 2022, the City commenced its application for judicial review by a Notice of Application issued that day.
- [9] By letters dated June 28 and July 4, 2022, counsel for the Union advised counsel for the City of the Union's position that the City must comply with the Award and reinstate the Grievor immediately, absent an application for a stay.
- [10] On July 5, 2022, counsel for the City wrote to counsel for the Union and advised that the City will proceed with reinstatement, on the understanding that if the Grievor's discharge is eventually upheld, he will be required to repay the City all monies paid to him, benefits used, and pension contributions between November 18, 2020 (the date of his discharge) and the date on which the discharge is ultimately withheld.
- [11] On July 11, 2022, counsel for the Union advised counsel for the City that the Grievor wants to be reinstated as soon as possible. Counsel for the Union advised that the Grievor and the Union are prepared not to require retroactive compensation be paid pending disposition of the judicial review application, so that the Grievor will incur no liability if the application is successful. Counsel for the Union expressed the Union's position that any wages and benefit coverage for time worked is not something the Grievor would be required to repay, even if the judicial review application is successful and the Grievor's discharge is upheld. Counsel asked for confirmation that the City agrees.
- [12] By letter dated July 13, 2022, counsel for the City responded to the Union and advised that the City's position is that while the Grievor will be reinstated as ordered, the question of his liability to repay salary payments, top-up payments, and benefits he receives following reinstatement will be addressed if his discharge is ultimately upheld and, if the discharge is not upheld, the issue will be moot.
- [13] On July 18, 2022, counsel for the Union wrote to counsel for the City and indicated that the Grievor was not prepared to return to work unless the City would agree not to recoup his compensation if the discharge was ultimately upheld.
- [14] On July 19, 2022, counsel for the City responded and maintained the City's intention to seek to recoup salary and benefits in the event that the discharge is ultimately upheld.

- [15] In response, on the same day, counsel for the Union repeated that the Grievor was not prepared to return to work with the City so long as the City insisted on reserving the right to recoup earned wages and benefits. Counsel for the Union advised that the Union will be filing the Award in Court and, unless the City filed an application for a stay by July 22, 2022, the Union would be bringing a motion for contempt.
- [16] Later on July 19, 2022, counsel for the City wrote to counsel for the Union and advised that the City intends to implement the three elements of the Award: that the City reinstate the Grievor to work, without loss of seniority, and with compensation for lost wages. Counsel for the City took the position that there is nothing in the Award about judicial review, the discharge being ultimately upheld, and what will happen to payments to the Grievor in such event. Counsel for the City advised that the City does not intend to conditionally reinstate the Grievor or demand that he agreed to something as a condition of reinstatement.
- [17] On July 20, 2022, counsel for the Union wrote to counsel for the City. In this letter, counsel for the Union stated that it and the Grievor are prepared not to seek payment for lost wages and benefits from the date of termination of the Grievor's employment (less the 30 day suspension period) until the date of reinstatement, pending the determination of the City's application for judicial review. Counsel for the Union stated that the only dispute outstanding was the compensation received by the Grievor for work performed after his reinstatement. The Union reiterated its position at such a condition by the City could not be considered a *bona fide* reinstatement in accordance with the Award. Counsel for the Union advised that unless the City changed its position, they intend to file a motion for contempt.
- [18] On July 20, 2022, the Union filed the Award with this Court pursuant to section 48(19) of the *Labour Relations Act, 1995*.
- [19] This motion was brought by Notice of Motion dated August 24, 2022. The Union seeks:
- a. An Order that the City be found in contempt of the Award of the Arbitrator dated June 8, 2022 which was entered as an Order of this Court in accordance with the *Labour Relations Act, 1995*;
 - b. An Order that the City forthwith comply with the Award of the Arbitrator. In the Union's factum, the Union seeks an order for compliance with the Award and the Order by, *inter alia*, reinstating the Grievor to his employment and confirming in writing that there are no conditions of any kind attached to the reinstatement except those specifically set out in the Arbitrator's Award.
 - c. An Order that the City be fined an amount of \$10,000 per day, or such terms as the Court determines are just, commencing June 9, 2022.

Analysis

[20] The Union filed a copy of the Award in the Superior Court of Justice on July 20, 2022. The Union having done so, the Award is enforceable as a judgment or order of the Superior Court of Justice pursuant to s. 48(19) of the *Labour Relations Act, 1995*.

[21] In *Blatherwick v. Blatherwick*, 2016 ONSC 2902, the Court, at para. 47, cited the decision of the Court of Appeal in *Prescott-Russell Services for Children and Adults v. G. (N.) et al.* (2007), 82 O.R. (3d) 686 and set out the criteria applicable to a contempt of court conclusion:

The criteria applicable to a contempt of court conclusion are settled law. A three-pronged test is required. First, the order that was breached must state *clearly and unequivocally* what should and should not be done. Secondly, the party who disobeys the order must do so *deliberately and wilfully*. Thirdly, the evidence must show contempt *beyond a reasonable doubt*. Any doubt must clearly be resolved in favour of the persons or entity alleged to have breached the order. (Italics in original)

[22] The question on this motion is whether the City should be found to be in contempt of the Award and Order by maintaining the position that it reserves the right to seek an adjudicative decision requiring the Grievor to repay wages and the value of benefits received after his reinstatement as an employee of the City in the event that the judicial review application is successful and the Grievor's discharge is upheld.

[23] The Union submits that at all material times, the City (i) was aware of the clear terms of the Award; and (ii) had known of both the Award and the fact that the Award was filed in Court by the Union. The Union submits that the Order is clear that the City was ordered to "[r]einstat[e] the grievor, without loss of seniority, and with compensation for lost wages". The Union submits that notwithstanding the clarity of the Order, the City has sought to impose additional conditions on the Grievor's reinstatement and compensation for lost wages. The Union notes, in support of this submission, that the *Employment Standards Act, 2000* provides in s. 11 that an employer is required to pay wages for work performed.

[24] The Union submits that the City, by reserving this right, to is trying to impose, in a roundabout way, an additional condition on the Grievor's reinstatement not contained in the Award or Order. The Union submits that the City could have sought relief from its obligation to comply with the Award pending the outcome of the judicial review application through a motion for a stay of proceedings, but it did not seek a stay.

[25] The Union submits that the City has not restored the Grievor to his *status quo* as it was before his dismissal because before his dismissal the Grievor was not subject to potential liability to repay wages should the judicial review be successful. The Union submits that if the City had concerns with implementation of the Award or wished to seek some right of recovery in the event of a successful application for judicial review, the proper approach

would have been to return to the Arbitrator who had written in the Award: “I remain seized to deal with any issues of remedy”.

- [26] The Union submits, further, that if the City wished to reserve a right to seek repayment of wages paid to the Grievor should the judicial review application be successful, it could have sought a stay of the Award pending the outcome of the judicial review application, and it failed to do so.
- [27] The Union submits that the City wilfully and deliberately disobeyed the Order when it did not reinstate the Grievor and compensate him for his lost wages on the specific terms set out in the Award. The Union submits that it has met the onus of proving beyond a reasonable doubt that the City committed an intentional act that is in breach of a clear order of which the City had notice. The Union submits that in the absence of legal authority relieving the City from complying with the Award, the City remains obligated to reinstate the Grievor to his employment, without conditions, and compensate him for his lost wages.
- [28] The City submits that it complied with the Award unconditionally, and that its reservation of a right to seek reimbursement of wages paid to the Grievor after his reinstatement if its judicial review application is successful is not a condition of reinstatement but a reservation of a right to seek a remedy from a future decision maker that, the City contends, may follow from a successful adjudication of its judicial review application. The City notes that the Order does not preclude the City from reserving a right to seek recovery of payments upon a successful judicial review application. The City contends that the union’s invocation of the Court’s power to make an order for contempt is being used as a coercive mechanism to force the City to expressly enter into an agreement not to pursue a right it may have.
- [29] I was not provided with any authority where a party’s reservation of a right to take a position in the future before a court or an adjudicative tribunal qualifies as disobedience of the award or order, absent a clear prohibition against doing so in an arbitral award or court order. There may very well be sound legal and policy reasons why a court or arbitral tribunal would not agree to allow an employer in the position of the City to recover payment of wages for work done if an order for reinstatement of employment is set aside, but this would be a matter to be decided by the court or tribunal if the issue arises.
- [30] The Award and Order required the City to reinstate the Grievor to his employment, without loss of seniority, and with compensation for lost wages. The City has done so. The Award and Order are silent about whether the parties may seek adjudicative decisions in the future in respect of asserted legal rights in relation to the Grievor’s employment with the City. In particular, the Award and Order are silent about whether the City is entitled to seek the determination by a court or other adjudicative tribunal of a legal right to be reimbursed for wages paid to the Grievor if the City’s application for judicial review is successful.
- [31] Although in its July 5, 2022 letter, the City initially requested the Grievor’s agreement that if his reinstatement were to be overturned on the judicial review application, the Grievor would be required to repay wages, benefits and pension contributions, ultimately, the City did not require the Grievor to so agree, as a condition of reinstatement. If the City had

required the Grievor to so agree, this would have amounted to the imposition of a condition of reinstatement and disobedience with the Award and Order. However, by not agreeing to the demand by the Grievor and the Union that the City will not reserve the right to seek such a determination, the City is not imposing a condition to full compliance with the Award and Order.

- [32] I am not satisfied that the Union has shown that by reserving a right to seek a determination of a legal right it may have if its judicial review application is successful, the City has deliberately and wilfully disobeyed the Award and the Order.

Disposition

- [33] For these reasons, the Union's motion is dismissed.
- [34] The parties agreed that the successful party on this motion would be entitled to an award of costs on a partial indemnity scale in the amount of \$3,500. I fix costs of this motion in this amount, to be paid by the Union to the City within 30 days.

Cavanagh J.

Date: March 30, 2023