**CITATION:** Carleton University v. Carleton University Academic Staff Association, 2011 ONSC 5869
**COURT FILE NO.:** 10-1609
**DATE:** 2011/10/05

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**DIVISIONAL COURT**



**RE:** CARLETON UNIVERSITY, Applicant

**AND**

CARLETON UNIVERSITY ACADEMIC STAFF ASSOCIATION, Respondent

APPLICATION UNDER the *Judicial Review Procedure Act*, R.S.O. 1990, c.J.1, s. 2

**BEFORE:** Valin, Belch and Rady JJ.

**COUNSEL:** Stephen Bird and Alanna Twohey, Counsel for the Applicant

James K. McDonald, Counsel for the Respondent

**HEARD:** October 3, 2011

## ENDORSEMENT

[1] The applicant university (the "University") hired Professor Stanley Bottomley ("Professor Bottomley") in 2004 on a one-year contract. The University renewed his contract for successive one-year terms until November 2007 when it advised Professor Bottomley his appointment would not be renewed and his employment would expire on June 30, 2008.

[2] The respondent association (the "Association") represents faculty members appointed to fixed term appointment at the University. The Association and the University are parties to a collective bargaining agreement (the "collective agreement").

[3] As a faculty member covered by the terms of the collective agreement, Professor Bottomley was a beneficiary of the University's long-term disability plan. He was responsible for paying the full cost of the premium for that plan. That plan contains a 180 day waiting period before benefits commence. Article 20.5(a) of the collective agreement contains a corresponding short-term sickness benefits provision that gives employees an entitlement to sickness benefits for a period of 180 days or until the long-term disability plan comes into effect.

[4] On June 14, 2008, Professor Bottomley advised the University he had become incapacitated by a serious illness and was applying for sick leave and long-term disability benefits. He provided medical information to substantiate his claim. The University has never taken any issue with the legitimacy of his illness.

[5] The University paid sick leave benefits to Professor Bottomley on June 10, 2008 to June 30, 2008 when his term of employment ended. He did not receive any sickness benefits for the remainder of the 180 day waiting period until his long-term disability benefits commenced on December 12, 2008. He continues to receive long-term disability benefits.

[6] While it did not take issue with the appropriateness of Professor Bottomley's termination, the Association did file a grievance on his behalf alleging a breach of Article 20.5(a) of the collective agreement and claiming sickness benefits for the period between June 30, 2008 and December 12, 2008. In an award dated March 16, 2010, Arbitrator Owen Shime (the "Arbitrator") found Professor Bottomley was entitled to the full 180 days sick leave.

[7] This is an application by the University for judicial review in which it seeks an order quashing that arbitration award. For the reasons that follow, the application is dismissed.

[8] The University argued the Arbitrator declined his jurisdiction because he failed to determine the matter before him. It also argued that the Arbitrator exceeded his jurisdiction by amending the collective agreement. Since those are jurisdictional questions, the University submitted the appropriate standard of review in this case was correctness. We do not agree.

[9] The University argued the Arbitrator answered the wrong question. We do not agree. The question before the Arbitrator was whether the benefits that had vested in Professor Bottomley during his employment continued after the contractual relationship ended. The Arbitrator answered this question having regard to the language of the collective agreement, the context in which the question arose, and the relevant jurisprudence.

[10] The University also argued the effect of the Arbitrator's decision was to amend the collective agreement. Again, we do not agree. The Arbitrator dealt with the issue before him. The issue was whether under Article 20.5(a) of the collective agreement, Professor Bottomley was entitled to receive sickness benefits for 180 days despite the fact that his employment had ended. The question before the Arbitrator was not whether Professor Bottomley continued to be an employee. Rather, the question dealt with what rights he had under the collective agreement.

[11] In those circumstances, we conclude the Arbitrator's award did not amend the collective agreement.

[12] In this case, the grievance alleged the University breached Article 20.5(a) of the collective agreement. To establish whether such a breach had occurred, the Arbitrator was required to determine the meaning of the language of that Article and its application to the factual situation before him.

[13] The interpretation and application of the provisions of collective agreements lie at the core of the expertise of a labour arbitrator. For that reason, the standard of review in a labour

arbitrator's interpretation of a collective agreement has long been held to be reasonableness. If the existing jurisprudence already identifies the appropriate standard of review, the analysis to determine the appropriate standard of review does not need to be repeated.[1] We therefore conclude the standard of review in this case is reasonableness.

[14] When a labour arbitrator engages in the interpretation of rights enjoyed by parties under a collective agreement, his decision is entitled to deference.[2] A reviewing court cannot substitute its own version of what it considers to be the appropriate solution. Rather, the court must determine if the decision under review falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law. In order to interfere, the court must find there are no lines of reasoning supporting the decision that could reasonably have led the Arbitrator to reach the decision he made.[3]

[15] In this case, the Arbitrator concluded there was a distinction between "entitlement" and "coverage". He ruled that, although coverage ended with employment, entitlements such as sick leave benefits had vested in Professor Bottomley when he was still an employee and he was, therefore, entitled to the benefits for 180 days or until his long-term disability benefits began.

[16] We find the Arbitrator's decision was transparent, rational and justified in the context of the facts and the law. This finding that Professor Bottomley's entitlement had crystallized, vested and continued beyond the end of his employment was reasonable because:

- Article 20.5(a) of the collective agreement provides that employees "shall" be entitled to sick leave benefits for 180 days or until the long-term disability benefits start;

- since the waiting period for long-term disability benefits is also 180 days, short-term sickness benefits are intended to bridge the gap between the start of an illness and the receipt of long-term disability benefits;

- the bargaining unit includes people on one-year contracts who would not be able to benefit from this provision if the University's interpretation is accepted; and

- the principles in *Dayco*[4] and other cases confirm vested collective agreement benefits are payable even when there is no longer a contractual relationship.

[17] The Arbitrator concluded that if the party had intended the sickness benefit not to vest or to end with the termination of employment, they would have done so explicitly. He pointed out that, in other parts of the collective agreement, where the parties did intend to terminate benefits when employment status changed, they did so explicitly.

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[1] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 57.
[2] *Community Nursing Home v. Ontario Nurses' Assn* [2010] O.J. No. 1477 at para. 9 (Div. Ct.).
[3] *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at para.59.
[4] *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada*, [1993] 2 S.C.R. 230

[18] The Arbitrator's award establishes an important difference between "coverage" and "entitlement". He found that coverage for this benefit ends with termination of employment. However, he found that entitlement to this benefit, which was the issue before him, can vest prior to the end of employment and thus continue beyond the termination of employment.

[19] The application is therefore dismissed. The respondent is entitled to its costs in the amount of $7,000, inclusive of disbursements and HST. Those costs are payable forthwith.



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Mr. Justice G. Valin

I agree _____

Mr. Justice D. Belch

I agree _____

Madam Justice H. Rady

**Date:** October 5, 2011

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**ENDORSEMENT**

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Valin J.
Belch J.
Rady J.

**Released:** October 5, 2011