Date: 20080123

Docket: A-250-07

Citation: 2008 FCA 27

CORAM: **LÉTOURNEAU J.A.**
SEXTON J.A.
PELLETIER J.A.

BETWEEN:

HARVEY THIEN

Applicant

and

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, SHIP & DOCK FOREMEN LOCAL 514 -and- WESTERN STEVEDORING LIMITED -and- WATERFRONT FOREMEN EMPLOYERS' ASSOCIATION

Respondents

Heard at Vancouver, British Columbia, on January 21, 2008.

Judgment delivered at Vancouver, British Columbia, on January 23, 2008.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: SEXTON J.A.
PELLETIER J.A.

Date: 20080123

Docket: A-250-07

Citation: 2008 FCA 27

CORAM: **LÉTOURNEAU J.A.**
SEXTON J.A.
PELLETIER J.A.

BETWEEN:

HARVEY THIEN

Applicant

and

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, SHIP & DOCK FOREMEN LOCAL 514 -and- WESTERN STEVEDORING LIMITED -and- WATERFRONT FOREMEN EMPLOYERS' ASSOCIATION

Respondents

REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

The Issue

[1] The applicant challenges by way of judicial review a decision of the Canada Industrial Relations Board (Board) which dismissed his complaint pursuant to section 37 of the *Canada Labour Code*, R.S.C. 1985, ch. L-2 (Code). According to the applicant, his Union violated its duty

of fair representation by refusing to represent him in the grievance procedure pertaining to his entitlement to a retirement allowance.

[2] The issue is whether the Board's decision was patently unreasonable as a result of a double failure by the Board. The first consists in the Board's omission to deal satisfactorily with the applicant's request for an oral hearing (see paragraph 31 of the applicant's memorandum of fact and law).

[3] The second is the Board's failure to examine whether the Union violated its duty of fair representation when the Union did not:

a) appropriately address the complexity of the issue raised by the applicant (*ibidem*, at paragraph 30);

b) assess the additional complexity pertaining to the structure of the longshore industry (*ibidem*, at paragraph 33);

c) address whether termination by one employer within a group of employers severs all entitlements, including those concerning possible employment and dispatch with other employers (*ibidem*, at paragraph 34); and

d) consider whether there was any significance in the applicant's continuing union membership to retirement.

[4] The applicant also contended that the Board erred in law and made erroneous findings of fact when it found that the applicant was seeking a ruling on the merits of the Union's decision: *ibidem*, at paragraph 29.

[5] At the hearing, counsel for the applicant insisted particularly on clause 6.02 of the collective agreement dealing with Credited Service. His submission in this respect was that the Union failed to assess the rights of the applicant under that section which, he says, survive the applicant's termination of employment. This failure or omission amounted to a violation of the duty of fair representation.

[6] Before I address the applicant's grounds of judicial review, I need to relate some of the facts which led to these proceedings and summarize the decision of the Board.

The Facts

[7] The applicant was an employee of the second respondent in the present proceedings, i.e. Western Stevedoring Limited. On July 21, 1997, his employment was terminated for cause, such being that he had deliberately misled his employer and the Trustees of the Waterfront Foremen's Welfare Plan (Trustees) with respect to his disability and ability to work: see applicant's record, volume 1, at page 13 the letter terminating the employment dated July 21, 1997.

[8] The following month, the applicant's Union initiated a grievance disputing the termination of the applicant's employment. The Union reviewed the grievance and a legal opinion that it sought on the issue. On November 20, 1997, it informed the applicant that it would not be proceeding with the grievance.

[9] In this respect, the applicant filed a complaint with the Board pursuant to section 37 of the Code. The complaint was dismissed. A complaint filed by the applicant before the Canadian Human Rights Commission was also dismissed.

[10] In May 2004, the applicant applied for a retiring allowance under the provisions of the Retiring Allowance Agreement (RA Agreement) between the Union and the Employers' Association. On August 12, 2004, he was found to be ineligible by the Trustees because he was not employed at the time of retirement as required by the RA Agreement. The section reads:

> **RETIRING ALLOWANCE AGREEMENT**
>
> This Agreement between the Companies collectively known as the Waterfront Foremen Employers' Association (WFEA) and the International Longshore and Warehouse Union (ILWU), Ship and Dock Foremen, Local 514, is effective from January 1, 1993.
>
> 1. Eligible Members
>
> There are two categories of Eligible Members, both of whom must be employed under the terms of the WPEA/ILWU Collective Agreement at the time of their retirement.

[Emphasis added]

[11] Pursuant to the Trustees' refusal, the applicant filed a grievance claiming entitlement to the allowance. The Union sought legal advice on the merits of the applicant's grievance. The legal opinion was to the effect that the applicant had no chance of success whatsoever because his employment had been terminated for cause six years earlier. On the basis of that information and its review of the facts surrounding the grievance, the Union informed the applicant that it would not represent him. Hence, the applicant's complaint to the Board pursuant to section 37 of the code.

The decision of the Board

[12] The Board recited the facts and reviewed the jurisprudence governing a complaint that a union has violated its duty of fair representation. At pages 4 and 5 of its decision, the Board summarized the essential principles applicable to such complaints. Then it proceeded to apply these principles to the facts of this case.

[13] It dismissed the applicant's complaint essentially on the basis that he had not provided sufficient facts to establish a violation of the duty of fair representation. I reproduce the following two paragraphs found at page 6 of the Board's decision which represent the reasons for its dismissal of the complaint:

> Based on the criteria noted above, the Board has analyzed the facts submitted and the positions of the parties and finds that the complainant did not provide sufficient facts to establish that the respondent union has violated its duty of fair representation.
>
> In this case, the union and its counsel were well aware of the complainant's situation and were of the opinion that a grievance could not be successful, given the wording of the collective agreement. The fact that the complainant disagrees with the union's interpretation of the collective agreement is not sufficient for the Board to find that the union

> has violated section 37 of the Code, especially if the union has not acted with discrimination, arbitrariness or in bad faith and even if the union's decision could have been erroneous (see *Yvonne Mistura, supra*). Most of the arguments presented by complainant's counsel in this case appear to be directed at the merits of the grievance rather than the manner in which the grievance was handled by the union. As the Board has stated in numerous past decisions (see *Fred Blacklock et al., supra*; and *Marinus Van Uden, supra*) section 37 of the Code does not provide an avenue for appealing a union's decision or a forum for resolving a difference of opinion between a complainant and its union on the interpretation of a collective agreement provision.

Analysis of the applicant's submissions on judicial review

The Union's failure to address the issues mentioned in paragraph 3 a) to d) of these reasons

[14] The Board was called upon to decide a straightforward issue which fell within its field of expertise. As I look at the applicant's complaints in this judicial review proceeding, most of them go much beyond the question of whether or not the Union breached its duty of fair representation when it refused to represent the applicant in his grievance pertaining to his entitlement to a retirement allowance. They involve considerations relating to the merits of both the Trustees' decision denying him entitlement to the retirement allowance because he was no longer employed, and the employer's decision to terminate the applicant's employment.

[15] It is not disputed that the employer's decision terminating the employment was final and binding at the time the applicant made his application for a retirement allowance. Yet, in my respectful view, the applicant seeks to circumvent or ignore these two decisions when he requires his Union to consider whether employment was terminated or not in view of the fact that the longshore industry consists of multiple employers and that the applicant continued his union

membership. In any event, the applicant provided no evidence that he worked for any other employer, member of the Association, after the termination of his employment.

The Union's failure to consider the clause relating to Credited Service

[16] This brings me to the argument based on the Credited Service. I reproduce clause 6.02 relied upon by counsel for the applicant and underline the relevant portions:

> 6.02 Credited Service
>
> (a) Credited Service is granted after an Employee becomes a Member, and is used to calculate the amount of pension to which a Member may become entitled.
>
> (b) A Member shall be granted a year of Credited Service for any year of Waterfront Service, after he becomes a Member:
>
> (i) in which he worked for a minimum of 800 hours, or was employed for a period of not less than 7 months, under the terms of a Collective Agreement; or
>
> (ii) during which he was a full-time Union official; or
>
> (iii) during which he was in receipt of time loss benefits under the Waterfront Foremen's Welfare Plan, in which case such time will be counted as employment for the purpose of (i) above;
>
> (iv) during which he was absent and in receipt of Workers' Compensation time loss benefits for the absence, in which case such time up to a maximum of 36 months will be counted as employment for the purposes of (i) above;
>
> (v) while in receipt of Canada Pension Plan Disability monthly benefits for a majority period in a calendar year;
>
> (vi) during which he was absent because of his participation in an educational or training program which the Trustees, in their discretion, have determined to be of benefit to the waterfront industry. The period of Credited Service granted with respect to participation in educational or training programs may in no event exceed 24 months.
>
> [Emphasis added]

[17] The applicant was found to be disabled under the *Canada Pension Plan* and by the *Workers' Compensation Board of British Columbia* after his dismissal from employment. However, his entitlement to disability benefits was retroactive to a date prior to that dismissal.

[18] The applicant's contention is that the Credited Service survived his termination of employment and that, therefore, he was entitled to the retirement allowance. His Union should have considered that in assuming its duty of fair representation. Failure to do so amounts to a violation of that duty.

[19] I must say that it is far from obvious to me that, in the absence of evidence of bad faith or misconduct, a simple omission to consider clause 6.02, in and of itself, entails a violation of the duty of fair representation.

[20] In addition, it is a debatable issue that the Credited Service survives the termination of the applicant's employment. Such a conclusion is not an obvious one, nor is it one that is foregone. It requires an interpretation of the RA Agreement and the collective agreement.

[21] Furthermore, a reading of clause 6.02 shows that the purpose of the clause is to ensure that an employee will not be penalized if he suffers a break in service as a result of, among other things, disability or his participation in an educational or training program. Indeed, clause 6.02(k) stipulates that "No person shall receive benefits from this Plan and the Longshore Plan in respect of more

years of Credited Service than are included in the benefit calculation for a Member who has no breaks in service".

[22] Finally, clause 6.02, as it appears from subparagraph (a), relates to the computation of the years of service, not to the entitlement to the pension. Subparagraph (a) clearly states that Credited Service "is used to calculate the amount of pension to which a Member may become entitled" (emphasis added). Entitlement is determined by clause 1 of the RA Agreement previously cited. Whatever the adjudicative authorities under the Canada Pension Plan or the B.C. Workers' Compensation Board decided in relation to the disability of the applicant, his entitlement to the retirement allowance remains governed by the agreement negotiated between the Union and the Employers' Association, in this case the RA Agreement.

[23] Counsel for the Union conceded that there is in the correspondence no express reference to clause 6.02 and the Credited Service. However, he submits that that issue was implicitly considered in the legal opinion which analyzed the merits and the chance of success of the applicant's grievance. He referred us to the following considerations at pages 74 and 75 of the Applicant's Record, volume 1:

> In this case Mr. Thien's employment relationship was brought to an end through the action of the employer. The Collective Agreement clearly recognized the employer's management right to discharge employees for just cause. We are therefore of the opinion that no arbitration board could possibly reach a conclusion that Mr. Thien's employment had not been terminated.
>
> We have also considered the question of whether Article 19(3) of the Collective Agreement would result in any different conclusion. That article deals with the calculation of creditable years of service for vacation pay purposes and allows "due consideration" to be given for "broken service" on account of sickness, injury or other reasonable causes.

> In our opinion the concept of "broken service" cannot influence a determination of whether a person is employed at the time of their retirement. Broken service would typically apply where a person maintained an employment relationship but was not actively employed due to layoff, illness or leave of absence.
>
> Article 19 of the Collective Agreement can therefore not overcome the fact that Mr. Thien's employment was terminated prior to the time of his retirement.
>
> [Emphasis added]

[24] The conclusion that "the concept of broken service cannot influence a determination of whether a person is employed at the time of their retirement" is consistent with clause 6.02(a) which refers to the amount of pension "to which a Member may become entitled" and with section 1 of the RA Agreement which says that, in order to be eligible to the allowance, the Member must be employed at the time of retirement (emphasis added).

[25] In conclusion, I think that the applicant's allegations of failure on the part of his Union to address issues a) to d), previously mentioned, and the issue of Credited Service are not substantiated. Therefore, there was no failure on the part of the Board to examine whether the Union violated its duty of fair representation.

The applicant's demand for a hearing

[26] The Board is not bound to hold a hearing according to section 16.1 of the Code. In the case at bar, it concluded that the material provided was sufficient to enable it to decide the section 37 complaint. I see no error in the Board's decision which requires or justifies the intervention of this Court.

Whether the Board erred in law or in fact when it found that the applicant was seeking a ruling on the merits of the Union's decision

[27] I am not clear what this complaint addresses. The Union's decision was a decision not to represent the applicant. The Board's conclusion was on a different issue. The Board was of the view that most of the applicant's arguments appeared to be directed at the merits of the grievance rather than the manner in which the grievance was handled by the Union: see page 6 of the Board's decision.

[28] The applicant has not shown that this conclusion was erroneous, whether in fact or in law.

Conclusion

[29] For these reasons, I would dismiss the application for judicial review with costs to both respondents.

"Gilles Létourneau"
J.A.

"I agree
J. Edgar Sexton J.A."

"I agree
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-250-07
STYLE OF CAUSE:	HARVEY THIEN v. INTERNATIONAL LONGSHORE AND WAREHOUSE UNION SHIP & DOCK FOREMEN LOCAL 514 -and- WESTERN STEVEDORING LIMITED -and- WATERFRONT FOREMEN EMPLOYERS' ASSOCIATION
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	January 21, 2008
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	SEXTON J.A. PELLETIER J.A.
DATED:	January 23, 2008

APPEARANCES:

Mr. Gregory Bruce	FOR THE APPLICANT
Mr. Bruce Laughton, Q.C.	FOR THE RESPONDENT International Longshore and Warehouse Union, Ship & Dock Foremen Local 514
Mr. Thomas A. Roper, Q.C.	FOR THE RESPONDENT Western Stevedoring Limited and Waterfront Foremen Employers' Ass.

SOLICITORS OF RECORD:

Gregory Bruce, Barrister and Solicitor Vancouver, BC	FOR THE APPLICANT
Laughton and Company, Barristers and Solicitors Vancouver, BC	FOR THE RESPONDENT International Longshore and Warehouse Union, Ship & Dock Foremen Local 514
Roper Greyell, LLP Vancouver, BC	FOR THE RESPONDENT Western Stevedoring Limited and Waterfront Foremen Employers' Ass.