

STATE OF MICHIGAN  
COURT OF APPEALS

---

TOLL BROTHERS, INC.,

Plaintiff-Appellant/Cross-Appellee,

v

JULIE FEKETE,

Defendant-Appellee/Cross-  
Appellant.

---

UNPUBLISHED  
February 21, 2008

No. 274964  
Oakland Circuit Court  
LC No. 2006-077774-CZ

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Plaintiff Toll Brothers, Inc., appeals as of right from a circuit court judgment denying its motion to vacate an arbitration award and granting defendant Julie Fekete's motion to confirm the award. Defendant cross appeals the circuit court's decision denying her request for post-arbitration attorney fees. We affirm the circuit court's decisions, but hold that defendant is entitled to reasonable appellate attorney fees and remand for the singular purpose of the trial court making a determination of those fees.

This appeal arises from a claim initiated by defendant following her termination from employment with plaintiff. Defendant filed a demand for arbitration against plaintiff on October 17, 2005, alleging gender discrimination. The parties stipulated that (1) defendant began work as an assistant project manager with plaintiff on October 21, 2002; (2) that she was off work on maternity leave from April 7, 2003, to July 28, 2003; (3) that her annual salary for 2002-2003 was \$65,000, and that, based on her 2003 performance; (4) she received a 4.6 percent increase in her base salary for 2004 to \$68,000. The parties also stipulated that plaintiff terminated defendant's employment on October 28, 2004, and that defendant's supervisor, William Bye, and evaluating supervisor, John Oberlin, both recommended her termination.

The arbitrator determined that plaintiff's decision to terminate defendant's employment was motivated in part by gender discrimination, contrary to Title VII of the Civil Rights Act of 1964, 42 USA 2000 *et seq.*, and Michigan's Civil Rights Act (CRA), MCL 37.2102 *et seq.* Plaintiff thereafter filed a circuit court complaint to vacate the arbitrator's decision and defendant filed a motion to confirm the award. The circuit court found no basis for disturbing the arbitrator's decision and confirmed the award.

On appeal, plaintiff argues that the arbitrator failed to provide written conclusions of law and that he exceeded his authority by improperly basing his decision on speculation and his own personal views, and by ignoring controlling principles of law.

This Court reviews de novo a circuit court's decision involving an arbitration award. *Saveski v Tiseo Architects, Inc.*, 261 Mich App 553, 554; 682 NW2d 542 (2004). A court's power to modify, correct, or vacate an arbitration award is limited. An arbitration award may be vacated if it was procured by corruption, fraud or undue means, was the result of partiality or misconduct, or if the arbitrator exceeded his or her powers, or conducted the hearing in violation of the requirements of the court rule. MCR 3.602(J)(1). When a party claims that an arbitrator exceeded the scope of his authority or committed a material error of law, "a reviewing court's ability to review an award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record." *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 175-176; 550 NW2d 608 (1996). Therefore, arbitrators exceed their powers whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law. *Id.* at 176. Moreover, "[t]he character or seriousness of an error of law which will invite judicial action to vacate an arbitration award . . . must be error so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *DAIIE v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982). The arbitrator's findings of fact are not reviewable. *Id.* at 429.

Initially, we reject plaintiff's argument that the arbitrator failed to provide written conclusions of law. In Michigan, arbitration awards "must be in writing and contain findings of fact and conclusions of law." *Rembert v Ryan's Family Steak Houses, Inc.*, 235 Mich App 118, 165; 596 NW2d 208 (1999). The parties' arbitration agreement also required that the arbitrator's decision be in writing and include the findings and conclusions upon which the decision was based. In general, however, there are no specific requirements regarding the scope of formal findings of fact or conclusions of law. See *Gavin, supra* at 429. The arbitrator issued an eight-page written opinion explaining his findings and conclusions. The arbitrator's opinion indicates that defendant's gender discrimination claim was brought under both the federal Civil Rights Act of 1964 and Michigan's CRA, and that defendant had the burden of proving that her gender was a reason for her termination and that the reasons for her termination offered by plaintiff were pretextual. The arbitrator thereafter summarized the evidence presented by the parties and determined that plaintiff's decision to terminate defendant was "motivated at least in part by gender discrimination in violation of state and federal law." The arbitrator's opinion satisfies the requirement that it issue a written decision setting forth the findings and conclusions on which the decision is based.

Plaintiff also argues that the arbitrator exceeded his powers and committed a material error of law because there was no causal link between the alleged discriminatory conduct and defendant's termination. As our Supreme Court cautioned in *Gordon Sel-Way, Inc v Spence Bros, Inc.*, 438 Mich 488, 497; 475 NW2d 704 (1991):

an allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrators' decision. Stated otherwise, courts may not substitute their judgment for that of the arbitrators and hence are reluctant to

vacate or modify an award when the arbitration agreement does not expressly limit the arbitrators' power in some way.

Our Court has concluded that arbitrators have exceeded their powers whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *Dohanyos, supra* at 175-176. As explained in *Gavin, supra* at 429:

Arbitration by its very nature, restricts meaningful legal review in the traditional sense. As a general observation, courts will be reluctant to modify or vacate an award because of the difficulty or impossibility, without speculation, of determining what caused an arbitrator to rule as he did. The informal and sometimes unorthodox procedures of the arbitration hearings, combined with the absence of a verbatim record and formal findings of fact and conclusions of law, make it virtually impossible to discern the mental path leading to an award. Reviewing courts are usually left without a plainly recognizable basis for finding substantial legal error. It is only the kind of legal error that is evidence without scrutiny of intermediate mental indicia which remains reviewable, such as that involved in these cases. In many cases the arbitrator's alleged error will be as equally attributable to alleged "unwarranted" factfinding as to asserted "error of law." In such cases the award should be upheld since the alleged error of law cannot be shown with the requisite certainty to have been the essential basis for the challenged award and the arbitrator's findings of fact are unreviewable.

"The character or seriousness of an error of law which will invite judicial action to vacate an arbitration award . . . must be error so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *Id.* at 443.

Plaintiff's arguments in this case are a reflection of its disagreement with the arbitrator's decision rather than evidence that the arbitrator exceeded his authority or committed a material error of law.

Although plaintiff correctly observes that "stray remarks" are not direct evidence of discrimination, *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 135; 666 NW2d 186 (2003), nothing in the arbitrator's decision demonstrates that the arbitrator found the remarks at issue in this case to be "stray remarks." Further, the arbitrator's decision was not based solely on the alleged discriminatory remarks. The arbitrator concluded that, although plaintiff detailed performance reasons for defendant's termination, the "key decision makers came to the decision to terminate Claimant's employment with a mindset that welcomed harsh scrutiny on her everyday activities." The arbitrator explained that the position of project manager was "a very difficult, time-consuming position," but that defendant was an assistant project manager whose "immediate supervisor was expected to serve as a mentor, in a position of support." The arbitrator found that Bye had high expectations for defendant's performance "with little support or mentoring," and "wanted everything to be done accurately and his testimony did not reflect a desire to mentor or support" her. The arbitrator then held that a similarly situated male was given areas to improve and time to make improvements ten months before his termination, while defendant was not advised in writing of changes that needed to be made.

The arbitrator also examined plaintiff's reasons for defendant's termination and recognized that it is "a difficult task to discern an individual's motives in making employment decisions." After summarizing the evidence presented by both parties, the arbitrator concluded that "[plaintiff's] decision to terminate [defendant's] employment was motivated at least in part by gender discrimination in violation of state and federal law." The arbitrator's remarks reflect that he was aware that there must be a causal connection between the evidence of discriminatory animus and the employment decision.

In sum, the arbitrator's factual findings support his determination that defendant's termination was motivated in part by discrimination on the basis of gender. Although plaintiff may disagree with those findings, it is not the function of a court to substitute its opinion for that of the arbitrator or otherwise disturb the arbitrator's findings of fact. Accordingly, pursuant to the dictates set forth in *Gavin*, the circuit court did not err in confirming the arbitrator's award.

On cross appeal, defendant argues that she was entitled to an award of post-arbitration attorney fees incurred in the circuit court proceedings. She also requests an award of appellate attorney fees.

We review a trial court's decision to award attorney fees for an abuse of discretion. *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006).

The basis for an arbitration award is determined by the arbitration agreement. *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150-151; 393 NW2d 811 (1986). The parties' arbitration agreement gave the arbitrator discretion to award all or some of either party's costs and attorney fees, "in addition to any such awards required by law." In addition to the arbitration agreement, the Civil Rights Act also permits an award of attorney fees at the trial court's discretion, MCL 37.2802; *Grow v W A Thomas Co*, 236 Mich App 696, 714; 601 NW2d 426 (1999), and appellate attorney fees. *McLemore v Detroit Receiving Hosp & Univ Medical Ctr*, 196 Mich App 391, 402-403; 493 NW2d 441 (1992). An arbitration agreement may not deprive an employee of his or her statutory rights. *Rembert, supra* at 156.

The arbitrator awarded defendant attorney fees in the amount of \$22,500. The circuit court declined defendant's request for additional attorney fees in the amount of \$3,925. The parties' arbitration agreement contemplated post-arbitration proceedings to vacate, modify, or confirm the award and, as stated above, the CRA permits an award of attorney fees. The circuit court therefore had the discretion to award post-arbitration attorney fees, but did not do so. In denying defendant's request for attorney fees for the post-arbitration action, the circuit court observed that defendant had already been awarded attorney fees in the amount of \$22,500, which it suggested was sufficient to adequately compensate defendant. The circuit court's decision not to award additional attorney fees in the amount of \$3,925 was within the court's discretion. Under the circumstances, the circuit court's decision not to award additional attorney fees did not constitute an abuse of discretion.

Although appellate attorney fees are not specifically provided for in the parties' arbitration agreement, this Court has discretion to award appellate attorney fees under MCL 37.2808. *McLemore, supra* at 402-403. Although a post-arbitration hearing was required in order to confirm the arbitration award, and plaintiff's complaint to vacate the award and defendant's motion to confirm the award was merely a part of that process, plaintiff's decision to

appeal the trial court's order required defendant to defend her arbitration award. "The purpose of the CRA's attorney fee provision is to encourage persons deprived of their civil rights to seek legal redress, to ensure victims of discrimination access to the courts, and to deter discrimination," *Grow, supra* at 720, while the purpose of arbitration is to avoid protracted litigation. *City of Huntington Woods v Ajax Paving Industries, Inc (After Remand)*, 196 Mich App 71, 75; 492 NW2d 463 (1992). Under the circumstances, we conclude that an award of appellate attorney fees is appropriate and consistent with the purpose of the Civil Rights Act. *Grow, supra* at 720. Accordingly, we remand this case to the trial court for a determination of reasonable appellate attorney fees. *McLemore, supra* at 403.

Affirmed, but remanded for a determination of reasonable appellate attorney fees. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ William B. Murphy

/s/ Stephen L. Borrello