STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: February 23, 2017)

TOWN OF CUMBERLAND,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PM-16-5833**
	:	
CUMBERLAND TOWN EMPLOYEES UNION, and NORMAN TREMBLAY,	:	
	:	
Defendants.	:	

DECISION

LICHT, J. Before the Court are the Town of Cumberland's (Town) Motion to Vacate Arbitration Award and the Cumberland Town Employees Union's (Union) cross-petition to confirm the same award. The Town also moved to stay implementation of the arbitration award while the Union moved to enforce the same award. Jurisdiction is pursuant to G.L. 1956 § 28-9-14.

I

Facts and Travel

The facts in this matter are not in dispute. Norman Tremblay (Tremblay) was hired by the Town on November 19, 2001. Pl.'s Ex. G, Arbitration Tr. 25:8-9, Aug. 11, 2016 (Arbitration Tr.). As of August 2014, Tremblay was working as a light equipment operator in the Town's Highway Department. Id. at 25:10-13. At that time, the Union and the Town were parties to a collective bargaining agreement (CBA). See Joint Ex. 1, CBA between Cumberland Town Employees Union and Town of Cumberland, 2013-2016 (CBA).

On August 5, 2014, Tremblay, while at work, rolled his ankle at the bottom of some stairs due to uneven ground, tearing tendons and ligaments. Arbitration Tr. 25:14-21. After three independent doctors evaluated Tremblay and recommended surgery, the insurance carrier eventually approved the procedure, and Tremblay had surgery in June 2015. Id. at 26:7-16. He never requested a leave of absence nor was told to apply for one. Id. at 26:17-27:2. No one from the Town told Tremblay when he had to return to work or that there was a time limit on when he could do so. Id. at 27:12-19.

On November 10, 2015, Tremblay received the following letter from Kathleen Taraian (Taraian), the Town's Human Resources Director:

> "Please be advised that after reviewing the medical report of your November 2, 2015 visit with your treating physician, it is obvious that you are still unable to return to your position in the Highway Department of the Town of Cumberland. This is the result of a work-related injury which occurred on August 5, 2014. Therefore, as of November 10, 2015, your right to reinstatement to your position is terminated at this time pursuant to R.I.G.L. 28-33-47(c)(1)(vi) as it has been more than one year from the date of your injury and you are unable to return because of that injury." Joint Ex. 2 (emphasis added).

The letter referred to the Workers' Compensation Act, chapter 33 of title 28 of the Rhode Island General Laws. Section 28-33-47, "Reinstatement of injured worker," provides, in pertinent part:

> "(a) A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment upon written demand for reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of the position with reasonable accommodation made by the employer in the manner in which the work is to be performed. A workers' [sic] former position is 'available' even if that position has been filled by a replacement while the injured worker was absent as a result of the worker's compensable injury. If the former position is not available, the worker shall be reinstated in any other existing position that is vacant and suitable. A certificate by the treating physician that the physician approves the worker's return to the worker's regular

> employment or other suitable employment shall be prima facie evidence that the worker is able to perform the duties.
> . . .
> "(c) Notwithstanding subsection (a) of this section:
> "(1) The right to reinstatement to the worker's former position under this section terminates upon any of the following:
> . . .
> "(vi) The expiration of thirty (30) days after the employee reaches maximum medical improvement or concludes or ceases to participate in an approved program of rehabilitation, or one year from the date of injury, whichever is sooner . . . ." Sec. 28-33-47 (emphasis added).

Thereafter, on November 13, 2015, Tremblay filed a grievance with the Union contending that he was terminated without just cause in violation of Article 13.1 of the CBA. See Joint Ex. 3. As a remedy, he sought to be reinstated to his position. Id.; see CBA 14-15. Taraian denied Tremblay's grievance on November 20, 2015—again citing § 28-33-47(c)(1)(vi) (hereinafter referred to as the One Year Limit)—and the Town's Mayor did the same on December 2, 2015. See Joint Exs. 6 and 8.

The Union then filed a demand for arbitration on Tremblay's behalf, seeking reinstatement for Tremblay. See Pl.'s Ex. A. The Arbitrator held a hearing on August 11, 2016. The Union framed the issue as whether the grievance should be sustained and, if so, what the remedy should be. Arbitration Tr. 7:11-16. The Town argued only that the grievance was not arbitrable. Id. at 7:17-22. After the parties submitted post-arbitration briefs and reply briefs, the Arbitrator issued a written decision (Award) on December 13, 2016. See Pl.'s Ex. F (Award); see also Pl.'s Exs. B, C, D, and E. Therein, the Arbitrator found that the grievance was, indeed, arbitrable and that Tremblay was wrongfully terminated without just cause. Award at 11-14. Consequently, the Arbitrator sustained the grievance and awarded that the Town reinstate Tremblay to his position. Id. at 14.

On December 19, 2016, the Town filed a Miscellaneous Petition with this Court as well as a Motion to Stay Implementation of Arbitration Award and a Motion to Vacate Arbitration Award. The Union filed objections to the Town's Motions on January 26, 2017, along with a cross-petition to confirm the award and a cross-motion to enforce it. The Court held oral arguments on these matters on January 31, 2017. At that time, this Court granted the Town's Motion to Stay Implementation of Arbitration Award on a temporary basis pending the Court's decision on the merits of the Town's Motion to Vacate Arbitration Award and the Union's cross-petition to confirm. See Hr'g Tr. 26:21-27:11, Jan. 31, 2017.

II

Standard of Review

In order "'[t]o preserve the integrity and efficacy of arbitration proceedings, judicial review of arbitration awards is extremely limited.'" Berkshire Wilton Partners, LLC v. Bilray Demolition Co., 91 A.3d 830, 834-35 (R.I. 2014) (quoting Aponik v. Lauricella, 844 A.2d 698, 704 (R.I. 2004)).

The Superior Court's review of an arbitrator's award is governed by § 28-9-18, which sets forth:

> "(a) In any of the following cases the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated:
>
> > "(1) When the award was procured by fraud.
> >
> > "(2) Where the arbitrator or arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made.
> >
> > "(3) If there was no valid submission or contract, and the objection has been raised under the conditions set forth in § 28-9-13.
>
> "(b) A motion to vacate, modify or correct an arbitrator's award shall not be entertained by the court unless the award is first implemented by the party seeking its vacation, modification, or

> correction; provided, the court, upon sufficient cause shown, may order the stay of the award or any part of it upon circumstances and conditions which it may prescribe.
> "(c) If the motion to vacate, modify, or correct an arbitrator's award is denied, the moving party shall pay the costs and reasonable attorneys' fees of the prevailing party."

"Though 'judicial authority to review or to vacate an arbitration award is limited,' the court 'must . . . [vacate] the award . . . [when] the arbitrator or arbitrators exceed . . . their powers.'" State v. R.I. All. of Soc. Servs. Emps., Local 580, SEIU, 747 A.2d 465, 468 (R.I. 2000) (alterations in original) (quoting R.I. Council 94, AFSCME, AFL-CIO v. State, 714 A.2d 584, 587-88 (R.I. 1998)).

Of course, "[o]ne sure way for an arbitrator to exceed his or her powers is to arbitrate a dispute that is not arbitrable in the first place." Id. "Thus awards purportedly resolving nonarbitrable issues must be set aside[.]" R.I. Council 94, 714 A.2d at 588 (citing R.I. Court Reporters All. v. State, 591 A.2d 376, 379 (R.I. 1991); Vose v. R.I. Bhd. of Corr. Officers, 587 A.2d 913, 914-15 (R.I. 1991)). Whether an issue is arbitrable is a question of law to be reviewed by this Court de novo. R.I. All. of Soc. Servs. Emps., 747 A.2d at 468 (quoting R.I. Council 94, 714 A.2d at 588 n.2). "[This Court's] review of the issue of arbitrability, therefore, should not be equated with the deference due the arbitrator's interpretation of the contract that is at issue in the present case." R.I. Council 94, 714 A.2d at 588 n.2 (citing Providence Teachers' Union Local 958—Am. Fed'n of Teachers v. Providence Sch. Comm., 433 A.2d 202, 205 (R.I. 1981)).

III

Analysis

The only real challenge for the Court in this matter is to decide the issue of arbitrability. The Town has made no other argument that could otherwise set aside the Arbitrator's Award. However, if Tremblay's grievance was not arbitrable ab initio, the Arbitrator's Award "must be

set aside[.]" R.I. Council 94, 714 A.2d at 588; see R.I. All. of Soc. Servs. Emps., 747 A.2d at 468.

The Town argues that the grievance is not arbitrable because the Workers' Compensation Court has exclusive jurisdiction over disputes regarding the reinstatement of an injured worker under § 28-33-47(d), which provides: "Determinations of reinstatement disputes shall be rendered by the workers' compensation court . . . ." The Union's first contention is that the Workers' Compensation Court's jurisdiction is not exclusive because the statute does not use the word "exclusive." The Union's second contention is that § 28-33-47(b) (the Seniority Section) allows a CBA to modify the one-year limitation on Tremblay's right to reinstatement contained in the One Year Limit. The Seniority Section states that "[t]he right of reinstatement shall be subject to the provisions for seniority rights and other employment restrictions contained in a valid collective bargaining agreement between the employer and a representative of the employer's employees . . . ." Sec. 28-33-47(b). Therefore, the Union contends, Tremblay's grievance is arbitrable as it is governed by the CBA, which contemplates a leave of absence up to two years. See CBA 25, Art. 20.2.

An examination of the plain language of the statute undermines the Union's first argument that the grievance was arbitrable under the CBA. "'When the language of a statute is clear and unambiguous, [this Court] must enforce the statute as written by giving the words of the statute their plain and ordinary meaning.'" Gem Plumbing & Heating Co. v. Rossi, 867 A.2d 796, 811 (R.I. 2005) (quoting Harvard Pilgrim Health Care of New England, Inc. v. Gelati, 865 A.2d 1028, 1037 (R.I. 2004)). The plain and ordinary meaning of § 28-33-47(d) is inescapable: "Determinations of reinstatement disputes shall be rendered by the workers' compensation court . . . ." Sec. 28-33-47(d) (emphasis added). This statute is unambiguous. Section 28-33-47(d)

employs the word "shall" not "may." Our Supreme Court has said that the use of the word "shall" makes mandatory that which is set forth in the statute. See Shine v. Moreau, 119 A.3d 1, 13 (R.I. 2015) (citing 1A Norman J. Singer and J.D. Shambie Singer, Statutes and Statutory Construction § 25:4 at 589 (7th ed. 2009)). In that light, the statute blatantly requires a grievant, such as Tremblay, to bring any dispute regarding reinstatement before the Workers' Compensation Court to resolve. The Arbitrator's Award, itself, says that "[t]he Town shall reinstate Norman Tremblay to his position . . . ." Award at 14 (emphasis added). As such, the Court concludes that the Workers' Compensation Court has exclusive jurisdiction over reinstatement disputes.

The Union's second contention that the Seniority Provision renders Tremblay's grievance arbitrable is to no avail. The Seniority Provision provides that an injured worker's reinstatement is "subject to the provisions for seniority rights and other employment restrictions contained in a valid collective bargaining agreement . . . ." Sec. 28-33-47(b). The Seniority Provision simply protects employees' seniority rights during any absence stemming from a compensable injury if the collective bargaining agreement so provides. When such language is read in conjunction with the whole "Reinstatement of injured worker" section—namely, (1) that "[a] worker who has sustained a compensable injury shall be reinstated . . . [,]" § 28-33-47(a); (2) that "[t]he right to reinstatement . . . terminates" upon specified conditions, § 28-33-47(c)(1); (3) that "[a]ny violation of this section is deemed an unlawful employment practice[,]" § 28-33-47(d); and (4) that "[d]eterminations of reinstatement disputes shall be rendered by the workers' compensation court . . . [,]" § 28-33-47(d)— there can be no other conclusion..

The Seniority Provision does not, as the Union claims, indicate that a CBA can supersede the Workers' Compensation Court's jurisdiction over reinstatement disputes or extend the One

Year Limit. Neither does the Union's assertion that three prior employees of the Town had been reinstated after the passage of a year from the dates of their injuries negate the restriction of the One Year Limit. "Indeed, the parties to a CBA have no legal authority to contravene state law by word or deed. Thus, statutory obligations cannot be bargained away via contrary provisions in a CBA, nor can they be compromised by the past or present practices of the parties." R.I. All. of Soc. Servs. Emps., 747 A.2d at 469. "[O]ur [Supreme Court's] cases in this area all boil down to a fundamental proposition: applicable state employment law trumps contrary contract provisions, contrary practices of the parties, and contrary arbitration awards." Id. After all, statutory obligations such as the one set forth in the One Year Limit "certainly cannot be negated by an arbitrator who purports to do so through the medium of 'contract interpretation.'" Id. Tremblay is bound by the mandates of § 28-33-47, no matter how the Arbitrator interpreted the interplay between the Seniority Provision and the CBA. Whether the two-year leave of absence contemplated by Article 20.2 of the CBA provides a longer window for Tremblay to seek reinstatement to his former position is not a decision for an arbitrator of the Superior Court. As previously states, reinstatement disputes are within the exclusive jurisdiction of the Workers' Compensation Court.

Tremblay did not submit a written demand for reinstatement within one year from the date of his injury on August 5, 2014, in compliance with § 28-33-47. He even admitted as much at the arbitration hearing. See Arbitration Tr. 36:7-9. As such, it cannot be plausibly contested that Tremblay's right to reinstatement had terminated under the One Year Limit.

IV

Conclusion

This Court finds that Tremblay's grievance was not arbitrable under the CBA, as the Workers' Compensation Court has jurisdiction over reinstatement disputes pursuant to § 28-33-47(d). The Arbitrator thus exceeded his powers under § 28-9-18(a)(2). Accordingly, the Court grants the Town's Motion to Vacate Arbitration Award, and the Union's cross-petition to confirm the same is denied.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Town of Cumberland v. Cumberland Town Employees Union and Norman Tremblay**
CASE NO:	**PM-16-5833**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**February 23, 2017**
JUSTICE/MAGISTRATE:	**Licht, J.**
ATTORNEYS:	
For Plaintiff:	**Dylan B. Conley, Esq.**
For Defendant:	**Marc B. Gursky, Esq.**