Order

Michigan Supreme Court
Lansing, Michigan

May 3, 2024

164435-6

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

MICHIGAN AFSCME COUNCIL 25 and AFFILIATED LOCAL 101,
Plaintiffs-Appellants,

v

SC: 164435
COA: 356320
Wayne CC: 20-007378-CL

COUNTY OF WAYNE,
Defendant/Third-Party Plaintiff-Appellee,

and

VICTOR PLESA,
Third-Party Defendant.
_____/

MICHIGAN AFSCME COUNCIL 25 and AFFILIATED LOCAL 101,
Plaintiffs,

v

SC: 164436
COA: 356322
Wayne CC: 20-007378-CL

COUNTY OF WAYNE,
Defendant/Third-Party Plaintiff-Appellee,

and

VICTOR PLESA,
Third-Party Defendant-Appellant.
_____/

On November 8, 2023, the Court heard oral argument on the application for leave to appeal the April 21, 2022 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

WELCH, J. (*concurring*).

I agree with the Court's decision to deny leave to appeal. The parties disagree about what standard of judicial review applies when a court is asked to review an arbitrator's decision resolving a dispute governed by a collective bargaining agreement between a public sector employer (Wayne County) and a labor organization (Michigan AFSCME Council 25 and Affiliated Local 101, hereinafter "AFSCME").

In this case, an employee of Wayne County was involved in a workplace incident on November 8, 2018, that led to disciplinary action. While awaiting the outcome of the disciplinary action, on November 20, 2018, the employee applied for retirement, and the application required that the employee sign a "separation waiver," which stated, "You are terminating employment and do not have any agreement, offer, or promise, oral or written, concerning reemployment." The effective date for the retirement was listed as January 1, 2019. The day after the employee signed the waiver, November 21, 2018, the County terminated the employee as a result of the disciplinary action. The employee filed a grievance seeking reinstatement. But in December 2018, while the grievance was pending, the employee's retirement was approved by the Wayne County Employees' Retirement System. After January 1, 2019, the employee transferred the entirety of his retirement funds to an individual, private retirement account.

The grievance went to arbitration in May 2019. Wayne County argued that the employee's representations in his retirement application and the withdrawal of funds from his public retirement account prevented reinstatement. Wayne County further claimed that reinstatement would violate the County's retirement ordinance and the Internal Revenue Code. The arbitrator ultimately concluded that the County violated the collective bargaining agreement when it terminated the employee, that suspension was the appropriate disciplinary action, and that the employee was entitled to reinstatement of employment and backpay.

AFSCME filed suit in circuit court against the County to enforce the arbitrator's award. The County countered with its own complaint seeking to vacate the arbitration award and recover compensation for what it believed was improperly awarded back pay. The circuit court later granted the County's request for summary disposition and vacated the arbitration award. The circuit court held that the arbitrator had exceeded their authority by failing to enforce the separation waiver in the retirement application and issuing an award that violated Internal Revenue Service regulations.

The Court of Appeals affirmed in an unpublished per curiam opinion, with one judge dissenting. Even though this case involves a collective bargaining agreement, the majority applied the standard for judicial review that this Court adopted in the context of statutory arbitration disputes in *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407 (1982). The Court of Appeals did not cite to nor follow *Kaleva-Norman-Dickson Sch Dist No 6 v Kaleva-Norman-Dickson Sch Teachers' Ass'n*, 393 Mich 583 (1975), or *Port Huron Area Sch Dist v Port Huron Ed Ass'n*, 426 Mich 143 (1986). *Kaleva*, 393 Mich at 591, expressed approval of "[t]he policy favoring arbitration of disputes arising under collective bargaining agreements, as enunciated by the United States Supreme Court in the Steelworkers' Trilogy" for purposes of contracts entered into under the Public Employment

Relations Act, MCL 423.201 *et seq*.[1] The case addressed whether the issue disputed by the parties was arbitrable, and the Court held that it was. *Kaleva*, 393 Mich at 594-596. Although *Kaleva* discussed all three of the decisions comprising the *Steelworkers* trilogy, the Court was not presented with the opportunity to select and apply a specific standard of judicial review to a contested labor arbitration decision rendered pursuant to a collective bargaining agreement. See *id*. at 591-594.

But 11 years later, *Port Huron Area Sch Dist* removed any doubt as to our full endorsement of the *Steelworkers* trilogy. The Court affirmed its "general acceptance" of the "policy of judicial deference in the context of labor arbitration" as expressed in the *Steelworkers* trilogy and described the standard for judicial review for labor arbitration awards as follows:

> It is well-settled that arbitration is a favored means of resolving labor disputes and that courts refrain from reviewing the merits of an arbitration award when considering its enforcement. To that extent, judicial review of an arbitrator's decision is very limited; a court may not review an arbitrator's factual findings or decision on the merits. [*Port Huron Sch Dist*, 426 Mich at 150.]

The Court expressly adopted the standard of review established in *United Steelworkers v Enterprise Wheel & Car Corp*, 363 US 593 (1960).[2] *Port Huron Sch Dist*, 426 Mich at 152, citing *Enterprise Wheel*, 363 US at 597.

The Court of Appeals in this case recognized that it had previously declined to apply *Gavin* to disputes concerning labor arbitration awards involving public sector unions in *Roseville Community Sch Dist v Roseville Federation of Teachers*, 137 Mich App 118 (1984), but it was not bound by that decision because it was decided before November 1, 1990, see MCR 7.215(J)(1). However, the Court of Appeals failed to recognize that *Port*

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[1] "The *Steelworkers* trilogy" refers to the following decisions from the United States Supreme Court: *United Steelworkers of America v American Mfg Co*, 363 US 564 (1960); *United Steelworkers v Warrior & Gulf Navigation Co*, 363 US 574 (1960); and *United Steelworkers v Enterprise Wheel & Car Corp*, 363 US 593 (1960).

[2] *Enterprise Wheel*, 363 US at 597, described the standard as follows:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Huron Area Sch Dist not only reinforced *Kaleva* but also that it expressly adopted the *Steelworkers* standard of review.

Under the *Steelworkers* trilogy, a court reviewing an arbitration decision is confined to interpretation and application of the collective bargaining agreement, an arbitration award is valid if it "draws its essence from the" agreement, and a court can refuse to enforce an award only if the "arbitrator's words manifest an infidelity to this obligation . . . ." *Enterprise Wheel*, 363 US at 597. Conversely, *Gavin* allows a reviewing court to consider the merits of the underlying dispute and set aside the award if an error of law resulted in a substantially different award than what the court believes should have been awarded. See *Gavin*, 416 Mich at 443. In other words, the statutory arbitration standard of judicial review set forth in *Gavin* is less deferential to an arbitrator's decision than the *Steelworkers* trilogy standard of judicial review provides for arbitration awards issued under collective bargaining agreements.

The Court of Appeals failed to acknowledge this Court's well-settled law in *Kaleva* and *Port Huron Area Sch Dist v Port Huron Ed Ass'n*, 426 Mich 143 (1986). While the question of which standard applies can sometimes be dispositive to resolution of a dispute, under the unique facts of this case, I concur in the denial of leave to appeal this unpublished Court of Appeals decision. Were the Court of Appeals' decision published, and thus binding precedent, then I believe this Court would be obligated to act in this case and resolve the parties' disagreement about which standard of judicial review governs. Not only would we have to grapple with the party's arguments as to the different standards of review for arbitrator decisions set forth in *Gavin*, *Kaleva*, and *Port Huron Area Sch Dist*, but we would also have to consider the significant developments in Michigan's statutory law since these cases were decided.

It is undisputed that the collective bargaining agreement at issue in this case is subject to the public employment relations act. It is also undisputed that, up until recently, Michigan's statutory scheme governing the arbitration of disputes has not applied to arbitrations conducted pursuant to collective bargaining agreements. Rather, statutory arbitration has historically covered arbitration outside the collective bargaining context (for example, in business or consumer disputes). The absence of any statutory scheme governing arbitrations conducted pursuant to collective bargaining agreements was significant to the development of a common law standard of review set forth in *Kaleva* and *Port Huron Area Sch Dist*. It is also notable that the Michigan arbitration act, MCL 600.5001 *et seq*., which was at issue in *Gavin*, "specifically exclude[d] arbitration agreements in collective-bargaining contracts from its scope," and the Court of Appeals has long recognized that nothing in *Gavin* purported to change the standard of judicial review of labor arbitration awards. *Roseville Community Sch Dist*, 137 Mich App at 122,

citing MCL 600.5001(3).[3] The now repealed MCL 600.5021 also allowed this Court to set rules governing statutory arbitration, which were contained in GCR 1963, 769.1 when *Gavin* was decided. Thus, the law was settled that statutory arbitration and collective bargaining arbitration decisions were treated differently when contested in court, with collective bargaining arbitration awards being provided a higher degree of deference by the judiciary.

But the standard of review that applies to collective bargaining arbitration decisions is now called into question. The Michigan arbitration act, which *Gavin* dealt with, was repealed, 2012 PA 370, when the Legislature adopted the Uniform Arbitration Act (UAA), MCL 691.1681 *et seq*., with the enactment of 2012 PA 371. In this case, AFSCME filed its complaint under the UAA, and the County has not argued that the arbitration at issue in this appeal falls outside the scope of the UAA. The UAA contains its own statutory standard of judicial review and lists several grounds for vacating an arbitration decision, one of which is that "[a]n arbitrator exceeded the arbitrator's powers." MCL 691.1703(1)(d). Unlike Michigan's prior statutory arbitration provision, see MCL 600.5001(3), as amended by 1961 PA 236, the UAA does not carve out arbitrations governed by collective bargaining agreements or those involving public or private sector labor organizations. See, e.g., MCL 691.1683(1) ("On or after July 1, 2013, this act governs an agreement to arbitrate whenever made."); MCL 691.1683(2) (stating that the act "does not apply to an arbitration between members of a voluntary membership organization if arbitration is required and administered by the organization").[4] This lack of a carveout is at odds with some other states' adoption of the UAA.[5]

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[3] See MCL 600.5001(3), as amended by 1961 PA 236 ("The provisions of this chapter shall not apply to collective contracts between employers and employees or associations of employees in respect to terms or conditions of employment.").

[4] On the contrary, one of its provisions specifically refers to a "labor organization" and "labor arbitration." See MCL 691.1684(2)(d) (allowing an employer and a labor organization to waive the right to representation by a lawyer in a labor arbitration).

[5] The Michigan Legislature's decision not to exempt labor arbitration from the UAA is at odds with some other states that have adopted comprehensive arbitration legislation but also included specific exemptions for labor arbitration. See, e.g., Wash Rev Code 7.04A.030(4) ("This chapter does not apply to any arbitration agreement between employers and employees or between employers and associations of employees."); Texas Civ Prac & Rem Code 171.002(a)(1) (stating that this chapter "does not apply to" "a collective bargaining agreement between an employer and a labor union").

Despite the clear relevance of the UAA and its enactment after the judicial decisions the respective parties rely on in this case, the parties have not briefed in this Court (or below) how and whether the standards adopted in *Gavin*, *Kaleva*, or *Port Huron Area Sch Dist* are affected by the Legislature's adoption of the UAA. It would be difficult, if not impossible, to determine what standard of judicial review now applies to labor arbitration disputes without engaging with the UAA. After all, if the UAA covers labor arbitrations, then the standard of review of an arbitrator's decision is no longer a purely common law issue. Instead, we would need to offer an interpretation of the pertinent provisions of the UAA, such as MCL 691.1703(1), and potentially determine whether the UAA has superseded previous judicial decisions. Considering this, the lack of thorough briefing on the subject, and the unpublished nature of the Court of Appeals' decision, I find denying leave to appeal to be the most prudent option.

I encourage the Legislature to solve this dilemma by clarifying whether the *Steelworkers* trilogy standard of review should continue to be applied to labor arbitrations in Michigan. As explained earlier, prior to the adoption of the UAA, there was a unique standard of review for labor arbitration awards as compared with all other arbitration awards. It is unclear from the language of MCL 691.1703(1)(d) whether the Legislature intended to codify *Kaleva* and *Port Huron*, codify *Gavin*, or create an entirely new standard. I also encourage the Legislature to clarify whether it intends courts to apply the same standard of judicial review to labor arbitration awards that is applied to other arbitration awards, which would be a significant departure from the historical practice.[6]

VIVIANO, J., joins the statement of WELCH, J.

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[6] This issue likely only applies to public-sector union labor arbitrations, as the federal Labor Management Relations Act, 29 USC 141 *et seq*., establishes a policy that grievances arising out of collective bargaining agreements with private-sector unions be resolved by arbitration, see *American Mfg*, 363 US at 566, and the Labor Management Relations Act preempts state-law claims that require interpretation of a collective bargaining agreement, *Klepsky v United Parcel Serv, Inc*, 489 F3d 264, 269 (CA 6, 2007). But it is worth noting that there is ongoing debate as to the effect of the Federal Arbitration Act on the *Steelworkers* trilogy for private-sector unions. See Hayes, *Hey, We Were Here First!: Union Arbitration and the Federal Arbitration Act*, 70 Syracuse L Rev 991, 1037 (2020).