SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3398-16T2

HALLIE TORIAN, NORHREENA THOMAS
and CLIFFORD WALKER, JR.,

Plaintiffs-Respondents,

v.

NEWARK SCHOOL DISTRICT,

Defendant-Appellant.

Argued February 13, 2018 – Decided March 28, 2018

Before Judges Gilson and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-7317-15.

Sandro Polledri argued the cause for appellant (Adams Gutierrez & Lattiboudere, attorneys; Sandro Polledri, of counsel and on the brief; Leslie F. Prentice, on the brief).

Mark Pfeffer and Elliott J. Almanza argued the cause for respondents (Goldenberg, Mackler, Sayegh, Mintz, Pfeffer, Bonchi & Gill, attorneys; Elliott J. Almanza, on the brief).

PER CURIAM

Defendant Newark School District (District) appeals from a March 31, 2017 order denying its motion to compel teachers' aides, who are members of a class action, to arbitrate their claim that the District did not provide them with paid vacation leave. We affirm because the governing collective bargaining agreement (CBA) allows for permissive, but not mandatory, arbitration.

I.

In October 2015, a teacher's aide and two cafeteria workers, who are employed by the District, filed a complaint on behalf of a proposed class. Plaintiffs sought to represent a class consisting of full-time and part-time employees of the District, other than teachers. Thus, the proposed class would include teachers' aides, food service workers, school clerks, bus drivers, and security personnel. Plaintiffs contended that the District failed to provide them with paid vacation leave as required by the Civil Service Act and its administrative regulations, N.J.S.A. 11A:6-3 and -7, and N.J.A.C. 4A:6-1.1 and -1.2.

In response, the District filed an answer and asserted various affirmative defenses, including the defense that the claims were subject to arbitration. The District then moved for summary judgment contending, among other things, that the teachers' aides were required to arbitrate their claim. Plaintiffs filed opposition and cross-moved to certify the class. After hearing

oral argument, the trial court entered orders on September 16, 2016, denying the District's motion for summary judgment and granting plaintiffs' motion to certify the class.

The District sought to appeal the order denying it summary judgment. In an order dated January 30, 2017, we dismissed the District's appeal as interlocutory because it was appealing an order for summary judgment and not a motion to compel arbitration.

Thereafter, in March 2017, the District filed a motion to compel the teachers' aides to arbitrate their claim. The various class members are covered by different collective bargaining agreements. The District only contended that the CBA governing teachers' aides required mandatory arbitration.

The trial court heard oral argument and, on March 31, 2017, entered an order denying the District's motion. The trial court reasoned that the Civil Service Act allowed plaintiffs to bring claims regarding paid vacation leave in Superior Court, the issue of paid vacation leave was not within the scope of the grievances covered by the CBA, and the arbitration clause in the CBA did not require mandatory arbitration.

The District now appeals from the March 31, 2017 order. That order is subject to review because it is an order denying a motion to compel arbitration. R. 2:2-3(a)(3).

II.

On appeal, the District argues that the trial court erred in denying its motion to compel arbitration for three reasons. First, the District contends that the grievance and arbitration procedures in the CBA meet the "substantive arbitrability" standard. Second, it argues that the trial court did not appropriately consider the presumption in favor of arbitration. Finally, it asserts that the teachers' aides did not exhaust their administrative remedies under the CBA's grievance procedures.

To put these issues in context, we will briefly summarize the Civil Service Act. We will then discuss the law on arbitration and apply that law to the CBA between the teachers' aides and the District. Finally, we will address the District's specific arguments.

Initially, we point out that this appeal presents a question of law. Specifically, whether the claims by the teachers' aides are subject to mandatory arbitration. To determine that issue, we review the language of the CBA. Thus, our standard of review is de novo. See Frumer v. Nat'l Home Ins. Co., 420 N.J. Super. 7, 13 (App. Div. 2011) (reviewing the denial of a request for arbitration de novo).

A. The Civil Service Act

The Civil Service Act (Act), N.J.S.A. 11A:1-1 to 12-6 "implements the constitutional provision requiring a civil service system." In re Johnson, 215 N.J. 366, 375 (2013) (citing N.J. Const. art. VII, § 1, ¶ 2). The goal of the Act is "to ensure efficient public service for state, county, and municipal government." Commc'ns Workers of Am. v. N.J. Dep't of Pers., 154 N.J. 121, 126 (1998). Among other things, the Act establishes the minimum amount of certain types of leave to be provided to civil service employees. Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 440 (2012).

School districts may adopt the Act's provisions through voter referendums. See N.J.S.A. 11A:9-5 to -7. The District is a civil service jurisdiction and, therefore, is subject to the Act. Headen, 212 N.J. at 439-40; N.J. Civil Servs. Comm., Civil Service Jurisdictions, http://www.state.nj.us/csc/about/divisions/slo/jurisdictions.html. (last visited March 9, 2018). With regard to vacation time, the Act sets certain minimum amounts of paid vacation leave that must be afforded to full-time and part-time employees in civil service jurisdictions. N.J.S.A. 11A:6-3, -7. Our Supreme Court has held that the "Act and its implementing regulations establish a floor for the amount of leave to be provided to such school

district employees." Headen, 212 N.J. at 440. The Court has also explained that leave time for public employees is a term and condition within the scope of negotiations, unless the term is set by statute or regulation. Id. at 445. "[A] school district opting to become a political subdivision subject to the Act cannot pick and choose among the Act's provisions for those it wishes to follow." Id. at 447. Thus, school districts that have adopted the Act are subject to the provisions governing full-time employee vacation time, N.J.S.A. 11A:6-3, and part-time, pro rata vacation time, N.J.S.A. 11A:6-7. Id. at 448.

The Act also provides a "party in interest" with the right to bring an action in Superior Court for enforcement of the Act. N.J.S.A. 11A:10-4. A party in interest includes an employee who works in a civil service jurisdiction. The Act does not, however, expressly preclude arbitration of disputes. Accordingly, like other statutory remedies, the right to bring a claim in court can be waived in favor of arbitration, so long as the agreement to arbitrate is clear in waiving that statutory right. See, e.g., Atalese v. U.S. Legal Servs. Grp., LP, 219 N.J. 430, 442-43 (2014); Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 134-35 (2001); Riverside Chiropractic Grp. v. Mercury Ins. Co., 404 N.J. Super. 228, 236-37 (App. Div. 2008).

In Headen, our Supreme Court did not address whether vacation leave claims arising under the Act could be subject to an arbitration agreement. In that regard, there was no discussion of whether the governing CBA had an arbitration provision. Instead, the Court held that if there was a CBA, the Act's provisions on vacation time established a minimum amount of paid vacation leave that must be provided to covered employees. Headen, 212 N.J. at 448. Indeed, the Court held that a CBA could provide leave time that satisfies the minimum amount of vacation leave under the Act and that it "is acceptable to require career employees to use vacation time during scheduled breaks in the academic year." Id. at 452.

B. Arbitration and the CBA

Agreements to arbitrate are contracts and, therefore, subject to the laws governing contract interpretation. Garfinkel, 168 N.J. at 135. In interpreting an arbitration provision, courts look to the contract's plain language. Ibid. (explaining that the "intent express or implied in the writing . . . controls" the interpretation of an arbitration agreement).

It is the public policy of New Jersey to encourage arbitration as an alternative mechanism to resolve disputes. CTC Demolition Co. v. GMH AETC Mgmt./Dev. LLC, 424 N.J. Super. 1, 7 (App. Div. 2012). Consequently, an "agreement to arbitrate should be read

liberally in favor of arbitration." Alamo Rent A Car, Inc. v. Galarza, 306 N.J. Super. 384, 389 (App. Div. 1997). Moreover, our Legislature has encouraged the resolution of labor disputes by arbitration in the public sector. In that regard, the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -43, provides:

> In interpreting the meaning and extent of a provision of a collective negotiation agreement providing for grievance arbitration, a court or agency shall be bound by the presumption in favor of arbitration. Doubts as to the scope of an arbitration clause shall be resolved in favor of requiring arbitration.
>
> [N.J.S.A. 34:13A-5.3.]

Nevertheless, "because arbitration involves a waiver of the right to pursue a case in a judicial forum, 'courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent.'" Atalese, 219 N.J. at 442-43 (citation omitted). Consequentially, when a contract contains a waiver of a right to pursue a statutory remedy in court, that waiver "must be clearly and unmistakably established[.]" Garfinkel, 168 N.J. at 132.

Furthermore, courts need to evaluate whether an arbitration provision is permissive or mandatory. If a provision allows one party to choose arbitration, but does not mandate arbitration, the provision is optional. Riverside, 404 N.J. Super. at 237.

Accordingly, when a contract states that one party "may" submit a dispute to arbitration, arbitration is permissive, not mandatory. Ibid. It is also important to focus on who has the right to choose arbitration. Ibid. If the contract only gives that right to one party, the other party does not have the right to compel arbitration. Ibid.

Applying these principles to the CBA between the District and the teachers' aides, the grievance and arbitration provisions do not mandate arbitration. The arbitration provision is contained within the grievance procedures set forth in Article III of the CBA. Importantly, the CBA "encourage[s]" the use of the grievance procedure, but does not mandate the use of such procedure. Specifically, the CBA states: "The prompt, informal and confidential adjustment of grievances is encouraged and therefore the following procedure to accomplish this purpose is hereby established."

The CBA then defines a grievance to be:

> a complaint by an employee that (1) she/he has been treated unfairly or inequitably by reason of any act or condition, including those relating to employee health and safety, which is contrary to established and prevailing policy or practice governing or affecting employees, or (2) there has been as to her/him a violation, misinterpretation or misapplication of the provisions of this agreement or of any existing rule, regulation or order of the Newark Public Schools, or any

> of the rules regulations or orders of the New Jersey State Department of Education having the force and effect of law.

The right to pursue a grievance is given to the employee and his or her union. The procedure calls for three steps: an informal conference, review by the principal, and review by the superintendent. If the grievance is not resolved by the three-step procedure, then the "employee may" submit the grievance to binding arbitration. Critically, there is no language in the CBA suggesting that the District could initiate, much less compel, arbitration.

In summary, a plain reading of the CBA establishes: (1) the decision to bring a grievance rests with the employee and his or her union; (2) the grievance procedure is not mandatory; and (3) the follow up arbitration procedure is not mandatory. In short, the teachers' aides are not required to submit their claim for paid vacation leave to arbitration.

C. The District's Arguments

Having determined that the CBA provides for permissive arbitration, but not mandatory arbitration, we can summarily address the District's arguments.

The District first argues that the question it presented was a question of substantive arbitrability, as opposed to procedural arbitrability. Substantive arbitrability refers to whether the

particular grievance is within the scope of the arbitration clause in the CBA. Amalgamated Transit Union, Local 880 v. N.J. Transit Bus Operations, Inc., 200 N.J. 105, 115 (2009). In contrast, procedural arbitrability focuses on whether procedural conditions to arbitration have been met. Id. at 116. While we agree that the question presented is an issue of substantive arbitrability, for the reasons we have already explained, we hold that the CBA here does not require arbitration. In other words, the teachers' aides' claims for vacation time may be within the definition of a grievance under the CBA, but the grievance procedure and the ensuing right to arbitration, are not mandatory.

Next, the District contends that the trial court failed to consider the public policy favoring arbitration. We disagree. We have acknowledged that policy and the trial court also appeared to have understood that policy. That policy, however, does not allow us to rewrite the CBA. Here, the CBA does not provide for mandatory arbitration. Instead, all of the language is permissive. Thus, the CBA talks about "encouraging" the use of the grievance procedure, and that an employee "may" submit a grievance to binding arbitration. Accordingly, neither the trial court, nor we, are free to rewrite the parties' CBA. See Fawzy v. Fawzy, 199 N.J. 456, 469 (2009) (acknowledging the policy favoring arbitration,

but explaining that a court cannot rewrite a contract to broaden the scope of an arbitration provision).

Finally, the District argues that the teachers' aides failed to exhaust their administrative remedies. The administrative remedies are the right to file a grievance and pursue the three-step grievance procedure set forth in the CBA. We have already explained that the CBA is clear in stating that use of the grievance procedure was "encouraged," but not mandatory. Accordingly, the teacher's aides had the option to file a grievance, but nothing in the CBA extinguished their statutory right to choose to pursue the vacation leave claim in Superior Court.

In summary, we reject the District's arguments and hold that the CBA here did not mandate arbitration of the claim for vacation leave by the teachers' aides. Thus, that claim, together with the claim of the other class members, can be evaluated in the trial court. Obviously, nothing in this opinion expresses a view on the merits of those claims. Instead, this opinion simply addresses where the claim will be evaluated.

Affirmed.