COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1755

DONALD A. PIERCE

vs.

SUPERINTENDENT OF SCHOOLS OF MASCONOMET REGIONAL SCHOOL DISTRICT & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Donald Pierce, filed this action against his former employer, the Masconomet Regional School District (district), and the superintendent of the district, Kevin Lyons (collectively, the defendants), for the failure to pay him certain end of career benefits he contends were owed to him under a collective bargaining agreement (CBA or agreement). On cross motions for summary judgment, a Superior Court judge concluded that the plaintiff had failed to initiate the grievance procedures contained in the CBA and granted summary judgment in favor of the defendants. We affirm.

Background. Employed as a foreign language teacher for the district for twenty-five years, the plaintiff resigned from his

[1] Masconomet Regional School District.

position on June 24, 2010, at the age of fifty. He did not retire at that time. During his employment, the plaintiff was a member of a collective bargaining group known as the Masconomet Teachers' Association (MTA), which negotiated successive CBAs with the district, and he served for a period of time as the chair of the MTA's professional improvement committee. The CBA in effect on the date of the plaintiff's resignation, which governed from September 1, 2008 until August 31, 2010 (2008-2010 CBA), contained an "End of Career Policy" which provided:

> "To qualify for the provisions of this section, a professional staff member must have been employed on or before the date of ratification of this agreement, and must have completed ten (10) years of experience as defined in Article IX, Section 7, Subsection 3, in the Masconomet Regional School District, must have attained the age of fifty-five (55) years and/or otherwise qualify for immediate payment of retirement benefits upon termination of employment. In addition, the staff member shall have notified the Superintendent of his/her intended date of retirement no later than four (4) months prior to said date . . . .
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> "On the next July 1st following the teacher's retirement, a sum of money equal to the product of one (1) percent, the number of years of experience at Masconomet, as defined in Article IX, Section 7, Subsection 3, and the teacher's final year salary, as determined by the Masconomet Regional Teachers' Agreement, will be paid to the teacher. The employee will repay all monies received pursuant to this policy should he/she not retire and not receive retirement benefits following his/her final year of employment. If notification of retirement occurs according to the timeline outlined in paragraph one (1) of this section, the employee

> may choose to have the end of career benefit deferred until January 1st of the following calendar year."[2]

On September 19, 2013, over three years after his resignation and after two subsequent CBAs, the plaintiff sent a letter to the then superintendent of the school district, Darrell Lockwood, stating that he was preparing to retire and requesting information on how to access his benefits pursuant to the End of Career Policy. On September 24, 2013, Lockwood responded by letter stating that the plaintiff was "not eligible to receive the benefits of [the CBA] based on [his] June 2010 resignation." Despite this response, the plaintiff sent a second letter to Lockwood on February 19, 2014, notifying him of his intended retirement date of June 30, 2014. Lockwood responded by acknowledging receipt of the plaintiff's letter and enclosing a copy of his September 24 letter, which, as stated, informed the plaintiff that he was not entitled to end of career benefits.

The plaintiff then contacted the president of the MTA, Sandra Dearborn, and Dearborn agreed to speak to Lockwood on the plaintiff's behalf. Lockwood refused to speak with Dearborn because the plaintiff was no longer employed by the district. Dearborn thereafter contacted Lisa Nazarro, the local

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[2] The agreement also contained a clause that stated that the 2008-2010 CBA would continue to be effective "from year to year thereafter unless it [was] superseded by a subsequent [CBA]."

representative from the Massachusetts Teachers' Association (MassTA), and inquired about the plaintiff's eligibility for benefits. Nazarro informed Dearborn that, because the plaintiff was not an employee of the district, the MassTA, rather than the MTA, would handle the matter. Nazarro then spoke to a representative of the district who reiterated the district's position that the plaintiff was not entitled to benefits. Eventually, after receiving several phone calls and voicemail messages from the plaintiff, Nazarro contacted the plaintiff directly, informed him of the district's position, and stated that there was nothing that could be done.

On September 18, 2014, the plaintiff, through counsel, sent a third letter to Lockwood demanding payment of his end of career benefits, which he asserted had been due on July 1, 2014, pursuant to the CBA.[3] Lyons, as successor superintendent, responded by letter notifying the plaintiff that he agreed with Lockwood's position that the plaintiff was not entitled to the end of career benefit.

On February 6, 2015, the plaintiff filed this action against the defendants asserting violation of the Wage Act, G. L. c. 148, § 149, and two counts of breach of contract. On

[3] The plaintiff contends that the benefits owed to him amount to $25,000.

the defendants' motion, a Superior Court judge dismissed the Wage Act count and the count that asserted breach of contract for failure to provide health insurance. Thereafter, the plaintiff filed an amended complaint asserting only a breach of contract for failure to pay benefits under the CBA's End of Career Policy. The defendants moved for summary judgment on that sole claim arguing that (1) there was no enforceable contract, (2) the plaintiff failed to comply with the grievance procedure, and (3) the plaintiff failed to satisfy the requirements of the contract. The plaintiff cross-moved for summary judgment. Following a hearing, the judge concluded that the plaintiff failed to follow the grievance procedure set forth in the 2008-2010 CBA, and also failed to pursue a claim against the MTA with the Department of Labor Relations for their failure to file a grievance on his behalf. As a result, the judge concluded that the plaintiff had no remedy. He accordingly allowed the defendants' motion, and dismissed the plaintiff's complaint. The plaintiff timely appealed.

Discussion. As a general rule, the "failure to pursue contractual grievance procedures bars suit against the employer." Johnston v. School Comm. of Watertown, 404 Mass. 23, 25 (1989). See Azzi v. Western Elec. Co., 19 Mass. App. Ct. 406, 408-409 (1985), citing Vaca v. Sipes, 386 U.S. 171, 184 (1967). This holds true even where the agreement has expired,

so long as the employee's claim arose under the agreement. See Boston Lodge 264, Dist. 38, Int'l Ass'n of Machinists & Aerospace Workers v. Massachusetts Bay Transp. Auth., 389 Mass. 819, 821 (1983). "Rights that were violated or 'which accrued or vested under the agreement will, as a general rule, survive termination of the agreement.'" Watertown v. Watertown Mun. Employee Ass'n, 63 Mass. App. Ct. 285, 291 (2005), quoting Litton Fin. Printing Div., Inc. v. National Labor Relations Bd., 501 U.S. 190, 207 (1991).

"As an exception to that requirement, an employee may bring an action against his employer for a violation of a [CBA] if he alleges and shows that the union has failed in its duty to represent him fairly, or that his employer repudiated or otherwise nullified the grievance procedures." Azzi, 19 Mass. App. Ct. at 409. To qualify for these exceptions, however, the employee must first "initiate the grievance procedures as the contract provides." Balsavich v. Local Union 170, Int'l Bhd. of Teamsters, 371 Mass. 283, 286 (1976) ("Employees may not simply disregard the grievance procedures set out in a collective labor contract and go direct to court for redress against the employer").

The 2008-2010 CBA sets forth a grievance procedure that must be followed by all parties to the agreement. Under this CBA, either the union or the employee may present the grievance

at the first step. If a grievance is not "presented within ten (10) school days of the time when a teacher should reasonably have been aware of the act, decision, or ruling forming the basis of the grievance," it "shall be deemed waived." The plaintiff did not follow this grievance procedure and argues that he was not required to because he was not an employee of the district when his benefits were denied to him, and therefore was not governed by the CBA.

The 2008-2010 CBA included as members of the collective bargaining unit "[a]ll full time classroom teachers of [the district], including . . . instructors," as well as several other categories of employees not relevant here.[4] The agreement,

[4] At its inception, the CBA also purported to include retirees as members of the collective bargaining unit. However, on February 8, 2010, the Commonwealth Employment Relations Board, on petition by the district, determined that retirees were not employees within the meaning of G. L. c. 150E, § 1, and as a result, retirees were excluded from the bargaining unit. See Masconomet Regional Sch. Dist. vs. Masconomet Teachers Ass'n, Labor Relations Comm'n, No. CAS-08-3725 (February 8, 2010). Their exclusion, though, did not preclude the MTA or MassTA from negotiating over the future retirement benefits of existing bargaining unit members, and the union was not precluded from bargaining for retirees to the extent that the school district agreed to do so. Id. Of course, when the plaintiff first asserted his rights to the end of career benefits, he was not retired.

which expired in 2010 and was superseded by two subsequent CBAs,[5] thus governed all full-time classroom teachers.

While the plaintiff is correct that he ceased to be an active employee after his June 2010 resignation, his breach of contract claim against the defendants is based on rights which he contends arise pursuant to the 2008-2010 CBA in effect while he was actively employed by the district as a full-time teacher. Because his claim is based upon a breach of the 2008-2010 CBA, "he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced." Vaca, 386 U.S. at 184. Though that agreement expired in 2010, the plaintiff's entitlement to benefits arose under the agreement and the right to grieve survived its expiration. See Watertown, 63 Mass. App. Ct. at 291. The plaintiff was thus required to grieve pursuant to the 2008-2010 CBA, unless an exception applied. The fact that the plaintiff was a former employee at the time the grievance arose does not exempt him from this requirement. See, e.g., Azzi, 19 Mass. App. Ct. at 408-410 (former employee subject to grievance requirement in CBA).

Here, the employee had two routes by which he could have grieved. The union could have filed a grievance, or he could

[5] See G. L. c. 150E, § 7 (CBA shall not exceed term of three years, except may remain in force beyond three-year period until successor agreement negotiated by parties).

have initiated a grievance at the first step. We address each of these routes in turn.

With respect to a grievance by the union, the plaintiff argued in the Superior Court that, if the grievance process was available to him, he was not required to follow it because the MTA and the MassTA failed in their duty to fairly represent him. Such a claim must first be presented to the Department of Labor Relations before an employee can seek to avoid a contractual grievance procedure on that ground. See Tortolano v. Lemuel Shattuck Hosp., 93 Mass. App. Ct. 773, 777 (2018), citing Johnston, 404 Mass. at 24-25. The judge accordingly rejected that argument. On appeal, the plaintiff now argues that he was not required to pursue a claim against the union with the Department of Labor Relations because it did not owe him a duty of representation. That argument however, raised for the first time on appeal, is waived. See Carey v. New England Organ Bank, 446 Mass. 270, 285 (2006).

Nevertheless, even if that argument was not waived, the plaintiff, asserting rights pursuant to the agreement in effect while he was an employee, was permitted by the agreement and by statute to initiate the grievance procedure on his own behalf

and without the assistance or approval of the union.[6] See G. L. c. 150E, § 5. He did not do so, and as a result cannot now seek to avoid the grievance procedure to obtain a judicial remedy. See Tortolano, 93 Mass. App. Ct. at 777 (where employee could have filed a grievance independent of union, required to initiate and pursue that procedure prior to resorting to court).

The plaintiff further cannot sidestep the grievance requirement by asserting that the district nullified or repudiated the grievance procedure. In order to rely on the repudiation exception to the exhaustion requirement, the plaintiff was required to press a formal grievance in accordance with the CBA until he was prevented by his employer from doing so. See Balsavich, 371 Mass. at 286. See also Vaca, 386 U.S. at 185. Setting aside whether the union could have invoked the grievance procedure, the plaintiff was entitled to grieve the denial of an accrued or vested benefit in his capacity as a former employee under the expired contract, at least at the first step. An employer cannot be held to have repudiated procedures that were not invoked. Balsavich, supra.

[6] As noted supra, the plaintiff served as chair of the MTA's professional improvement committee and, in that capacity, he was responsible for overseeing the grievance process.

For these reasons, the plaintiff's suit against the defendants is barred and summary judgment was properly entered in their favor.

Judgment affirmed.

By the Court (Milkey, Desmond & Englander, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: September 3, 2021.

[7] The panelists are listed in order of seniority.