NOVA SCOTIA COURT OF APPEAL

Citation: *Sydney Airport Authority v. Public Service Alliance of Canada*, 2015 NSCA 105

Date: 20151117
Docket: CA 436238
Registry: Halifax

Between:

Sydney Airport Authority

Appellant

v.

Public Service Alliance of Canada

Respondent

Judges:	Fichaud, Bryson and Scanlan, JJ.A.
Appeal Heard:	September 29, 2015, in Halifax, Nova Scotia
Held:	**Appeal allowed per reasons for judgment of Scanlan, J.A.; Fichaud and Bryson, JJ.A. concurring.**
Counsel:	Eric Durnford, Q.C. and Isabelle French, for the appellant Andrew Astritis, for the respondent

Reasons for judgment:

Background

[1] On October 20, 2011, a plumber/pipefitter who was employed by Sydney Airport Authority (the appellant) applied for an indefinite leave of absence in order to get knee replacement surgery. That leave request was approved on October 28, 2011. The employee remained on paid sick leave until late September 2012, by which time he had depleted his sick leave bank. The employee has not returned to work and has been receiving long term disability benefits. In October 2012, the employee claimed that, pursuant to the provisions of the collective agreement, he was entitled to accumulate vacation leave credits during the months (November 2011 to September 2012) he was off on paid sick leave. The employer denied this request for vacation leave, the matter was grieved and remitted to a single arbitrator.

[2] An arbitration hearing was held on October 17, 2013. The arbitrator concluded that the employer was correct and dismissed the grievance. The employee is a member of the Public Service Alliance of Canada (PSAC). It applied on behalf of the employee for judicial review of the arbitrator's decision, arguing the arbitrator failed to apply proper legal principles when interpreting the terms of the contract.

[3] Nova Scotia Supreme Court Justice Robin Gogan, (the reviewing judge) concluded that the arbitrator's interpretation of the collective agreement was not sustainable. She set aside the award of the arbitrator, ordering that the matter be remitted back to a different arbitrator.

[4] The employer appellant now appeals that decision (2015 NSSC 38) asking this Court to reinstate the arbitrator's decision.

Issues

[5] The appellant suggests this appeal raises three distinct issues:

1. Did the reviewing judge err in law in finding that the arbitrator had not reasonably framed the issue to be determined?
2. Did the reviewing judge err in law in finding that the arbitrator's interpretation of Article 13.02 was unreasonable?

3. Did the reviewing judge err in law by substituting her own view of the proper outcome of the interpretative exercise?

[6] PSAC takes the position that the language in the Collective Agreement, and relevant case law, support the position of the reviewing judge. It submits that it was not within the range of reasonable outcomes available to the arbitrator to decide that the employee did not earn vacation credits while on sick leave with pay. It argues that the reviewing judge properly identified a number of fundamental errors in the arbitrator's decision which required it to be set aside. PSAC also suggests that the arbitrator ignored a basic principle of the interpretation of a collective agreement, saying the word "pay" was used in numerous portions of the collective agreement and the parties must be presumed to have intended the same meaning throughout. It frames this argument by saying the collective agreement uses the term "pay" to describe both monies received while on sick leave, and pay for work. PSAC argues that in not finding that the word "pay" had a single meaning throughout the contract, the arbitrator effectively amended the collective agreement.

[7] Secondly, PSAC argues that the arbitrator erred by suggesting that "prevalent jurisprudence" supported his interpretation of the collective agreement. PSAC says that, in fact, the prevalent jurisprudence says just the opposite.

Standard of Review

[8] The reviewing judge was alive to the standard of review that she was to apply was and she, in fact, quoted from *Communications, Energy and Paperworkers' Union, Local 1520 v. Maritime Paper Products Ltd.*, 2009 NSCA 60 saying at ¶30:

> Clearly, the reviewing court should apply reasonableness to an arbitrator's interpretation of the collective agreement.

[9] In ¶33 the reviewing judge stated:

> [33] In *Dunsmuir, supra*, the Supreme Court of Canada explained that reasonableness is a deferential standard and one which recognizes that the questions before administrative tribunals may have the potential for a number of reasonable conclusions. ...

[10] She also referred to *Egg Films Inc. v. Nova Scotia(Labour Board)*, 2014 NSCA 33, ¶26 where Justice Fichaud said:

> [26] Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't – What does the judge think is correct or preferable? The question is – Was the tribunal's conclusion reasonable? If there are several reasonably permissible outcomes the tribunal, not the court, chooses among them. If there is only one and the tribunal's conclusion isn't it, the decision is set aside. ...

[11] She also correctly noted *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 where Justice Abella, for the majority, reiterated:

> [54] The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. ...

Analysis

[12] In her application of the reasonableness standard of review, the reviewing judge referred to the decision of Justice Estey in *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245 at p. 292 where the Court said of arbitrators' decisions:

> ... Precision of conclusion is of course required, and the relationship between the conclusion and the contractual or statutory provisions will be closely scrutinized by the courts. Expressional latitude must, however, be accorded the arbitrator as he applies the law of the contract or the statute to the facts as he finds them. The parties have selected him specifically for this task. The state speaking through the statute requires that his decision be final and binding. The whole atmosphere of the industrial – commercial arena requires that such differences be quickly and fairly settled by this summary procedure, designed as it is to be economical of time and expense. ...

[13] The reviewing judge interpreted that provision and said in ¶43:

> [43] ... However, I do not read this excerpt to suggest that arbitrators should be excused for less than adequate reasons, either in form, or substance. The adequacy of reasons will be determined by the application of the reasonableness standard.

[14] She went on to find that in the case now on appeal:

> [46] ... Although brief, I find that the Arbitrator did provide sufficient reasons to explain the basis of his conclusion.

[15] In his decision the arbitrator looked at the language in Article 13.02 and compared it to language in Article 15.01 of the Collective Agreement. The arbitrator, as noted by the reviewing judge, found that it would be anomalous for the employee to accumulate sick leave credits while on sick leave. He found no "evidence" in the Collective Agreement that it was the intention of the parties that employees on sick leave would accumulate sick leave credits. He said if the similar provisions in Articles 13 and 15 were interpreted the same, an employee would earn both sick leave and vacation pay while receiving sick leave pay. The arbitrator said to do so would be an anomaly.

[16] The reviewing judge said the arbitrator concluded that "pay" was "earned while actively working", and that sick leave "pay" was not the same as "regular pay" (¶50, Judicial Review Decision). The reviewing judge determined, however, that the outcome did not fall within the range of reasonable outcomes. She referred to *Newfoundland and Labrador Nurses' Union v, Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 where the Court said:

> [47]…A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
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> [*Dunsmuir v. New Brunswick*, 2008 SCC 9]

[17] In making that ruling the reviewing judge agreed with PSAC that the arbitrator framed the question incorrectly, asking himself the wrong question. She says the arbitrator only explored the meaning of the word "pay" with reference to one other article in the Collective Agreement; Article 15.01. She concluded:

> [61] ... With respect to the Arbitrator, I am of the view that he came to this conclusion without any analysis of the meaning of the word "pay" and its context throughout the remainder of the Collective Agreement. This lead to a failure to fully consider the intention of the parties as reflected in their use of the word "pay" in Article 13.02.

[18] The judicial review judge noted at ¶72:

> [72] ... The Award discloses little analysis of the intention of the parties within the four corners of the Collective Agreement and fails to apply some of the basic principles applicable to the interpretation of Collective Agreements.

[19] She stated at ¶85:

> [85] In my view, the proper approach would be to determine the plain meaning of the word "pay" and then look to the broader agreement to determine if this meaning reflects the intention of the parties. In this case, the Arbitrator worked backwards, concluding that the plain meaning was anomalous without looking at the broader agreement. He then placed the burden on the employee to establish that the "anomalous" interpretation reflected the parties' intention. I find this approach, and its outcome, unreasonable.

[20] In labour contracts there will be provisions within collective agreements that are not as clear or explicit as they might be. Parties to collective agreements rely upon referrals to arbitrators to quickly resolve disputes over the interpretation of the terms in a collective agreement.

[21] Courts rely upon this system of arbitration. To do otherwise would result in an avalanche of cases that would quickly overwhelm courts with innumerable applications seeking court interpretation of collective agreements. The cost to the public purse and the parties would be prohibitive. The sheer volume of disputes would be more than the court system is designed to accommodate. Courts have consistently indicated over the years that matters that would normally go before arbitrators do not belong in the courtroom simply because one side or the other does not like the outcome.

[22] In this case the arbitrator was succinct in his reasons. It was clear that he made reference to two provisions within the Collective Agreement which dealt with benefits earned while the employee was in receipt of sick leave pay. Specifically, Article 15.01 and Article 13.02:

> **13.02** An employee shall earn vacation leave credits for each calendar month during which the employee receives at least ten (10) days pay at the following rates:
>
> ...
>
> Employees not working in a full-time capacity will earn vacation leave credits on a pro-rated basis according to the number of hours worked.

> **15.01** An employee shall earn sick leave credits at the rate of one and one-quarter (1¼) days for each calendar month for which the employee receives pay for at least ten (10) days. Employees not working in a full-time capacity will earn sick leave credits on a pro-rated basis according to the number of hours worked. ...

[23] Articles 13.02 and 15.01 both refer to employees not working in a full-time capacity but earning benefits pro-rated according to the number of hours worked. Given the similarity of the provisions it was not unreasonable for the arbitrator to consider the logical application of those two provisions as informing his analysis. It was not improper for the arbitrator to reference the anomaly of an employee earning sick leave while receiving sick pay. As noted in *Complex Services Inc. v. O.P.S.E.U. (Local 278)*, 106 C.L.A.S. 211; 2011 CarswellOnt 5935 at ¶23:

> 23. The fundamental rule of collective agreement and statutory interpretation is that the words used must be given their plain and ordinary meaning unless it is apparent from the structure of the provision of the collective agreement read as a whole that a different or special meaning is intended. ...

[24] Articles 13.02 and 15.01 both reference employees not working in a full-time capacity and how the employee earns vacation or sick leave credits. It was not unreasonable for the arbitrator to find that only those who actually work earn vacation and sick leave benefits. In reaching that conclusion the arbitrator did not restrict himself to the words in the contested provision. He went beyond those words and looked to an analogous provision in the same agreement and found that to interpret the word "pay" in the way as urged by PSAC would result in an anomaly.

[25] This dispute was referred to a consensual arbitrator as chosen by the parties. They referred the matter in the context of asking the arbitrator to determine the specific words in the Collective Agreement. As noted by Justice Moldaver in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, if there are two reasonable interpretations that is the end of the argument in relation to judicial review. If one of the parties does not like the result they are free to renegotiate the contract once it expires.

[26] I agree with the appellant's submission that this case is on all fours with the *Newfoundland and Labrador Nurses' Union*. The issue before the arbitrator here was a straightforward matter of the interpretation of the words of the contract. There was a reasonable basis for the arbitrator's conclusions. The reviewing judge was wrong to find that the arbitrator's reasons required more cogency.

[27] I am satisfied the arbitrator asked himself the appropriate questions. In his decision at ¶42-43 he said:

> 42. I find that pay is earned while actively working. Sick leave "pay" is not regular pay. It is not earned. It is an insurance or indemnity against illness; a benefit provided to Employees under the Collective Agreement. Vacation leave credits are the same. They are a benefit accumulated while earning pay.
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> 43. To find for the Union would be in my mind an unreasonable interpretation of the Collective Agreement and would create an absurdity whereby an Employee could accumulate benefits while not working, resulting in an accumulation of vacation leave credits and sick leave credits while out of the workplace on prior accumulated sick leave credits.

[28] At ¶45 he said:

> I find no evidence that the intention of the parties was to provide for the accumulation of vacation leave and given the similar wording of the Collective Agreement, by default sick leave while out of the workplace on sick leave.

[29] The respondent had presented to the reviewing judge a number of arbitration cases which they argue disproves the arbitrator's understanding of the arbitral jurisprudence. There are two points I would make in that regard. First that material was not before the arbitrator. Even if the cases were before the arbitrator, he would not be bound by those cases in the way that courts are for example bound by precedents. In this regard I refer to: *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 at ¶87-94; *Nurses Union v. Camp Hill Hosp*. (1989), 94 N.S.R.(2d) 430 (C.A.) at ¶15-17, leave to appeal ref'd, [1990] S.C.C.A. No. 56; *Halifax Employers Association v. International Longshoremen's Association, et al*, 2004 NSCA 101 at ¶82, leave to appeal ref'd [2004] S.C.C.A. No. 464; and *Hydro Ottawa Ltd. v. International Brotherhood of Electrical Workers, Local 636*, 2007 ONCA 292 at ¶59, leave to appeal ref'd [2007] S.C.C.A. No. 305.) Second, having regard to the lack of binding precedent, and the application of a deferential standard of review as noted by Blair, J.A. in *Hydro Ottawa, supra*, ¶59.

> In each case the issue is whether the arbitrator's interpretation of the collective agreement is supportable in the record and not patently unreasonable in that context.

[30] At the end of the day the arbitrator chose what I am satisfied is one reasonable interpretation of the meaning of the words in the Collective Agreement.

It was wrong for the reviewing judge to supplant her decision for that of the arbitrator.

[31] The appeal is allowed. The appellant is entitled to costs in the amount of $3,500.00 plus disbursements on this appeal and $3,500.00 plus disbursements at the judicial review level.

Scanlan, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.