NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia Government and General Employees Union v. Nova Scotia Health Authority*, 2024 NSCA 42

Date: 20240403
Docket: CA 524063
Registry: Halifax

Between:

Nova Scotia Government and General Employees Union

Appellant

v.

Nova Scotia Health Authority and Susan M. Ashley

Respondents

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	December 5, 2023, in Halifax, Nova Scotia
Subject:	Administrative Law – Judicial Review Labour Law – Grievance Arbitration
Summary:	The NSGEU filed grievances against the NSHA because an agreement to amend the wage scale for one job classification under the collective bargaining agreement ("CBA") was not extended to another classification under the CBA. The NSGEU said the classifications required the same qualifications and the differentiation was unfair and unreasonable. The NSHA argued amending the wage scale was beyond the scope of a grievance arbitration. The arbitrator agreed with NSGEU and found a breach of the management rights provision of the CBA – the NSHA decision not to amend the wage scale further was an unreasonable management rule. On judicial review the arbitration award was set aside as unreasonable.
Issue:	**Was the award reasonable?**

Result: Appeal dismissed. The award was unreasonable because it did not address the NSHA submissions nor the CBA provision which precluded an arbitration award from amending the CBA. The grievance effectively sought to amend the CBA wage scale which must be done through bargaining and not arbitration. The grievance was not remitted for reconsideration.

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Respondents

Judges:	Wood C.J.N.S., Fichaud and Derrick JJ.A.
Appeal Heard:	December 5, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Wood C.J.N.S; Fichaud and Derrick JJ.A. concurring
Counsel:	Jillian Houlihan and Julia Hiltz, articled clerk, for the appellant Patrick Saulnier and Michelle McCann, for the respondent, Nova Scotia Health Authority

Reasons for judgment:

[1] In 2020 the Nova Scotia Government and General Employees Union ("NSGEU") and Nova Scotia Health Authority ("NSHA") negotiated a salary increase for one of the job classifications in a collective agreement covering public sector nurses in Nova Scotia. By decision dated November 10, 2021 ("the Award"), Arbitrator Susan M. Ashley allowed grievances filed by the NSGEU against the NSHA which alleged the NSHA breached the collective agreement by failing to apply the same increase to other job classifications.

[2] Arbitrator Ashley found the decision not to extend the wage increase to other classifications was unreasonable and in breach of the collective agreement.

[3] The NSHA sought judicial review. By decision dated May 16, 2023, Justice Glen G. McDougall of the Nova Scotia Supreme Court quashed the Award on the basis it was unreasonable (2023 NSSC 154). He remitted the matter to a different arbitrator for a new hearing. I agree the Award is unreasonable, and I would dismiss the appeal for the reasons which follow. However, I would not remit the matter for reconsideration.

Background

[4] The applicable collective bargaining agreement ("the CBA") is between NSHA as employer and The Nova Scotia Council of Nursing Unions. The term runs from November 1, 2014 to October 31, 2020, and continues in effect on a year to year basis thereafter. The CBA applied to nurses who held licenses as registered nurses, nurse practitioners and licensed practical nurses working in a variety of positions throughout Nova Scotia. The bargaining unit included members of several unions including NSGEU.

[5] With respect to the NSGEU, the CBA applied to five union locals and more than 30 job classifications. One of the job classifications was Licensed Practical Nurse ("LPN"). It is important to recognize that "licensed practical nurse" is both a job classification under the CBA and a category of nursing license. There are employees holding this license who work in job classifications other than LPN.

[6] In 2020, a review was underway with respect to the LPN classification under the CBA. On June 11, 2020, Arbitrator Lorraine P. Lafferty, K.C. issued a consent award granting a 12% increase to the hourly rate for employees in the LPN

classification who were employed by the former Capital District Health Authority. The increase was effective as of March 17, 2014 (“the Lafferty Award”).

[7] On July 23, 2020, the NSGEU filed two policy grievances against NSHA alleging a violation of the CBA. The essence of the two grievances was the same - employees who were licensed practical nurses working outside of the Capital District Health Authority or in other job classifications should have received the same increase. The two job classifications referenced in the grievances were Continuing Care Referral Assistants (“CCRA”) and Operating Room Technicians ("ORT”). The NSGEU grievance notice described the dispute as follows:

> Wage rates for Licensed Practical Nurses at the former CDHA have been increased by 12% as the result of a Consent Award issues [*sic*] by Arbitrator Lorraine Lafferty. The increase, which settled a job evaluation grievance filed by the NSGEU under its predecessor collective agreement, was retroactive to March 17, 2014.
>
> It has come to the Union’s attention that the Employer is denying to pay LPNs and LPNs who work in other designations (ie: Continuing Care Referral Assistants etc.) Wage Parity across the province. As you know, wage parity has long been accepted as a fundamental principle in the health sector in Nova Scotia. Wage parity protects the interests of employers and employees throughout the Province. It allows employers to retain their work force.

[8] The redress sought by the NSGEU was a declaration that the CBA had been breached and for any affected employees to be made whole in terms of wage loss and benefits.

[9] On November 4, 2020, the NSHA and NSGEU entered into an agreement which resolved a portion of the grievance issues. It extended the wage increase for LPNs in the Lafferty Award to employees in that classification formally employed at other District Health Authorities in the province. This agreement included the following recital:

> **AND WHEREAS** the Employer denies that the Union’s grievances have merit, and wishes to make this pay adjustment Without Prejudice and Without Precedent to any grievances, classification appeals or other claims filed now or in the future;

[10] On January 26, 2021, the parties agreed to eliminate the classification of ORT under the CBA and all employees in that classification became part of the LPN classification. As a result, NSGEU withdrew the portion of the grievance seeking an increase in the ORT wage rate.

[11] After these two agreements the only issue remaining for arbitration was the failure to apply the wage increase to the CCRA classification.

Arbitration Hearing and Award

[12] The arbitration took place on September 7, 2021. The hearing exhibits included the grievances, the CBA, the Lafferty Award, and the agreements of November 4, 2020 and January 26, 2021.

[13] The NSGEU called five witnesses, a union representative and four employees working in the CCRA classification. The union representative testified that historically there was a difference in pay between the LPN and CCRA classifications of 50-60 cents per hour. In addition, she confirmed employees in the CCRA classification were required to be licensed practical nurses. The four CCRA employees all testified their job duties fell within the scope of practice for licensed practical nurses, and they believed they should be paid at the same rate as the LPN classification under the CBA.

[14] The NSHA did not call any witnesses.

[15] The position of counsel for NSGEU was summarized in the Award as follows:

> 20. Counsel for the Union argued that the facts support that CCRAs employed by the Nova Scotia Health Authority were wrongly denied the 12% increase given by the Employer to all other LPN classifications. They are LPNs in another classification, and in order to do their work, they must be qualified LPNs, as an Employer requirement. They do a range of nursing functions to serve as intake and provide an ongoing management role in the process of nursing care in the Continuing Care system. There has been a well-established wage parity relationship between CCRAs and LPNs, the denial of which makes the Employer's decision unreasonable.
>
> 21. As a result of devolution in 2009, wage rates for LPNs and CCRAs were established with an approximate fifty cent differential, which should be continued. The most recently bargained health care collective agreement (NSGEU and CDHA, expiry October 2014) confirms this differential. The current collective agreement contains the same differential. He argued that by refusing to extend the increase to this group, the Employer has severed that historic parity relationship, with no justification, which is unreasonable. This has been a longstanding parity relationship which came into effect when the two classifications were placed in the same bargaining unit, and sustained by bargaining between the parties.

[16] In terms of the CBA provision alleged to have been breached, counsel for NSGEU said it was article 3 which provides:

> **Article 3: Management Rights**
>
> **3.00** The Employer reserves and retains, solely and exclusively, all rights to manage the business including the right to direct the work force and to make reasonable rules provided that such rights are exercised in accordance with the terms and conditions of this Collective Agreement. All the functions, rights, power, and authority which the Employer has not specifically abridged, deleted or modified by this Agreement are recognized by the Union as being retained by the Employer.

[17] Counsel for NSHA argued there was no entitlement to wage parity amongst the classifications in the CBA. The NSHA had paid the negotiated rate for CCRAs and, as a result, there could be no breach of the CBA. NSHA said any alleged inequity arising out of the wage differential between the LPN and CCRA classifications must be addressed through collective bargaining and is outside the authority of a grievance arbitrator. In support of this submission, counsel for NSHA submitted two arbitration awards. In *Izaak Walton Killam Grace Health Centre for Children, Women & Families v. N.S.N.U.*, [2001] N.S.L.A.A. No. 7, 2001 CarswellNS 545, Arbitrator Innis Christie said:

> **Interpretation and Application of The Collective Agreement.** The serious question then is whether, because the work done by Clinical Leaders and the Clinical Resource Nurses was essentially the same, I should interpret the Collective Agreement as providing that they were to paid the same, i.e. the Clinical Leaders were to be paid the head nurse premium as were the Clinical Resource Nurses. **It is not for a grievance arbitrator to determine whether two jobs are sufficiently similar that they should be paid the same.** My job is to decide whether that is what the parties intended, as derived from the words they used in the context, and, if those words are ambiguous, any other relevant evidence.
>
> Obviously, on its face the Collective Agreement provides for payment of that rate of pay to the Clinical Resource Nurses and says nothing about the Clinical Leaders. The Clinical Leader position existed at the time of the negotiation and was known, or should have been known, to both the Employer and Union negotiators. I have no basis for thinking that either party adverted specifically to that position and, indeed, its seems likely that neither did. **But that is not a basis upon which I as arbitrator can write special pay for the position into the Collective Agreement.**
>
> [emphasis added]

[18] Similarly, in *Hamilton Health Sciences and CUPE Local 7800 (RPNs), Re* (2013), 115 C.L.A.S. 64, 2013 CarswellOnt 8776, Arbitrator Lorne Slotnick dealt with a grievance concerning differential pay rates between job classifications. The union argued the duties were virtually the same and, as a result, the employees should receive the same compensation. The issue was whether this differential was a violation of the collective agreement. Arbitrator Slotnick concluded it was not for the following reasons:

> **It appears there may indeed be an inequity here; in fact, there are some indications that the grievors may perform tasks at a more advanced level than the higher-paid registered orthopaedic technologists. But that inequity, if there is one, was created by the bargaining process and it is there, if anywhere, that it ought to be addressed**. For now, the grievors, who are RPNs and are classified as such, are being paid the correct rate for RPNs as set out in the collective agreement. There is no basis in the agreement for an arbitrator to intervene in this situation and grant the remedy requested by the union, even assuming the facts as asserted by the union to be correct.
>
> [emphasis added]

[19] In the Award, arbitrator Ashley framed the issue for determination as follows:

> 30. The facts in this arbitration are not in dispute. The issue is whether the Employer has breached the collective agreement by not awarding the same increase to the CCRA classification as was given to LPNs in the Lafferty Award, as extended.
>
> 31. The Lafferty Award, on its face, only applies to LPNs in the CDHA. That situation was untenable, and the Province/Employer agreed to fund all public sector LPNs to increase the wage rates by the same amount as in the Award, in a without prejudice agreement. The two grievances were filed prior to the decision to extend the increase beyond the CDHA group. The only remaining issue was that of two classifications of LPNs in other positions, ORTs and CCRAs. The parties entered into an agreement to apply the 12% increase to ORTs, which is not without prejudice. The Union accepted this, but did not accept the refusal to extend it to the other classification. All of this leaves the group of approximately forty CCRAs as the only classification of employees who are required to be LPNs that did not get the 12% increase. The Employer called no evidence.

[20] The NSGEU argued the agreement to apply the 12% wage increase from the Lafferty Award to employees in the LPN classification but not those in the CCRA classification was a management rule created by NSHA. They said it was unreasonable and, therefor a violation of article 3 of the CBA. The arbitrator accepted this argument and explained her rationale as follows:

> 34. One of the major contextual factors here is the historical ratio between the LPN and CCRA rates in the collective agreement, which has been in place for some time, flowing from devolution in 2009. This has resulted in the CCRA wages being approximately fifty cents lower than the regular LPN rate. With the Lafferty change, that differential is closer to four dollars.
>
> 35. The triggering change came from that Award which applied to the LPN classification in a certain area. The parties entered into agreements extending the scope of the increase both geographically and to other positions. All of these actions are binding, and are imported into the collective agreement.
>
> 36. The collective agreement cannot be interpreted in a vacuum, or in isolation from the various agreements between the parties, Arbitration Awards, and political actions that have affected it: *Creston Moly Corp. v. Sattva Capital Corp.* 2014 SCC 53. Looking at the Union's "reasonable rule" argument with this wider textual lens, it becomes clear that the significant changes to the wage rates for all LPNs, except CCRAs, is not a decision that can meet the reasonability test. I should note that the Employer did not address the reasonableness argument in any detail.
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> …
>
> 38. I conclude that the decision not to extend the rate increase to CCRAs amounts to an unreasonable rule, following the Lafferty Award. The "rule" is the decision to apply the Award in a manner that differentiates one group from another similarly situated, and which severs the longstanding wage ratio, without justification being offered.

[21] The Award did not address the argument of NSHA that a grievance arbitrator did not have the authority to modify the wage rates in the CBA.

Judicial Review Decision

[22] The reviewing judge applied the reasonableness standard of review described by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. As required by *Vavilov*, the reviewing judge focused on the Award. The first issue addressed in the judicial review decision was the arbitrator's conclusion that the decision not to extend the Lafferty Award increase to the CCRA classification was a workplace rule within article 3 of the CBA. The reviewing judge found this to be unreasonable for the following reasons:

> [63] The Arbitrator found that the Applicant made a workplace rule by withholding the pay raise from CCRAs. However, she did not explain why she found this decision to be a workplace rule. The decision does not provide an evidentiary or legal basis for the finding, other than the Respondent's position that

> it was a rule. The evidence summarized by the Arbitrator did not discuss the Applicant's rulemaking powers, policies, or address other examples of workplace rules. She did not contemplate the definition of a rule or what type of employer action would fall under the rule-making powers in the Management Rights clause. She did not suggest that any other elements of the hearing record provide guidance on this issue, or cite any caselaw that would suggest this action fits into the accepted definition of a workplace rule.
>
> [64] In short, the Arbitrator simply stated that the decision was a rule without providing justification for this conclusion. I conclude that her finding that this was a workplace rule is akin to reverse-engineering the outcome: after determining that the Applicant's decision was unreasonable, the Arbitrator seems to have assumed that the decision was a rule, rather than first considering whether the action fit into the definition of "rule".

[23] In addition to finding a lack of justification for the arbitrator's finding of a workplace rule, the reviewing judge also found the Award internally irrational and, therefore, unreasonable. The judicial review decision described this deficiency as follows:

> [87] Internal rationality requires a reviewing judge to be able to trace the decision-maker's reasons and find a line of analysis that leads to the decision-maker's conclusion. A decision-maker cannot simply summarize the arguments made and state a peremptory conclusion. A decision-maker is expected to find facts, analyze, make inferences, and come to a conclusion. If the decision-maker's reasons "exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise", this is a sign of an internally irrational decision (*Vavilov supra,* at paras. 102-104).
>
> …
>
> [89] Without justification for her determination that the decision was a "rule", the Arbitrator's decision contains a gap in the logic chain that led to the conclusion that the Applicant breached the Collective Agreement by refusing to extend the wage increase. Other management decisions made under the management rights clause are not subject to reasonableness scrutiny but must be made in "accordance with the terms and conditions of the collective agreement" (Collective Agreement, Article 3). The unjustified conclusion that the Applicant's decision was a rule substantially impacted the remainder of the Arbitrator's decision, as she directed her analysis to the reasonableness of the rule rather than considering other possible breaches of the Collective Agreement, such as whether the Applicant's decision was a use of their residual management authority, and if that decision was made in accordance with the terms of the Collective Agreement.

[24] As a result of the finding of unreasonableness, the reviewing judge quashed the Award and remitted the matter for a new hearing before a different arbitrator.

Standard of Review

[25] The standard of review on appeal from a judicial review decision was described by this Court in *United Food and Commercial Union Canada, Local 864 v. Sproule Lumber*, 2024 NSCA 27:

> [35] The standard of review on an appeal from a judicial review is correctness. This means the reviewing judge must correctly identify and apply the standard of review to the administrative decision. The appellate court steps into the shoes of the lower court and conducts its own review of the administrative decision. The focus is on this decision and not the judicial review (*Paladin* at para. 37).

[26] The parties agree the Award is to be assessed using the standard of reasonableness. The principles governing a reasonableness review are summarized by Fichaud, J.A. in *Paladin Security Group Limited v. Canadian Union of Public Employees, Local 5479*, 2023 NSCA 86:

> [39] In *Vavilov*, the majority's judgment set out the principles of reasonableness review. In *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, Justice Jamal for the majority reiterated *Vavilov*'s ruling. I will summarize the principles from *Vavilov* and *Mason*.
>
> [40] Reasonableness is a "reasons first" approach. The reviewing court "must begin its inquiry into the reasonableness of the decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion". "Reasons first" means the reviewing court does not start with its view, *i.e.* it does not fashion its "own yardstick … to measure what the administrator did", and then proceed with "disguised correctness review". (*Vavilov*, paras. 83-84. *Mason*, paras. 8, 58, 60 and 62-63).
>
> [41] Both the administrative decision's outcome and its reasoning matter. The outcome must be justifiable and, where reasons for the decision were required, the outcome must be "justified" by the reasons. The reviewing court "must consider only whether the decision made by the administrative decision maker – including both the rationale for the decision and the outcome to which it led – was reasonable". (*Vavilov*, paras 86-87. *Mason*, paras. 58-59)
>
> [42] Reasonableness is "a single standard that accounts for context". Reviewing courts are to analyze the administrative decisions "in light of the history and context of the proceedings in which they were rendered". The history and context may show that, after examination, an apparent shortcoming is not a failure of justification. History and context include the evidence, submissions, record, the policies and guidelines that informed the decision-maker's work and past decisions. Context also includes the administrative regime, the decision maker's institutional expertise, the degree of flexibility assigned to the decision

maker by the governing statute and the extent to which the statute expects the decision maker to apply the purpose and policy underlying the legislation. (*Vavilov*, paras. 88-94, 97, 110; *Mason*, para. 61, 67, 70. See, for instance, *Labourers' International Union, Local 615 v. Grafton Developments Inc.*, 2023 NSCA 25, paras. 104-108, for how these factors affect the Nova Scotia Labour Board.)

[43] The "hallmarks of reasonableness" are "justification, transparency and intelligibility". Consequently, a decision will be unreasonable where "the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point". (*Vavilov*, paras. 99 and 103; *Mason*, para. 60)

[44] More specifically, the reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that 'there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived' [citation omitted]". A question-begging gap on a critical point may impair intelligibility. Mere repetition of the statutory language, followed by a peremptory conclusion "will rarely assist a reviewing court" and is "no substitute for statements of fact, analysis, inference and judgment". (*Vavilov*, para. 102; *Mason*, para. 65)

[45] A "minor misstep" or a "merely superficial or peripheral" shortcoming will not suffice to overturn an administrative decision. Rather, the flaw must be "sufficiently central or significant to render the decision unreasonable". To determine whether there is a sufficiently central or significant flaw, the reviewing court asks whether the administrative decision "is based on an internally coherent and rational chain of analysis and … is justified in relation to the facts and law that constrain the decision maker". If yes, "[t]he reasonableness standard requires that a reviewing court defer to such a decision". If no, the decision "fails to provide a transparent and intelligible justification for the result" and is unreasonable. (*Vavilov*, para. 84-85, 99, 100-107; *Mason*, paras. 8, 59, 64).

[46] *Vavilov*, paras. 105-135, and *Mason*, paras. 65-76 elaborated on the factors that "constrain the decision maker", under this test, and their utility in a particular case: the governing statutory scheme, other statutory or common law, principles of statutory interpretation, evidence before the decision maker, submissions of the parties, past practices and decisions, and the impact of the decision on the affected individuals. The factors are "not a checklist" and will vary in application and significance from case to case (*Vavilov*, para. 106; *Mason*, para. 66).

[27] It is with these principles in mind that I will review the Award.

Reasonableness of the Award

[28] As *Vavilov* tells us, the focus of a reasonableness review is on the administrative decision. It should consider the internal reasoning and assess the outcome in light of the context.

[29] With respect to context, the Supreme Court of Canada in *Vavilov* said:

> [108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.

[30] For a grievance arbitration, the context includes any limits imposed by the statutory regime and the collective agreement. The NSHA position before the arbitrator was she did not have the authority to require changes to the wage structure under the CBA. In light of this, I will start with a consideration of applicable legislation and CBA provisions.

[31] In Nova Scotia, every collective agreement must include a provision for resolving disagreements with respect to its meaning or violation. Section 42(1) of the *Trade Union Act*, R.S.N.S., c. 475 provides:

> 42 (1) Every collective agreement shall contain a provision for final and binding settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose

> behalf it was entered into, concerning its meaning or violation, including any question as to whether a matter is arbitrable.

[32] The CBA includes an arbitration provision as required by the *Trade Union Act*. The grievances in this matter were filed as policy grievances pursuant to article 14.09 of the CBA:

> **14.09 Policy Grievance**
>
> Where either party disputes the general application or interpretation of this Agreement, the dispute may be discussed with the Employer's Vice-President responsible for Human Resources, or such person designated by that individual, or the Union, as the case may be. Where no satisfactory agreement is reached, the dispute may be resolved pursuant to Article 14.12. This section shall not apply in cases of individual grievances.

[33] The issues which can be addressed in an arbitration award are subject to the limitations found in article 14.17 of the CBA:

> **14.17 Arbitration Award**
>
> All arbitration awards shall be final and binding as provided by Section 42 of the *Trade Union Act*. **An arbitrator may not alter, modify or amend any part of this Agreement**, but shall have the power to modify or set aside any unjust penalty of discharge, suspension or discipline imposed by the Employer on a Nurse.
>
> [emphasis added]

[34] These provisions confirm an arbitrator under the CBA may address disputes with respect to the application or interpretation of the agreement including whether either party has violated its terms. Their authority does not extend to altering, modifying or amending the provisions of the CBA.

[35] In addition to complying with the constraints imposed by the legal context, which would include the CBA, a reasonable decision must also be justified and transparent. These principles were described in *Vavilov* at para. 127:

> [127] **The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties**. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary

> mechanism by which decision makers demonstrate that they have actually *listened* to the parties.
>
> [emphasis added]

[36] This means that a reasonableness review of the Award will require consideration of the parties' submissions and the extent to which the arbitrator responded to those concerns.

[37] Finally, the requirement for internal rationality means the decision maker's reasoning must make sense. *Vavilov* describes the principle in these terms:

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

[38] The grievances filed in July 2020 are premised on a complaint the negotiated wage increase for the LPN classification established by the Lafferty Award should have been offered to employees in other classifications and locations. As explained by the NSGEU witnesses at the arbitration hearing, this was because these employees were licensed practical nurses and performed similar duties. Between the filing of the grievances and the arbitration hearing in September 2021, the parties agreed to amend the CBA and resolve the grievances with respect to the LPN classifications outside of the Capital District Health Authority and the ORT classification. As a result, the Award was limited to the CCRA classification.

[39] The original grievance alleged NSHA had violated articles 2 and 3 of the CBA as well as appendix "A". Article 2 is the union recognition article and appendix "A" lists the wage rates for all of the job classifications. By the time of the arbitration hearing, the only alleged violation was the management rights provision in article 3.

[40] There was no confusion at the arbitration hearing or in the Award with respect to the employer conduct complained of. It was the failure to increase the wages for the CCA classification beyond the level set out in appendix "A" to the CBA. The following comments in the Award illustrate the point:

> 3. What I am left to determine here, as a result of various agreements and government decisions, is whether the wage rate of Continuing Care Referral Assistants (CCRAs), who are required to be registered LPNs to get their job and

> to keep it, should be eligible for the same wage increase as LPNs and Operating Room Technicians (ORTs). The Union argues that the Employer acted unreasonably in failing to raise the rate to this group, making it the only classification in the nursing bargaining unit requiring an LPN designation to not receive the increase. Both grievances seek a declaration that the Employer has breached the collective agreement, that members negatively affected be made whole, and that the Employer pay arbitration costs.
>
> …
>
> 30. The facts in this arbitration are not in dispute. The issue is whether the Employer has breached the collective agreement by not awarding the same increase to the CCRA classification as was given to LPNs in the Lafferty Award, as extended.

[41] The position of NSHA, as described in the Award, was equally clear; they were complying with their obligations under the CBA with respect to the CCRA classification:

> 32. Counsel for the Employer argues that that there is no violation of the collective agreement, as it is paying CCRAs the designated wage rate in the collective agreement. I note that this is the wage rate that currently illustrates the historic wage rate ratio between that classification and LPNs, as the collective agreement does not yet reflect the increased LPN rate. (That is not to suggest that the increased rate is not binding on the parties.)

[42] The constraints on the scope of permissible grievance issues found in articles 14.09 and 14.17 of the CBA as well as the submissions of the NSHA, raised an important question for consideration by the arbitrator. It is whether the decision to adjust wage rates for some, but not all, job classifications is a management rule within article 3 and, therefore, subject to challenge. The original grievances sought a declaration that NSHA violated the CBA, as well as compensation for any wage loss and benefits by affected employees. The Award did not deal with remedy, but the arbitrator retained jurisdiction over those issues.

[43] The arbitrator's analysis, as reflected in the Award, starts by saying the NSHA conduct in not agreeing to a wage increase for the CCRA classification is a rule within the meaning of article 3 of the CBA. No explanation for the conclusion is offered, nor is there any discussion about the NSHA submission that a change in wage rates is for the collective bargaining process and not grievance arbitration. The arbitrator's entire analysis is contained in the following paragraphs:

33. The parties agree that the issue here comes down to interpretation of the collective agreement. The Union alleges that the violation flows from the management rights clause (Article 3), which states as follows:

> **ARTICLE 3: MANAGEMENT RIGHTS**
>
> **3.00** The Employer reserves and retains, solely and exclusively, all rights to manage the business including the right to direct the work force and to make reasonable rules provided that such rights are exercised in accordance with the terms and conditions of this collective agreement. All the functions, rights, power, and authority which the Employer has not specifically abridged, deleted or modified by this Agreement are recognized by the Union as being retained by the Employer.

The Union argues that the Employer's decision to extend the Lafferty increase to all LPNs and nurses doing LPN work, except CCRAs, is not a "reasonable rule", in the circumstances.

34. One of the major contextual factors here is the historical ratio between the LPN and CCRA rates in the collective agreement, which has been in place for some time, flowing from devolution in 2009. This has resulted in the CCRA wages being approximately fifty cents lower than the regular LPN rate. With the Lafferty change, that differential is closer to four dollars.

35. The triggering change came from that Award which applied to the LPN classification in a certain area. The parties entered into agreements extending the scope of the increase both geographically and to other positions. All of these actions are binding, and are imported into the collective agreement.

36. The collective agreement cannot be interpreted in a vacuum, or in isolation from the various agreements between the parties, Arbitration Awards, and political actions that have affected it: *Creston Moly Corp. v. Sattva Capital Corp.* 2014 SCC 53. Looking at the Union's "reasonable rule" argument with this wider textual lens, it becomes clear that the significant changes to the wage rates for all LPNs, except CCRAs, is not a decision that can meet the reasonability test. I should note that the Employer did not address the reasonableness argument in any detail.

37. While there may well be other classifications in the collective agreement where the internal consistency between wage rates has been "thrown off" by virtue of the increase to the LPNs and the larger group, CCRAs are the only remaining group in the nursing bargaining unit where a central job requirement is the continuing licensure as a Licensed Practical Nurse. The Employer has not argued that CCRAs should not be LPNs, or that they do not perform LPN duties. I also note that those in the nursing bargaining unit must occupy positions that "must be occupied by a registered nurse of [sic] a licensed practical nurse": *Health Authorities Act*, 2014, 2. 80B (1) (a). This is unlike the situation in ***Re Hamilton Health*** (supra).

> 38. I conclude that the decision not to extend the rate increase to CCRAs amounts to an unreasonable rule, following the Lafferty Award. The "rule" is the decision to apply the Award in an manner that differentiates one group from another similarly situated, and which severs the longstanding wage ratio, without justification being offered.

[44] I am satisfied the Award does not meet the reasonableness standard as explained in *Vavilov* and subsequent decisions. The critical question of how an employer's conduct in negotiating amendments to the CBA wage rates can result in a breach of that agreement is unanswered.

[45] A breach of article 3 of the CBA requires two findings by an arbitrator. The first is that NSHA made a rule for the management of its business. The second is that this rule was not reasonable. The submissions of NSGEU focussed on the unfairness of the differential wage rates between the LPN and CCRA classifications and argued this was unreasonable. The NSHA addressed whether the complaint of unfair treatment fell within the scope of issues which are subject to grievance under the CBA. It did not respond to the NSGEU argument about unreasonableness.

[46] The Award says the decision not to extend the LPN wage increase to the CCRA classification was a "rule" but offers no reasoning path to reach such a result. A reasoning path is essential in order for the decision to be internally rational in light of the constraint prohibiting the arbitrator from modifying or amending the CBA and the submissions of the NSHA. The Award does not meaningfully respond to the issues and concerns raised by the NSHA and, for this reason, fails to comply with the principles of justification and transparency described in *Vavilov* (at para. 127).

[47] I agree with the conclusion reached by the reviewing judge that the Award is unreasonable.

Disposition

[48] I would dismiss the appeal. However the matter should not be remitted for reconsideration by another arbitrator. *Vavilov* (at paras. 139 to 142) directs courts to be guided by concerns about the proper administration of justice, including expedient and cost efficient decision making, in exercising their remedial discretion.

[49] Where it is evident a particular outcome is inevitable, remitting the matter for reconsideration serves no useful purpose. Although such a scenario is not common this is a circumstance where nothing would be accomplished by having the grievance reconsidered. Article 14.17 of the CBA prohibits an arbitrator from amending or modifying the CBA and this is, in effect, what the NSGEU is seeking. The grievance asks for a declaration NSHA breached the CBA by not paying a higher wage to the CCRA classification as well as compensation for the affected employees. Even if the arbitrator agrees the differential treatment is unfair, increasing the rates in appendix "A" of the CBA must be dealt with through bargaining, not grievance arbitration.

[50] NSHA advised it was not seeking costs in the event it was successful on appeal and, as a result, none are ordered.

Wood C.J.N.S.

Concurred in:

Fichaud J.A.

Derrick J.A.