SUPREME COURT OF NOVA SCOTIA

Citation: *Dalhousie University v. Nova Scotia Government and General Employees Union*, 2017 NSSC 38

Date: 20170217
Docket: Hfx. No. 453844
Registry: Halifax

Between:

Dalhousie University

Applicant

and

Nova Scotia Government and General Employees Union
and
William M. Wilson, Q.C.

Respondents

LIBRARY HEADING

Judge: The Honourable Justice Robert W. Wright

Heard: November 24, 2016 in Halifax, Nova Scotia

Written Decision: February 17, 2017

Subject: Judicial Review of Labour Arbitration Award

Summary: A grievance was filed on behalf of the Grievor alleging that the employer had violated the Collective Agreement covering employees at the Nova Scotia Agricultural College by failing to appropriately fill a bargaining unit vacancy. The Grievor was then a long service term employee whose employment was coming to an end because of the cessation of outside funding supporting the project for which she had been initially hired. She grieved that her employment had thereupon been terminated without being extended the benefits of the layoff/placement provisions of the Collective Agreement, further to which she sought to be placed in a newly created position classified as Associate Professor.

The grievance largely turned on the interpretation of the definition of a layoff contained in the Collective Agreement which expressly included long service term employees who were laid off because of, *inter alia*, a "shortage of funds". The arbitrator ruled that the Grievor fell within this extended definition of a layoff and allowed the grievance. He then ordered the employer to apply the placement provisions in the Collective Agreement to the Grievor's layoff and to identify opportunities for her new placement, including an opportunity for placement in the position she had sought. The employer then filed for judicial review of that decision.

Issue: (1) Should the arbitrator's decision be interfered with, applying the standard of review of reasonableness?

Result: The reasoning path of the arbitrator was justifiable, intelligible and transparent and his conclusion fell within the range of acceptable outcomes. Although a different interpretation of the layoff provisions could have been made in the factual context of this case, the interpretation adopted by the arbitrator was one which the language of the agreement could reasonably bear. The application for judicial review was therefore dismissed.

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Counsel:	Rebecca Saturley and Michelle Black for the Applicant David Wallbridge and Balraj Dosanjh for Respondent Union

Wright, J.

INTRODUCTION

[1] Dalhousie University has applied for judicial review of the labour arbitration award rendered by William M. Wilson on June 30, 2016. Mr. Wilson had been consensually appointed by the Minister of Labour and Advanced Education under the prevailing Collective Agreement to act as sole arbitrator of a grievance filed by the Nova Scotia Government and General Employees Union (the "Union") on behalf of Dr. Kathleen Glover (the "Grievor").

[2] The grievance, filed on March 16, 2012, alleged that the employer had violated the provisions of the Collective Agreement between the Province of Nova Scotia and the Union by failing to appropriately fill a bargaining unit vacancy.

[3] It should be noted that Dalhousie was not the employer at the time the grievance was originally filed and hence was not then a named party. However, Dalhousie participated in the arbitration hearing held in March of 2016 in light of the *Dalhousie University – Nova Scotia Agricultural College Merger Act* which served to merge those two institutions. By virtue of that statute, all employees who were previously employed by Nova Scotia Agricultural College ("NSAC") became employees of Dalhousie and Dalhousie became bound by the existing Collective Agreement. It is therefore common ground that Dalhousie is the proper Applicant for purposes of this judicial review application.

BACKGROUND

[4] The factual background underlying this grievance is set out in detail in the arbitrator's award. The material facts are not contentious.

[5] By way of overview, Dr. Glover has a long scientific background, having been granted a PhD from Dalhousie specializing in Biochemistry and Molecular Biology. After receiving her PhD, she started a company offering research services to the agriculture industry on a contract basis and it was during this time that she began working with scientists at NSAC. She was eventually appointed as an Adjunct Professor which enabled her to apply for funded research grants in collaboration with NSAC faculty.

[6] Over the years, Dr. Glover successfully applied for funding for a number of research projects. One of those projects, which came with an approved budget of approximately $2.5 million dollars from the Atlantic Canada Opportunities Agency, was called Nutritionally Enhanced Milk Products for the Atlantic Canada Dairy Industry (the "Milk Project"). Dr. Glover worked on the proposal for that research project with a view to working on it as part of the team.

[7] In January, 2005 the Province approved the position of Research Professor, Dairy Molecular Biology which was classified at the Associate Professor level. Dr. Glover was the only applicant for this position which was awarded to her on October 4, 2005. This was to be a term position for five years to be remunerated by the project funding.

[8] As an aside, the exact nature of that new position was the subject of another grievance arbitration initiated by Dr. Glover who alleged that the Employer breached the Collective Agreement by its failure to change her term employment status to permanent status after she completed two continuous years of service. In an award rendered on September 26, 2014 a different arbitrator concluded that her position was that of an Industry Research Chair within the meaning of Article 10.13 of the Collective Agreement. That Article specified that appointments to Industry Research Chair faculty positions were to be on a term basis up to 60 months in duration, with permitted extensions up to an additional 36 months. That decision clarifying the status of Dr. Glover's employment set the stage for her other grievance with which we are here concerned.

[9] By the time her initial term of employment was to expire in October of 2010, the project had still not been completed. However, NSAC was able to offer Dr. Glover a one year extension to October 31, 2011. In its confirmatory letter dated April 27, 2011 captioned "End of Employment Notice", NSAC advised Dr. Glover "that the funding for your term Associate Professor position will end effective October 31, 2011 and as a result, your position will end effective the same date."

[10] With that writing on the wall, Dr. Glover pursued discussions with a department head at NSAC that began sometime in 2010 about the creation of a new position within his department for which she could apply. Dr. Glover worked on the documentation for that position which was eventually created and entitled Assistant/Associate Professor – Health & BioProducts. Dr. Glover formally applied for that position on July 31, 2011 with interviews planned to take place in December.

[11] In the meantime, as of October 31st Dr. Glover was given a further six month extension in her incumbent position with a new end date of April 30, 2012. This further extension was made only after the transfer of funds from the original project funding to support her position was confirmed, and in the expectation by NSAC that it would allow Dr. Glover to finish out the project.

[12] Dr. Glover was short listed for an interview for the new Assistant/Associate Professor position being created, but by way of a letter dated February 13, 2012 she was informed that she was not the successful candidate. As a result, two grievances were filed on her behalf on March 16, 2012, namely, the one seeking clarification of the exact classification of her incumbent position and the one with which we are here concerned.

[13] Eleven days later, on March 27, 2012 NSAC sent a further confirmatory letter in virtually the same form as its earlier letter dated April 27, 2011 above referenced, which served to advise Dr. Glover that the funding for her position would end effective April 30, 2012 and that as a result, her position would end effective that same date. Her employment thus came to an end after 6.5 years of service with NSAC as a term employee.

POSITIONS OF THE PARTIES

[14] The position of the Union throughout on behalf of Dr. Glover is that she was qualified for the newly created position of Associate Professor – Health & BioProducts, that the employer knew that her employment term was otherwise coming to an end, and that she should have been given the new position as the senior person in accordance with the Employment Stability provisions contained in Article 33 of the Collective Agreement, having been laid off.

[15] Article 33 contains a comprehensive section governing layoffs including Placement/Displacement Procedures when a bargaining unit vacancy is to be filled. There are three key provisions at the heart of this case which read as follows:

33.06 Layoff

> a. An employee(s) may be laid off because of technological change, shortage of work or funds, or because of the discontinuance of a function or the reorganization of a function. (underlining mine)

33.07 Application

> For the purpose of this Article "employee" means a permanent employee or a term employee with five (5) or more years of service.

33.16 Placement/Displacement Procedures

> a. Subject to consideration of ability, experience, qualifications, or where the Employer establishes that special skills or qualifications are required, … an employee in receipt of layoff notice … shall have the right to be placed in a vacancy in the following manner and sequence….

[16] Because Dr. Glover's employment was effectively terminated on April 30, 2012 for the stated reason that the funding for her position would end on that date, the Union maintains that she was entitled to the benefit of the placement procedures under Article 33.16 because:

1. she was a term employee as an Industry Research Chair per Article 10.13(a) with five or more years of service; and
2. she had been effectively laid off because of a shortage of funds within the meaning of Article 33.06(a).

[17] Accordingly, the remedy ultimately sought through her grievance was her placement in the position of Assistant/Associate Professor – Health & BioProducts in compliance with Article 33 which she felt she had been wrongly denied in February of 2012.

[18] The essence of the Employer's position in the arbitration proceeding was that Dr. Glover did not meet the qualifications of the Associate Professor position and moreover, she was not laid off within the meaning of the Collective Agreement. The Employer has maintained throughout that Dr. Glover's employment was terminated on a fixed date which was to coincide with the date that the funding for her position ran out. Simply put, when the funding ended, so did Dr. Glover's term position of employment and it is said that everyone involved knew and understood that. The Employer further maintains that the only consequence of the cessation of the funding was to mark the end date of Dr. Glover's fixed term of employment and that when that term ended, no further obligations existed. The Employer says that it is unreasonable to classify such an event as a layoff and that the grievance ought therefore to have been dismissed.

OVERVIEW OF THE AWARD

[19] In his award dated June 30, 2016 the arbitrator allowed the grievance in part with his finding that the Employer had violated the Collective Agreement by not applying the provisions of Article 33. He concluded that Dr. Glover was entitled to the benefit of the placement rights under Article 33 because she was a term employee with five or more years of service and fell within the definition of a "layoff" pursuant to Article 33.07 because her employment had ended by reason of a lack of funding for her position.

[20] In fashioning a remedy, the arbitrator denied the request that Dr. Glover be placed in the sought after employment position for two apparent reasons. First, he was not satisfied that a proper determination had ever been made as to whether Dr. Glover met the qualifications for that position, and properly declined to make that determination himself. Secondly, and in any event, he noted that at the time of her layoff, the Associate Professor position was no longer vacant.

[21] In the result, the remedy ordered by the arbitrator was that the Employer be required to apply the provisions of Article 33 to Dr. Glover's layoff, and to identify opportunities for placing her in accordance with its terms, including an opportunity for placement in the Associate Professor position following a proper assessment of the qualifications necessary to fill that position.

REQUEST FOR JUDICIAL REVIEW

[22] As earlier noted, it is common ground that Dalhousie is the proper Applicant to bring this judicial review application. Its Notice for Judicial Review was filed on July 25, 2016 whereby it seeks an order from this court quashing the arbitration award. Dalhousie seeks review on the following grounds:

1. The Decision was unreasonable and should be quashed because Arbitrator Wilson failed to:

    a. Interpret the relevant provisions of the Collective Agreement in accord with the specific facts, particularly by finding that:

        i. Even though the Grievor was a term employee, the Grievor had been laid off; and

        ii. The Grievor had rights under Article 33 of the Collective Agreement.

2. In arriving at the unreasonable conclusion that the Grievor had been laid off, Arbitrator Wilson unreasonably ordered that Article 33 of the Collective Agreement (regarding lay offs) should be applied to the Grievor in relation to the Health BioProducts position.

STANDARD OF REVIEW

[23] It is well established in Canadian law that the applicable standard of review pertaining to the decision of a labour arbitrator is reasonableness as opposed to correctness (see, for example, **Irving Pulp & Paper Ltd. v. CEP, Local 30**, 213 SCC 34).

[24] Also well established is the manner in which this standard of reasonableness is to be applied. In the leading decision of the Supreme Court of Canada in **Dunsmuir v. New Brunswick**, 2008 SCC 9, it was stated (at para. 47) that 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".

[25] The Nova Scotia Court of Appeal has since elaborated on the reasonableness test on a number of occasions, notably in **Casino Nova Scotia v. Nova Scotia (Labour Relations Board)**, 2009 NSCA 4 and **Maritime Paper Products Ltd. v. C.E.P., Local 1520**, 2009 NSCA 60. In the latter case, the Court of Appeal reiterated the application of the reasonableness test in the following passage (at paras. 23-24):

> 23. In *Casino Nova Scotia*, this court elaborated on *Dunsmuir*'s reasonableness test:
>
> [29] In applying reasonableness, the court examines the tribunal's decision, first for process to identify a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion, then second and substantively to determine whether the tribunal's conclusion lies within the range of acceptable outcomes.
>
> [30] Several of the Casino's submissions apparently assume that the "intelligibility" and "justification" attributed by *Dunsmuir* to the first step allow the reviewing court to analyze whether the tribunal's decision is wrong. I disagree with that assumption. "Intelligibility" and "justification" are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to process (*Dunsmuir*, para. 47). They mean that the reviewing court can understand why the tribunal made its decision, and that the tribunal's reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes. *Nova Scotia (Director of Assessment) v. Wolfson*, 2008 NSCA 120, para. 36.
>
> [31] Under the second step, the court assesses the outcome's acceptability, in respect of the facts and law, through the lens of deference to the tribunal's "expertise or field sensitivity to the imperatives or nuances of the legislative regime." This respects the legislators' decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. *Dunsmuir*, para. 47-49; *Lake*, para. 41; *PANS Pension Plan* [Police Association of Nova Scotia Pension Plan v. Amherst (Town), 2008 NSCA 74, leave to appeal denied by SCC Jan. 22, 2009], 2008 S.C.C.A. No. 442 para. 63; *Nova Scotia v. Wolfson*, para. 34.
>
> 24**.** The reviewing judge assessing reasonableness does not plot his own itinerary, but tracks the tribunal's reasoning path. *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 47-55; *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)*, 2005 NSCA 141 at para. 42-44; *CBRM v. CUPE* at para. 71-72. So the reviewing judge's first task is to chart the tribunal's reasoning.

[26] The Court of Appeal further expounded on the standard of reasonableness in that same decision at paras. 35-36:

> 35. Reasonableness tracks the tribunal's reasoning, and asks whether the tribunal's finding or conclusion inhabits the set of rational outcomes. If the answer is yes, it does not matter that there may be other rational outcomes or that the judge may prefer another interpretation of "management convenience". *Canada (Citizenship and Immigration) v.*

> *Khosa*, 2009 SCC 12, para. 59. See also: *Ryan*, para. 51, 55; *Granite*, para. 42-44; *CBRM v. CUPE*, para. 71-72.

> 36. As stated in *Casino Nova Scotia* (above para. 23), intelligibility, justification and transparency in the first step of *Dunsmuir*'s reasonableness analysis are not disguises for correctness. If those words signified correctness, there would be no point to a separate reasonableness standard. Correctness would govern every judicial review. Justices Bastarache and LeBel in *Dunsmuir* (para. 47) said that the first step relates to process, not outcome. The reviewing court asks whether it can understand how the tribunal reached its conclusion, and whether the tribunal's decision affords the raw material for the reviewing court to perform its second function of assessing whether the tribunal's conclusion occupies the range of reasonable outcomes.

[27] In its more recent decision in **Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)**, 2011 SCC 62, the Supreme Court of Canada further elaborated on the process for identifying a justifiable, intelligible and transparent reasoning path to the arbitrator's conclusion. The following excerpts are taken from paras. 13 and 16 of that decision:

> 13. This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist….

> 16. Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[28] Put another way, as Justice Cromwell did in **Halifax Employers Association v. International Longshoremen's Association et al.,** 2004 NSCA 101 (at para. 80), the standard of review is not to be applied to every line of reasoning; the question for the reviewing court is whether the reasons of the tribunal disclose any line of reasoning that rationally supports the result.

[29] Bearing the foregoing principles in mind, I now turn to the first task of charting the adjudicator's line of reasoning.

LEGAL ANALYSIS OF AWARD AND FINDINGS

[30] After setting out the factual background and reciting the pertinent provisions of the Collective Agreement, the arbitrator properly identified the first issue for determination as whether the Grievor was entitled to the benefit of Article 33. He noted that her Industry Research Chair faculty position had been created for the sole purpose of participating in the Milk Project. He found the evidence to be clear that there was no intention by the employer to create a permanent position, and that once the project was completed there would be no need for the Grievor's services. The arbitrator then made the unassailable key finding of fact that the reason for the termination of the Grievor's employment on April 30, 2012 was due to a lack of available funding.

[31] Since the Grievor was not entitled to the conversion rights to permanent status under the Collective Agreement, the arbitrator noted that the employer had treated the notice given to the Grievor on March 27, 2012 as a termination of her employment which was to coincide with the end of the funding for her term

position. The employer did not consider the Grievor to have been laid off and therefore did not extend the benefits of Article 33 to her.

[32] In continuing his analysis, the arbitrator found that Dr. Glover met the definition of an employee for the purposes of Article 33 (being a term employee with 5+ years of service) which is undisputable. What is in dispute, however, is the pivotal question of whether Dr. Glover met the additional requirement for the Article 33 benefits of having been "in receipt of layoff notice".

[33] As previously recited, Article 33.06 sets out the kinds of circumstance that constitute a layoff for purposes of the Collective Agreement which include "a shortage of funds". The arbitrator recognized that if an employee's services are terminated for any other reason than those specified, it would not amount to a layoff.

[34] The arbitrator then engaged in a brief review of labour arbitration jurisprudence illustrating that "layoff" is a flexible word that is capable of having different meanings depending on the circumstances. However, he recognized that general principles which characterize when a layoff occurs are subject to the guidance to be taken from the specific wording of the Collective Agreement.

[35] The arbitrator then zeroed in on Article 33.07 which in his view modifies the common perception of a layoff. Under the clear wording of the Collective Agreement, the arbitrator found that the parties had agreed to extend the rights available under Article 33 to term employees with lengthy service (5+ years) provided that they fell within the definition of "layoff" contained in Article 33.06. He then interpreted the language of a "shortage of funds" as extending to the situation where the funding of a term position of employment came to an end, as

was the stated reason given here for the termination of Dr. Glover's employment. That being the case, the arbitrator concluded that Dr. Glover had been laid off and therefore should have been offered placement rights under Article 33.

[36] The arbitrator then turned to a consideration of the appropriate remedy. As summarized earlier, he declined to award Dr. Glover's preferred option of being placed in the Associate Professor – Health and BioProducts position because (a) the threshold decision of Dr. Glover's qualifications for that position had not yet been made by the employer and (b) in any event, that position had already been filled by the time of her layoff. He did add, however, his finding that it would be a reasonable interpretation of the Collective Agreement that a faculty position on tenure track could be filled by a term employee hired as an Industry Research Chair.

[37] In the final outcome, the arbitrator allowed the grievance to the following extent:

> a. The finding was made that the employer had violated the Collective Agreement by not applying the provisions of Article 33 and;
>
> b. Although the request for placement in the new Associate Professor position was denied, the employer was ordered to apply the provisions of Article 33 to Dr. Glover's layoff by identifying opportunities for placing her in accordance with its terms (including an opportunity for placement in that new position following a proper assessment of her qualifications).

[38] The track of the arbitrator's reasoning path is readily discernable. However, counsel for the employer vigorously argues that it was unreasonable for the arbitrator, after having recognized that Dr. Glover's term of employment had a set end date (tied to the availability of funding for the Milk Project), to then conclude

that because the funding supporting her term position was to end on April 30, 2012, she had then been laid off. The employer contends that the very nature of term employment is that it automatically ends at the completion of the term, with no further obligations on the parties, and that it is unreasonable to classify such an event as a layoff.

[39] As for the Collective Agreement, the Employer contends that Article 33.06 cannot be reasonably interpreted as extending placement benefits to term employees whose positions are tied to the availability of funding for a specific project. The argument continues that Article 33.06 was not intended to expand the "shortage of funds" criterion for a layoff so broadly and that it was an unexplained jump in logic for the arbitrator to have done so without engaging in a deeper interpretive analysis. Such an inadequate reasoning path, in the submission of the employer, has lead to an unreasonable decision.

[40] At first blush, it is counter intuitive to think of a layoff as including the situation where a fixed term of employment, tied to the availability of funding for a specific project, comes to an end. However, when the parties have defined a wider spectrum of circumstances constituting a layoff for purposes of a Collective Agreement, that language prevails over a more common connotation of the term and it becomes a matter of contractual interpretation.

[41] In the present case, the parties have chosen to extend the benefits of Article 33 to long service term employees who have been laid off within the meaning of Article 33.06. The vital question for contractual interpretation therefore is how expansive a meaning should be given to the "shortage of funds" criterion for a layoff.

[42] In working through his decision, it was open to the arbitrator to ascribe a more restrictive meaning to those words in the pursuit of ascertaining the intention of the contracting parties, leading to a dismissal of the grievance. Indeed, he stated in his decision that since the Milk Project had a limited life, the expectation for a term employee (employed for that project) was that the employment would come to an end and thus, there never was an expectation of a return to work for the Grievor. Arguably, the cessation of funding for the project signified nothing more than the end of Dr. Glover's fixed term of employment. However, in light of the wording of Article 33, the arbitrator considered that the acceptance of the proposition that there must be expectation for future employment (for a layoff to occur) would render the inclusion of term employees for Article 33 benefits meaningless. He then reiterated his finding that the Grievor was laid off under the terms of the Collective Agreement.

[43] In the final analysis, I have come to the conclusion that it was also open to the arbitrator as a rational outcome to give the more expansive meaning to the subject words that he did by treating the cessation of funding supporting a term position as an instance of "shortage of funds". Put another way, I am of the view that the expanded meaning of those words in Article 33.06 adopted by the arbitrator is an interpretation which the language of that clause can reasonably bear.

[44] Granted, the arbitrator did not engage in a detailed analysis of the principles of contractual interpretation in coming to his decision. However, as noted earlier (at paras. 26-27), reasons may not include all of the arguments, jurisprudence or details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis.

Reasonableness tracks the arbitrator's reasoning, and asks whether his finding or conclusion inhabits the set of rational outcomes. If the answer is yes, it does not matter that there may be other rational outcomes or that the judge may prefer another interpretation. It is clear from the jurisprudence that the test for judicial intervention in a case such as this is a severe one (see, for example, **Delta Sydney v. Canadian Autoworkers Union, Local 4624**, 2001 NSCA 130).

CONCLUSION

[45] In applying the reasonableness standard of review, I am satisfied that there exists a justifiable, intelligible and transparent reasoning path to the arbitrator's conclusion in allowing the grievance to the extent that he did. I am further satisfied that as a consequence, the arbitrator's chosen remedy lies within the range of acceptable outcomes. It follows that this judicial review application is dismissed with costs to the Union.

[46] I anticipate that counsel will be able to agree on the quantum of costs for this application but if not, I invite written submissions within the next 30 days.

Wright, J.