SUPREME COURT OF NOVA SCOTIA

Citation: *Stavco Construction Limited v. Labourers International Union of North America, Local 615,* 2018 NSSC 84

Date: 20180409
Docket: Hfx No. 466788
Registry: Halifax

Between:

Stavco Construction Limited

Applicant

v.

Labourers International Union of North America, Local 615, Arbitrator Eric Slone

Respondents

J U D I C I A L R E V I E W

Judge:	The Honourable Justice M. Heather Robertson
Heard:	January 2, 2018, in Halifax, Nova Scotia
Decision:	April 9, 2018
Counsel:	Eric Durnford, Q.C. and Courtney Barbour, for the plaintiff Gordon N. Forsyth, Q.C., for the respondents

Robertson, J.:

[1] This is a judicial review of a collective grievance decision of an Arbitrator, Eric Slone, pursuant to s. 107 of the *Trade Union Act*, RSNS 1989, c. 475.

[2] Stavco Construction Limited ("Stavco") is a small formwork company that was performing formwork services as part of the construction of a multi-unit apartment building at 29 Abbington Avenue in Bedford, Nova Scotia, in mid-2016.

[3] Stavco began work at the site as a non-union company, but in October 2016 the Labourers International Union of North America, Local 615 (the "Union") applied for certification, followed by the Carpenter's Union, which filed a competing application (which it eventually withdrew) before the Nova Scotia Labour Board (the "Board"), in May 2017.

[4] The Board dismissed the application on November 2, 2016. The Union applied for a hearing pursuant to s. 96 of the *Trade Union Act* to review the order dismissing the application. The hearing was held on May 17, 2017. The Board's decision was released on June 2, 2017, certifying the Union as the bargaining agent for Stavco's labourers on mainland Nova Scotia and setting the effective date of certification as November 2, 2016.

[5] The Union immediately filed a grievance pursuant to s. 107 of the *Act* alleging Stavco had failed to follow union security and pay and benefit provisions of the Collective Agreement from the effective date of the order. Article 5.01 of the Collective Agreement states:

> 5.01 When employees are required, the Employer shall request the Union to furnish competent and qualified Union Members, and the Union shall supply, when available, competent and qualified Union Members as requested.
>
> [emphasis added]

[6] Arbitrator Sloan, appointed by the Minister of Labour on July 24, 2017, pursuant to s. 107(4) of the *Act*, held a hearing and heard three witnesses:

1. Jamie Grant, an employee of Stavco from May 2016 to May 2017;
2. Troy Colburn, a Union Organizer; and
3. Franco Callegari, the business manager of Local 601.

[7] Stavco did not call evidence.

[8] Stavco had continued to pay its regular non-union wages to its labourers from the date of the Board's initial dismissal of the application for certification on November 2, 2016 to July 25, 2017. The Arbitrator ruled that Stavco should pay lost wages to the Union for that period, even though it had already paid its workers, finding that it was appropriate for Stavco to pay a damage award "in the nature of a penalty" because it had not been "entirely honest and accurate in responding to the certification order." The Arbitrator relied on *Labourers International Union of North America, Local 615, v. CanMar Contracting Ltd.*, 2016 NSCA 40, at paras. 106-107 and 116-118, where the court endorsed the practice of backdating certification to the date the application was initially dismissed. He then awarded damages in the amount of $447,630.02.

[9] The applicant asked the court to review the following issues:

A. Did the Arbitrator deprive the Applicant of natural justice by relying solely on hearsay and opinion evidence to make a key finding of fact regarding the Union's ability to furnish competent, available and qualified labourers during the relevant time period?

B. Was the Arbitrator incorrect to rely on speculation rather than actual evidence when making a key finding of fact regarding Stavco's labour needs during the period March 26, 2017 and July 25, 2017?

C. Was the Arbitrator incorrect to order that Stavco pay a punitive amount of damages given there was no evidence that Stavco acted improperly?

The Standard of Review

[10] The respondent Union submits in its brief at paras. 3 and 4:

> The standard of review of the Arbitrator's decision is reasonableness. The reasonableness standard applies not only to the Arbitrator's interpretation and application of the collective agreement, but also to evidentiary and procedural rulings with respect to the arbitration hearing. The arbitrator is entitled to decide the type of evidence he will hear and determine what findings to draw from that evidence.
>
> The Decision was reasonable. The reasons for the Decision are clear and intelligible. The Arbitrator interpreted the collective agreement and the *Trade Union Act*, his home statute, and made findings of fact based on the evidence before him. The Decision is owed deference and should stand.

[11] And again, at para. 26 the Union cites the Arbitrator's statutory authority pursuant to s. 43B of the *Act*:

> Stavco's first ground of judicial review alleges a breach of natural justice on the basis that the Arbitrator relied on hearsay and opinion evidence. An arbitrator's decisions on procedure and evidence attract a reasonableness standard of review even where there is an allegation of procedural fairness.

[12] The Union relies on *CanMar*, *supra*, and *Burt v. Kelly*, 2006 NSCA 27, and a long list of authorities supporting the view that reasonableness is the standard of review of a grievance Arbitrator's decision:

> *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55, para. 17;
>
> *Communications, Energy and Paperworkers Union of Canada, Local 30, v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 7;
>
> *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 8;
>
> *Cape Breton-Victoria Regional School Board v. Canadian Union of Public Employees, Local 5050*, 2011 NSCA 9;
>
> *Communications, Energy and Paperworkers' Union, Local 1520, v. Maritime Paper Products Limited*, 2009 NSCA 60;
>
> *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 68;
>
> *Cape Breton (Regional Municipality) v. Canadian Union of Public Employees, Local 933*, 2006 NSCA 80;
>
> *Nova Scotia Government and General Employees Union v. Capital District Health Authority*, 2006 NSCA 44; and
>
> *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, [2016] 1 S.C.R. 29, 2016 SCC 8, at paras. 30 to 33.

[13] The Union says the court must merely address the reasonableness of the Arbitrator's decision.

[14] It urges the court to apply this deferential standard, consider the reasoning path of the Arbitrator, and assess whether the reasoning is justifiable, intelligible,

and transparent, and determine whether the conclusion is within the range of reasonable outcomes on the reasonableness standard, the Union cites the following cases:

> *Communications, Energy and Paperworkers' Union, Local 1520, v. Maritime Paper Products Ltd., supra*, para. 24;
>
> *Egg Films Inc. v. Nova Scotia (Labour Board)*, 2014 NSCA 33, paras. 26, 30 and 31;
>
> *Nova Scotia Government and General Employees Union v. Metro Community Living Support Services Ltd.*, 2017 NSCA 15;
>
> *Casino Nova Scotia/Casino Nouvelle Ecosse v. Nova Scotia (Labour Relations Board)*, 2009 NSCA 4, para. 29; and
>
> *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), supra*, paras. 14 and 15.

[15] The Union cautions the court not to revisit the facts, or reweigh the evidence, citing the following cases:

> *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, at para. 61;
>
> *Casino Nova Scotia, supra*, para 44; and
>
> *Canadian Union of Public Employees, Local 301, v. Montreal (City)*, [1997] 1 SCR 793.

[16] Stavco says the Union has misstated the law respecting procedural fairness, in the light of *Communications, Energy and Paperworkers' Union of Canada, Local 141 v. Bowater Mersey Paper Company Limited*, 2010 NSCA 19, which states the prevailing view at para. 30:

> 30 The judge [para. 8] gave no deference to the arbitrator in the judge's assessment of procedural fairness. With that, I agree. I note parenthetically that deference is not withheld because of any standard of review analysis. The judge is not reviewing the tribunal's ultimate decision, to which a "standard of review" is accorded. Rather, the judge assesses the tribunal's process, a topic outside the typical standard of review analysis. In *Nova Scotia (Provincial Dental Board) v. Creager*, 2005 NSCA 9, this court said:
>
> > [24] Issues of procedural fairness do not involve any deferential standard of review: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1

> S.C.R. 249, at para. 74 per Arbour, J.; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paras. 100-103 per Binnie, J. for the majority and at para. 5, per Bastarache, J. dissenting. As stated by Justice Binnie in *C.U.P.E*, at para. 102:
>
> > The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.
>
> This point is also clear from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Justice L'Heureux-Dubé (paras. 55-62) considered "substantive" aspects of the tribunal's decision based on the standard of review determined from the functional and practical approach but (para. 43) considered procedural fairness without analyzing the standard of review.
>
> [25] Procedural fairness analysis may involve a review of the statutory intent and the tribunal's functions assigned by that statute: eg. *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at paras. 21-31; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624 at paras. 31-32. But, once the court has determined that a requirement of procedural fairness applies, the court decides whether there was a violation without deference.

To the same effect: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74; *Nova Scotia v. N.N.M.*, para. 39; *Allstate Insurance Company v. Nova Scotia (Insurance Review Board)*, 2009 NSCA 75, para. 11.

[17] Stavco argues that:

> The Union is conflating two separate issues at paras 27-30 and 55 of its brief discussing the Nova Scotia Court of Appeal decisions in *CanMar* (*supra*) and *Kelly* (*supra*).
>
> In *CarMar*, the issue dealt with the Board's power to determine its own procedure with respect to certification. The Board had used its discretionary power to fashion its own procedures to develop a policy to insulate membership evidence from Employer scrutiny. That is not the situation here, where the issue is one of procedural fairness in the traditional sense; the present issue is not about an administrative decision-maker's power to determine its own policies and procedure, but about <u>how</u> an administrative decision-maker handled the evidence in an adjudicative proceeding. The instant case is therefore distinguishable from *CanMar*.
>
> The reasons of a majority of the Supreme Court of Canada in *CUPE (CUPE v. Ontario (Minister of Labour)*, 2003 SCC 29, at paras. 100 and 102*),* is helpful to understanding the distinction:

> The unions, for example, question whether the Minister was right to refuse to consult with them before making the appointments. These questions go to the procedural framework within which the Minister made the s. 6(5) appointments, but are distinct from the s. 6(5) appointments themselves. It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions. It is only the ultimate exercise of the Minister's discretionary s. 6(5) power of appointment itself that is subject to the "pragmatic and functional" analysis, intended to assess the degree of deference intended by the legislature to be paid by the courts to the statutory decision maker, which is what we call the "standard of review."
>
> …
>
> 102 The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations
>
> [emphasis added]

The focus in the present application is on how the Arbitrator made his decision. Quasi-adjudicative proceedings must ensure that the parties have the opportunity to meaningfully participate. As stated in *The Principles of Administrative Law, 6th ed,* Jones and deVillars, (Toronto: Carswell, 2014), at 316:

> The fact that the strict traditional rules of evidence do not apply to administrative tribunals does not mean that tribunals have complete discretion to determine what evidence they will hear. Firstly, the tribunal must not abuse its discretion by basing its decision on insufficient or no evidence, nor on irrelevant considerations. As in other areas of the *audi alteram partem* rule, the tribunal must exercise its discretion to hear evidence in a manner consistent with procedural fairness.

The authority to determine procedure is not a substitute for proper handling of the evidence, which is the essence of procedural fairness in this case.

The Union appears to be suggesting that Justice Fichaud's analysis at para 47 of *CanMar* means that whenever an administrative decision-maker includes in its decision reasoning pertaining to matters of procedure, then such reasoning must be reviewed for reasonableness, regardless of whether the procedural matter deprives a party of fair process. Surely this cannot be true; including discussion about *how* or *why* a tribunal conducted its process as it did cannot not [sic] insulate it from review for fairness. If this was the rule, then challenges to procedural fairness could be avoided simply by writing about them.

[18] A two-step procedural fairness analysis is set out by Cromwell, J.A. (as he then was) in *Kelly, supra*. First it is necessary to determine the content of the duty and second to determine if the decision maker has breached the duty.

[19] Stavco relies on the factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, in assessing the content of the duty. L'Heureuz-Dubé, J. said:

> 22 . . . I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
>
> 23 . . . In *Knight, supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. . . .
>
> 24 . . . The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted . . .

[20] Stavco notes that the *Trade Union Act* provides no appeal procedure and that s. 43(1)(a) mandates that arbitrators "shall give full opportunity to the parties to the proceedings to present evidence and make submissions." The submission continues:

> Therefore, the *Trade Union Act* itself recognizes the requirement to allow parties to have a full opportunity to present evidence and make meaningful response, which also indicates a requirement for a high level of procedural fairness.
>
> Stavco does not agree that the "exigencies of expedited arbitration" under s. 107 of the *Trade Union Act* (Union Brief at para 58) means that the basic rules of evidentiary procedure can be dispensed with. The Union filed its grievance on June 8, 2017. It had until July 25, 2017 to prepare the witnesses and evidence necessary to prove its case. Just because the hearing occurred within 48 hours of the Arbitrator's appointment does not mean that evidence less than the best available should be deemed sufficient.

[21] With respect to the importance of the decision to the person affected, Stavco relies on *Baker* at para. 25:

> 25 . . . The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. . . .

[22] Here the importance to the persons affected is two-fold. Under the Union security grievance, the determination of the effective date would have a major impact on the labourers on the Union's out-of-work list and for Stavco a major effect on its financial well-being.

[23] Stavco further says that s. 43B of the *Act* may allow the arbitrator to determine its own procedures, but that does not mean that the arbitrator can base his findings "on insufficient or no evidence, [or] on irrelevant considerations" (Jones, *supra*).

[24] With respect to the evidence relied upon by the arbitrator, Stavco says he relied on hearsay, opinion, and speculation evidence adduced by the Union instead of the best evidence available, undermining Stavco's procedural right to meaningful participation.

[25] The arbitrator relied on the evidence of Jamie Grant, a labourer employed by Stavco from May 2016 to May 20, 2017, that during his period of employment there were "maybe six to ten labourers doing similar work" (arbitrator's decision, para. 43).

[26] Union Organizer Troy Colburn provided evidence quantifying the Union's claim for unpaid wages. Mr. Colburn prepared a spread sheet for the period November 2, 2016 to March 25, 2017, for which figures could be verified from Stavco documents available at the s. 96 hearing. However, in a second spread sheet from March 26, 2017 to July 25, 2017, Mr. Colburn made the assumption that nine workers would have worked during that period (arbitrator's decision, paras. 51, 53 and 56). This resulted in the calculation of lost union wages of $448,573.02.

[27] Colburn testified that he had visited the Stavco work site "many times" before October 15, 2016, and a "few times" from a distance after that date.

[28] The third witness to testify was Franco Callegari, the business manager of the Union Local 615. He maintains the "out of work" list of labourers who continue to pay union dues and are ostensibly "available for work." Stavco objects

that this list was not tendered into evidence, nor were any workers on the list called to testify as to their availability to work. Mr. Callegari could not say how many were on the list during the relevant period, but he estimated between 40-100. He did agree that labourers might not be available if they were working elsewhere, but believed that the Union could have fulfilled Stavco's need for labourers from his list (arbitrator's decision, paras. 66-67). The arbitrator found that this witness's evidence was enough to prove the Union's lost wages.

[29] Stavco argues that there was no evidence to support the Union's suggestion that Stavco employed an average of nine workers during the period March 26, 2017 to July 25, 2017. Stavco says the arbitrator, although acknowledging the speculative nature of the evidence, went on to make a damages award to the Union in the nature of a penalty because Stavco had not been "entirely honest and accurate in responding to the certification order" (arbitrator's decision, paras. 82-83).

[30] The Union bears the burden of proof to prove the breach of the collective agreement and to prove damages if such a breach occurs. This burden does not shift.

[31] Stavco says the arbitrator accepted the Union's speculation regarding the number of labourers needed during the period and faulted Stavco for not providing further and better evidence on this point, when there was no legal or evidentiary onus upon them to do so.

[32] Stavco argues that an absence of evidence in support of a finding of facts warrants judicial intervention, relying on *Cuff v. Edmonton School District No. 7*, 2009 ABCA 6, at paras. 6-7:

> 6 Making a decision on the basis of non-existent evidence is an error to which the correctness standard of review applies: The Honorable Roger P. Kerans & Kim M. Wiley, *Standards of Review Employed by Appellate Courts*, 2d ed., (Edmonton: Juriliber, 2006) at 137-8 citing *R. v. Caouette*, [1973] S.C.R. 859, 32 D.L.R. (3d) 185; see also *R. v. Skogman*, [1984] 2 S.C.R. 93, 54 N.R. 34. Similar principles apply to judicial review. In *H.F.I.A., Local 110 v. C.G.W.U., Local 92* (1986), 70 A.R. 228 (C.A.), this Court explained at para. 28:
>
> > Where an arbitrator's finding of fact on an essential point is not supported by any evidence - i.e. where there is a complete lack of evidence - there is, in my view, a jurisdictional error on the part of the arbitrator. The trend to so characterize the error is recognized by the learned authors Jones and de Villars in their recent work *Principles of Administrative Law*, where at

> page 282 they refer to the judgment of Lamer J. in *Blanchard v. Control Data Canada Ltd.* [1984] 2 S.C.R. 476 (at pages 494-495) ...
>
> 7 A different approach was used in *Toronto (City) Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 S.C.R. 487, 208 N.R. 245, which applied the pragmatic and functional analysis to conclude the standard of review was patent unreasonableness. The Court held "[t]he absence of any evidence to support the conclusion ... renders the arbitrators' decision patently unreasonable": at 489.

[33] In *Toronto (City) Board of Education v. OSSTF District 15*, *supra*, Justice Cory stated that the court should intervene if there was no evidentiary basis for the finding of facts made.

[34] In this case, there is no evidence for the basis of the arbitrator's conclusions and the arbitrator does appear to have shifted the onus of proof onto Stavco, thus allowing the court to intervene on a standard of correctness.

[35] The court may also intervene if the award of damages was unreasonable, had no evidentiary basis or was based on irrelevant considerations. The standard of review of the arbitrator's discretionary power to assess damages should be judged on a standard of reasonableness.

[36] I find myself in agreement with Stavco that the arbitrator accepted hearsay evidence at least when he accepted the testimony of Franco Callegari with respect to the "out of work" list, when he ought to have produced the list to allow Stavco the opportunity to review the list or test its veracity on cross examination. The identities of the individuals on the list were unknown, as were their qualifications and availability for work during the relevant period. In this respect Stavco relies on *R. v. Starr*, 2000 SCC 40, paras. 159 and 162:

> 159 The difficulty encountered in defining hearsay has been acknowledged many times by courts and by learned authors on the law of evidence: see, e.g., *R. v. Abbey*, [1982] 2 S.C.R. 24, at pp. 40-41, per Dickson J. (as he then was), citing *Phipson on Evidence* (12th ed. 1976 (supplemented to 1980)), para. 625, at pp. 263-64. More recent definitions of hearsay have focussed upon the precise evidentiary concerns underlying the exclusionary rule, namely the absence of an opportunity for meaningful, contemporaneous cross-examination of the out-of-court declarant in court under oath or solemn affirmation, regarding the truth of the specific statement or expressive conduct that is sought to be admitted as proof of its contents. The central concern revolves around the inability to test the reliability of the declarant's assertion. As stated by the Law Reform Commission of Canada in its 1975 Report on Evidence, at pp. 68-69:

> Hearsay statements are excluded from evidence in trials because of the difficulty of testing their reliability. If a person who actually observed a fact is not in court, but a statement he made to someone about it is introduced in evidence, there is no way of inquiring into that person's perception, memory, narration or sincerity. His statement about the fact might be false because he misperceived it or did not remember it correctly, or he may have misled the person to whom it was made because he used words not commonly used, or he may simply have lied about it. These factors, which determine the reliability of his statement, can only be tested if he is in the courtroom and subject to cross-examination.
>
> . . .
>
> 162 These articulations of the hearsay rule make clear that hearsay evidence is defined not by the nature of the evidence per se, but by the use to which the evidence is sought to be put: namely, to prove that what is asserted is true. When the out-of-court statement is offered for its truth, the inability to cross-examine or "test" the source of the evidence in court under oath or solemn affirmation as to the truth of the assertion undermines its reliability: see I. Younger, An Irreverent Introduction to Hearsay (1977), an address to the American Bar Association Annual Meeting, Atlanta, Georgia, August 11, 1976. In short, the essential defining features of hearsay are the purpose for which the evidence is adduced, and the absence of a meaningful opportunity to cross-examine the declarant in court under oath or solemn affirmation as to the truth of its contents.

[37] Notwithstanding s. 43B(2) of the *Trade Union Act*, Stavco argues that the caselaw is clear that such statutory license does not give decision makers *carte blanche* to completely disregard evidentiary rules, relying on *Murray v. Saskatchewan Veterinary Medical Assn.*, 2011 SKCA 1, [2011] S.J. No. 1, at para. 26, where the court endorsed the following passage from Guy Régimbald's text *Canadian Administrative Law*, 1st edn. (Markham, Ont.: LexisNexis, 2008), at 265-266:

> Tribunals that are not subject to the common law rules of evidence may rely on hearsay evidence even if it deprives the other party of any possibility to cross-examine or challenge the witness. The hearsay evidence must, however, be relevant and the decision maker must give it appropriate weight given the circumstances. Nevertheless, it may be an error for the decision maker to base its decision solely on hearsay evidence, unless the decision maker has valid reasons for doing so. The tribunal will also err if its decision is based on insufficient or no evidence, or on irrelevant considerations. In such circumstances, the decision may be set aside.

[38] Stavco says they take no issue with the admissibility of hearsay evidence, only with the undue weight the arbitrator placed on hearsay evidence. Stavco says

Mr. Callegari's evidence was not necessary because the Union could have simply produced the "out of work" list. According to Stavco, his evidence was not reliable because it was vague and untested, denying Stavco the right to meaningful cross-examination.

[39] Stavco relies on Wesley Rayner, *et al*, *Canadian Collective Bargaining Law: Principles and Practice*, 3d edn. (Toronto: LexisNexis, 2017) at 463:

> Labour relations arbitrators and authors also agree that it is an error for adjudicators to base key findings solely on hearsay evidence. Citing the leading case on the subject *Girvin v Consumers' Gas Co, supra, Rayner, et al*, state:
>
> > The evidence receivable at the hearing is not limited to evidence admissible in a court of law. However, a decision cannot be made solely on the basis of hearsay evidence. Judicial review when there is an improper receipt or exclusion of evidence, or where a decision is not supported by any evidence, is based on procedural fairness and the error goes to fundamental jurisdiction.
>
> [emphasis added]

[40] Stavco also relies on a recent Ontario decision by Adjudicator Dissanayake setting out the basic principles governing the receipt of evidence in an administrative setting, *Ontario (Minister of Community Safety and Correctional Services v. OPSEU* (2012), 226 LAC (4th) 205, 2012 CarswellOnt 13494, at para. 99:

> I have read the authorities submitted by the parties carefully. However, it is not useful to review each of them in this decision because the principles contained therein are not controversial or disputed. Therefore, it suffices to simply set out some of the key applicable principles. They are as follows:
>
> - There is a need for clear, cogent and convincing evidence commensurate with the seriousness of the allegation.
>
> - Evidence that only creates suspicion, surmise or conjecture is insufficient to meet the employer's onus. [NB: the employer bears the onus in just cause grievances.]
>
> …
>
> - While arbitrators are not bound by strict rules as to admissibility of evidence, they should only rely upon evidence having cogency in law. Therefore, it is not appropriate to rely exclusively on hearsay evidence, particularly where such hearsay is in conflict with more reliable direct testimony.

> - Hearsay evidence, to be admissible to prove the truth of its contents, must meet the two-fold test of necessity and reliability.
>
> [emphasis added]

[41] I agree with these submissions.

[42] Stavco has also cited authority for the principle that the Board places little weight on hearsay evidence:

> *Tjarera v. Dalhousie University (Imhotep's Legacy Academy)*, 2012 NSLB 121, at para. 75; and
>
> *McAndrew v. Physioclinic Limited*, 2012 NSLB 14, at para. 47.

[43] Stavco cites *Hanlas & Son v. United Brotherhood of Carpenters and Joiners of America, Local 83*, Decision No CIP-3075 (February 25, 2008), at para. 26:

> Under section 16(8) of the *Trade Union Act* the Nova Scotia Labour Relations Board (and Construction Industry Panel) "… may receive and accept any evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper, whether admissible in a court of law or not." This broad discretion, however, must be exercised within the limits of procedural fairness established by administrative law. Application of basic principles of relevance in admission and use of evidence, including inference drawing, are clearly within the necessary purview of the Panel's authority. Thus, when it comes to assessing whether there is "any evidence, which if believed, could form the basis for the decision of reasonable Construction Industry Panel" one must be speaking of relevant evidence capable of grounding legitimate inferences which are rooted in logic and experience. In admitting evidence for the drawing of inferences, however, there must be a rational foundation for drawing of the inference proposed.

[44] *Hanlas* analyzed the quality of the evidence at paras. 30-33, criticizing the panel's reliance on speculation and conjecture, rather than original documentation.

[45] In the instant case, the "out of work" list ought to have been produced. The arbitrator relied on Mr. Callegari's opinion that there would have been out of work labourers available, yet Mr. Callegari was merely opining in this regard and was not testifying as an expert: *CJA, Local 27 v. Wasaga Trim Supply (2006) Inc.* (2010), 101 CLAS 420, 2010 CarswellOnt 16294. His lay opinion ought to have been accorded little weight.

[46] Although Stavco argued that the Union's evidence was deficient and merely hearsay, the arbitrator described Mr. Callegari's evidence as the best evidence available when clearly it was not (arbitrator's decision, paras. 74-75). Then the arbitrator stated that Stavco could have filled in these evidentiary gaps, when they were under no obligation to do so (arbitrator's decision, para. 75).

[47] With respect to the damages the Union suffered, it is their responsibility to prove their loss. Their calculation of Stavco's labour needs between March 26 and July 25, is at best pure speculation and not supported by any evidence that Stavco's labour needs remained constant at nine labourers.

[48] Stavco relies on *O & S Contractors and IUOE, Local 115, Re,* 2014 CarswellBC 3872, at para. 4:

> While the Arbitrator found a breach of the collective agreement he decided not to aware damages to the Union. That analysis is found at pages 25-30 of the Award. A portion of the Arbitrator's reasons for not awarding damages is written as follows at pages 29-30:
>
> > A review of the evidence confirms that the union failed to demonstrate that it or its members have suffered a loss as a result of the alleged breach of the collective agreement. The employer used its existing employees to do bargaining unit work. However, the union has failed to demonstrate that any member suffered a loss as a result of the breach.
> >
> > Such evidence as there was on the subject of the supply of crane operators consisted of Herb Conat's statement: "We can supply crane operators". He also made the statement that "Crane operators are scarce. We do not just dispatch operators. You will have to take our craft".
> >
> > The statement of Mr. Conat that the union could supply crane operators is not in itself sufficient to establish that there were unemployed crane operators who were members of the union and who were available to do this work. Something more concrete th[a]n just the bald assertion that the union could supply crane operators is required in order to establish a real monetary loss.
> >
> > …
> >
> > Accordingly, to find that the union has failed to establish a monetary loss resulting from the employer's breach of the collective agreement.
>
> [emphasis added]

[49] And at para. 22:

> The fact the Union's witness was not cross examined with respect to the availability of crane operators does not lead to a different result. There is no dispute the onus was on the Union to demonstrate it had members who were available to do the work. The fact the Union's witnesses was not cross examined does not necessarily lead to a finding that the Union satisfied its evidentiary onus to provide evidence of a loss. In my view, it was open to the Arbitrator to find the Union's witness' statement that "we can supply crane operators", when considered in the context of the other evidence called was not enough in the case before him for the Union to meet its onus to prove a loss. I find that in coming to the result he did, the Arbitrator did not depart from generally accepted law or act inconsistently with *Blouin Drywall* in a manner which would require further reasons.
>
> [emphasis added]

[50] The Union had an obligation to prove its damages and adduce some objective evidence to support its claim for damages, instead of merely guessing at Stavco's labour needs from March 26 to July 25. This guess was speculation and could not result in a properly drawn inference. I agree that the arbitrator faulted Stavco for its failure to adduce further and better evidence regarding the labour needs during the period from March 26 to July 25, in paras. 55, 71, 77, and 90 of his decision. Stavco was under no legal or evidentiary burden to do so.

[51] Then, at para. 82 of his decision, the arbitrator accepted that Stavco should pay wages twice during the period November 2, 2016 to July 25, 2017, as a penalty for not seeking out union employees after November 2, 2016:

> [82] As noted in Dalhousie (above) and as noted by many others, it is strange that an employer might have to pay twice for the same work. It has already paid its existing employees, and as a result of this grievance may have to pay the Union for all of the hours since November 2, 2016 that the Union members could have worked. It seems on its face to be punitive. But the flip side of the argument is that unless the employer is assessed this "penalty," the orders of the Labour Board have no teeth and employers can proceed with impunity to defy a certification order, including running out the clock until it no longer has need for employees working in the applicable trade.
>
> [83] The Board's backdating of its order sends a clear message to the Employer. Had it been entirely honest and accurate in responding to the certification application, identifying precisely who were working as labourers on the date in question, and who were not, the issue of whether or not the Union had majority support would have been settled on the spot. Assuming that the Union had requisite support, the Employer would have had to adjust to the fact that it was in a collective bargaining relationship. If not, life would have gone on as before. The Employer should not be allowed to benefit from its own choice to

> contest the application (in the way it did) and hope to run the clock and take advantage of some additional weeks or months of paying non-union rates.
>
> [84] Any arguments to the effect that the Employer ought not to incur this type of penalty should have been made to the Board at the time the issue of effective date was under consideration. That is now a settled point.
>
> [emphasis added]

[52] I agree with Stavco that there was no evidence before the Board or the arbitrator to suggest that Stavco was in any way dishonest or attempting to thwart the Board's process. Stavco did not defy the certification order nor did it delay or stymie the s. 96 hearing process. After the Board's dismissal of the application on November 2, 2016, Stavco was under no obligation to start paying union wages.

[53] The arbitrator's award of $447,630.02 was a punitive measure and undeserved. In this case, I do not believe that any union damages should be assessed before the Board's decision of June 2, 2017. The Adjudicator took a casual approach to the sufficiency of evidence required for the Union to meet its case.

[54] While it is acknowledged that the arbitrator has the power to determine its own policies and procedures, he has a duty to hear evidence in a manner consistent with procedural fairness to ensure that the parties have the opportunity to meaningfully participate.

[55] I am in agreement with Stavco that they were denied procedural fairness based on the arbitrator's improper evidentiary rulings. He relied on hearsay evidence and did not hold the Union to account, to provide cogent evidence of the availability of competent and qualified union members. Stavco had no opportunity to meaningfully test this evidence. Nor can the arbitrator merely accept that Stavco's labour needs remained constant during the period and not require cogent evidence of this fact.

[56] Similarly, in the assessment of damages the arbitrator recognized that the employer had to pay twice for the same work, which he justified as being "punitive" and a "penalty." As there was no evidence that Stavco had not "been entirely honest and accurate in responding to the Certification Application", the calculation of damages, at most, should have reflected the difference between the non-union and union rates for the individuals employed by Stavco and should not have made an order that effectively led to a double recovery. This was unreasonable.

[57] In the result, I will allow the application for judicial review and set aside the decision of the arbitrator. I will order that the calculation of damages be limited to the period between June 2, 2017 and July 25, 2017.

[58] Stavco shall have its costs of the application, and in the absence of agreement between the parties as to costs, I will be happy to receive written submissions.

Justice M. Heather Robertson