SUPREME COURT OF NOVA SCOTIA

Citation: *Canadian Union of Public Employees (CUPE) Local 108 v. Nova Scotia Police Review Board*, 2019 NSSC 54

Date: 2019-02-12
Docket: Hfx. No. 480843
Registry: Halifax

Between:

Canadian Union of Public Employees, Local 108

Applicant

v.

Nova Scotia Police Review Board, Halifax Regional Municipality, Christopher Mosher, the Attorney General of Nova Scotia and Halifax Regional Police Association

Respondents

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	January 31, 2019, in Halifax, Nova Scotia
Counsel:	Susan Coen, for the Applicant Duane Eddy for the Respondent, the Attorney General of Nova Scotia and the Nova Scotia Police Review Board Randolph Kinghorne and Duncan Read for Halifax Regional Municipality Michael Murphy and Alex Warshick for Christopher Mosher and Halifax Regional Police Association

By the Court:

Introduction

[1] Mr. Mosher was a police officer, and a member of the Halifax Regional Police Association ("HRPA"). His employment was terminated effective February 15, 2017, following a decision by Superintendent Colleen Kelley based on her conclusions arising from various internal disciplinary complaints made against him.[1]

[2] In the summer of 2018, he found himself before the Nova Scotia Police Review Board ("PRB") for an appeal hearing. He sought to have his termination of employment overturned.[2]

Part way through that hearing, a confidential agreement (the "MOA") was reached on August 21, 2018 between his employer, Halifax Regional Municipal("HRM"), the HRPA (which was not a party to the appeal proceeding) and Mr. Mosher. They also entered into a Disability Accommodation Agreement (DAA) which was annexed to the MOA. Subject to the approval of the PRB, the MOA would see him re-employed with HRM in a disability accommodation job position as a labourer in the bargaining unit represented by CUPE Local 108 ("Local 108"). The PRB accepted the proposed Consent Order, and endorsed it as its own on August 31, 2018.[3]

[3] Local 108 has filed a Notice of Judicial Review seeking that this court set aside the Order of the PRB and remit the matter to a reconstituted panel of the PRB.[4]

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[1]On December 12, 2018 the HRPA and Mr. Mosher jointly moved for an order for confidentiality pursuant to Civil Procedure Rule (CPR) 85.04 and 85.05 to exclude the public from the proceeding and to seal the record in the proceeding, or in the alternative to ban publication of the proceeding. The parties intend to preserve the confidentiality of those materials by practical means until a hearing of the matter can be conveniently scheduled.

[2] Under Section 77 of the *Police Act*, SNS 2004, c.31 the persons or entities who are "entitled to be parties to the proceedings" are: a complainant; a municipal Police Department officer subject of a complaint; the Chief officer or delegate of the Police Department; the Review Board; the "Minister"; and "any person who can demonstrate a personal interest in the proceedings". Thus, at the beginning of the proceedings, CUPE Local 108 did not have an interest; however, it argues that once it was implicated in the proposed disposition of Mr. Mosher's appeal hearing, it did have an interest and should have been a "party" to the proceedings before they continued on.

[3] The affidavit of Joni Keeping filed herein, at Exhibit "A" sets out an index of the contents of the Record before the PRB.

[4]The Respondents will also argue that Local 108 does not have standing to bring this judicial review. By agreement the parties will address that issue at the time of the judicial review hearing presently scheduled for hearing on May 27, 2019.

[4] In simple terms, Local 108 argues that:

1. The failure to provide it notice of, and an opportunity to participate in, the PRB process before the PRB Order that placed Mr. Mosher in the Local 108 bargaining unit, is a violation of procedural fairness and natural justice;[5]
2. That the PRB exceeded its jurisdiction (by ordering Mr. Mosher be placed in a position in Local 108, without an opportunity for them to participate and speak to the proposed disposition, including the DAA);[6] and
3. The Order was not reasonably supported by the evidence presented to the PRB (*inter alia*, that there was no evidence presented in support of the DAA, save the inclusion of the letter of Molly MacLean with her *curriculum vitae*).[7]

[5] I am dealing with a preliminary matter. Pursuant to Civil Procedure Rule 7.28, Local 108 and HRM both seek to supplement the existing proposed Record relevant to the PRB Order and hearing.

[6] HRM proposes to include the affidavit of Nicole Evenden, which attaches as exhibits, the Collective Agreement between HRM and Local 108, and the Grievance filed September 10, 2018 by Local 108 regarding the placement of Mr. Mosher in the Local 108 bargaining unit.[8] I conclude that her affidavit should properly supplement the Record that will be reviewed by the court.

[7] Local 108 has proposed that three affidavits supplement the Record. In these *unusual* circumstances, I am satisfied that it is in the interests of justice that the Record to be considered by the judge conducting the judicial review, should be

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[5]Local 108 recognizes that section 54(3) of the "*Police Regulations*" made under subsection 97(1) of the *Police Act*, SNS 2004, c. 31 requires that the Police Review Board "*must only* notify each of the following… of the review [the police officer, and the disciplinary authority that made the decision]".

[6] The PRB has the authority to proceed to hold a hearing *de novo* and *inter alia* affirm the "penalty imposed", or "vary any penalty imposed….". A question arises whether its powers permit it to make Mr. Mosher's re-hiring as a member of Local 108 a part of its order, and whether HRM re-hiring him is in the nature of a necessarily incidental aspect of the "penalty imposed"? – see s. 79 *Police* Act, S.N.S. 2004, c. 31.

[7] I recognize that such statutory boards are generally entitled to accept consent orders by the parties, and endorse them (to the extent that they deal with the merits of the case, and are within the jurisdiction of the Board to do so). An example may be found in Justice Saunders' concurring reasons in *Nova Scotia (Human Rights Commission) v. Grant*, 2016 NSCA 37, at para. 24: "A settlement can be achieved without there having to be any determination that a breach of the statute has occurred."

[8]The Grievance form was sent to HRM with a letter of even date, which is Exhibit 2 to Scott Lillington's affidavit.

supplemented by the affidavits of Scott Lillington and Govind Rao, but not that of Joseph Kaiser.

Background

[8] A Consent Order was filed with the PRB on August 28, 2018. Included therewith were the MOA and DAA, as well as a letter dated July 18, 2018, from Molly Anne MacLean, a substance abuse professional (and her *curriculum vitae*).

[9] On August 31, 2018 the PRB endorsed the terms of settlement *agreed upon by the parties* and ordered that the appeal be concluded. The MOA and DAA were annexed to the Board's order.

[10] Local 108 has filed a Notice for Judicial Review. In its amended form, filed October 10, 2018, it sets out the Grounds for review, the Order proposed, and the Record to be produced. Of particular interest is the following:[9]

> Record to be produced
>
> The Applicant foresees no difficulty of obtaining the record and believes it will be delivered to the Court and the Respondents no later than November 30, 2018.
>
> The Record will include:
>
> i. the Order and attached Memorandum of Agreement and Disability Accommodation Agreement;
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> ii. The medical evidence referred to in the Order;
>
> iii. any other documentary evidence submitted to the Police Review Board in support of the Order;
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> iv. Halifax's personnel file for Mr. Mosher;
>
> v. Any and all documents related to the disciplinary decision of Superintendent Colleen Kelley on February 7, 2017;
>
> vi. Any other documents related to Mr. Mosher's employment with Halifax;
>
> vii. The appeal to the Police Review Board filed by Mr. Mosher; and
>
> viii. Any and all documents related to Police Review Board files PC – 12 – 0119, 12 – 0142, 12 – 0154,13– 0031, 13 – 0110, 14 – 0049, and 14 – 0054.

[9] This may be conveniently contrasted with what the PRB considers to be the Record, which is attached as Exhibit "A" to the affidavit of Joni Keeping.

[11] Notices of Participation were filed between October 12 and 24 2018, by the PRB, Mr. Mosher, HRPA, and HRM.

[12] Of note in those Notices of Participation are the following excerpts:

1-Mr. Mosher

> … no breach of procedural fairness or natural justice… as the Applicant did not have a direct or indirect interest in the subject matter of Mosher's appeal and was therefore not entitled to notice of the proceeding.
>
> …
>
> … The [Board] did not exceed its jurisdiction in approving the written Settlement Agreement… as this falls directly within its statutory mandate under the *Police Act*.
>
> …
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> The Board's order was supported by the evidence… [it] provided a sufficient basis to conclude that Mosher had a disability and that his disability was a significant contributing factor to the conduct that resulted in the termination of his employment. The evidence supported the Board's conclusion that the HRM was legally obligated under the *Human Rights Act* to provide a reasonable accommodation to Mosher, including his placement in the HRM's Parks and Recreation business unit.[10]
>
> …
>
> … The Applicant has filed a grievance against the HRM… alleging that the placement of Mosher within the Parks and Recreation business unit is in breach of the Collective Agreement. The same fundamental issues being raised in this Application are therefore already subject to the Collective Agreement's dispute resolution process and the relevant provisions of the *Trade Union Act*.
>
> … The Respondent requests that the Application be dismissed on the basis that the Applicant has no standing to bring the within proceedings, and on the basis that the Applicant has placed itself in a conflict of interest with respect to its statutory obligation per the *Trade Union Act* to fairly represent the Respondent as a member of the bargaining unit.

2-HRM

> … The Collective Agreement grievance/arbitration process can provide an appropriate remedy to the Applicant's concerns raised in this judicial review and accordingly the court should defer jurisdiction to that process.
>
> …

[10]At the motion hearing before me, counsel for Local 108 represented that due to the short timelines to do so, and to preserve its rights under its Collective Agreement, in the interim, it filed that grievance, although its September 10, 2018, letter to HRM attaching the Grievance simultaneously advised it would be seeking judicial review.

> The essential characterization of the dispute raised by the Applicant is an allegation that the direct placement of Mosher into that accommodation position is a violation of the job posting and seniority provisions of the Collective Agreement. The *Trade Union Act* provides for these types of issues to be addressed to the exclusive jurisdiction of the processes provided for under that legislation. This judicial review constitutes an abuse of process as being a collateral attack upon the *Trade Union Act* processes and the grievance dispute resolution procedure included in the HRM/CUPE Collective Agreement as mandated by the *Trade Union Act*.
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> …
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> The disability accommodation for Mosher was effected by creating a new job position in HRM's Parks and Recreation business unit… [which] would not have existed except to accommodate Mosher's disability and the wage funding contribution provided by the Police Services business units solely for the purpose of that accommodation. The Applicant CUPE is seeking to impede the ability of HRM, as a single employer, to accommodate an employee with a disability by the direct placement of Mosher from employment in a bargaining unit represented by [HRPA] to work in the bargaining unit represented by the Applicant. The provisions of the *Human Rights Act* obligating HRM to provide a reasonable employment accommodation for Mosher's disability supersede the provisions of the Collective Agreement between the Applicant and HRM. Further Mosher's placement does not create undue hardship on the Applicant CUPE or its members.
>
> The [Board] could not have provided the Applicant with notice of the proceeding as proposed by the Applicant as… the Board was merely accepting and approving the settlement of the proceeding before the Board as not being contrary to the provisions of the *Police Act* – not the status of the settlement relative to the *Trade Union Act* or the *Human Rights Act*.

3- HRPA

> The Settlement Agreement was executed in accordance with the parties' obligations under the Nova Scotia *Human Rights Act* to provide a reasonable accommodation to Mosher, given the nature of his disability. The Respondent states that the Applicant is similarly obligated to accommodate Mosher's placement in the bargaining unit represented by the Applicant.

Purposively interpreted, the relevant law regarding when a record from proceedings before a statutory decision-maker may be supplemented permits additions to the Record sought by Local 108.

[13] While the circumstances here are unusual, the existing jurisprudence has commented extensively on this issue.[11]

[11] See Justice Arnold's decision in *Taylor v Nova Scotia (Attorney General)*, 2019 NSSC 25; Justice Ann Smith's decisions in *Canadian National Railway v. Teamsters Canada Rail*, 2017 NSSC 10, and *Nova Scotia Provincial*

[14] In *Provincial Judges*, the court was being asked, on an appeal from a reviewing judge's decision, to assess the correctness of her approach vis-à-vis supplementing the record. The Provincial Government had rejected an independent compensation tribunal's recommendation regarding the adjustment of salaries of the judges, who then sought judicial review of the government's actions. They claimed that the government's rejection infringed the principles of judicial independence. When the Attorney General filed the Record for the judicial review, it omitted the Report and Recommendation of the Attorney General and Minister of Justice that had been cited in the Order-in-Council which rejected the tribunal's recommendations. Justice Fichaud stated:

> 45 The Government knew that its variation or rejection of the Tribunal's recommendation would be subject to judicial review for legitimacy, reasonable factual foundation and respect for the purpose of the process, according to *Bodner*'s criteria. The judicial review would focus on matters vital to the administration of justice, the proper functioning of the executive and the relationship between two branches of government. To the extent the R & R speaks to those significant topics, its airing for the judicial review is, on balance, in the public interest and is well supported by La Forest J.'s comments in *Carey*.
>
> 46 The motions judge's analysis is meticulous, has no error in principle and causes no patent injustice. Subject to the issue of solicitor-client privilege, that I will come to next, the R & R should be included in the record for the judicial review.

[15] Also in issue was the admission of Judge Burrill's affidavit. Justice Smith had excluded from the record some passages thereof as irrelevant. On appeal, in response to the Attorney General's argument that the entire affidavit should have been disallowed, Justice Fichaud concluded:

> 73 *On the judicial review from a decision of an administrative tribunal, the reviewing court may receive fresh evidence to assess the exercise of procedural fairness at the tribunal*: Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22, para. 20(b), per Stratas J.A; *Keeprite Workers' Independent Union v. Keeprite Products Ltd*. (1980), 29 O.R. (2d) 513 (C.A.), leave to appeal refused [1980] 2 S.C.R. viii (note). Similarly, an appeal court may receive fresh evidence respecting the regularity of the trial court's process: *R. v. Wolkins*, 2005 NSCA 2, paras. 58 and 61, per Cromwell J.A. for the Court; *R. v. Assoun*, 2006 NSCA 47, paras. 297 and 316, and authorities there cited, leave to appeal refused [2006] 2 S.C.R. iv (note).

Judges' Association v., Nova Scotia (Attorney General), 2018 NSSC 13, at paras. 212 – 219. Her latter decision was upheld- 2018 NSCA 83, per Fichaud JA for the court.

74 *The principles that govern admissibility in this case are like those that apply to a typical administrative judicial review and to an appeal, but they operate independently*. The Government, when considering its reply to the Tribunal Report, was a political actor constrained by constitutional responsibilities. *It functioned as neither a typical administrative tribunal nor a lower court. The Government neither received "evidence", nor conducted a "hearing", nor were its sources confined to a particular "record". Consequently, the appropriate scope of the material for this unique type of judicial review should reflect basic norms: the reviewing court may receive evidence that is relevant to an arguable submission of either party*.

75 It is useful to summarize what appear to be key -- though not necessarily the only -- aspects of the parties' theories on the merits.

> The Attorney General would cite Lamer C.J.C.'s acknowledgements that: (1) a "non-binding" commission recommendation is a permissible model, (2) "[t]he standard of justification ... is one of simple rationality", and (3) "[a]cross-the-board measures which affect substantially every person who is paid from the public purse, in my opinion, are *prima facie* rational" (*PEI Reference*, paras. 175-78, 183-84).
>
> The Attorney General would contend: (1) the 2016 amendment to the *Provincial Court Act* merely enacted the permissible model, (2) nothing suggests any pressure exerted toward, or manipulation of the judiciary, (3) the OIC represents the Government's *bona fide* view on judicial remuneration, and (4) that the Government may have held this view since 2015 does not make it unconstitutional.
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> The Association would cite *Bodner*'s directions that the reviewing court: (1) must analyze whether "viewed globally, has the commission process been respected and have the purposes of the commission -- preserving judicial independence and depoliticizing the setting of judicial remuneration -- been achieved?", and (2) "must weigh the whole of the process and the response in order to determine whether they demonstrate that the government has engaged in a meaningful way with the process of the commission". (*Bodner*, paras. 31, 38)
>
> The Association would allege that the Government had decided by 2015, before the 2017-20 Tribunal convened, that any 2017-20 adjustment to the compensation of Provincial and Family Court Judges would never exceed the adjustment given to other provincial civil servants. Thereafter, according to the Association, the Government just bided its time through the 2017-20 process, "going through the motions" without the required meaningful engagement, until it could implement its pre-ordained determination.
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> [My italicization added]

[16] While factually those circumstances are distinguishable from those here, recall Justice Fichaud's comment at para. 74 that: "Consequently, the appropriate scope of the material for this unique type of judicial review should reflect basic norms: the reviewing court may receive evidence that is relevant to an arguable submission of either party."

[17] In the case at Bar, Local 108's position is unusual. They were not a party to the PRB process;[12] however, they seek judicial review. They urge this court to take a "big picture" view of the circumstances in relation to why they should be permitted to supplement the Record. In their rebuttal brief to HRPA they pose the question: "Can any administrative tribunal in Nova Scotia… endorse a consent order by certain parties (here the employer HRM and union HRPA) premised upon a purported legal obligation of another party (here CUPE) and impacting that other party, without the knowledge of, or opportunity for, that other party to have its say?"

[18] In these unusual circumstances, I am inclined to adopt Justice Fichaud's words as applicable here: "the reviewing court may receive evidence that is relevant to an arguable submission of either party."[13] I also bear in mind that the present jurisprudence permits a number of exceptions to the general rule that the record may not be supplemented, so as to avoid a judicial review becoming a hearing *de novo*: where there are allegations of lack of jurisdiction (which we have in this case), reasonable apprehension of bias, breach of procedural fairness or natural justice (which we have in this case), fraud, "general background information" which is restricted to neutral non-argumentative statements that assist the reviewing court to understand the history and nature of the case (which we have in this case), and the *Keeprite* [(1980) 29 OR (2d) 513 (CA)] exception, which permits affidavits necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision maker, so that the judicial review court can fulfil its role of reviewing for procedural fairness (which we have in this case).

[19] Notably as well, in *Access Copyright and Delios v. Canada (Attorney General),* 2015 FCA 117, the court stated at paragraph 20:

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[12]There is no evidence before me, or suggestion that, the PRB had before it any materials relating to the Local 108 Collective Agreement, or whether it should be, or had been, consulted. It is possible the Board presumed Local 108 had been notified of, and involved in the creation of Consent Order presented to it.

[13] I bear in mind that the Respondents are also arguing that Local 108 does not have standing at the judicial review, and that even if its judicial review could be successful, the court should decline jurisdiction in this case. In my opinion, the affiants herein could assist the reviewing court with these issues.

> There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and *the list of exceptions may not be closed*…
>
> [My Italicization added]

[20] Context is important. Local 108's position and arguments require an expansion of the Record that was before the PRB, in order to provide an evidentiary foundation for, and life to, its arguable submissions questioning the validity and outcome of the process leading up to the PRB approval of the Consent Order.

[21] Having said that, I recognize I must still consider the evidentiary arguments made by the Respondents that all or some of the portions of the affidavits here are either irrelevant, unnecessary, or hearsay and nevertheless should be inadmissible.

The application of evidentiary principles to the proposed affidavits

[22] I have before me two motions to add to the "Record".

The Evenden affidavit

[23] HRM moves "for an order permitting a supplement to the Record in this proceeding by the filing of the affidavit of Nicole Evenden, HRM Labour Relations Specialist, adding into evidence the two documents, the Collective Agreement between [Local 108] and HRM, and Grievance 16 – 18 issued by [Local 108] on September 10, 2018."

[24] HRM states therein:

> [Local 108] in its within Application for judicial review has alleged that its members are employed by HRM under the provisions of a Collective Agreement, which provides the basis for its interest in the subject matter of the Police Review Board decision under review. HRM in its Notice of Participation is submitting that the court does not have the jurisdiction to address the Collective Agreement issues raised by [Local 108], or in the alternative should exercise its inherent jurisdiction to dismiss the judicial review application, on the basis that the issues raised by [Local 108] are the subject matter of an issued grievance, or otherwise would be more appropriately addressed by the grievance/arbitration procedures of the Collective Agreement as required by the *Trade Union Act.* HRM believes the two documents contained in the intended Supplement to the Record will be beneficial to the court in understanding the claim of the Applicant and are relevant to the exercise of discretion being requested by HRM of the court. Accordingly, it is submitted by HRM that it is in the interest of justice that the

> court have access to the subject Collective Agreement and Grievance 16 – 18 to fairly conduct the judicial review.

[25] None of the parties disputed the addition of the Evenden affidavit as appropriately supplementing the Record, and I will permit same.

[26] Local 108 "moves for an Order to add evidence to the Record." Local 108 states therein, that the evidence in support of the motion, are the affidavits of Scott Lillington, President of Local 108, Govind Rao, CUPE National Research Representative, and Joseph Kaiser, President of the Nova Scotia Union of Public and Private Employees (NSUPE) Local 13. Do the affidavits of Messrs. Lillington, Rao, and Kaiser contain admissible evidence – i.e., are they compliant with *Civil Procedure Rule* 39 and the relevant jurisprudence?

The Lillington affidavit

[27] The Respondents say that no part of the entire affidavit should be admitted, because it is unnecessary (as direct evidence in the existing Record, or clear inferences therefrom, render it so); irrelevant (could not affect any potential outcome that the reviewing court could order); contains hearsay (statements made by a person not having personal knowledge of the information included in the affidavit) or are not compliant with CPR 39 – e.g., contains information that is in the nature of the submission or plea.

[28] Mr. Lillington has been the President or Vice President of Local 108 since November 2015. In summary, paragraphs 1 to 14 set out: the Collective Agreement between it and HRM; explain when, and the manner in which, Local 108 became aware of Mr. Mosher becoming a member of the Local 108 bargaining unit; its receipt of the formal PRB Order; and in its letter dated September 10, 2018 notice of its intent to file an Application for Judicial Review, as well as the formal (enclosed therewith) Grievance.

[29] These are in the nature of general background information which, even if found elsewhere in the record, there being no undue prejudice arising therefrom, are admissible to supplement the Record. Mr. Lillington may still be subject to cross-examination thereon-but I direct that the parties must give the other parties and the court notice of their intention to cross-examine any affiant by March 29, 2019, for the May 27, 2019 hearing.

[30] In paragraph 15, he relies upon "Local 108 records, and based upon information from past President Mark Cunningham", that "never before has an

employee from outside the bargaining unit been accommodated into the Local 108 bargaining unit." Such records and sources of information are either traditional exceptions to the hearsay rule, or sufficiently necessary and reliable regarding the facts in issue that they do not offend the hearsay rule. Given the nature of the inquiry on judicial review, it is sufficiently relevant. I conclude the same for paragraph 19 regarding Mr. Mosher's position since August 2018, within the Local 108 bargaining unit.

[31] In paragraphs 18, 21 and 23, he sets out, "based upon CUPE research": that Unions and Associations which would be potentially affected in such cases; that HRPA is in the HRM Police Business Unit, as are NSUPE Local 13 and CUPE Local 4814; that HRM has a total of 10 Business Units. This information is not disputed and is reliable, as well as arguably necessary (HRM did not provide such information in its sole affidavit), as it sets out the organizational and collective agreement background in which the disputed decision was made. These paragraphs are admissible.

[32] In paragraph 27, he states:

> Based upon information available to the Executive of Local 108, I do verily believe that the following negative impacts have occurred or could well occur within Local 108 due to Mr. Mosher's placement into a full-time permanent position in the 108 bargaining unit (despite be it being an "overfill" position) …

[33] This information is reliable, and his opinion about potential "negative impacts" is relevant to Local 108's claim that it had a sufficient interest in the PRB process once the Consent Order was presented to the Board, that it should have been involved in that process before the Order issued.

[34] In paragraphs 20 and 22 he states:

> Based upon the transcript and other material on the Record of the PRB proceeding, I do not believe that HRM, HRPA and Mr. Mosher explored possible accommodations, first in the HRPA bargaining unit, including non-policing classifications, to the point of undue hardship… [or] explored possible accommodations within the Police Business Unit to the point of undue hardship.

[35] His conclusions are based on review of the transcript, which is not in evidence before me, and other materials from the proceeding. This information is reliable, and his opinion about other "possible accommodations" may be found to be relevant by the reviewing judge. These paragraphs are admissible.

[36] In paragraphs 16, 17 and 25 he states what Local 108 would have done had it been informed of the PRB process, been allowed to intervene and participate, and that "Only if evidence showed that no accommodation could have been made in the HRPA bargaining unit, or alternatively in the remainder of the Police Business Unit, without undue hardship, would CUPE Local 108 have further examined the request, and depending upon discussions among other unions and canvassing of affected Local 108 members, might or might not have accepted it."

[37] As President of Local 108, he is well qualified to speak to what positions Local 108 likely would have taken regarding the proposed placement of Mr. Mosher, had it been involved in the process. His opinion is relevant for similar reasons to paragraph 27.

[38] In its initial submission file January 10, 2019, Local 108 says that it "did not get an opportunity to attempt to ensure that the duty to accommodate to the point of undue hardship, in accordance with human rights jurisprudence, was followed… [It] would have insisted that proper steps be taken to explore possible accommodation within Mr. Mosher's own bargaining unit… within the HRM Police Business Unit… [and that] it may well be that an accommodation could have been found without looking at the [Local 108] bargaining unit."

[39] Paragraphs 26 and 28, that Local 108 owes a duty of fair representation to the entire bargaining unit, and would take the same position no matter what tribunal unions are employees were involved are in the nature of a submission, are not admissible, and will be struck.

The Rao affidavit

[40] Mr. Rao is "the Research Representative of… 'CUPE' in the Atlantic Region."

[41] The Respondents generally argue that his affidavit is not relevant because the other unions referred to therein are not affected by the PRB order, nor would the review create a binding precedent upon those other unions. None of them has applied for intervenor status. Nor is it relevant to the reviewing court's determination of the issues (procedural fairness, exceeding its jurisdiction, and "no evidence" to support making the order by virtue of accepting the DAA without any evidence in support).

[42] Local 108 takes the position that his affidavit is relevant as general background to accommodation of HRM employees in similar circumstances.

[43] I accept that his research is sufficiently reliable, and is relevant as general background. It is intended to supplement Mr. Lillington's affidavit wherein he references the positions that Local 108 would have taken had it been present at the PRB process, and must be seen through the position of Local 108 that:

> [It] would have insisted that proper steps be taken to explore possible accommodation within Mr. Mosher's own bargaining unit… within the HRM Police Business Unit… [and that] it may well be that an accommodation could have been found without looking at the [Local 108] bargaining unit.

[44] Although it may be more relevant to a presentation to the PRB in the first instance, or in a case of a grievance procedure with an arbitrator, in these unusual circumstances given the "big picture" concerns posited by Local 108, I am reluctant to rule it inadmissible on the basis that it is irrelevant, given the jurisprudence that permits non-contentious "general background" information to be placed before a reviewing court.

[45] I rule it admissible.

The Kaiser affidavit

[46] Mr. Kaiser is the President of the Nova Scotia Union of Public and Private Employees (NSUPE Local 13).

[47] His affidavit is oriented towards instances of accommodations for employees between HRM and NSUPE Local 13, and HRM's practice.[14] As he says at paragraph 14:

> NSUPE 13's position is that HRM should continue to consult and reach agreement with it prior to disabled employees from other bargaining units being accommodated within NSUPE 13.

[48] Local 108 states that his affidavit "describes the duty to accommodate process that HRM has followed with NSUPE and the Amalgamated Transit Union (ATU) and provides examples of resulting accommodation agreements."

[49] His affidavit would likely be more relevant to a presentation to the PRB in the first instance, or in a case of a grievance procedure with an arbitrator. It

[14] E.g. At para 6- "HRM has always consulted with and reached agreement with [his Union] prior to placing disabled employees from other bargaining units within [his Union]."

suggests HRM has a practice in relation to disability accommodations, which HRM should have followed in Mr. Mosher's case.

[50] While it does involve documentation regarding a disability accommodation for one employee of the HRPA, I cannot conclude that even this information is sufficiently relevant to the decision that the reviewing judge must make in this case.

[51] His entire affidavit is struck as inadmissible.

Conclusion

[52] The following persons' affidavits are admissible in their entirety to supplement the Record herein: Nicole Evenden; and Messrs. Lillington (save paras. 26 and 28) and Rao.

[53] I strike in its entirety as inadmissible the affidavit of Joseph Kaiser.

[54] Counsel for the Applicant shall prepare the order. Should the parties be unable to agree on costs per Tariff C, applicable by CPR 77.05, I will accept their brief written submissions by 4:00 p.m. on February 22, 2019.

Rosinski, J.