Cite as: Nova Scotia (Civil Service Commission) v. Nova Scotia Government Employees Union, 1992 NSCA 5

S.C.A. No. 02597

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Hallett, Matthews and Chipman, JJ.A.

BETWEEN:	
THE NOVA SCOTIA CIVIL SERVICE COMMISSION and ERIC K. SLONE Appellants	Jonathan Davies for the Appellants
- and -	
NOVA SCOTIA GOVERNMENT EMPLOYEES UNION Respondent	Kimberley Turner and Gordon N. Forsyth for the Respondent
	Appeal Heard: June 15, 1992
	Judgment Delivered: July 9, 1992

THE COURT: The appeal is allowed, the decision and order of Gruchy, J. is set aside and costs are allowed to the appellants of the application before him and in this Court as per reasons for judgment of Chipman, J.A.; Hallett and Matthews, JJ.A., concurring.

CHIPMAN, J.A.:

The issue in this appeal is whether a decision of an adjudicator acting pursuant to the Civil Service Collective Bargaining Act, R.S.N.S. 1989, c. 71 (the Act) was patently unreasonable.

The appellant (the Commission) is a statutory body, established by the Civil Service Act, R.S.N.S. 1989, c. 70 as bargaining agent for the Province of Nova Scotia to bargain with its employees. The respondent (the Union) is a trade union representing employees of the Province pursuant to the Act.

The Commission and Union are parties to a number of collective agreements containing the terms and conditions of employment for employees of the Province. Many of these contain provisions dealing with the conditions of employment for part-time employees. Such employees are hired to work a specific percentage of the time worked by a full-time employee. The vast number of such appointments are for a round percentage of full-time hours, with the largest concentration being 40%, 50% or 60%. It is the practice of the Commission to issue a letter when a part-time appointment is amended or transferred from one percentage level to another. In actual practice, many part-time employees are commonly called upon to work well in excess of their percentage designation.

The parties filed with the adjudicator an agreed statement of facts summarized as follows:

(1) In the 1987 negotiations between the parties, it was agreed that certain part-time employees would be included in the civil service collective agreements. In the agreements executed that year, the entitlement of benefits for part-time employees was stated:

> "Part-time employees employed on a regular basis in position titles and classifications included in the Bargaining Unit for work not less than 40% of the full-time hours will be covered by the Collective Agreement and entitled to benefits pro-rated on the basis of hours worked, except as otherwise agreed to by the parties.
>
> The benefits provided to part-time employees will be not less than that provided under the V. G. H. nurses part-time contract."

(2) More meetings were held between representatives of the parties to discuss further terms respecting part-time employees. A memorandum was executed on December 20, 1988 which included the following:

> "Except as otherwise provided in the Agreement part-time employees will accumulate service and be credited with service on a pro-rata basis in accordance with time worked, including designated paid holidays or days off in lieu thereof, vacations, sick leave, injury on duty leave, paid leave of absence."

(3) Subsequently, the two agreements were consolidated in a single memorandum, forming part of each of the various collective agreements.

(4) On April 30, 1990 the Union filed a policy grievance alleging that the Commission was in breach of the agreement as it related to part-time employees of the Department of Health because it was pro-rating benefits for these employees on the basis of the percentage of hours for which they were engaged to work rather than the number of hours which they in fact worked. On August 9, 1990 the grievance was amended to apply to all departments of the Provincial Government.

Eric K. Slone was appointed adjudicator of the grievance pursuant to s. 35(2) of the Act. He convened a hearing on April 24, 1991 and after hearing viva voce evidence and counsel for the parties, he filed an award on May 22, 1991 denying the grievance.

On June 19, 1991 the Union applied to the Trial Division of the Supreme Court for an order in the nature of certiorari to quash the award on the ground of reviewable error in the interpretation of the language of the agreements and, in particular, the adjudicator's interpretation of the words "hours worked" and the consideration by him of the terms of the Victoria General Hospital part-time contract as an aid to interpretation of the agreements. The application was heard by Mr. Justice David Gruchy on October 8, 1991. He filed his decision on October 29, 1991 granting the Union's application. He held that the adjudicator applied a patently unreasonable interpretation to the language of the agreements which effectively amended them, thereby committing a reviewable error.

The Commission appeals to this Court. There are three issues:

(1) Whether the Chambers judge applied the correct standard of review to the award;

(2) Whether the Chambers judge was correct in finding that the adjudicator applied a patently unreasonable interpretation to the language of the agreements and thereby effectively amended them;

(3) Whether the Chambers judge was correct in finding the adjudicator committed reviewable error if he considered extrinsic evidence as an aid to interpretation of the agreements.

ISSUE ONE:

On this appeal, there was no disagreement with the general statement that on a review of an arbitration award the court must be satisfied that there was a jurisdictional error or that the decision was patently unreasonable. See U.E.S. Local 298 v. Bibeault,

[1988] 2 S.C.R. 1048 at p. 1086.

In Nova Scotia Liquor Commission v. Nova Scotia Government Employees Union, Local 470 (1990), 97 N.S.R. (2d) 55 at p. 57 this court said:

> "Thus, in applying the test it is, in the last analysis, for the court to make a judgment call on the reasonableness of the decision under review. In doing so, it must exercise restraint and the jurisdiction to set aside such a decision will be sparingly used. Where, however, the court's evaluation of the decision leads to the conclusion that rather than having interpreted the agreement, the adjudicator has amended it, added to it or overlooked material provisions in it, the threshold is reached ."

It might be said that a patently unreasonable error or an amendment is what the court says it is. Lest this might appear to result in an unfettered power of the court to decide as it likes, it is necessary to keep in mind what LaForest, J. said in Paccar of Canada Ltd. (Canadian Kenworth Company Division) v. Canadian Association of Industrial, Mechanical & Allied Workers, Local 14 et al., (1989), 62 D.L.R. (4th) 437 (S.C.C.) at p. 453:

> "Where, as here, an administrative tribunal is protected by a privative clause, this court has indicated that it will only review the decision of the board if that board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function: see **C.U.P.E., Local 963 v. N.B. Liquor Corp.** (1979), 97 D.L.R. (3d) 417, [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237. The tribunal has the right to make errors, even serious ones, provided it does not act in a manner "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 425). The test for review is a "severe test": see **Blanchard v. Control Data Canada Ltd.** (1984), 14 D.L.R. (4th) 289 at p. 302, [1984] 2 S.C.R. 476, 84 C.L.L.C. 14,070. This restricted scope of review requires the courts to adopt a posture of deference to the decisions of the tribunal. Curial deference is more than just a fiction courts resort to when they are in agreement with the decisions of the tribunal. Mere disagreement with the result

> arrived at by the tribunal does not make that result "patently unreasonable". The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result. . . ."

To the like effect is what Dickson, J. (as he then was) said in C.U.P.E. Local 963 v. New Brunswick Liquor Corporation (1979), 97 D.L.R. (2d) 417 at p. 423-4. In Reference re Public Service Employee Relations Act (Alta.) (1987), 38 D.L.R. (4th) 161 (S.C.C.) at p. 234 McIntyre, J. made the following comments which LaForest, J. in Paccar, supra, at p. 454 characterized as "particularly apt":

> "Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time. Labour legislation has recognized this fact and has created other procedures and other tribunals for the more expeditious and efficient settlement of labour problems. Problems arising in labour matters frequently involve more than legal questions. Political, social, and economic questions frequently dominate in labour disputes. The legislative creation of conciliation officers, conciliation boards, labour relations boards, and labour dispute-resolving tribunals, has gone far in meeting needs not attainable in the court system. The nature of labour disputes and grievances and the other problems arising in labour matters dictates that special procedures outside the ordinary court system must be employed in their resolution. Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems. The courts will generally not be furnished in labour cases, if past experience is to guide us, with an evidentiary base upon which full resolution of the dispute may be made. In my view, it is scarcely contested that specialized labour tribunals are better suited than courts for resolving labour problems, except for the resolution of purely legal questions."

Thus it is not surprising that it has been held that it is possible for both of two diverse arbitration rulings to stand because neither was patently unreasonable. See N.S.

Nurses' Union v. Grace Maternity Hospital (1990), 97 N.S.R. (2d) 20 at p. 29. Indeed, in Camp Hill Hospital, Local of Nova Scotia Nurses' Union v. Camp Hill Hospital (1989), 94 N.S.R. (2d) 430, this Court reversed the decision of a trial judge who set aside the majority decision of an arbitration board because they failed to consider themselves bound by the finding of this Court in Grace Maternity Hospital Local v. Grace Maternity Hospital (1986), 78 N.S.R. (2d) 178. By that decision, this Court restored an arbitration board ruling reaching an opposite result in a dispute over an identical provision in a substantially similar collective agreement. On appeal to this Court in the Camp Hill case, it was held that where two arbitration boards dealt with similar issues and reached different conclusions, the courts could not interfere with their decisions if both interpretations, although contrary, were interpretations which the collective agreement could reasonably bear. There could be two or more different interpretations, neither or none of which was patently unreasonable. It has also been held that an arbitrator was not bound to follow a prior arbitration award dealing with the same issue. See C.B.C. v. Canadian Wire Service Guild (1990), 99 N.S.R. (2d) 419.

Mr. Justice Gruchy considered that by virtue of s. 33 of the Act, the tribunal was a statutory one protected by a privative clause. I agree. I also agree that Mr. Justice Gruchy correctly stated the guiding principles. The only question is whether he erred in applying them.

ISSUES TWO AND THREE:

Did Mr. Slone apply a patently unreasonable interpretation to the language of the agreements thereby amending them? In analyzing his decision, it is convenient at the

same time to deal with the question whether he wrongly considered extraneous evidence - the V.G. contract - as an aid to interpretation.

Because as LaForest, J. says, the emphasis must be on how the tribunal reached its result, I will review Mr. Slone's reasoning.

After reciting the agreed statement of facts and summarizing the viva voce evidence, Mr. Slone referred to the Commission's practice of confirming in the letter of appointment of a part-time employee, the specific percentage of full-time salary upon which the appointment was based. The V.G. contract, mentioned in the agreements as a minimum standard, was referred to. The Commission's position was that it was an indication of the negotiating history and of the intention of the parties. Mr. Slone noted that the provisions in the V.G. contract respecting benefits for part-time employees was fairly clear and that the pro-ration of benefits was based on the contracted percentage of the full load - analogous to what the Commission contended was meant by the language in the agreements - albeit expressed quite differently.

Mr. Slone stated the position of the parties: (a) that of the Commission that the pro-ration of benefits was based on the percentage established in advance for the employee, with additional hours worked as overtime or something like it, for which compensation was payable under the agreements but which did not carry benefits; and (b) that of the Union which was that "hours worked" was plain language calling for pro-ration of benefits on the basis of the history of hours worked. It was said that by the use of the past tense the intention was clear.

Mr. Slone stated his task was to determine the intention of the parties as

expressed in the agreement - an exercise which is not always easy. He commenced by quoting as follows from Brown & Beatty's Canadian Labour Arbitration, Third Edition, at para. 4:2100:

> "... in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions. Thus where, for example, the parties had detailed in the collective agreement specific elements of management rights, without limitation as to the manner in which they would be applied, the adjudicator was held to have erred in implying that those rights were to be exercised fairly and without discrimination. When faced with a choice between two linguistically permissable interpretations, however, adjudicators have been guided by the reasonableness of each possible interpretation, administrative feasibility, and which interpretation would give rise to anomalies . . .
>
> In searching for the parties' intention with respect to a particular provision in the agreement, adjudicators have generally assumed that the language before them should be viewed in its normal or ordinary sense unless that would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense . . .
>
> The context in which words are found is also a primary source of their meaning. Thus, it is said that the words under consideration should be read in the context of the sentence, section and agreement as a whole."
>
> And at para. 4:2300:
>
> "... in construing collective agreements arbitrators in their search for the intention of the parties have sought to determine the purpose of the particular provision in the collective agreement. In this regard, arbitrators have recognized that collective agreements are not negotiated in a vacuum but rather are settled in the context of general industrial relations practices, within a specific negotiating context, and against a vast history of judicial and arbitral jurisprudence which will affect the parties' expectations and understandings. In the result,

> arbitrators give effect to this general contextual climate by requiring clear statements to alter such general expectations."

Mr. Slone continued:

> "From these quotations I extract the following basic principles: Language is not to be viewed in a vacuum, but must be taken in context. Within that context, unless a specialized meaning is shown to have been intended, the ordinary meaning ought to prevail unless it creates a serious absurdity. On the other hand, where there are two or more linguistically permissable interpretations, the reasonableness and administrative feasibility of each may be compared in an effort to discern the intention of the parties."

In considering what was linguistically permissible, Mr. Slone considered both the Union's and the Commission's position required some modifier to the word "hours", be it "actual" in the case of the Union's position or "regular" in that of the Commission's. To the Union's contention that the word "worked" is in the past tense, he gave an example where a word expressed in the past tense did not always refer to the past. Frequently in a questionnaire it might be asked such a thing as "type of food eaten". Since a word used in the past tense may have reference to events in the future, he thought it would be linguistically permissible to use the term "hours worked" without some past record to look to. Such words used in the prospective sense have more regard to intention than they do to past experience. He therefore concluded that it was linguistically permissible to use the term "hours worked" to have regard to something that has not yet happened. Put another way, the words are a convenient label for the percentage of full-time work for which part-time workers are engaged. While the Union's interpretations was "more obviously linguistically permissible", it was not the only linguistically permissible interpretation. He therefore considered he was not bound by the plain language rule to accept the Union's

interpretation as the only one, without further consideration.

Mr. Slone then addressed the question of which interpretation was more reasonable and/or administratively feasible. He said:

> "In my view, one should not lose sight of the fact that the parties here were negotiating benefits, which are collectively a term of employment that both parties would wish to have identified and quantified before the employee starts work, rather than after. Therefore, it is quite possible that the words 'hours worked' were being used in the prospective rather than the retrospective sense. If that were the case, it could not in all cases be past performance that the parties were looking to, since at the time of hiring there would be no past performance to look to.
>
> The Union's interpretation would also create, in my view, an extremely unwieldy system of benefits that I find difficult to believe could have been intended by the parties. Some benefits are relatively easy to accrue on the basis of past hours worked, but some are not. For example, sick days or vacation days can easily be banked on an 'earn as you work' basis. But consider group life insurance. The collective agreement calls for the Employer to provide life insurance pro-rated as a percentage of a full-time salary. To use the example in the agreement of a hypothetical employee hired on a 50% basis for a job that earns $30,000 full-time, the Employer is obligated to maintain a policy for that employee that will pay a benefit in the event of death. If the Employer is correct, all it need do is arrange a $15,000 policy. If the Union is correct, the face amount of the policy to which this hypothetical employee is entitled will float in accordance with actual hours worked, which may be in excess of 50%. On what would the policy be based: last week? last month? an averaged amount based on the past year? What if the person died one day after being hired? The impracticality of this example points to the Employer's interpretation as being the one that is more consistent with common sense and administrative feasibility, in the specific context of employee benefits. There are other examples of how the Union's interpretation would be terribly unwieldy, such as pension entitlement."

In addressing other aids to interpretation, he referred to the section in the

agreements dealing with group life insurance where the following example was used:

> "Part-time employees will be covered by group life insurance with benefit entitlement pro-rated on the basis of hours worked. 50% of the full-time hours in a position with an annual (full-time) salary of $30,000 will have his/her insurance coverage based on $15,000 per annum salary."

He attached significance to the rounded number used rather than the inevitably ragged number which would be generated by a retrospective view based on actual experience. As to the V.G. contract, he said the reference to it was also something of a clue "albeit a weak one", in that it at least establishes a system of benefits in existence elsewhere and known to both parties at the time they negotiated. He said that he suspected that no one would anticipate that there would be a significant variance between most employees assigned percentages and their actual experience. It was not, he thought, unfair to calculate the benefits on the basis of assigned percentages. He continued:

> "That the parties anticipated some variance is obvious, since they included provisions for the payment of premium overtime, and for the payment of straight-time for certain other hours worked beyond the regular hours. Had the parties wished to provide for the earning of additional benefits, they could have done so explicitly. Instead they created a system of overtime and quasi-overtime, the latter of which on the Employer's interpretation carries pay but no benefits. The Union argues that it would be an unfair result if both the overtime and quasi-overtime carried no benefits. I cannot say that there is prima facie any real unfairness in the context of part-timers, brought into the collective bargaining process for the first time, who may be given additional work in excess of their anticipated percentages."

He dismissed the grievance and did not deal with certain subsidiary issues which would, in his view, have complicated the situation had he found in favour of the Union's position.

After reviewing Mr. Slone's reasoning, Mr. Justice Gruchy found that he committed a patently unreasonable error in his interpretation of the phrase "hours worked". This was a meaning which could not be borne out by the context of the agreement or by the context of the facts as agreed or as found. In Mr. Justice Gruchy's opinion it was the adjudicator's duty to first ascertain, if he could, the intent from the language. In his view, the phrase "hours worked" is retrospective in its plain meaning. Its plain meaning, he said, should be followed and he quoted from the same passages in Brown & Beatty as did the adjudicator. He considered the adjudicator's finding that two meanings had come from the plain words was "not a factual one". The adjudicator was wrong in imputing to the phrase "hours worked" the modifier "scheduled". An arbitrator could not do that. As to whether the adjudicator erred in considering the terms of the Victoria General Hospital contract, since it was referred to in the agreements, it could be considered incorporated to the extent that it established a floor or minimum level of benefits for part-time workers. He considered that any further reference to that contract was not justified, except in an attempt to explain an absurdity, and none existed here.

In reading the adjudicator's decision as a whole, one could easily disagree with his conclusion that there were two linguistically permissible interpretations, that the language admitted of any ambiguity or required any modifiers or reference to the history of dealings between the parties. If these were errors, we must keep in mind that the tribunal has the right to make errors, "even serious ones", provided it does not act in a manner "so patently unreasonable that its construction cannot be rationally supported by the documentation so as to demand intervention". If it was an error I do not think it is so

patently unreasonable or so irrational that I would strike it down. This whole issue was more than just the resolution of a purely legal question. It was a labour problem set against the backdrop of the negotiations between the parties, the fact that this was the first time that part-time employees had been given pro-rated benefits and the fact that the Union's contention would raise a number of practical difficulties which concerned the adjudicator.

In particular, the reading in of a modifier to the language of the agreement - for the purposes of analysis, "actual" in the Union's case, and "regular" or "scheduled" in the employer's, was not patently unreasonable even though I might not have done so myself. As the adjudicator himself said, to determine the intention of the parties is never easy and to determine the "true" meaning of words is elusive. The words "hours worked" may seem clear enough, but when read in the context of the dealings of the parties and having regard to the difficulty of their application when read as the Union would have it, the adjudicator's "judgment call" though clearly debatable is not without some rational foundation. The analysis is not quite so tortured as counsel for the Union would ask us to conclude.

I probably would not have reached the same conclusion he did were I in his place, but as I apply the test, I cannot say his reasoning fails so badly as to warrant interference.

With respect to the V.G. contract, it would appear that Mr. Justice Gruchy was not entirely sure of the extent to which it influenced the adjudicator. I share the same view. The adjudicator referred to it as something of a clue "albeit a weak one". To the extent that he considered it a precedent for how this totally new package of benefits between these parties should be approached, it was, again, not an unreasonable approach

for a labour arbitrator whose decision is governed by all the considerations mentioned in the authorities.

I would allow the appeal, set aside the decision and order of Gruchy, J. and allow costs to the appellants of the application before him and in this Court. If the parties cannot agree to the amount of the costs in this Court, I would propose that we fix the amount following written submissions from each party one week apart.

J.A.

Concurred in:

Hallett, J.A.

Matthews, J.A.