C.A. No. 130527

NOVA SCOTIA COURT OF APPEAL

**Clarke, C.J.N.S.; Hallett and Pugsley, JJ.A.**
Cite as: Health Services Association of South Shore v. Health Services Association of South Shore Local of Nova Scotia Nurses' Union, 1997 NSCA 25

**BETWEEN:**

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| HEALTH SERVICES ASSOCIATION OF THE SOUTH SHORE<br><br>Appellant<br><br>- and -<br><br>HEALTH SERVICES ASSOCIATION OF THE SOUTH SHORE LOCAL OF THE NOVA SCOTIA NURSES' UNION<br><br>Respondent | Eric B. Durnford, Q.C.<br>for the appellant<br><br>Raymond F. Larkin, Q.C.<br>for the Respondent<br><br>Appeal Heard:<br>January 13, 1997<br><br>Judgment Delivered:<br>January 29, 1997 |

**THE COURT:** Appeal dismissed with costs to the respondent per reasons for judgment of Hallett, J.A.; Clarke, C.J.N.S. and Pugsley, J.A. concurring.

HALLETT, J.A.:

This is an appeal from a decision of the Supreme Court of Nova Scotia refusing to quash an award of an arbitrator upholding a policy grievance of the respondent union objecting to the interpretation by the appellant employer (the Hospital) of a Letter of Agreement made between the parties that formed part of the Collective Agreement dated July 30, 1990.

The clause in issue in the Letter of Agreement is as follows:

> "It is agreed that no regular nurses will suffer a loss of employment in the event that the hospital agrees with another hospital to amalgamate services."

The parties submitted the following agreed statement of facts to the arbitrator:

> "1. Fishermen's Memorial Hospital (FMH) and South Shore Regional Hospital (SSRH) merged on August 27, 1992 by Order in Council.
>
> 2. The Health Services Association of the South Shore applied to the Labour Relations Board for an Order for Successor Rights.
>
> 3. The Union and the Hospital entered into an Agreement dated October 26, 1993 settling any matters that were in issue before the Labour Relations Board. As part of the October 26, 1993 agreement, the Union agreed not to contest the exclusion of head nurses at the SSRH site from the bargaining unit.
>
> 4. The Labour Relations Board issued an Order dated December 14, 1993. Head nurses at SSRH had been members of the Nova Scotia Nurses' Union, those at FMH were not.
>
> 5. Head nurses, who were removed from the bargaining unit as a result of the Agreement, were permitted to return to the bargaining unit with seniority for a one year period.

6. In October 1993, Ruby Fraser, Director of Nursing, advised the head nurses that one of the positions of head nurse/surgical would be eliminated and the combined head nurse position would be posted. At that time, Lucille Steadman was head nurse/surgical at the SSRH site and Anna Fogarty was head nurse/surgical at the FMH site.

7. On November 3rd, the position was posted and Anna Fogarty was the successful applicant. Lucille Steadman did not apply. Instead, she elected to return to the bargaining unit.

8. On November 29, 1993, she requested to bump into day surgery. The Hospital agreed to the bump.

9. This, in turn, resulted in the following "chain bumping":

(a) Lucille Steadman - Mary Oickle
(b) Mary Oickle - Shirley Lane
(c) Shirley Lane - Scott Smith
(d) Scott Smith - Gabrielle Jarvis
(e) Gabrielle Jarvis - Karen McMullin

10. Karen McMullin was a full time nurse on In Patient Mental Health. On May 6, 1994, she was advised that Gabrielle Jarvis would be displacing her from her full time position.

11. Karen McMullin then applied for a temporary full time position on Medical 3A and was appointed to it effective June 6, 1994 (before her lay off became effective). It was to continue until November 23, 1994.

12. Karen McMullin also applied for a permanent part time position in Recovery Room and was appointed to it effective the date the temporary position on Medical 3A ended. The effect of this was that she did not commence working in her 40% position in the Recovery Room until November 1994.

13. Karen McMullin received a second lay off notice dated January 5, 1995 and effective February 5, 1995. She continues to work in the

Recovery Room at 40%.

14. The Union filed a policy grievance on May 10, 1994. It reads:

> Karen McMullin has been issued a lay off notice dated May 6, 1994 due to the bumping process as a result of Lucille Steadman returning to the bargaining unit back in November 1993. Lucille's head nurse position was amalgamated with the surgery department at the Fishermen's Memorial Hospital site after the voluntary amalgamation of the South Shore Regional Hospital and Fishermen's Memorial Hospital.

15. The Hospital responded to the grievance on May 25, 1994. The Director of Nursing, wrote as follows:

> This is to notify you that your policy grievance of May 10, 1994 is being denied.
>
> It is management's position that the bumping process of Lucille Steadman and lay-off of Karen McMullin resulted from budget cuts by the provincial Government and not from the amalgamation of the FMH and SSRH sites. As stated in the May 6, 1994 letter to Karen McMullin: "Due to recent budget cuts from the Provincial Government and more anticipated cuts in the spring of this year, we must keep our staffing at the approved levels."
>
> Therefore the lay off stands.

16. The grievance was referred to arbitration on May 31, 1994."

The agreement referred to in paragraph 5 was dated October 26th, 1993.

The clause in question is contained in the second paragraph of Clause 11:09 of that agreement; it provides:

> "Nurses who leave the Bargaining Unit to take a position outside of the scope of the Bargaining Unit will retain their accumulated seniority up to the point of departure, should a nurse return to a position within the scope of the Bargaining Unit, the nurse shall begin to accumulate seniority from the previously accumulated seniority point onward.
>
> Notwithstanding Article 11.09, any Head Nurse who, as a result of this Agreement, has been removed from the scope of the Bargaining Unit and returns to a position within the scope of the Bargaining Unit within a period of one (1) year from the date of execution of this Agreement shall return to the Bargaining Unit with no loss of Seniority."

The bumping referred to in paragraph 9 took place over a period from May, 1993, to October, 1994. The evidence disclosed that Ms. McMullin has had uninterrupted employment at the Hospital from May 6th, 1994, the date she received her lay-off notice that she would be displaced from her full time position by Gabrielle Jarvis. Her lay-off had not become effective prior to Ms. McMullin obtaining a temporary full time position as she was entitled to one month's notice.

**The Award**

After reviewing the facts, the learned arbitrator stated the issues as follows:

> "The basic issue submitted to me for resolution was whether Ms. McMullin's loss of employment was covered by the provisions set out in the Letter of Agreement attached to the Collective Agreement. In particular whether it was as a result of the hospital agreeing with another hospital to amalgamate services. In the course of the hearing the basic issue broke down into

four further issues:

1. Was what occurred in relation to the removal of one head nurse/surgical position the result of an amalgamation of services?

2. If it was an amalgamation of services, did it cause the loss of Ms. McMullin's job or was that the result of budget cuts?

3. If it was an amalgamation of services, was it covered by the Letter of Agreement or did the Letter of Agreement refer only to subsequent amalgamation?

4. Does the Grievor have any rights under the provision of the Letter of Agreement in light of the fact that she was hired subsequent to the amalgamation of the two hospitals?"

Only Issues 1 and 2 are relevant to this appeal. The learned arbitrator resolved these issues as follows:

1. He found the combination of the two hospitals under one management structure was an amalgamation of services within the scope of the wording of the Letter of Agreement;

2. He found that the loss of employment by Ms. McMullin was as a result of the amalgamation of services and not budget cuts;

He concluded his award as follows:

> "Accordingly, I find that Ms. McMullin, a regular nurse, suffered a loss of employment as a result of the amalgamation of the services which occurred between the South Shore Regional Hospital and Fishermen's Memorial Hospital and that the provisions of the Letter of Agreement applied to such an amalgamation of services and that accordingly the loss of Ms .McMullin's employment was a breach of the undertaking given by the Employer in the Letter of Agreement and accordingly the grievance is allowed."

On the application to the Supreme Court of Nova Scotia for judicial review of the arbitrator's award, the Hospital asserted that the arbitrator committed the following errors:

> "(a) ..... Notwithstanding the following factual findings at page 7 of his award:
>
> 'It is noted that both surgical units continued to exist independently and to function at their respective hospitals, at least during the times material to this grievance. It might therefore be suggested that there was no actual amalgamation of services itself and that all that really occurred is that the same head nurse would be responsible at both units',
>
> he gave the provisions being interpreted, which were:
>
> 'It is agreed that no regular nurses will suffer a loss of employment in the event that the hospital agrees with another hospital to amalgamate services.'
>
> a patently unreasonable interpretation and/or an interpretation that the provisions will not reasonably bear in particular by his interpretation that a simple management reorganization whereby nursing services in two surgical units, which continued to function in the two hospitals but with only one Head Nurse, constituted an agreement by one hospital with another hospital 'to amalgamate services', when the services in question (provided by the two surgical units) were not in fact amalgamated at all.
>
> (b) ..... by exceeding his expressly limited jurisdiction not to add to the provisions of the Collective Agreement. This he did by effectively adding to the Letter of Agreement provision the words

underlined, as follows:

'It is agreed that no regular nurses will suffer a layoff or a loss of employment in the event that the hospital agrees with another hospital to amalgamate services or to reduce the number of managers of the hospital services in the two hospitals.'

(c) ..... by his interpretation that 'lay-off' is a 'loss of employment' under the provisions of the Letter of Agreement and that this loss was caused by an amalgamation of hospital services. The Arbitrator made a patently unreasonable interpretation or an interpretation which the language will not reasonably bear by his conclusion that the grievor 'suffered a loss of employment' caused by two hospitals amalgamating services, even though the Arbitrator found:

(i) That the grievor was laid off (and entitled to recall rights) and did not find that her employment was terminated;

(ii) That the cause of the grievor's lay-off was an agreement of the parties reached in proceedings before the Labour Relations Board by which, on the establishment of the Employer as a single Board, only one of the Collective Agreements at the two hospitals would be used (that at South Shore Regional Hospital) and that for a certain period Head Nurses excluded from the newly-merged single bargaining unit could elect to bump back into the unit. ...'[I]n accordance with the agreements reached between the Union and the Employer, one of the Head Nurses affected, [Lucille Steadman] elected to bump back into the bargaining unit ... [which] ... 'set off a series of moves as the person who Lucille Steadman bumped exercised her bumping rights, etc. Those series of bumping manoeuvres ultimately resulted in a nurse bumping into [the grievor's] position in May of 1994. As a result of that bump, [the grievor] was given a layoff

> notice and that prompted the grievance that is before me.' (emphasis added - Award, p. 5)
>
> The Arbitrator further found that:
>
> 'I am satisfied on the evidence that the loss of [the grievor's] employment was a result of the termination of the head nurse/surgical position. That decision was motivated by the desire to streamline the management of the hospital and it was a result of the amalgamation of the two hospitals under one management structure. Accordingly, the loss of the [the grievor's] employment was as a result of the amalgamation of services.' (Emphasis added - Award, p. 10)
>
> These findings and interpretations of the relevant provisions of the Letter of Agreement are patently unreasonable and/or interpretations which the language will not reasonably bear."

The application to quash was refused on the basis that the interpretation of the Letter of Agreement was not patently unreasonable.

The notice of appeal to this Court asserts that the reviewing judge erred in finding that the arbitrator did not err in his interpretation of the Letter of Agreement. I have reviewed the record filed with the Supreme Court and the decision of that Court refusing to quash the arbitrator's award. I have also reviewed the factums of the parties and considered the oral representations on the hearing of the appeal.

Counsel for the Hospital agreed on the hearing of the appeal that there were really only two issues: first, whether the learned Chambers judge erred in failing to find patently unreasonable the arbitrator's decision that "loss of employment" as used in the Letter of Agreement is synonymous with a lay-off. Counsel asserts that this error effectively amended the collective agreement and,

therefore, the arbitrator exceeded his jurisdiction and so did the Supreme Court. The second issue is that the learned Chambers judge erred in failing to find patently unreasonable the arbitrator's decision that he need not carefully analyze the phrase "amalgamation of services" as it appears in the Letter of Agreement and his finding that the grievor had lost her employment without establishing a proper causal connection for such loss.

There is no dispute between the parties respecting the standard of judicial review to be applied to the interpretation of a collective agreement by a consensual arbitrator protected by a privative clause. The interpretation of the Collective Agreement by the arbitrator must not be patently unreasonable (**Volvo v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 720**, [1980] 1 S.C.R. 178 (S.C.C.); **United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.** (1993), 102 D.L.R. (4th) 402 (S.C.C.); **Canada Post Corp. v. Canadian Postmasters and Assistants Assoc.** (1993), 121 N.S.R. (2d) 112 (N.S.S.C.A.D.); and **Halifax (City) v. Halifax Firefighters' Assoc.** (1995), 137 N.S.R. (2d) 264 (N.S.C.A.)). What amounts to patent unreasonableness was considered by the Supreme Court of Canada in **Canada (Attorney General) v. P.S.A.C.** (1993), 101 D.L.R. (4th) 673 at p. 690, Cory, J., writing for the majority stated:

> "It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational." (emphasis added)

**Issue 1**

The Hospital asserts that the arbitrator, rather than considering the

meaning of the phrase "loss of employment" as used in the Letter of Agreement, in the labour relations context, in effect, held that the phrase was synonymous with a lay-off. The appellant asserts that this is not what the parties agreed and is not the meaning in the labour relations context. Counsel for the appellant argues that in so doing the learned arbitrator amended the Collective Agreement which, of course, he cannot do.

The learned Chambers judge concluded that the terms "loss of employment" and "lay-off" are not different labour relations concepts in the circumstances of the case and he concluded:

> "I have no difficulty if the arbitrator did make an implicit interpretation that the grievor's "layoff" was synonymous with a "loss of employment". I do not find that to be a reviewable error."

The appellant's principal assertion with respect to this ground is that the arbitrator never turned his mind to determining whether the grievor, in fact, suffered a loss of employment. Counsel for the Hospital asserts that the award reveals that the arbitrator assumed there was a loss of employment and, therefore, he never properly considered whether the grievor suffered a loss of employment.

I agree with the general proposition made by the Hospital's counsel in his factum that:

> "'Loss of employment' means the termination or end of the employment relationship, not a mere interruption in that relationship; a 'layoff' involves a continuing nexus between worker and employer, most often manifested in ongoing recall rights."

Counsel for the appellant argues that Ms. McMullin was laid off. She simply moved from regular full time to regular part time duties and, therefore, the

employment relationship was not severed. Counsel asserts that by upholding the grievance the arbitrator erroneously equated loss of employment with lay-off and that his interpretation was patently unreasonable.

Counsel makes a strong argument but I find myself in agreement with the position advanced by the respondent's counsel that the issue of whether Ms. McMullin was merely laid off (and therefore the employment relationship was not severed) was not an issue before the arbitrator. A review of the record satisfies me that both the Hospital and the union assumed there was a loss of employment by Ms. McMullin and the arbitration proceeded on this assumption. The issue on the arbitration was whether the assumed loss of employment by Ms. McMullin was caused by an amalgamation of services or caused by budget cuts by the Provincial Government. The arbitrator cannot be faulted for failing to consider an issue not raised before him. The issue was first raised on the application for judicial review and is one of the two issues raised by the Hospital on this appeal.

Assuming for a moment that Ms. McMullin had been laid off, and has not suffered a loss of employment because she is still employed, should this Court intervene on the ground that the arbitrator arrived at a patently unreasonable interpretation of the Letter of Agreement when the issue was not raised before the arbitrator?

The resolution of grievances by arbitration is intended to be a speedy and effective way to resolve differences arising under a collective agreement. In my opinion an arbitrator cannot be expected to resolve issues not raised by a grievance, including a policy grievance. While the courts have an important supervisory role to judicially review decisions of arbitrators for jurisdictional or legal error, our role should not be extended to reverse awards of consensual arbitrators on the basis of

issues not raised before the arbitrator. Therefore, I would not interfere with the arbitrator's award under these circumstances.

That aside, the meaning of the phrase "loss of employment" as used in the Letter of Agreement and in the context of the proposed amalgamation of Hospitals' services, is somewhat ambiguous. I agree with the position taken by counsel for the Union, that it is not patently unreasonable to conclude that a reduction in employment from 100% of nursing hours to 40% of nursing hours is a loss of employment.

The issue is not whether this Court would have come to the same conclusion as the arbitrator, but whether his interpretation of the clause in question is patently unreasonable. Therefore, it cannot be said that the arbitrator, in impliedly finding Ms. McMullin suffered a loss of employment, interpreted the language of the Letter of Agreement in a patently unreasonable manner. That the Hospital seemed to assume Ms. McMullin had suffered a loss of employment goes some considerable way to supporting the view that the meaning of the phrase "loss of employment" as used in the Letter of Agreement is not as clear as asserted by the Hospital's counsel. Therefore, I am not persuaded that the reviewing judge erred in refusing to interfere with the award on this issue.

**Issue 2**

The appellant argues that the learned Chambers judge committed reviewable error in failing to find as patently unreasonable, the arbitrator's decision that he need not carefully analyze the key phrase "amalgamation of services" and his finding that the grievor had lost her employment without establishing a proper causal connection between the loss of employment and the amalgamation of services. He argues that the combining of the two hospitals under one management

structure did not constitute amalgamation of services in that both hospitals continued to operate their respective surgical units and, therefore, the services as related to the work of the nurses in the bargaining units were not amalgamated.

I have reviewed the award of the arbitrator and am satisfied that he proceeded in a logical manner and that his conclusion that the cause of Ms. McMullin's loss of employment was the amalgamation of services was supported by the evidence. While the Hospital makes a strong argument that the loss of employment was caused by either government funding cutbacks or the terms of the agreement which permitted head nurses to go back into the bargaining unit with seniority, there was evidence to support the arbitrator's conclusion that the loss of employment was caused by the amalgamation of services as testified to by Ms. Schmitz. It is correct that the arbitrator stated in his summary of the facts that Steadman

> " ...in accordance with the agreements reached between the Union and the Employer, elected to bump back into the bargaining unit. That set off a series of moves as the person who Lucille Steadman bumped exercised her bumping rights etc. Those series of bumping maneuvers ultimately resulted in a nurse bumping into Karen McMullin's position in May of 1994. As a result of that bump, Ms. McMullin was given a layoff notice and that prompted the grievance that is before me."

The learned arbitrator then outlined the issues and went on to resolve them. The statement above quoted was simply a reference to the mechanism in place that allowed Ms. Steadman to bump back into the bargaining unit. It is not inconsistent with the appellant's finding that the cause of Ms. McMullin's loss of employment was the amalgamation of services.

The Letter of Agreement between the Bridgewater Hospital and the Union

presumably signed on or before July 30th, 1990, provided that the parties agreed "that no regular nurses will suffer loss of employment in the event that the Hospital agrees with another hospital to amalgamated services". The hospitals were merged by Order-in-Council on August 27th, 1992. A merger is the combining of two entities into one. Implicit in this is that the entities are amalgamating the services provided. The Hospital's function is to provide medical services to the public. The words 'merger' and 'amalgamation' when applied to the two hospitals are synonymous. It was not irrational for the arbitrator to have found that the two hospitals amalgamated their services. The arbitrator did not err in failing to put such a fine distinction on the meaning of the provision in the Letter of Agreement relating to the loss of employment on amalgamation of services as counsel for the Hospital urges is the only rational interpretation. There is nothing in the wording of the clause in issue which dictates that there be a causal link between loss of employment by a regular nurse with the amalgamation of nursing services. While such an interpretation would be reasonable it cannot be said that the interpretation by the arbitrator, that the combining of the two hospitals under one management was an amalgamation of services within the meaning of the Letter of Agreement, was patently unreasonable. I would dismiss this ground of appeal.

**Conclusion**

The interpretation by the arbitrator of the relevant provision of the Letter of Agreement was not patently unreasonable. There was evidence that Ms. McMullin's loss of employment was caused by the hospitals amalgamation of services. The award is not clearly irrational. I would dismiss the appeal with costs to the respondent of $1,000 plus disbursements.

Hallett, J.A.

Concurred in:

Clarke, C.J.N.S

Pusgley, J.A.

C.A. No. 130527

NOVA SCOTIA COURT OF APPEAL

**BETWEEN**:

HEALTH SERVICES ASSOCIATION OF THE SOUTH SHORE

Appellant

- and -

HEALTH SERVICES ASSOCIATION OF THE SOUTH SHORE LOCAL OF THE NOVA SCOTIA NURSES' UNION

Respondent

REASONS FOR JUDGMENT BY:

HALLETT, J.A.