NOVA SCOTIA COURT OF APPEAL

Citation: *Canadian Union of Public Employees, Local 3912 v. Nickerson*, 2017 NSCA 70

Date: 20170726
Docket: CA 458993
Registry: Halifax

Between:

The Canadian Union of Public Employees Local 3912
Appellant (Cross-Respondent)

-and-

Shannon Nickerson
Respondent (Cross-Appellant)

-and-

Nova Scotia Labour Board
Respondent

Judges:	Fichaud, Hamilton and Van den Eynden, JJ.A.
Appeal Heard:	May 12, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed and cross-appeal dismissed, with costs, per reasons for judgment of Fichaud, J.A., Hamilton and Van den Eynden, JJ.A. concurring
Counsel:	Susan D. Coen, for the Appellant (Cross-Respondent) Barry J. Mason, Q.C., for the Respondent (Cross-Appellant) Edward A. Gores, Q.C., for the Respondent Nova Scotia Labour Board

Reasons for judgment:

[1] Ms. Nickerson taught at a university. She was in a bargaining unit represented by C.U.P.E., Local 3912. She filed two grievances that her employer had harassed her with a disciplinary letter, and later terminated her without cause.

[2] The Union's view was that the harassment grievance would fail, the termination grievance might succeed, and the best outcome would be a settlement of both grievances on terms favourable to Ms. Nickerson. Ms. Nickerson opposed settlement and insisted on "vindication" by an arbitral award. She said she had a depressive mental disability that only vindication would accommodate. These opposing perspectives permeated the administration of these grievances.

[3] Eventually, the Union negotiated a settlement with the employer that would have reinstated Ms. Nickerson with compensation, returned her seniority and withdrawn the disciplinary letter. Ms. Nickerson rejected the settlement. Instead, she filed a complaint with the Labour Board that the Union had breached its statutory duty of fair representation under the *Trade Union Act*.

[4] The *Trade Union Act* provides that a Review Officer screens, and is to dismiss an unfair representation complaint that has no potential of success with the Labour Board. Ms. Nickerson alleged, among other points, that the Union had delayed processing the grievances in bad faith. "Bad faith" is a named category of unfair representation under the *Act*. The Review Officer dismissed Ms. Nickerson's complaint. On the delay issue, he held that legally the Union, not the grievor, controls the grievance process, Ms. Nickerson's attempts to direct that process resulted from her misunderstanding of this principle, and this contributed to the delay. Hence that delay was not caused by the Union's bad faith.

[5] Ms. Nickerson applied for judicial review. The reviewing judge set aside the Review Officer's decision. The judge held that the Review Officer's findings of fact, on the delay issue, were unreasonable.

[6] The Union appeals, and Ms. Nickerson cross-appeals. The key issues are (1) whether the reviewing judge misapplied the reasonableness standard to the Review Officer's findings of fact, and (2) whether there is a basis for Ms. Nickerson's proposition that the Union was required to take the grievances to an arbitration hearing in order to accommodate her mental disability.

1. Background

[7] From September 2010 to September 2011, Saint Mary's University employed the Respondent Ms. Shannon Nickerson as a part-time professor of psychology. In September 2011, Saint Mary's declined to renew her appointment.

[8] At Saint Mary's, Ms. Nickerson occupied the bargaining unit represented by the Appellant Local 3912 of the Canadian Union of Public Employees ("Union"). The Union had been certified under the *Trade Union Act*, R.S.N.S. 1989, c. 475. Saint Mary's and the Union had a collective agreement that covered part-time faculty.

[9] During her employment, on March 23, 2011, Ms. Nickerson filed a grievance that Saint Mary's had undertaken "a pattern of harassment pertaining to communications and the issuance of a disciplinary letter dated March 21, 2011 without just cause" ("Harassment Grievance").

[10] After her employment ended, Ms. Nickerson filed a second grievance on October 6, 2011, that Saint Mary's denial of her reappointment was an unjustified dismissal ("Termination Grievance").

[11] The progress of the grievances lagged for some time. The reasons for the delay are disputed. I will discuss them later.

[12] The Union's view was that the Harassment Grievance had no reasonable prospect of success, but the Termination Grievance had potential. The Union concluded that attempting to achieve an overall settlement of both grievances, if the terms were satisfactory, was the best option.

[13] Ms. Nickerson opposed settlement discussions. The Review Officer's decision which is subject to this judicial review, stated Ms. Nickerson's reasons:

> The Complainant's position is that she is physically and mentally disabled. She opposed the mediation session because she did not feel it adequately accommodated her disabilities. In particular, she believed that she needed "vindication" for the allegations made against her in a March 21, 2001 [*sic* 2011] discipline letter. She believed that she could only obtain such vindication through arbitration of the Harassment Grievance, so she was not willing to consider settlement of that Grievance. …

[14] The Union scheduled a mediation session with Saint Mary's and a mediator for December 9, 2014. Ms. Nickerson did not attend. Her counsel said that late disclosures exacerbated her depression and she was unable to participate.

[15] Given Ms. Nickerson's absence, the formal mediation did not proceed on December 9. Nonetheless, the Union and Saint Mary's continued to discuss the grievances. On December 18, 2014, the Union and Saint Mary's concluded a settlement agreement ("Settlement Agreement") that was conditional on Ms. Nickerson's approval. The terms were that Saint Mary's would:

> (1) re-appoint Ms. Nickerson to her previous position for two years, and she would have up to one year to return to work;
>
> (2) reinstate Ms. Nickerson to her seniority level when her re-appointment had been denied;
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> (3) withdraw the disciplinary letter of March 21, 2011; and
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> (4) pay Ms. Nickerson compensation of $16,500.

The Settlement Agreement provided that Ms. Nickerson would:

> (1) provide medical clearance that she was physically able to resume her duties;
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> (2) comply with Saint Mary's Policy on Social Media and Personal Privacy;
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> (3) comply with the University's regulations on submission of marks;
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> (4) be responsive to students for whom she provides letters of reference;
>
> (5) give advance notice to the University of absences;
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> (6) submit an updated dossier;
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> (7) sign a full release; and
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> (8) agree to a confidentiality clause.

Ms. Nickerson was given to January 30, 2015 to accept.

[16] Ms. Nickerson declined to accept the Settlement Agreement.

[17] On November 25, 2014, Ms. Nickerson filed with the Labour Board a complaint that the Union had violated its duty of fair representation under the *Trade Union Act*, s. 54A(3):

> 54A (3) No trade union and no person acting on behalf of a trade union shall act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employee in a bargaining unit for which that trade union is the bargaining agent with respect to the employee's rights under a collective agreement.

[18] The *Trade Union Act*, s. 56A, provides that a review officer is to screen complaints under s. 54A(3):

> **Review officer**
>
> 56A (1) Where the Board receives a written complaint that a trade union or a person acting on behalf of a trade union has contravened subsection (3) of Section 54A, the Board shall appoint an employee within the Department of Environment and Labour, or a person appointed by the Minister, as a review officer to review the complaint to determine whether there is sufficient evidence of a breach of the duty of fair representation.
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> (2) Where a review officer appointed pursuant to subsection (1) is not satisfied on initial review that there is sufficient evidence of a failure to comply with subsection (3) of Section 54A, the review officer shall dismiss the complaint.
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> …
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> (7) A decision of a review officer under this Section is final and conclusive and not open to question or review.

[19] Mr. Brian Sharp was the Review Officer appointed for Ms. Nickerson's complaint. Mr. Sharp reviewed the material filed by Ms. Nickerson's counsel. On November 18, 2015, Mr. Sharp wrote to Ms. Nickerson's counsel, enclosing a decision dated November 13, 2015. The Decision dismissed Ms. Nickerson's complaint against the Union. The Decision concludes:

> Having reviewed this complaint carefully, I am not satisfied that there is sufficient evidence to potentially permit the Board to find that the Respondents failed to comply with s. 54A(3). Consequently, I must dismiss the complaint.

[20] Ms. Nickerson had submitted, among other arguments, that the Union had delayed the processing of her grievance in bad faith. "Bad faith" is one of s. 54A(3)'s criteria for breach of the duty of fair representation. On this point, the

Review Officer found that (1) "disagreements between the Complainant and Respondents negatively affected the progress of the Grievances", and (2) "the Complainant/Respondent relationship was strained throughout the representation period, and … the strain interfered with the Union's collection of evidence and the ability to schedule case related dates". According to the Review Officer, the strain resulted from the attempts by Ms. Nickerson to direct the strategy for handling the grievances. As a matter law, the certified bargaining agent, not the grievor, controls the strategy for enforcing the collective agreement. According to the Review Officer, Ms. Nickerson's efforts to direct the strategy "reflect that the Complainant and her counsel misunderstood the nature of the grievance process", and the resulting delays were not from the Union's exercise of bad faith. Later I will quote the Review Officer's passages at greater length.

[21] On December 23, 2015, Ms. Nickerson filed a Notice of Judicial Review. On July 20 and 21, 2016, Justice Joshua Arnold heard the application for judicial review in the Supreme Court of Nova Scotia.

[22] On December 23, 2016, the reviewing judge issued a decision (2016 NSSC 348). He adopted the reasonableness standard of review, and determined that the Review Officer's findings of fact were unreasonable. The judge found that Ms. Nickerson did not significantly contribute to the delay. Consequently, according to the judge, the delay arguably resulted from the Union's bad faith. He set aside the Review Officer's Decision and directed that a different Review Officer re-consider Ms. Nickerson's complaint. Later I will discuss the judge's reasons in more detail. On May 9, 2017, the Supreme Court of Nova Scotia issued its Order.

[23] On January 6, 2017, the Union filed a Notice of Appeal to the Court of Appeal. Ms. Nickerson filed a Notice of Cross-Appeal. The Court heard the matter on May 12, 2017.

2. Issues

[24] The Union's Notice of Appeal lists fifteen grounds or sub-grounds. Its factum reduces these to twelve. I will consolidate them into one: did the reviewing judge misapply the reasonableness standard to the Review Officer's dismissal of Ms. Nickerson's complaint?

[25] Ms. Nickerson's cross-appeal submits that the Union had a duty to accommodate Ms. Nickerson's mental disability, and the appropriate accommodation required the Union to take her grievances to arbitration.

3. Standard of Review

[26] First is this Court's standard to the decision of the reviewing judge.

[27] The reviewing judge must be correct on issues of law which include the selection and application of the standard of review to the decision of the administrative tribunal: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, paras. 43-44; *Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd.*, 2016 NSCA 40, leave to appeal refused March 2, 2017 (S.C.C.), paras. 30-31; *R. v. Nova Scotia (Ombudsman)*, 2017 NSCA 31, para. 21.

[28] In *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, Justice LeBel for the Court summarized the appellate approach:

> [46] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247, Deschamps J. aptly described the process as " 'step[ing] into the shoes' of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision" [emphasis deleted by Justice LeBel]

[29] Next is the reviewing judge's standard to the Review Officer's Decision.

[30] It is settled that reasonableness applies to a decision of the Labour Board that interpreted and applied the *Trade Union Act*: *Egg Films Inc. v. Nova Scotia (Labour Board)*, 2014 NSCA 33, leave to appeal refused [2014] S.C.C.A. No. 242, para. 24, and authorities there cited; *Labourers v. CanMar*, paras. 32-34. See also *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770, paras. 15, 70, 71.

[31] In *Coates v. Nova Scotia (Labour Board)*, 2013 NSCA 52, paras. 39-45, this Court held that a Review Officer's function under s. 56A of the *Trade Union Act* similarly is subject to reasonableness. I note that s. 56A(7) of the *Trade Union Act* signals deference:

> 56A(7) A decision of a review officer under this Section is final and conclusive and not open to question or review.

[32] Reasonableness governs the Review Officer's Decision in this case.

[33] In *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, Justice Moldaver for the majority succinctly explained reasonableness:

> [20] … However, the analysis that follows is based on this Court's existing jurisprudence – and it is designed to bring a measure of predictability and clarity to that framework.
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> …
>
> [32] In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations. … The question that arises, then, is *who gets to decide among these competing reasonable interpretations?*
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> [33] The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision-maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired the *administrative decision maker* – not the courts – to make. …
>
> [38] … Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable – no degree of deference can justify its acceptance. [citations omitted]
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> [Justice Moldaver's emphasis]

[34] We are dealing principally with the Review Officer's findings of fact. The reasonableness standard applies to findings of fact. The test is whether the tribunal's reasons allow the reviewing court to understand why the tribunal made its key findings and whether they are within the range of inferences that are permissible from the evidence before the tribunal. If the answer is yes, then the tribunal's findings stand, and it is immaterial that the reviewing judge might have drawn different inferences had he or she been the trier of fact.

[35] The reviewing judge's perspective is wide-angled, not microscopic. The judge appraises the reasonableness of the "outcome", with reference to the tribunal's overall reasoning path in the context of the entire record. The judge does not isolate and parse each phrase of the tribunal's reasons, and then overturn because the judge would articulate one extract differently.

[36] As authority for those principles, I refer to the following.

[37] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, Justice Abella for the Court said:

> [14] … It is a more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes." (para. 47)
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> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means the courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[38] In *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, Justice Abella for the majority reiterated:

> [54] The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. …

[39] In *Egg Films*, the majority said:

> [30] … Reasonableness isn't the judge's quest for truth with a margin of tolerable error around the judge's ideal outcome. Instead, the judge follows the tribunal's analytical path and decides whether the tribunal's outcome is reasonable. *Law Society of Upper Canada v. Ryan*, [2003] 1 S.C.R. 247, at paras. 50-51.

[40] To similar effect: *Abridean International Inc. v. Bidgood*, 2017 NSCA 65, paras. 35 and 44.

4. First Issue (the Appeal) – Was the Review Officer's Dismissal of the Complaint Reasonable?

[41] I will track the Review Officer's reasoning path.

[42] Mr. Sharp's Decision noted the principle of collective labour relations that the union, not the grievor, controls the dispute resolution process:

> It is critical to understand the nature of the trade union duty of fair representation to review complaints that s. 54A(3) has been breached. When employees decide to have a union represent them, they give the union exclusive authority to represent their interests with regard to the terms and conditions of their employment. That exclusive authority encompasses the power to administer collective agreements, which includes control of the grievance process through to settlement.

[43] This settled principle derives from *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, and *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, and has been applied in many later cases. It was summarized by Justice Cromwell in *Davison v. Nova Scotia Government Employees Union*, 2005 NSCA 51, paras. 68-69:

> [68] … In such matters, the union is generally both the exclusive spokesperson for the employee and the ultimate decision-maker about whether and how a grievance will be pursued. …
>
> [69] The duty of fair representation balances the overall interests of the membership with those of individuals. It is the nature of collective bargaining that what is in the overall best interests of the unit will be contentious and may conflict with the personal interests of some individual members. The union's duty is to fairly represent the interests of all the members of the bargaining unit. Where the interests of individual members must be balanced with those of the bargaining unit as a whole, the union has considerable discretion as to how this should be done. And, as *Gagnon* makes clear, the standard is not perfection. The union is free to exercise its judgment concerning the best interests of the bargaining unit provided that it does so in good faith, objectively and honestly. It must not act arbitrarily, capriciously, in a discriminatory way or with "serious or major" negligence: *Gagnon* at 527-528. What is in the best interests of the bargaining unit is generally a multi-faceted question with no one, right answer. The duty of fair representation is imposed to prevent abuse of the union's exclusive power to represent the members of the unit, not to allow courts to second guess the union's judgment calls.

[44] After quoting Justice Cromwell's comments from *Davison*, the Review Officer stated how, in his view, these principles shape the union's duty of fair representation under s. 54A(3) of the *Trade Union Act*:

> … I am satisfied that the nature of [the] duty of fair representation, as expressed by s. 54A(3), establishes a standard of conduct trade unions and trade union representatives must meet when they represent bargaining unit members. It provides a means for ensuring that trade unions exercise their exclusive authority to represent employees on the basis of employment considerations that are relevant to the bargaining unit as a whole. I am further satisfied that the *Davison* decisions, as well as the Supreme Court of Canada decisions in *Weber* and *Gagnon*, provide principles which help define the scope of the duty of fair representation, namely:
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> - unions, not grievors, control the grievance process;
> - unions must place priority on the interests of the bargaining unit as a whole when they deal with and resolve grievances;
> - the duty of fair representation does not require unions to make correct decisions, rather they must make decisions that are in good faith, objective and honest; and
> - when the interests of the bargaining unit conflict with the interests of an individual member or members, the union must act in the interests of the bargaining unit.

[45] The Review Officer then considered whether the Union's conduct offended the three standards of fair representation in s. 54A(3), *i.e.* that the Union acted in a manner that was "arbitrary, discriminatory or in bad faith". The standard that is critical to the Union's grounds of appeal is "bad faith".

"Arbitrary"

[46] Ms. Nickerson submitted that the Union had inadequately investigated her circumstances. The Review Officer's Decision said:

> Turning first to the Complainant's allegation that the Respondents failed to adequately investigate her situation, I am not satisfied the Board could potentially find that her allegation is valid.
>
> … I am satisfied that the evidence shows that the Union, W, and a number of Union representatives took considerable steps to obtain information relevant to representing the Complainant.

The Decision elaborates with particulars of evidence that I will not reproduce, then finds:

> I am not satisfied that the Board could potentially find that the Respondents were ill-informed when they represented the Complainant in light of the evidence showing the breadth of relevant information they obtained, attempted to obtain, and considered in preparation for arbitration.

[47] Ms. Nickerson submitted that the Union arbitrarily disregarded her wishes. In rejecting this submission, the Review Officer identified the undercurrent of the dispute between Ms. Nickerson and the Union:

> The evidence, as a whole, reflects that the Complainant and her counsel misunderstood the nature of the grievance process. They appear to view the Complainant as a full party within the process, who has the authority to direct the case. This understanding is perhaps best reflected by the following from the Complainant counsel's December 11, 2014 letter to [the Union]:
>
> > [The Union's] actions over the last week have irreparably damaged an already strained relationship with its Member. Its actions are a serious violation of (the Complainant's) human rights and a breach of its duty to its Member. It is incumbent that you step aside now and fund independent counsel for (the Complainant) so that her grievance can proceed to Arbitration. Under no circumstances do you have the authority to settle (the Complainant's) grievance without her consent. I will be copying (the University's counsel) so she is aware of our position on this matter.
>
> …
>
> Since the Union has standing under the collective agreement and represents both the aggrieved employee and the bargaining unit, it exclusively controls how grievances are conducted. As a result, in this situation, the Union had the right to make decisions about how the Harassment and Termination Grievances were to proceed. It also had the right to assess whether a potential settlement adequately addressed the breaches of the collective agreement grievance it alleged. Further, it had the right to withdraw either or both grievances if an acceptable settlement was available, but the aggrieved employee refused to participate in the settlement. In other words, the aggrieved employee does not have the right to force the Union to arbitrate a grievance, particularly when an acceptable settlement is available.

[48] The Review Officer concluded:

> … I am not satisfied that the file evidence potentially permit[s] the Board to find that the Respondents represented her in an arbitrary manner.

[49] This tension over control spanned the grievance process. It culminated in Ms. Nickerson's rejection of what the Review Officer's Decision described as "an acceptable settlement offer when the outcome of arbitration would have been, at best, unclear". It remained the focus of debate during the judicial review before Justice Arnold and in this Court.

"Discriminatory"

[50] The Review Officer found there was no potential for the Board to rule that the Union had discriminated:

> … I am not satisfied that [Ms. Nickerson] has provided sufficient evidence for the Board to potentially find that she was represented differently than other members. Since she has not provided evidence which would permit the Board [to] compare her representation with another bargaining unit member's representation, I am not satisfied that [the] Board would be able to potentially find that she was represented in a discriminatory manner.

[51] The Review Officer considered Ms. Nickerson's individual allegations of discrimination, and found them to be unsupported by the evidence in the Record.

[52] In particular, Ms. Nickerson submitted that only "vindication" by a contested arbitral award would accommodate her disability. To this, the Review Officer's Decision said:

> … The Complainant's counsel responded to W's letter on October 31, 2014. He did not describe any specific accommodations for the Complainant. Rather, he accused the Respondents of "deliberately refusing the form of accommodation (the Complainant) medically requires." He then proceeded to indicate that the only accommodation the Complainant required to accommodate her disability was "to be vindicated". I am not satisfied that the Board could ignore W [the Union's national representative]'s efforts to determine measures which could be taken to help the Complainant participate in the mediation. I am also not satisfied that the Board could require the Respondents to provide an accommodation which was beyond their control. They had no way of guaranteeing that the Complainant would ultimately be "vindicated" if either or both grievances were taken to arbitration.
>
> …
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> I am not satisfied that the Board could find that the Respondents represented the Complainant in a discriminatory manner when they refused to proceed to arbitration even though they had negotiated a comprehensive settlement agreement reinstating her to her pre-dismissal position.

"Bad Faith"

[53] The Review Officer found there was no evidence that the Union represented Ms. Nickerson differently than other members and, consequently,

> I am not satisfied that the Board has been provided with the evidence it needs to potentially find that the Complainant was represented in bad faith.

[54] The Union had requested that Ms. Nickerson be assessed to determine whether she suffered from a "High Conflict Personality Disorder". Ms. Nickerson submitted this was an act of bad faith by the Union. The Review Officer rejected the submission:

> Subsection 54A(3) require[s] the Respondents to adequately inform themselves before representing the Complainant. The evidence, as well as allegations the Complainant has made, show that conflict existed between the Complainant and members of the University administration for a significant period of time. Under those circumstances, I am not satisfied that the Board could potentially find that the Respondents acted in bad faith by seeking to acquire an expert opinion which could either eliminate the Complainant's personality traits as a factor in her relationship with the administration; or provide evidence establishing that the University had a duty to accommodate those traits.

[55] Ms. Nickerson alleged that the Union had exercised bad faith by delaying the progress of the grievance. This point is the focus of both the reviewing judge's ruling and the Union's grounds of appeal to this Court. The Review Officer found that the allegation could not potentially succeed before the Labour Board. His Decision said:

> Over three years elapsed between the date the Complainant was dismissed, and the date when the mediation was scheduled to take place. While that is a troubling length of time, I am not satisfied that the Board could potentially find that the Respondents were solely responsible for that delay. Rather, I am satisfied that the Board could only find that the Complainant also played a significant role in delaying the progress of the Grievances. Since the evidence reflects that the parties were at least jointly responsible for the delay [in] the progress of the Grievances, I am not satisfied that the Board could potentially find that the delay amounted to bad faith representation on the Respondents' part.

Reasonableness of the Review Officer's Decision

[56] The Review Officer's key findings, on the delay issue before this Court, appear in the following extracts:

> It would have been in the Respondents' and the Complainants' best interests to cooperate with respect to the assembly and use of evidence. However, it is clear from the evidence that **there was no such cooperative relationship present in this situation.** Rather, there were disputes over:
>
> - access to information;
> - which Union officials were permitted to have access to information after it had been gathered;
> - the information which the Union should have demanded from the University;
> - the adequacy of evidence which had been gathered; and
> - the use/disclosure of medical evidence.
>
> …
>
> The Respondents had control over how the Grievances were to proceed, and how they were to be presented to either a mediator or an arbitrator. While they had no obligation to seek the Complainant's input or approval over the documentary aspects of the case, there is no dispute that they provided her with advance access to documents and invited her comments. …
>
> …
>
> As I have already noted, the evidence shows that **the Complainant/Respondent relationship was strained throughout the representation period, and that the strain interfered with the Union's collection of evidence and the ability to schedule case related dates. …**
>
> Other evidence reflects that **the evidentiary disputes affected the overall progress of the case**. …
>
> The Board could not ignore the evidence that **disagreements between the Complainant and Respondents negatively affected the progress of the Grievances**. Therefore, I am satisfied that the Board could only potentially find that the Complainant was at least partially responsible for the amount of time it took for the grievances to progress to mediation. …
>
> [emphasis added]

[57] There was ample evidence from which the Review Officer could reasonably infer that the tension over control disturbed the momentum of these grievances. The following draws from the Record before the Review Officer:

- The Union held the view that the Termination Grievance had a reasonable chance of success, while the Harassment Grievance likely would fail in arbitration, but the Harassment Grievance might afford leverage to achieve a favourable settlement of both grievances. Ms. Nickerson

vehemently disagreed. She wanted "vindication" for the employer's harassment, and insisted that only an arbitrator's award that she had been harassed would offer vindication (see above, para. 13). This schism of strategy vexed the administration of the grievances.

- Ms. Nickerson communicated with the Union through correspondence from her counsel, Mr. Mason. The Record includes letters from Mr. Mason to the Union: (1) directing that Ms. Nickerson be vindicated by arbitration, and objecting to the Union's attempts to settle and mediate, (2) objecting to the Union's proposed strategy, (3) objecting that the Union "blindly soldiered on" without a medical opinion (Dr. Rosenberg's was written on June 30, 2014), (4) objecting to the Union's approach to gathering evidence, such as by contacting Ms. Nickerson's physicians other than by correspondence, (5) objecting to the examination of certain medical evidence by some Union representatives (including the Union's lawyer, Ms. Coen), and (6) objecting to the short time frame for reviewing the employer's submission to the mediator. Mr. Mason's letters to the Union usually warned that the Union's failure to follow his directions would violate the Union's duty of fair representation.

- Ms. Nickerson and her counsel objected to the Union's suggested usage of mental disability at an arbitration hearing. The Union wished to cite Ms. Nickerson's depressive condition as a mitigating factor for discharge or discipline in the Termination Grievance. The Union needed to disclose the pertinent medical information to the University before the arbitration. Accordingly, the Union required Ms. Nickerson's concurrence on the usage of medical evidence for her mental disability. After exchanges on the topic, it was not until on October 30, 2014 that Ms. Nickerson's counsel advised the Union that Ms. Nickerson would agree to cite mental disability as support for accommodation, but not as a mitigating factor for discharge or discipline. Clarification of this point was essential before the Union could begin an arbitration hearing.

[58] On the issue of control, the Union's position was correct in law. In collective labour relations, the "exclusive" bargaining agent, not the grievor, controls the enforcement of the collective agreement, as explained by the authorities quoted earlier (para. 43). The Review Officer determined, reasonably from my review of the Record, that Ms. Nickerson's efforts to command the strategy "reflect that the Complainant and her counsel misunderstood the nature of the grievance process" (see passages quoted above, paras. 42, 44 and 47).

[59] As noted earlier, the Review Officer's findings of fact are subject to review for reasonableness. The test is whether the tribunal's "reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland Nurses*, paras. 15-16, and see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, paras. 47-48).

[60] The Review Officer's reasons clearly allow the Court to understand why the Review Officer made his findings. The findings are permissible inferences from the evidence on this record. The Review Officer's findings are reasonable.

The Reviewing Judge's Decision

[61] The reviewing judge did not see it that way.

[62] The judge focused on the "bad faith" component of s. 54A(3). Justice Arnold's Decision concluded:

> [79] The Review Officer's determination of the facts regarding the delay in this case was not reasonable. Ms. Nickerson did not play a "significant role" in the delay as stated by the Reviewing Officer. In fact, she did not play much of any role in the delay. The only conclusion possible on the Record is that delay was caused by the inattention and lack of follow up by the Union.
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> …
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> [88] Based on the Record, the Review Officer's decision regarding a lack of bad faith was based on unreasonable factual findings. Therefore, it cannot be said that his decision regarding the lack of bad faith, and the breach of the Union's duty of fair representation, fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[63] In my respectful view, the judge erred in law in three respects: his characterization of the Review Officer's reasoning, his use of a later overturned authority for an interventionist approach to factual findings, and his application of the reasonableness standard.

[64] ***Characterization of Review Officer's Reasoning:*** The judge (paras. 42 and 76) said the Review Officer had considered whether Ms. Nickerson "contributed to the delay by refusing to provide the Union with her medical information", and "[t]he Review Officer found that Ms. Nickerson was partly to blame for the delay because she obstructed the Union's efforts to obtain her medical information". The

judge then found that Ms. Nickerson had done nothing blameworthy, such as refusing to produce medical evidence.

[65] With respect, the judge missed the critical nuance in the Review Officer's reasoning. The Review Officer did not "blame" Ms. Nickerson or find that she "refused" to produce medical evidence. Rather, the Review Officer found that "the relationship was strained", and "the strain interfered with the Union's collection of evidence and the ability to schedule case related dates". The strain derived from the tension over control, and that tension stemmed from Ms. Nickerson's misapprehension that she, not the Union, controlled the process. The Review Officer did not fault Ms. Nickerson. He just said that delay flowing from her misapprehension was not caused by the Union's "bad faith".

[66] ***Reliance on Millett:*** As authority for his approach to the reasonableness review of a tribunal's factual findings, the judge (para. 45) relied on a lengthy passage from Justice Moir's reasons in *Millett v. Nova Scotia (Minister of Agriculture)*, 2015 NSSC 21. After the release of Justice Arnold's decision in Ms. Nickerson's case, this Court allowed an appeal from Justice Moir's ruling: *sub nom. Nova Scotia (Agriculture) v. Rocky Top Farm*, 2017 NSCA 2. Justice Saunders' reasons for the Court (*e.g.* paras. 52 and 90) disagreed with Justice Moir's aggressive application of the reasonableness standard.

[67] ***Application of the Reasonableness Standard:*** The judge did not address all the items of evidence that supported the Review Officer's key inferences – *i.e.* the tug-of-war for control, leading to the "strained" relationship and its consequential delay – then determine whether the Review Officer's findings were permissible inferences from that evidence. Instead, the judge plotted his own analytical path – *i.e.* whether or not Ms. Nickerson should be blamed for refusing to produce medical evidence.

[68] The judge independently sifted the evidence for materiality to appraise his line of reasoning, drew his own inferences and, on occasion, made his own assumption of fact without any evidence. For example, the judge (paras. 53-54, 56-57) made assumptions about the contents of correspondence that was not in evidence, and accepted facts, without direct evidence, alleged in the submissions of Ms. Nickerson's counsel. These related to what the judge considered to be the critical issue – whether Ms. Nickerson refused to produce medical evidence. At the end, when the judge's outcome differed from the Review Officer's, the judge termed the Review Officer's finding "unreasonable".

[69] The application of the reasonableness standard does not embody such *de novo* fact-finding by the reviewing court.

[70] The judge's factual excursion took him to unfamiliar waters.

- He said:

> [48] No medical records were ever requested by the Union relating to the March 23, 2011 grievance. …
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> The Record shows that requests were made (Appeal Book, pp. 205, 208, 211, 245, 261-2, 268, 271).

- The judge also stated (para. 66) that the Union received Ms. Nickerson's medical file on May 29, 2013 and did "nothing" with that information until May 28, 2014.

The Record shows steps taken by the Union during that interval (Appeal Book, pp. 205, 208, 222, 276). In particular: (1) the arbitration had been scheduled to begin in late July 2103; (2) the Union suggested that a psychologist assess whether Ms. Nickerson had a medical condition that should be considered by the arbitrator as a mitigating factor; (3) the arbitration was adjourned to allow the psychologist time for his report, which was received in October 2013; (4) the Union then proposed to meet Ms. Nickerson on October 11, 2013; (5) the meeting, with Ms. Nickerson and her counsel, did not occur until February 2014; (7) Ms. Nickerson and her counsel then decided to have Dr. Edwin Rosenberg, a psychiatrist, prepare another report, which was written on June 30, 2014. Dr. Rosenberg's report is discussed below (paras. 74-77).

Conclusion

[71] In my respectful view, the judge erred in law in the application of the reasonableness standard. I would allow the Union's appeal.

5. Second Issue (the Cross-Appeal) – Was Arbitration a Required Accommodation?

[72] Ms. Nickerson submits that human rights legislation gives her a *quasi*-constitutional right to be accommodated for her mental disability and, in this case, the only reasonable accommodation was for the Union to take her grievance to arbitration so she could achieve "vindication".

[73] The Review Officer rejected Ms. Nickerson's factual premise. He found that the evidence did not support Ms. Nickerson's assumption that the method of proceeding – *i.e.* arbitration, whatever the risk of loss, *versus* settlement – was critical to accommodate Ms. Nickerson's mental disability. This meant he did not find it necessary to address the legal issue – *i.e.* the interplay of a union's duty to accommodate (if it exists) under human rights legislation and the union's control of the grievance/arbitration process under principles of labour law.

[74] To support her submission that arbitration was essential, Ms. Nickerson had tendered reports of Dr. Rosenberg, a psychiatrist, and Dr. McGrath, Ms. Nickerson's family physician. Dr. Rosenberg's report stated the evidence "does not support the employer's position", recited his "assumption" that the University's position was "tenuous", and opined that "[v]indication will be of prime importance in the relief of any present depressive symptomatology". Dr. McGrath's report explicitly assumed that the grievor is personally represented in arbitration while mediation "shuts her out".

[75] The Review Officer was unimpressed. Dr. Rosenberg's opinion of the Grievances' likely success was legal, outside Dr. Rosenberg's expertise, and at best questionable. Dr. McGrath's opinion of the processes of mediation and arbitration was outside her expertise, and was incorrect. The physicians' opinions that derived from their misplaced assumptions would not be probative before the Labour Board. The Review Officer Decision said:

> … I am not satisfied that those reports provide sufficient evidence to potentially permit the Board to find that the way the Complainant's grievances proceeded would directly impact on either of her disabilities. Consequently, even if I were to agree with the Complainant about how the *Human Rights Act* interplays with s. 54A(3) (and I make no comment to that effect), I am not satisfied that the

> Complainant has provided sufficient evidence to permit the Board to find that the modified test she has proposed applies in this situation.
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> …
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> Since I am not satisfied that the Board could potentially rely on the legal aspects of either Dr. McGrath's or Dr. Rosenberg's opinions, I am not satisfied that the Board could rely on either opinion to find that the way that her grievances proceeded would directly impact her physical or mental impairments. As such, I am not satisfied that the Board could potentially find that the evidentiary basis has been established to impose an undue hardship standard of representation on the Respondents, even if I were to agree that the *Human Rights Act* has application to s. 54A(3) complaints.

[76] The Review Officer noted there was no basis to find that Ms. Nickerson would be "vindicated", and thus accommodated, by losing an acrimonious arbitration:

> The opinions Dr. Rosenberg expressed about the Complainant were medical/legal opinions, not purely medical opinions. For example, his opinion that vindication would benefit the Complainant's mental health was a medical opinion. However, his opinion that the University's basis for dismissing the Complainant was "tenuous" was a legal opinion. Similarly, his opinion that the Complainant could "refute" the University's non-Facebook disciplinary allegations was also a legal opinion. I am not satisfied that the Board could escape the inference that Dr. Rosenberg's understanding of the Complainant's legal position suggested that her Grievances would be upheld at arbitration.
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> …
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> … He [Ms. Nickerson's counsel] then proceeded to indicate that the only accommodation the Complainant required to accommodate her disability was "to be vindicated". I am not satisfied that the Board could ignore [the Union's representative]'s efforts to determine measures which could be taken to help the Complainant participate in the mediation. I also am not satisfied that the Board could require the Respondents to provide an accommodation which was beyond their control. They had no way of guaranteeing that the Complainant would ultimately be "vindicated" if either or both Grievances were taken to arbitration.

[77] Accordingly, the Union's negotiation of a favourable settlement was in play as an option to vindicate Ms. Nickerson's position. The Review Officer said:

> With respect to taking adequate steps to determine if an offer to settle was in the Complainant's best interests, I am not satisfied that the Board could potentially require the Respondents to ignore an acceptable settlement offer when the outcome of arbitration would have been, at best, unclear. While Dr. Rosenberg felt that "vindication" would be the best way for the Complainant's mental

> disability to be addressed, the Respondents had no way to guarantee that an arbitrator would provide that vindication. On the other hand, the draft settlement agreement which the Respondents negotiated: [summary of terms omitted].
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> …
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> I am not satisfied that the Board could find that the Respondents represented the Complainant in a discriminatory manner when they refused to proceed to arbitration even though they had negotiated a comprehensive settlement reinstating her to her pre-dismissal position.

[78] The reviewing judge rejected Ms. Nickerson's submission that the Union had a duty to accommodate which obligated the Union to take the grievances to arbitration. Justice Arnold said:

> [93] The Review Officer reasonably determined that proceeding through mediation as opposed to arbitration would not have shut Ms. Nickerson out as a mediated settlement would have required Ms. Nickerson's personal agreement and compliance.
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> …
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> [96] The Review Officer's conclusion that the Labour Board would not be able to rely on either Dr. McGrath's or Dr. Rosenberg's legal opinions in relation to certain issues was within the range of reasonable , acceptable outcomes that are defensible based on the facts and the law. …
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> …
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> [110] The Union has a statutory duty under s. 54A(3) of the *Trade Union Act* to fairly represent Ms. Nickerson. The Union also has a mandate in accordance with the *Trade Union Act* to act in the best interests of the Union and to foster labour relations between the Union and the employer (see, for instance, the Preamble). If a matter can be settled reasonably by the Union, without the need for arbitration or mediation, thereby avoiding unnecessary financial expense to the Union and the inevitable acrimony that would arise through litigation between the Union and the employer, then settlement must be pursued by the Union. Requiring the Union to accede to Ms. Nickerson's demands regarding the process by taking the matter to arbitration or mediation, in order to accommodate her desire to testify, when the matter could be settled, would fly in the face of well-established principles of labour law. Settlements achieved without the need for arbitration or mediation are commonplace and vitally important to the well-being of our labour law system.

[79] Ms. Nickerson's factum for her cross-appeal poses the issue this way:

> 1. This appeal concerns a unionized employee's quasi-constitutional right to be accommodated vs. the interests of the bargaining unit. Are unions exempt from

> accommodating disabled employees simply by virtue of the general principle that they must act in the best interest of the union as a whole?

[80] In his submissions to this Court, Ms. Nickerson's counsel reiterated that, as foretold by Dr. Rosenberg, only "vindication" by an arbitral award would accommodate Ms. Nickerson's mental disability.

[81] The problem with this is that Dr. Rosenberg either assumed or concluded that any arbitration would succeed. Consequently, just convening an arbitration hearing equated to "vindication".

[82] From a similarly optimistic perspective, at the appeal hearing Ms. Nickerson's counsel said that Ms. Nickerson's Plan A was arbitration, and she had no Plan B.

[83] There is no satisfactory answer to the question – where is the vindication if she loses the arbitration? Ms. Nickerson's presentation avoids that inconvenient query.

[84] The Review Officer addressed the question. He reasonably discounted the medical opinions based on their flawed assumptions and wishful legal opinion. Given the real risk that Ms. Nickerson might lose in arbitration, there was no basis to say that arbitration was the only viable option for either Ms. Nickerson or the bargaining unit.

[85] The Union's duty of fair representation is not a voucher of success with an arbitrator. For Ms. Nickerson, a stressful and unsuccessful arbitration was a serious risk. On the other hand, the Settlement Agreement was premised on Ms. Nickerson's approval and involvement and would have reinstated her with compensation, her seniority and removal of the disciplinary letter. The Union balanced the risk and opportunity, and concluded that the settlement would be more beneficial to both Ms. Nickerson and the bargaining unit as a whole, than the risk of outright loss. Undertaking that strategic balance is the function of an exclusive bargaining agent in the enforcement of the collective agreement.

[86] In the Review Officer's view, there was no potential that the Labour Board would say the Union's conclusion breached its duty of fair representation under s. 54A(3).

[87] I understand how the Review Officer reached his conclusion, and his conclusion occupies the range of permissible outcomes. The Review Officer's view was reasonable. I would dismiss the cross-appeal.

6. Conclusion

[88] I would allow the Union's appeal, dismiss Ms. Nickerson's cross-appeal, overturn the Supreme Court of Nova Scotia's Order of May 9, 2017 and re-instate the Review Officer's Decision of November 13, 2015.

[89] The reviewing judge's Order left costs to be determined. Any costs paid by the Union for the proceeding in the Supreme Court of Nova Scotia should be repaid to the Union. The Union did not request costs of its appeal, but sought $800 for Ms. Nickerson's cross-appeal. I would order that Ms. Nickerson pay to the Union appeal costs of $800, all-inclusive.

Fichaud, J.A.

Concurred: Hamilton, J.A.

Van den Eynden, J.A.