C.A. No. 02794

NOVA SCOTIA COURT OF APPEAL

Jones, Freeman and Pugsley, JJ.A.

Cite as: Nova Scotia Civil Service Commission v. Nova Scotia Government Employees Union, 1993 NSCA 111

B E T W E E N:

THE NOVA SCOTIA CIVIL SERVICE COMMISSION **appellant** **- and -** **THE NOVA SCOTIA GOVERNMENT EMPLOYEES UNION, MARTIN WEXLER and R. LORNE MacDOUGALL, Q.C.** **respondents**	**Marian F.H. Tyson for appellant** **Raymond F. Larkin, Q.C. for respondents** **Appeal Heard: May 17, l993** **Judgment Delivered: June 4, l993**

THE COURT: Appeal dismissed from dismissal of **certiorari** application to quash arbitrator's award per reasons for judgment of Freeman, J.A.; Jones and Pugsley, JJ.A. concurring.

FREEMAN, J.A.:

This is an appeal from the dismissal of an application for **certiorari** brought by the appellant Nova Scotia Civil Service Commission to quash the award of an adjudicator who found the employer had acted unreasonably in not granting an employee a year's leave of absence.

Martin Wexler, a social worker at the Nova Scotia Hospital and a member of the respondent Nova Scotia Government Employees Union, applied January 25, 1990 for a one-year leave of absence without pay. He required the time to develop community living centres for psychiatrically disabled individuals as a private business.

When his application was denied, the union filed a grievance on his behalf, alleging that the employer had applied management rights under Article 6 of the collective agreement in an inconsistent and arbitrary manner in denying the one-year leave of absence pursuant to Article 19.01. Mr. Wexler resigned from his employment June 1, 1990.

Lorne MacDougall, Q.C., was appointed sole adjudicator with the consent of both parties, as provided for under the collective agreement and the **Civil Service Collective Bargaining Act** R.S.N.S. 1989 c. 71. The parties agreed that he sat as a statutory tribunal subject to a privative clause. By a decision filed April 23, 1991 Mr. MacDougall upheld the grievance and held that "the Grievor shall be able to return to work after a reasonable grace period satisfactory to both the Employer and the Grievor."

Mr. Justice MacAdam of the Supreme Court of Nova Scotia dismissed the employer's application for **certiorari** and the employer appealed. Preliminary issues including timeliness and the effect of Mr. Wexler's resignation on the grievance are not before this court. The issues on this appeal stated by the appellant are:

> "18. (1) (a) Did the learned chambers judge err in finding that Article 19.01(a) of the Collective Agreement includes an implied term which would require the Employer not to unreasonably refuse a request for leave of absence made pursuant to that provision?
>
> (b) Did the learned trial judge err in failing to find that the decision of the arbitrator amounted to an amendment of

the Collective Agreement contrary to s. 37(2) of the **Civil Service Collective Bargaining Act?**

(2) If there is an implied term of reasonable contract administration in Article 19.01(a) of the Collective Agreement, which does not constitute an amendment of the Collective agreement,

did the learned trial judge err in refusing an order in the nature of certiorari to the Adjudicator by:

(i) failing to apply the proper standard of review to the decision of the adjudicator;

(ii) failing to decide that the decision of the Adjudicator was patently unreasonable;

(iii) failing to find that the Adjudicator wrongly applied a 'correctness' test in that he wrongly failed to give appropriate deference to the Employer's decision and wrongly substituted his decision for that of the Employer."

Article 19.01 of the collective agreement provides as follows:

"19.01 Special leave

The employer, in any one year, may grant to an employee:

(a) special leave without pay, for such a period as it deems circumstances warrant;

(b) special leave with pay for reasons other than those covered under 19.02 to 19.10 inclusive, for such period as it deems circumstances warrant."

Articles 19.02 to 19.16, provide for mandatory leave in a number of circumstances, including bereavement and maternity, and for other leaves, for purposes such as education, when the employer is bound to act reasonably by balancing its own requirements against those of the employee. The employer argues that these other provisions, with their express limitations, must be considered in interpreting article 19.01, in which there is no expression of any limitation on the employer's discretion. Because of this, it argues, the employer has an absolute discretion under article 19.01 which may be exercised arbitrarily and without stating reasons.

This position is buttressed by Article 6.01, which deals with management rights. It states that "all the functions, rights, power and authority which the employer has not specifically abridged, deleted or

modified by this agreement are recognized by the Union as being retained by the employer."

The union takes the position that this argument is not open to the employer on this appeal because it agreed in submissions to the adjudicator and Justice MacAdam that an employer is bound to act reasonably, and therefore did not raise the issue in the two previous hearings. While the employer acknowledged there was a trend in adjudication decisions to find employers must be reasonable, I am not persuaded it is estopped from raising the issue. The adjudicator made a finding on the question relevant to his jurisdiction.

The employer's argument is that if article 19.01 does not bind an employer to act reasonably, the adjudicator cannot impose a standard of reasonableness without amending the collective agreement. It cites s. 36(2) of the **Civil Service Collective Bargaining Act** which provides:

> "36(2) No adjudicator or adjudication board shall, in respect of any grievance, render any decision thereof the effect of which would be to require the amendment of a collective agreement."

This is a limitation on the jurisdiction of the adjudicator; the standard of review is correctness, not patent unreasonableness.

In a frequently quoted passage in **Paccar of Canada Ltd. v. Canadian Association of Industrial Mechanical and Allied Workers, Local 14** (1989), 62 D.L.R. (4th) 437 LaForest J. said:

> "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."

Paccar followed **U.E.S. Local 298 v. Bibeault,** [1988] 2 S.C.R. 1048 in which Beetz J. expanded on the issue of curial deference. His conclusions were recently affirmed by the Supreme Court of Canada in **Attorney General (Can.) v. Public Service Alliance of Canada (PSAC)** 93 CLLC [14,022] 12,124 at 12,130, as follows:

> "He set out the two instances in which an administrative tribunal will have exceeded its jurisdiction in this way, at p. 1086:
>
> 1. if the question of law at issue is within the tribunal's jurisdiction, it will only

> exceed its jurisdiction if it errs in a patently unreasonable manner, a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
>
> 2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review."

Thus there are two standards to be considered in determining whether the decision of an arbitrator is subject to judicial review: "correctness" with respect to the determination of jurisdiction, and "patent unreasonableness" with respect to the exercise of that jurisdiction.

In the present appeal the first ground, the issue of the employer's duty to exercise its discretion reasonably under Article 19.01, goes to the jurisdiction of the adjudicator. It must be settled according to the standard of correctness.

Article 26.01 gives the right to grieve to "an employee who feels that he has been treated unjustly or considers himself aggrieved by any action or lack of action by the employer."

Thus an employee has the right to grieve the refusal of special leave under Article 19.01. The employee would have no basis for feeling unjustly treated or aggrieved if the employer's right to refuse leave under article 19.01 were absolute and arbitrary. Therefore it is necessary to infer, from reading the collective agreement as a whole, that article 19.01 must include an implied term that the employer's right to refuse leave must be exercised reasonably, or justly, and not arbitrarily. The arbitrator committed no error of law in so finding.

In **Nova Scotia Government Employees Association v. Nova Scotia Civil Service Commission** (1977), 24 N.S.R. (2d) 364, the Appeal Division held:

> "An employee may take a grievance if he 'feels he has been treated unjustly or considers himself aggrieved by any action or lack of action by the Employer' (Art. 26.01). This, in my opinion, imports a standard of 'just treatment' for arbitration, similar to the standard of 'just and sufficient cause' for dismissal under Art. 24.01, a standard which has had to be applied in hundreds of labour arbitrations. The management rights clauses (Arts. 6.01 and 6.03) preserving management's prerogative functions must be read as protecting their just exercise from scrutiny, but not 'unjust' action."

The union cited the following Ontario cases in support of the right of arbitrators to imply a duty

of reasonableness in the exercise of rights under a collective agreement: **Re Council of Printing Industries (1983)**, 149 D.L.R. (3d) 53 (C.A.); **Wardair v. Canadian Air Line Flight Attendants** (1988), 47 D.L.R. (4th) 663 (D.C.); **Municipality of Metropolitan Toronto v. CUPE, Local 43** (1990), 69 D.L.R. (4th) 268 (C.A.).

I would therefore find against the employer on the first ground of appeal; the adjudicator met the standard of correctness in determining, in effect, that there was an implied term in article 19.01 that the employer must act reasonably; such a finding interprets the collective agreement but does not amend it.

Adjudicator MacDougall found that the union had the burden of proving that leave had been refused unreasonably. His determination that the union had discharged that burden was a question of fact within the arbitrator's jurisdiction which is subject to review only if the adjudicator has made a patently unreasonable error in the exercise of his function.

As expressed by Justice MacAdam:

> "Although, as noted by Adjudicator Outhouse in the Civil Service Commission and Nova Scotia Government Employees' Union (Pamela Mulvaney) the burden of proof rested on the Union to establish that the discretion was not exercised unreasonably and did not rest on the Employer to affirmatively establish that the discretion was exercised reasonably, the determination of whether the onus has been met is for the Adjudicator and not for this court unless there was no reasonable basis for the Adjudicator's decision in the first place."

A distinction must be observed between the standard to be applied by an adjudicator in considering a grievance involving the exercise of an employer's discretion, and the standard to be applied by superior courts invited to review the award of the adjudicator. Adjudicator Outhouse considered the former in the **Mulvaney** decision referred to by Justice MacAdam and cited in this appeal by the employer. Adjudicator Outhouse was dealing with a grievance from a refusal by the employer to grant an educational leave under either Article 19.10 or Article 19.14, both of which require the employer's discretion to be exercised reasonably:

> "Ultimately, it is for the adjudicator to determine whether or not education leave has unreasonably been denied; however, in making that determination, the adjudicator must have regard to the terms of the agreement and defer to the Employer's judgment to the extent required therein. Hence, where an agreement confers a discretionary decision-making authority on an employer, an adjudicator should only

> interfere with the exercise of that discretion where the employer has misconducted itself in a procedural sense or has made a decision which is patently unreasonable."

As will become apparent below, and with respect, the jurisprudence of judicial review has given the term "patent unreasonableness" a technical meaning related to curial deference. It does not apply in this sense in the first instance when an adjudicator is required to interpret a collective agreement as it affects a decision by an employer. Use of the word "patently" in senses other than the technical one can lead to confusion. Fortunately there is no shortage of synonyms.

Decisions of employers are protected by the burden upon the grievor, usually the union, to prove them unreasonable, not by the higher standard of "patent unreasonableness" which imports a test of irrationality which a grievor need not meet. Adjudicator Outhouse later in the same decision stated and applied a correct test, imposing on the union the burden of proving, on a balance of probabilities, that the employer's decision was unreasonably arrived at or obviously wrong. If a union is able to discharge the burden of proving that the grieved decision is merely unreasonable, one that a reasonable person possessed of the facts and exercising common sense would not reach, an adjudicator owes no further duty of deference to the employer.

It is the award of the adjudicator that is protected from judicial review by the higher standard of patent unreasonableness, as that concept has been developed and defined by the jurisprudence.

As recently as March 25, 1993, Cory J., writing for the majority of the Supreme Court of Canada in the **PSAC** case, provided guidance on the use of the concept. Under the heading "Why Should There be Deferential Treatment of This Board by the Courts?" He stated at p. 12,132:

> "There are a number of reasons why the decisions of the Board made within its jurisdiction should be treated with deference by the court. First, Parliament in the Act creating the Board has by the privative clause indicated that the decision of the Board is to be final. Secondly, recognition must be given to the fact that the Board is composed of experts who are representative of both labour and management. They are aware of the intricacy of labour relations and the delicate balance that must be preserved between the parties for the benefit of society. These experts will have earned by their merit the confidence of the parties. Each time the court interferes with a decision of such a tribunal confidence is lost not only by the parties which must appear before the Board but by the community at large. Further, one of the greatest advantages of the Board is the speed in which it can hold a hearing and render a decision. If courts were to interfere with decisions of the board on a routine basis,

> victory would always go to the party better able to afford the delay and fund the endless litigation. The court system itself would suffer unacceptable delays resulting from the increased case load if it were to attempt to undertake a routine review.
>
> None of this is to say that some form of review is not salutary and necessary. Certainly, the courts are eminently well suited for determining whether the Board has exceeded the jurisdiction which is granted to it by its enabling statute. Further, the courts are in the best position to determine whether there has been such an error in the procedure followed by it that there has been a denial of natural justice which would result in a loss of jurisdiction by the tribunal. As well, all the parties have a right to be protected from a decision that is patently unreasonable. Beyond that the courts need not and should not go. A board which is created and protected by a privative clause is the manifestation of the will of Parliament to create a mechanism that provides a speedy and final means of achieving the goal of fair resolution of labour management disputes. To serve its purpose these decisions must as often as possible be final. If the courts were to refuse to defer to the decisions of the Board, they would negate both the very purpose of the Act and its express provisions."

While Cory J. was referring specifically to the Public Service Staff Relations Board, his reasoning applies, subject to any necessary modifications, to all statutory tribunals, federal or provincial, including a single adjudicator as in the present appeal. The standards applicable to consensual arbitrators were recently considered by Mr. Justice Hallett of this court in his unreported decision in **Canadian Postmasters and Assistants Association v. Canada Post Corporation** delivered April 2, 1993.

Mr. Justice Cory's next heading was "What Constitutes a 'Patently Unreasonable' Decision?"

> "It is said that it is difficult to know what 'patently unreasonable' means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary 'patently', an adverb, is defined as 'openly, evidently, clearly'. 'Unreasonable' is defined as 'not having the faculty of reason, irrational, not acting in accordance with reason or good sense.' Thus, based on the dictionary definition of the words 'patently unreasonable,' it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test. "

He referred to the passage from **Paccar** cited above and concluded:

> "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."

The remaining grounds to be determined in the present appeal are whether Justice MacAdam erred in failing to apply the proper standard of review, failing to decide that the adjudicator's decision was patently unreasonable, and failing to find that the adjudicator wrongly applied a correctness test and wrongly failed to give appropriate deference to the employer's decision.

Adjudicator MacDougall extensively reviewed the facts and the submissions of counsel. He expressed a satisfactory test: "that the union has the burden of demonstrating on a balance of probabilities that the employer's decision to deny the application was unreasonable in having been arrived at in an improper manner, or that it was patently wrong." After a further summary of factors he considered relevant he concluded:

> " It is my opinion that Mr. Higgins in all the circumstances failed to exercise the discretion herein reasonably and in light of all relevant factors. On the whole he failed to balance the interests of the Grievor with those of the Employer despite the balanced report of Mrs. Milne and improperly denied the requested leave of absence. There was practically no evidence to indicate that by granting the leave that there would be any appreciable disruption in the operation of the Department concerned or in its efficiency. The Grievance therefore succeeds."

Justice MacAdam concluded as follows:

> "Although (Adjudicator) MacDougall obviously formed the opinion that the Employer had made an incorrect decision, his award, as noted at p. 55 and referred to earlier, is based on his assessment that Mr. Higgins [the official who refused the leave of absence on behalf of the employer] had failed to exercise the discretion reasonably and in light of all relevant facts. In addition, he found Mr. Higgins had failed to balance the interest of the Grievor with those of the Employer.
>
> Like Adjudicator Outhouse and realizing the limitations in having access only to submissions and a transcript, and not seeing and hearing the witnesses, I may very well have reached a different conclusion as to whether Mr. Higgins had been reasonable in the exercise of his discretion. However, it is equally clear that his decision, in all the circumstances, was not 'patently unreasonable' nor was his award 'a fraud upon the law, a flagrant injustice' or a patently unreasonable error. The application is therefore dismissed."

In my opinion the award of Adjudicator MacDougall was not patently unreasonable, and Justice MacAdam committed no reversible error in so finding. I would dismiss the appeal.

Freeman, J.A.

Concurred in: Jones, J.A.

Pugsley, J.A.

C.A. No. 02794

NOVA SCOTIA COURT OF APPEAL

B E T W E E N:

THE NOVA SCOTIA CIVIL SERVICE COMMISSION	)	**REASONS FOR**
	)	
	)	**JUDGMENT BY:**
- and -	)	
	)	**FREEMAN, J.A.**
THE NOVA SCOTIA GOVERNMENT EMPLOYEES UNION, MARTIN WEXLER and R. LORNE MacDOUGALIQ.C.	)	