IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia Government and General Employees Union v. Capital District Health Authority, 2008 NSSC 7

Date: 20080110
Docket: S.H. No. 270615
Registry: Halifax

In the Matter of: The *Arbitration Act*, R.S.N.S., 1989, c. 19

- and -

In the Matter of: An Application by the Nova Scotia Government and General Employees Union for an Order to quash and set aside a portion of the Arbitration Award of Peter Lederman dated July 14, 2006.

Between:

Nova Scotia Government and General Employees Union

Applicant

v.

Capital District Health Authority

Respondent

D E C I S I O N

Judge: The Honourable Justice Gerald R P Moir

Heard: 8 February 2007 at Halifax

Counsel: Mr. Gordon N Forsyth and Ms. Heather L Totton for the applicant
Ms. Kenda L Murphy for the respondent

Moir, J.:

Introduction

[1] The Nova Scotia Government and General Employees Union sought arbitration of the rates of pay for what it considered to be two new or substantially altered job classifications. The Capital District Health Authority objected to arbitration on the ground that the issue must be dealt with as a grievance. The learned arbitrator, Mr. Peter Lederman QC, ruled that there was no need to follow the grievance procedures and that he could determine the issue on the merits. This ruling was made under an agreement that the arbitrator would provide a preliminary ruling based on admitted documents.

[2] The learned arbitrator went on to determine whether the collective agreement allows him to set rates of pay for the new or substantially altered classifications. He found that one of the classifications was not new, but was "an existing classification with an existing pay rate". The union takes issue with this and says the arbitrator went beyond his mandate for a preliminary ruling.

[3] The union applies for a review of the decision on whether the classifications were new. It does so on two bases: the collective agreement could not reasonably bear the interpretation the arbitrator adopted, and the arbitrator breached procedural fairness by determining whether the classifications were new without giving the parties full opportunity to present evidence relevant to that issue and make submissions on it.

[4] (The parties proceeded with a grievance. This decision may be academic but the parties pressed for it, and I make no determination of the mootness issue.)

The Preliminary Arbitration

[5] The employees are paramedics and nurses who provide medical care on helicopters and other aircraft for patients being transferred into Halifax. They worked for Canadian Helicopters Limited until 2003 when they accepted transfers to the Capital District Health Authority.

[6] The health authority created a new classification for the paramedics under collective agreements it had with the union. They were classified as "Critical Care

Flight Paramedic". The flight nurses, on the other hand, were placed in an existing classification of "Staff Nurse". The paramedics are under a collective agreement for the "Healthcare Bargaining Unit", and the nurses are under an agreement for the "Nursing Bargaining Unit". There is no difference between the agreements of relevance on this review.

[7] For about two years, the authority and the union negotiated rates of pay for the transferred employees. In the fall of 2005, the union requested arbitration under Article 41.01(b) of the collective agreements. Article 41.01 is titled "Classification and Salary Adjustments". Article 41.01(a) requires the authority and the union to negotiate the rate of pay for "a new or substantially altered classification". Article 41.01(b) provides for arbitration:

> If the parties are unable to agree on the rate of pay for the new or substantially altered classification, the Union may refer the matter to a single Arbitrator who shall determine the new rate of pay.

[8] Despite protests on behalf of the authority (e.g., "I have never before heard the Union express the position . . . that a matter can be sent to arbitration . . . without the need to file a grievance ..."), the Minister of Labour appointed Mr. Lederman. Eventually, the authority submitted to Mr. Lederman that he was without jurisdiction because there was no grievance and requested a preliminary ruling. The entire text of the 19 May 2006 letter on behalf of the authority reads as follows:

> We represent the Employer in the above matter.
>
> In earlier correspondence relating to the scheduling of this matter it was indicated that there were preliminary issues to be dealt with. We understand that the May 26, 2006 hearing date has been scheduled to address these issues.
>
> The purpose of this correspondence is to outline the nature of the issues that will be raised by the Employer.
>
> It is the position of the Employer that this Board does not have jurisdiction to hear this matter.
>
> The preliminary issues in this case arise primarily from the fact that the matters which we understand as being in dispute have never been the subject of a

grievance under one or more of the four collective agreements between the parties. The absence of any grievance has been acknowledged by the Union.

Our investigation of the events giving rise to your appointment indicates that the group of employees involved in this case were previously employed by a company known as Canadian Helicopter Limited. They were hired by the Employer on November 3, 2003 when it assumed direct responsibility for providing this service. The employees were appointed to various positions within either of the Nursing or Healthcare bargaining units.

Shortly after this hiring the Employer and the Union engaged in a series of discussions regarding various terms and conditions of employment for these employees. By correspondence dated May 12, 2005 the Union notified the Employer that it wished to refer the issue of pay rates for these employees to arbitration. On May 27, 2005 the Employer responded indicating it's position that this matter should not proceed to arbitration.

The matter first came to our office through a letter, dated August 25th, from Union ERO Shawn Fuller to myself, requesting our agreement on an arbitrator. Through subsequent telephone communications, we confirmed with the Union that they did not intend to submit this matter to the grievance process. The Employer has taken the position that only matters which have been addressed as grievances and processed through the grievance process can be referred to arbitration.

The appointment of the Chair in this case was made at the request of the Union pursuant to section 42 of the Trade Union Act. When the Employer was made aware that this request was being made it wrote to Mr. Ken Zwicker of the Department of Environment and Labour to indicate that the Employer objected to the request. After receiving input from both sides regarding this issue, Mr. Zwicker indicated that the Department did not believe that it was appropriate for it to make a determination on an issue of ths nature as part of the appointment process. He stated that these were issues of arbitability that would have to be raised with the arbitrator as part of the hearing process.

Accordingly, we are now raising these issues with this Board. It is our intention to make detailed submissions regarding the arbitability of this matter and Board's jurisdiction on the May 26 hearing date and we will be requesting that the Board provide the parties with it's decision in advance of the dates currently set down to hear the merits of the case.

This letter refers to a supposed requirement for a grievance procedure instead of arbitration. It says nothing about a distinction between assignment to a new classification or an existing classification.

[9] The hearing on 26 May 2006 involved oral submissions, and no evidence beyond agreed documents. The learned arbitrator wrote:

> The current dispute between the parties relates to the classification and rates of pay for two groups of employees who were transferred from a private contractor to the employ of the Capital District Health Authority late in 2003. As a preliminary matter, the Employer asserts that I have no jurisdiction to deal with the dispute because the Union did not follow the proper grievance procedure set out in the relevant collective agreements before asking the minister to appoint an arbitrator. The Union asserts that the necessary steps have been take prior to my appointment, and that I should proceed to deal with the dispute on its merits. I heard oral submissions by both counsel on this point, and received by agreement a binder of documents relevant to the dispute.

As with the letter requesting a preliminary ruling, the learned arbitrator's introduction frames the preliminary issue in terms of the alleged need to follow grievance procedures, and says nothing about new or existing classifications.

[10] Mr. Lederman determined the grievance issue in favour of the union. He relied upon the plain words of article 41.01(b) and a complementary provision in the *Trade Union Act*, and distinguished those provisions from the articles about grievance:

> Because article 41 of the collective agreement does not contain any procedural prerequisites to the appointment of an arbitrator at the request of the Union, there is no need to exhaust "any grievance procedure established by this agreement". What we have here is a "difference . . . between the parties relating to the . . . administration of this agreement" but not a grievance in the sense used by articles 25 and 26 of the agreement. Section 42(2) of the act provides the necessary mechanism whereby an arbitrator can be appointed. A proper referral was made by the Union under article 41.01(b) and a proper appointment was made by the minister under section 41 (2), thereby empowering me as arbitrator to deal with the issue on its merits.

[11] After reviewing various correspondence between the parties and concluding that the authority had sufficient notice of the union's position on arbitration, Mr. Lederman stated this conclusion:

> I find that the grievance procedures set out in Articles 25 and 26 are inapplicable, and that Article 41 is a self contained remedial provision. I also accept the argument that section 42 of the ***Trade Union Act*** allows the minister to appoint an arbitrator. It is therefore up to me to determine if the provisions of Article 41.01 allow me to grant the remedy requested by the Union.

But then, he asked himself "Do I have authority under the collective agreements in question to proceed to set a pay rate for these two classifications?"

[12] The learned arbitrator answered his own question this way:

> I have searched the collective agreements in question to find any provision that would allow the Union to challenge or take to arbitration the actual classification of a job. There are no such provisions. The creation of job classifications appears to be a right of management. For example, Article 41.03 establishes a "classification appeal tribunal" to make final and binding decisions on disputes concerning "the classification of the position an employee occupies". However, the tribunal can only "decide the issue of the proper classification for the position in question based on the existing classification system" [section 41.03(f)]. The tribunal is prohibited from altering "any position descriptions and/or classification standards determined by the Employer" [section 41.03(h)(1)]. The process therefore appears to be designed to address the issue of whether an employee should be moved from one existing classification to another. It does not allow the employee to argue that he should have a classification that does not yet exist. Section 41.01 can be invoked by the Union "when a new or substantially altered classification covered by this Agreement is introduced". The party that introduces the new or substantially altered classification is the employer. Then, and only then, can the Union refer the issue of pay rate to an arbitrator. The arbitrator does not deal with the issue of classification. He does not have the power under this section to say to the employer that it should create a new classification for flight nurses. That is not an arbitrable matter, but rather is one that can only be dealt with through subsequent collective bargaining by the parties.
>
> In the matter at hand, it is apparent to me that the employer has classified the flight nurses as "staff nurses", an existing classification with an existing pay rate. Because it is an existing classification, I cannot determine a new rate of pay under Article 41. It is also apparent to me from the documents referred to above that a

> new classification has been created for the paramedics, and therefore I do have the power under their collective agreement to determine a new rate of pay. I am therefore prepared to proceed with the determination of a rate of pay for this new classification only.

Standard of Review

[13] Mr. Forsyth and Ms. Murphy agree that deference is owed at the highest level to the arbitrator's decision on the grievance issue. I am satisfied that deference is owed at the highest level. The arbitration award is protected by a statutory provision that makes it final and binding. The administration of a collective agreement is within the labour arbitrator's special expertise. The question is one of mixed fact, in a labour context which is in the arbitrator's expertise, and law, the interpretation of a contract which is in the expertise of both. Among the broad purposes of the *Trade Union Act* is the separation of labour disputes from determination by the ordinary courts.

[14] The functional and pragmatic approach for establishing standard of review does not apply to a review of an arbitration for its procedural fairness: *Moreau-Bérubé* v. *New Brunswick (Judicial Council)*, [2002] S.C.J. No. 9. On the second issue, I must review the record to determine whether the arbitrator afforded procedural fairness to the parties. At paragraph 75 of *Moreau-Bérubé* the Court (per Justice Arbour) stated:

> The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority . . . Within those rules exists the duty to act fairly, which includes affording to the parties the right to be heard, or the *audi alteram partem* rule. The nature and extent of this duty, in turn, "is eminently variable and its content is to be decided in the specific context of each case".

Here, as in *Moreau-Bérubé*, "the scope of the right to be heard should be generously construed". The interests of the represented employees and employer were to be determined according to the provisions of a contract, applied to facts found on evidence.

Whether the Interpretation Given to

the Collective Agreement is Patently Unreasonable?

[15] I do not intend to decide this issue. I have concluded that the union was not accorded procedural fairness and the decision of the arbitrator that pay rates for the nurses is not subject to arbitration must be set aside. That being the case, I think it would be wrong for the court to comment, even as an alternative, on an issue that may still be developed in the arbitration community. We should not intrude unless it is necessary to do so.

[16] However, I will comment on some of the arguments that could have been made to the arbitrator had an opportunity been accorded to the parties. This really goes to the next issue.

[17] One argument focuses on article 41.01(a), which is an important part of the textual context for understanding 41.01(b). Indeed, the text of (b) requires context taken from (a) to be meaningful. Article 41.01(a) requires negotiation of a new rate of pay for "a new or substantially altered classification". The learned arbitrator's interpretation of 41.01(b) allows the employer to automatically exclude negotiations, and therefore arbitration, by classifying a new kind of employee into an existing classification. The interpretation precludes an argument that would have had some merit: these new employees are sufficiently different from those classified before them that their inclusion substantially alters the class.

[18] The union would also have been in a position to refer the learned arbitrator to decisions of other arbitrators that may have persuaded him to an opposite conclusion. *Nova Scotia (Department of Human Resources) and NSGEU* (2001), 68 C.L.A.S. 108 (Arbitrator Outhouse) involved classification and reclassification provisions that are substantially the same as Arbitrator Lederman considered. It was argued that legislation permitted the government to exclusively decide a classification issue despite the collective agreement. This, it was argued, ousted Arbitrator Outhouse's jurisdiction. He said at para 42:

> Simply put, Article 40.01(a) of the collective agreement expressly provides that where a new or substantially altered classification is introduced in the bargaining unit, the rate of pay shall be negotiated between the Employer and the Union.

> Having made that agreement, the Employer cannot now resile from it and take the position that it is unenforceable by virtue of the *Civil Service Act* and the *Civil Service Collective Bargaining Act*. To permit it to do so would reduce the collective agreement to a sham.

That view of the purpose and text of article 40 may suggest a conclusion opposite to that reached by Arbitrator Lederman, that the terms of the collective agreement permit unilateral exclusion of employees from the mandated negotiation and arbitration.

[19] Ms. Murphy distinguishes Mr. Outhouse's decision on two bases. They may be compelling. My point is that the decision and the parties' submissions could have been given to the learned arbitrator had they known what he was about to decide.

[20] Other authorities could have been marshalled to advance the union's position: *NSGEU* v. *Nova Scotia Civil Service Commission* (1993), 33 C.L.A.S. 349 (Arbitrator Kydd), *NSGEU* v. *Nova Scotia (Pubic Service Commission)*, [2004] N.S.J. 144 (CA) particularly at para. 50; *Acadia University* v. *International Union of Operating Engineers, Local 968B*, [1985] N.S.J. 504 (SCAD).

Procedural Fairness

[21] When the learned arbitrator asked himself "Do I have the authority . . . to set a pay rate for these two classifications?" he entered territory beyond the preliminary issue the health authority asked him to decide. Ms. Murphy argues that all of the provisions in the collective agreement that Arbitrator Lederman considered were referred to by the parties in argument before him. That may be so, but it carries no assurance that the union presented all the evidence or all the arguments that might have been presented to the contrary.

[22] With great respect, the learned arbitrator deprived the union of the opportunity to be heard by straying into an issue on which the union had no reason to believe it needed to call evidence or present arguments.

Conclusion

[23] I will set aside the preliminary award to the extent that it provides the arbitrator cannot arbitrate the issues of whether health authority's classification of the nurses created a new or substantially altered classification and, if so, what the appropriate rate of pay is.

[24] As I said, this decision may be academic and is provided at the request of the parties. I do wonder why the union could not simply have asked for Arbitrator Lederman's reconsideration, since this was a preliminary award. But then, I should try not to stray from the issues put to me.

J.