IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Canada Post Corporation v. Canadian Union of Postal Workers, 2008 NSSC 300

Date: 2008/10/09
Docket: S. H. No. 284289
Registry: Halifax

Between:

Canada Post Corporation, a body corporate

Applicant

and

Canadian Union of Postal Workers
(on behalf of Kevin Buckland)

Respondent

and

Arbitrator Bruce Outhouse, Q.C.
(acting as an arbitrator pursuant to the *Canada Labour Code*)

Respondent

Judge: Justice N. M. Scaravelli

Heard: July 17, 2008 Nova Scotia

Counsel: Terry L. Roane, Q.C. and Jamie C. Eddy for the Applicant, Canada Post Corporation

David Roberts, for Respondent, Canadian Union of Postal Workers

By the Court:

[1] This matter involves an application by Canada Post Corporation ("Employer") for an Order in the nature of Certiorari quashing a decision of arbitrator, Bruce Outhouse, Q.C. , acting as a single arbitrator pursuant to the *Canada Labour Code* relating to a grievance filed on behalf of a grievor by the Canadian Union of Postal Workers ("Union").

Background

[2] The grievor, Mr. Buckland, a full time officer of the union, was serving as Atlantic Regional grievance officer in December 2005, when the incident giving rise to this proceeding took place. The employer had previously been advised by the union of several complaints against a supervisor (Mr. Sevigny) from women in the workplace. An investigation ensued and Mr. Sevigny was generally exonerated. The investigation had a negative impact on Mr. Sevigny and he was essentially off work for nine months, returning in September of 2005. The union took exception to his return and the grievor threatened consequences if Mr. Sevigny was permitted to continue working.

[3] When Mr. Sevigny appeared at the workplace in Moncton on December 8, 2005, the grievor who had travelled there from Halifax, confronted Sevigny and engaged as the arbitrator put it, in a “planned and deliberate ... prolonged and abusive tirade” against Mr. Sevigny “in the presence of other supervisors and employees”. The grievor was escorted from the premises by the Police.

[4] Later that day the grievor was notified that as a result of his conduct he was prohibited from entering any Canada Post facility until further notice. On December 14, 2005 the General Manager of Operations directed a letter to the grievor advising him that the ban from Canada Post premises was to be continued indefinitely and that any business he had with Canada Post was to take place off premises with a designated representative of the employer. Further that the grievor could not return to an operational position as an employee until he provided “authoritative evidence that you have both your emotional state and your anger managed and under control”.

[5] The union filed a grievance and argued at the hearing that the employer’s actions were disciplinary in nature and, therefore invalid based on binding

precedent between the parties. Further, that by prohibiting the grievor from entering a Canada Post facility, the employer failed to recognize the union's rights as sole bargaining agent. Specifically, the union referred to provisions in the Collective Agreement and Canada Labour Code preventing an employer from interfering with union activities by banning an officer unless there were "compelling, serious reasons".

[6] The employer argued it had compelling, serious reasons for banning the grievor from the workplace.

[7] The arbitration hearing commenced on October 10, 2006 and continued over eight days between October 10 - January 3, 2007. The arbitrator issued his award on February 14, 2007.

[8] The arbitrator rejected the claim of the union that the prohibition from the employer's facilities was disciplinary in nature. Instead, he characterized it as "a measure to provide (Canada Post) employees with a "safe and harassment free work environment".

[9] However, he found the permanent ban interfered unduly with the grievor's duties as an officer of the union and the union's right to administer its affairs and represent its members. The grievance was upheld in part, finding the ban from the employer's premises should not be permanent but should be limited in time. He imposed a Canada Post wide ban of 18 months against the grievor and prohibited the grievor from entering any Canada Post facilities in Moncton for a period of three years.

[10] The arbitrator stated that the requirement that the grievor obtain a medical clearance before returning to work was disciplinary in nature and was not supported by the evidence.

Issues

[11] The various grounds raised in the application can be reduced to two main issues.

(1) Should the arbitrator's decision to limit the time during which the grievor would be banned from the premises be quashed upon review?

(2) Should the arbitrator's decision to delete the requirement for the grievor to obtain medical clearance before returning to an operational position with the employer be quashed upon review?

Standard of Review

[12] The parties disagree on the standard of review applicable to this application.

[13] The Employer argues the correctness standard applies to the issues surrounding Occupational Health and Safety legislation (*Canada Labour Code*). In the alternative the reasonableness standard should be employed. With regard to the application of the provisions of the *Collective Agreement* dealing with occupational health and safety (and medical clearance) a reasonableness standard should be applied. Further the Employer argues that, as the arbitrator used a balancing of interests analysis regarding the permanent ban issue, a correctness standard should be applied.

[14] The union submits the reasonableness standard of review should be employed in this application.

[15] The Supreme Court of Canada recently signalled a new simplified approach to the law of judicial review in *Dunsmuir v. New Brunswick*, 2008 S.C.C. 9. The Court reduced the three level system of judicial review to two by collapsing patent unreasonableness and reasonableness *simpliciter* into a single standard of "reasonableness", resulting in the standards of reasonableness and correctness. As to the reasonableness standard:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[16] In order to grasp the meaning of reasonableness the Court discussed the meaning of deference:

> [48] ... What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference 'is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers' (*Mossop*, at p. 596, per L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of 'deference as respect' requires of the courts' not submission but a respectful attention to the reasons offered or which could be offered in support of a decision': 'The Politics of Deference: Judicial Review and Democracy', in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, per L'Heureux-Dubé J.; *Ryan*, at par. 49).
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> [49] Deference in the context of the reasonableness standard therefore implies that the courts will give due consideration to the determinations of decision makers. As Mullen explains, a policy of deference 'recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime': D. J. Mullan, 'Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[17] As to the correctness standard:

> [50] As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the

> decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[18] The Court abandoned the "pragmatic and functional analysis" for determination of the appropriate standard of review in favour of a less formalistic "contextual" analysis.

> [62] In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the property standard of review.

> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[19] With respect to the presence or absence of a privative clause:

> [52] The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither

> Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

[20] As to the nature of the question and the purpose of the tribunal:

> [53] Where the question is one of fact, discretion or policy, deference will usually apply automatically. ... We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.
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> [54] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. ... Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context. ... Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

[21] In summary, the Court concluded:

> [55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
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> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
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> - The nature of the question of law. A question of law that is of 'central importance to the legal system ... and outside the ... specialized area of expertise' of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.
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> [56] If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[22] I have determined that a reasonableness standard of review applies to the application before the Court.

[23] There is ample jurisprudence in the province, as cited by the union, that arbitrators dealing with grievances between these two parties under their collective agreement are entitled to deference on judicial review.

[24] As to a contextual analysis:

(1) There is a privative clause contained in Article 9 of the Collective Agreement and also contained in Section 58(1), Part I of the *Canada Labour Code.*

(2) The purpose of the arbitration as determined by Section 57(1) of the *Canada Labour Code* is to provide a final and binding settlement of all disputes over the "interpretation, application and administration or alleged contravention" of a collective agreement.

(3) The nature of the question involves the obligation by the employer to provide a safe workplace for employees as well as union's access to employer premises and representation of its members. The arbitrator was required to resolve the issues in accordance with the Collective Agreement and the statutory scheme.

(4) It is acknowledged that arbitrator Outhouse is highly experienced in the field of labour relation arbitrations.

[25] I disagree with the Employer's submission that as the grievance required the application of Occupational Health and Safety obligations under Part II of the *Canada Labour Code*, it was outside the arbitrator's expertise, requiring a correctness standard. In the present case there was a statutory arbitrator. Part of his function was to deal with the application of provisions of the collective agreement dealing with occupational health and safety. Occupational health and safety provisions are also contained in the *Canada Labour Code*. These provisions are closely connected and are within the expertise of the arbitrator.

[26] The Employer further submits the arbitrator failed to apply the health and safety provisions contained in the *Canada Labour Code*. I find there is no basis for a determination that the arbitrator did not consider the occupational health and safety provisions of the *Labour Code*. Although not specifically referenced, the arbitrator in his award, referred generally to the Employer's obligation to maintain a safe workplace. He was clearly aware of his duty and acknowledged it in his award as a legitimate concern of the employer. His modifications of the penalty was based in part on his finding that the evidence did not support the view that the grievor was a threat to other employees. Elsewhere, he noted that, contrary to the Employer's

letter of December 14th, there was no evidence of physical violence in the course of the incident with Mr. Sevigny.

[27] The Employer further argues the arbitrator exceeded his jurisdiction by applying a "balancing of interests test" regarding the length of the ban of the grievor from the Employer's facilities.

[28] The Employer states that while the Collective Agreement permits the arbitrator to review a disciplinary decision, the arbitrator held the ban imposed was not disciplinary, but was related to maintaining a safe workplace. The Employer states that neither the collective agreement nor the *Canada Labour Code* authorized third party review of management's non-disciplinary decisions. The present collective agreement contains a management rights clause which is subject to the terms of the collective agreement. It also prohibits an arbitrator from modifying any of the provisions of the agreement. Therefore, it is argued, the arbitrator had no jurisdiction to review the decision to impose the ban absent allegations of bad faith.

[29] I find the arbitrator did not exceed his jurisdiction in his analysis for the following reasons:

Article 3 of the Collective Agreement deals with the rights of union access to place of employment as well as the rights of union officers to access to non public areas of the Employer's facilities for purposes of union activities.

Article 8 provides for unrestricted attendance on Canada Post premises by union officers during meetings between union and employer.

Article 33 recognizes the Employer's responsibility for ensuring safe working conditions for its employees.

Article 9.33 provides that where a grievance has not been dealt with to the satisfaction of the union, the union may refer the grievance to arbitration if it concerns,

> (a) the interpretation, application or alleged violation of the Collective Agreement, including any disciplinary measure and termination of employment; ...

[30] I find that the arbitrator was dealing with an alleged violation of the Collective Agreement. Although the arbitrator used the words “non-disciplinary” and “balancing of interests” in his award, I find that in the context of the arbitration he was considering both the occupational health and safety obligations of the Employer, as well as the allegation of violation of the union’s rights under the Collective Agreement as they related to union activities. Clearly the arbitrator has jurisdiction to consider whether an action that purported to be an exercise of management rights conflicted with obligations arising under the Collective Agreement.

Reasonableness Standard

[31] In applying the reasonableness standard of review the Court must consider whether based on the evidence and the law, the award was reasonable. In this regard due respect must be given to the reasons supporting the decision of the experienced labour arbitrator.

[32] The powers of the arbitrator are set out in Article 9 of the Collective Agreement.

> 9.99 The arbitrator shall be vested with all the powers that are necessary for the complete resolution of the dispute. Where the arbitrator comes to the conclusion of the grievance is well founded, he or she may grant any remedy or compensation that he or she deems appropriate. More particularly, he or she may:
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> (a) Render a mere declaratory decision;
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> (b) Require the Corporation to rescind a decision which has been contested and to restore the situation as it existed prior to said decision;
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> (c) Evaluate the circumstances surrounding an abandonment of position or resignation and decide in such a case on the validity of the employee's consent.
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> It is understood that the arbitrator shall be vested with all the powers conferred upon him or her by the *Canada Labour Code.*

Limiting the Ban

[33] As previously stated in deciding to limit the ban, the arbitrator was considering whether management's actions conflicted with the Union activity rights under the Collective Agreement.

[34] The arbitrator determined that the Employer had sufficient reason to immediately prohibit the grievor from entering its facilities. That being said, the ban caused "real and significant" interference with the grievor's duties as regional grievance officer, with the administration of the Union and with the representation of its members. The uncontested evidence was the grievor was an experienced and effective union officer. While he could be "loud and abrasive", there was no history of violence, and the arbitrator did not believe there was any probability of the grievor engaging in similar misconduct should he be allowed back into the workplace. The arbitrator said:

> ... as I have already stated, the grievor's conduct was egregious. The only question, therefore, is whether the ban should be of an indefinite nature or whether it should be time limited. Obviously, the longer the ban, the more it will interfere with the grievor's performance of his duties as regional grievance officer and the more interference there will be with the administration of the union and the representation of its members. I am satisfied on the evidence that such interference is both real and significant.

[35] The message that such conduct was unacceptable and cannot be tolerated in the workplace could be communicated by a three year prohibition on entering postal facilities in Moncton, and 18 months at other facilities which the arbitrator substituted for the indefinite ban.

[36] Under the circumstances I find the arbitrator's resolution of this issue to be a reasonably acceptable outcome based on his findings.

Medical Clearance

[37] The Employer argued that the requirement for the grievor to provide "authoritative" evidence of emotional stability prior to returning to a position with Canada Post was necessary for the protection and safety of its employees. However, the arbitrator was not satisfied the evidence established the grievor posed a threat to other employees. Based on the evidence he made a finding that the grievor did not push or strike out at Mr. Sevigny or anyone else during the confrontational incident as alleged in the Employer's letter of December 14th. He further stated:

> The grievor made a conscience decision, as a union officer, to take it upon himself to intimidate and embarrass Mr. Sevigny with the objective of keeping him out of the workplace. The local union executive and some of its members were demanding that Mr. Sevigny not be in the workplace and the grievor saw it as his job to satisfy their demand. ...
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> As already indicated, the grievor's actions on December 8th were directly related to his role as an officer of the union and, while he clearly went beyond the bounds of

> permissible conduct in that role, there is nothing in the evidence to indicate that he would pose a threat to the health and safety of other employees if he were to return to the workplace as a letter carrier or in some similar capacity. Consequently, I find that the penultimate paragraph should be struck from the December 14th letter.

[38] I find the arbitrator's decision to delete the requirement for medical clearance prior to returning to work was reasonable, based on the history of relations between the parties and the findings of fact made by the arbitrator.

[39] Ultimately, the grievance filed by the union was only partially successful. The arbitrator was acting well within his mandate in structuring an award that recognized the rights and obligations of both parties under the Collective Agreement and the *Canada Labour Code.* His reasoning was transparent, coherent and supportive by the evidence. Moreover his conclusions were within the range of acceptable of outcomes.

[40] Accordingly, I dismiss the application with costs in the amount of $1500.00 as previously agreed by the parties.

J.