

SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Transportation and Infrastructure Renewal) v. Nova Scotia Government and General Employees Union, 2010 NSSC 15

Date: (20100121)

Docket: Hfx. 316791

Registry: Halifax

Between:

Her Majesty the Queen in Right of the Province of Nova Scotia, representing the
Department of Transportation and Infrastructure Renewal

Applicant

- AND -

The Nova Scotia Government and General Employees Union and William H.
Kydd, Q.C.

Respondents

Judge: The Honourable Justice David P.S. Farrar

Heard: November 25, 2009 in chambers, in Halifax, Nova Scotia

Counsel: Dana F. MacKenzie, Solicitor for the Applicant
David J. Roberts, Solicitor for the Respondent, NSGEU
William H. Kydd, Q.C., did not participate

By the Court:

[1] The Applicant, the Province of Nova Scotia (the Province) seeks judicial review and, in particular, an order in the nature of *certiorari* quashing the August 5, 2009, decision of William Kydd, Q.C. (the adjudicator).

Background

[2] The Province and the Respondent, Nova Scotia Government and General Employees Union (NSGEU) are parties to a collective agreement referred to as the Civil Service Master Agreement (the Agreement). It contains provisions relating to the classification and pay rates applicable to various positions in the Civil Service.

Article 40.01 of the Agreement is at the heart of this dispute and provides:

- (a) When a new or substantially altered classification covered by this Agreement is introduced, the rate of pay shall be subject to negotiations between the Employer and the Union. The Employer may implement a new classification and attach a salary to it, providing that the Union is given ten (10) days' written notice in advance.
- (b) 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 Adjudicator, established in accordance with Section 35 of the Civil Service Collective Bargaining Act, who shall determine the new rate of pay.

- (c) The new rate of pay shall be effective on the date agreed by the parties or the date set by the Adjudicator but, in any event, not earlier than the date of implementation of the classification.

[3] On August 3, 2005, by letter to the Nova Scotia Public Service Commission, the NSGEU filed a grievance claiming the Province had breached the Agreement when it created the position of Maintenance Supervisor in the Department of Transportation and Public Works.

[4] Not unexpectedly, by letter dated September 6, 2005, the Province denied any breach of the Agreement.

[5] On March 21, 2007, William H. Kydd, Q.C., was appointed, by consent of the parties, as a single adjudicator with respect to the grievance in accordance with Section 34(2) of the **Civil Service Collective Bargaining Act** (the Act). The hearing of the grievance took place on October 24, 25 and 26, 2007. The adjudicator issued his decision on February 22, 2008.

[6] Although the original decision of the adjudicator is not challenged in these proceedings, it is instructive to see how the adjudicator identified the dispute before him. At page 2 of the decision the grievance is identified as follows:

This case concerns a policy grievance in which the Union alleges that the Employer introduced a new classification or substantially changed an existing classification to the extent that the Employer was required to recognize that there was a new classification. The Union submits the Employer breached the collective agreement by failing to negotiate a pay scale for the new classification.

[7] In keeping with the wording of Section 40.01 of the Agreement, the adjudicator correctly identified the issues before him as whether a new classification was created and if so, whether there was an obligation on the Employer to negotiate a new rate of pay.

[8] The conclusion of the adjudicator is found at page 25 of his decision:

I find that the Maintenance Supervisor and Operations Supervisor positions were substantially and qualitatively different in their core duties from the jobs in the Supervisor Maintenance classification, and from any of the other existing classifications, and I therefore find that they qualify as a new or substantially altered classification within the meaning of Article 40.01(a).

I therefore declare that the Employer breached Article 40.01(a) by failing to negotiate a new rate of pay. I further declare that the rate of pay shall be subject to negotiations between the Employer and Union and that failing agreement, the Union may refer the matter to adjudication pursuant to Article 40.01(b).

[9] The parties entered into negotiations for a new pay rate, however, were unable to agree on the rate of pay for the new or substantially altered classification. As a result, the NSGEU requested that the adjudicator adjudicate that issue in accordance with Article 40.01(b) which, as previous set out, allowed for the matter to be referred to a single arbitrator in accordance with Section 35 of the **Civil Service Collective Bargaining Act** to determine the new rate of pay.

[10] The Province objected to the adjudicator being appointed as an adjudicator for the purposes of determining the rate of pay. The Province objected, not only to him being the adjudicator, but also objected to him ruling on his own jurisdiction. The Province agreed to argue the jurisdictional issue before the adjudicator without attorning to his jurisdiction to do so.

[11] The hearing to address the wage rate jurisdictional issue took place on June 3, 2009 and, by decision dated August 5, 2009, the adjudicator found that he had jurisdiction to act as adjudicator and to determine the appropriate pay level pursuant to Article 40.01(b). It is from the adjudicator's August 5, 2009 decision that the Province seeks judicial review.

Issues

[12] There are a number of issues set out in the Notice for Judicial Review filed by the Province and the Notice of Participation filed by the NSGEU. The adjudicator did not file a Notice of Participation and did not participate in these proceedings.

[13] The issues may be summarized as follows:

- (1) What is the appropriate standard of judicial review in relation to the adjudicator's decision that he had jurisdiction to hear the wage rate adjudication under Article 40.01(b)?
- (2) Did the adjudicator err in law by concluding that he had jurisdiction to hear and decide the wage rate adjudication?
- (3) Did the adjudicator err in law by undertaking the analysis of whether he had jurisdiction? To state this issue another way, did he retain some residual jurisdiction after his decision of February 22, 2008 to determine whether he had jurisdiction to hear the wage rate adjudication?

Standard of Review

[14] The applicable standard of review to be determined in accordance with the analysis established by the Supreme Court of Canada in *Dunsmuir v. New Brunswick* [2008] SCJ No. 9. The decision is conveniently summarized by Fichaud, J.A. in *Police Association of Nova Scotia Pension Plan v. Amherst (Town)* 2008 NSCA 74 at paragraphs 39 - 42.

39. Correctness and reasonableness are now the only standards of review (para. 34.) The court engages in a “standard of review analysis”, without the “pragmatic and functional” label (para. 63).
40. The ultimate question on the selection of an SOR remains whether deference from the court respects the legislative choice to leave the matter in the hands of the administrative decision maker (para. 49).
41. The first step is to determine whether the existing jurisprudence has satisfactorily determined the degree of deference on the issue. If so, the SOR analysis may be abridged (para. 62, 54, 47).
42. If the existing jurisprudence is unfruitful, then the court should assess the following factors to select correctness or reasonableness (para. 55):
 - (a) Does a privative clause give statutory directing indicating deference?

- (b) Is there a discrete administrative regime from which the decision maker has particular expertise? This involves an analysis of the tribunal's purpose disclosed by the enabling legislation and the tribunal's institutional expertise in the field (para 64)
- (c) What is the nature of the question? Issues of fact, discretion or policy, or mixed questions of fact and law, where the legal issue cannot be readily separated, generally attract reasonableness (para. 53). Constitutional issues, legal issues of central importance, and legal issues outside the tribunal's specialized expertise attract correctness. Correctness also governs "true questions of jurisdiction or vires", ie. "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter". Legal issues that do not rise to these levels may attract a reasonableness standard if this deference is consistent with both (1) any statutory privative provision and (2) any legislative intent that the tribunal exercise its special expertise to interpret its home statute and govern its administrative regime. Reasonableness may also be warranted if the tribunal has developed an expertise respecting the application of general legal principles within the specific statutory context of the tribunal's statutory regime (para. 55-56, 58-60). [emphasis added]

[15] A full analysis is not necessary in these circumstances. The adjudicator was clearly deciding a question of jurisdiction. The adjudicator's decision involves a determination of whether the wage rate adjudication fell within his grant of jurisdiction. There are no questions of fact or policy, and no discretions that need to be exercised. It is clear that what he was deciding was a "true question of jurisdiction or vires."

[16] *Dunsmuir*, supra, at paragraph 50 held;

As important as it is that the 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.

[17] The Court in *Dunsmuir* continued at paragraph 59:

Administrative bodies must also be correct in their determination of true questions of jurisdiction or vires. We mention true questions of vires to distance ourselves from the extended definitions adopted before CUPE. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise when the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction.

[18] In *Nova Scotia Teachers Union v. Nova Scotia (Minister of Education and Culture)*, [2001] NSJ No. 320 at paragraphs 43-45, Kennedy, C.J. addressed the matter squarely at paragraph 44 and 45:

Either an arbitrator has jurisdiction or he doesn't. He cannot be wrong when he determines that issue.

He cannot mistakenly create jurisdiction that he does not have, or in this context, decline jurisdiction on a significant issue that he does have.

[19] Similarly, I conclude that the standard of review to be applied on the adjudicator's decision is correctness.

[20] In the briefs filed on behalf of the parties and in an argument before me, the parties addressed the issue of *functus officio* and I expressed the view during the hearing that the doctrine of *functus officio* did not appear to have any application to these circumstances. Either the adjudicator had jurisdiction to decide the jurisdictional question, or he did not. In either circumstance, the doctrine of *functus officio* has no application and I will not address it further.

Did the Adjudicator err in law by concluding that he had jurisdiction to hear and decide the wage rate adjudication under Article 40.01(b)?

[21] Where the correctness standard applies, the adjudicator had to interpret the relevant provisions of the Act and the Agreement correctly. I find that the adjudicator erred in law determining that he had jurisdiction to hear the wage rate adjudication. Particulars of the errors of law are as follows:

1. Section 33 of the Civil Service Collective Bargaining Act

[22] The adjudicator in his decision, in particular at page 4, places considerable emphasis on the deeming provision in Section 33(2). The deeming provision provides:

Where a difference arises between the parties relating to the interpretation or application of this agreement, including any question as to whether or not a matter is adjudicable within the meaning of subsection (4) of Section 33 of the **Civil Service Collective Bargaining Act**, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to adjudication.

[23] I have difficulty in understanding how that provision in anyway assists the adjudicator in the determination of his jurisdiction in this case. The matter which was in dispute between the parties was whether a new or substantially altered position had been introduced. The remedy which flows from the determination that a new position had been introduced by the Province is for the parties to negotiate. The adjudicator decided the grievance in the NSGEU's favour and declared that the rate of pay was subject to negotiations. There was nothing about the adjudication before him which required a determination of any other issue.

2. Interpretation of the letter of appointment

[24] The adjudicator interpreted the letter of appointment as being broad enough to provide him with the ability to determine the rate of pay for the new or substantially altered classification. However, the adjudicator ignores the fact that the issue before him was the determination of breach of 40.01(a). No issue arises under 40.01(b) until such time as three things occur:

1. Breach of Article 40.01(a):

2. A determination that there has been a breach of Article 40.01(a):
3. The parties have been unable to negotiate a new rate of pay for the substantially altered position.

[25] There may never be a need to have an adjudication under 40.01(b) if the negotiations are successful. The adjudicator is assuming that he could be given jurisdiction over an issue which has not yet arisen. Indeed, it could not form part of the original grievance as the determination of a breach of Article 40.01(a) had not yet occurred and the negotiations had not failed.

[26] If 40.01(b) is analysed in its proper context, it can be seen that is not even part of the grievance procedure. There is no requirement that the grievance procedure be followed before recourse can be had to Article 40.01(b). It is simply a mechanism or a process by which the wage rate is determined. The failure to reach agreement by negotiation is not a breach of Article 40.01(b), but rather is the fulfilment of the requirements of that article. It is not a breach of the Agreement that leads to the appointment of an adjudicator. It is simply a continuation of the process provided for in the article.

[27] The adjudicator erred in determining that jurisdiction to determine the issues arising under 40.01(a) allowed him to also determine the issues under 40.01(b) when those issues were not before him and indeed, may never have arisen.

[28] The law and the reasoning can be found at page 6 of his decision at the third paragraph:

The deemed provision in the **Civil Service Collective Bargaining Act** indicates that any arbitration provision in the collective agreement is deemed to provide a means for final settlement of an issue. An interpretation that limits an adjudicator appointed under Article 40.01(a) from having the jurisdiction to determine the designated remedy for a breach under 40.01(a) is not providing for a “final settlement” of the issue but the requirement for a collective agreement to provide a final settlement provision endorses an expedited dispute resolution process. Requiring the appointment of a different adjudicator would appear to fly in the face of such an intention and would lead to the need to probably call evidence that has been heard by the original adjudicator.

[29] As noted above, the result of a violation of Article 40.01(a) is a requirement that the parties negotiate a new rate of pay for the relevant group of employees. Article 40.01(a) is not an automatic right to a wage rate hearing.

[30] Again, Section 40.01(b) is more in the nature of a process or mechanism allowing the parties to have the wage rate determined expeditiously.

3. The Province did not consent to Mr. Kydd acting as an arbitrator pursuant to Section 34(2) of the Civil Service Collective Bargaining Act.

[31] The Act establishes a series of prerequisites for the vesting of jurisdiction in an adjudicator, they are

1. The exhaustion of the grievance procedure (Section 36(1))
2. Consensual selection by the parties, which is formalized through an appointment by the Civil Service Employee Relations Board (Section 34(2)). Alternatively, in the absence of agreement the adjudicator is selected and appointed by the Civil Service Employee Relations Board (Section 34(3)).

[32] In this circumstance the exhaustion of the grievance procedure is not a prerequisite for the appointment of an adjudicator. Under Article 40.01(b), it is an inability to reach an agreement that triggers the appointment of an adjudicator, not anything that comes up with respect to the determination of the rights of the parties under the Agreement or the interpretation of a grievance. The Province has the right to consent to the individual doing the adjudication of the wage rate, if the matter is to be heard by a single adjudicator (s.34(2)).

[33] The Province, in its brief, referred to *Ward and Reid London (C) and CUPE Local 101 (2006) LAC (4th) 337* where the arbitrator declined to assume jurisdiction over a second grievance. The second grievance referred to as 09-5 was filed after the first grievance had begun to be processed through the hearing stage. It contained essentially the same facts and parties. However, because the employer had not specifically consented to the arbitrator in respect of the second grievance, the panel declined to accept jurisdiction at pages 356-7 he held:

Given the relevant statutory provisions, collective agreement provisions and arbitral jurisprudence, and given the undisputed facts regarding the dates of filing and referring to arbitrations grievances 05-05 and 0905 said of both does the Instant Board have the power pursuant to Section 48(2)(I) of the **Ontario Labor Relations Act**, to take jurisdiction unilaterally over grievance 09-05. In the essence of the consent of one of the parties to do so, by ordering its consolidation with grievance 05-05, with an implied direction by the Instant Board, following the Reasoning Board in the *Toronto School Board* case as set out above, to the recalcitrant party to consent to the Instant Board hearing grievance 0905 with the result that there would be “constructive consent” by the recalcitrant party to have the Instant Board hear grievance 09-05. The careful consideration of the arguments made and the authorities referred, the Instant Board does not think so.

[34] The Board went on to determine that it did not have the power to unilaterally take jurisdiction over grievance 09-05 in the circumstances.

[35] Similarly, the issue under Article 40.01(b) arose (and could only arise) after the original grievance was determined and dispensed with by the adjudicator. The

right to consent to the adjudicator is a significant right in the labor relations context and it is not one to be taken away lightly. The Province did not consent to the adjudicator acting as the wage rate adjudicator; by determining he had jurisdiction, absent that consent, the adjudicator erred.

[36] It is for these reasons that I find that the adjudicator erred in law in determining that he had jurisdiction to hear the wage rate adjudication.

[37] Reference has also been made to three other adjudication decisions relating to Article 40.01.

[38] I will, briefly, address the decisions in argument and in the adjudicator's decision, in the *Nova Scotia Department of Human Resources and Nova Scotia Government and General Employees Union re: grievance concerning buyers July 5, 2001* (commonly referred to as the buyer's grievance) a decision of adjudicator Outhouse. In that case, the union requested that the adjudicator reserve jurisdiction to fix the rates of pay in the event that the parties were unable to agree. There was no argument on the issue and, in a supplemental decision, arbitrator Outhouse

noted that the parties were unable to agree on new rates of pay. Accordingly, at their request, a hearing was convened before December 31, 2001.

[39] The buyer's decision is of little assistance as, in the end, the parties consented to adjudicator Outhouse hearing the matter.

[40] In the *Nova Scotia Department of Justice and Nova Scotia Government and General Employees Union re: Deputy Sheriffs* March 31, 2008, unreported, a decision of arbitrator Archibald, he allowed the grievance at page 46 stating:

Having found that a substantial alteration in the Deputy Sheriff classification has been introduced in accordance with Article 40.01(a), "...the rate of pay shall [now] be subject to negotiations between the employer and the union." I hereby retain jurisdiction to assist the parties with respect to the implementation of this award. Such retained jurisdiction may or may not include my engaging as an interest arbitrator under Article 40.01... it appears that the wording of the provision is sufficiently broad to encompass either my continuation in that role, if the parties so desire, or the appointment of a different single adjudicator if the parties prefer someone with a fresh perspective or different skills." [emphasis added]

[41] Arbitrator Archibald was prepared to continue "if the parties so desire", by necessary implication, if the parties did not consent, then a different adjudicator would have to be appointed.

[42] Finally, reference is made to a decision which the present adjudicator made in the *Nova Scotia Department of Agriculture and Fisheries and Nova Scotia Government and General Employees Union re: Agricultural College Safety and Security Officers* (March 17, 2008 unreported).

[43] After finding that Article 40.01(a) had been breached, in that case, the parties, by consent, referred the matter to another adjudicator to rule on the rate of pay. The issue never arose as to whether the adjudicator retained jurisdiction if the parties could not reach agreement on the rate of pay.

[44] These decisions, although cited by the adjudicator, are of little assistance in determining the jurisdictional issues.

Conclusion

[45] I find that the adjudicator erred in determining that he had jurisdiction to determine the wage rate adjudication. As a result, an Order in the nature of *certiorari* will issue and the decision dated August 5, 2009 is quashed.

[46] One other matter which was before me was whether the adjudicator had the power to even make the inquiry about whether he had jurisdiction. It is not necessary for me to decide that issue as a result of the conclusions reached on his decision on its merits. However, as is apparent from these reasons, it is my view that he did not have jurisdiction to enter into the inquiry at all. The issue of the rate of pay under Article 40.01(b) was not an issue at the time that the adjudicator was appointed, and at no time formed part of the matters in dispute between the parties. When the negotiations failed, at that time, it is a new matter and was not within the initial or any residual jurisdiction which the adjudicator had on the original grievance.

[47] The Province shall have its costs of this application. If the parties are unable to agree on the amount of costs, I will accept written submissions within 30 days of the date of this decision.

Farrar, J.