SUPREME COURT OF NOVA SCOTIA
Citation: Canada Post Corporation v. Canadian Union of Postal Workers - 2011 NSSC 147

Date: 20110428
Docket: Hfx. No. 333704
Registry: Halifax

Between:

Canada Post Corporation

Applicant

-and-

Canadian Union of Postal Workers

Respondent

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: March 31, 2011 at Halifax, Nova Scotia

Written Decision: April 28, 2011

Counsel: Counsel for the Applicant - Thomas Groves
Counsel for the Respondent - Gordon Forsyth, Q.C.

INTRODUCTION

[1] Canada Post Corporation ("CPC") has applied for judicial review of the labour arbitration award rendered by J.A. MacLellan on June 24, 2010. Arbitrator MacLellan had been consensually appointed under the parties' collective agreement to act as sole arbitrator of a pair of grievances filed by the Canadian Union of Postal Workers (the "Union") on behalf of Shaun Cloran and Angela Todd as grievors.

[2] These two grievances resulted from the dismissal of the grievors from their employment with CPC as temporary probationary employees.

BACKGROUND

[3] The factual background to these grievances is set out in detail in the arbitrator's award. The material facts are not contentious.

[4] By way of overview, both grievors were hired in late 2008 as temporary probationary employees with a view to becoming letter carriers. To that end, they were provided with training by CPC as required by the collective agreement. This involved one week of classroom training that concluded with a written test, followed by a second week of mentoring with a letter carrier that culminated with a mail sortation test. The grievors passed the written test but both failed to meet the required criteria under the sortation test.

[5] By reason of failing that test, and for that reason only, both grievors were dismissed from their employment as temporary probationary employees.

[6] Although their written grievances from their dismissals are not uniformly worded, they are of the same import. Both cite Article 44.06(b) of the collective agreement which sets out a just cause test for dismissal of temporary probationary employees, and Article 44.25 which obligates CPC to arrange sufficient and adequate training for such employees. The full text of these articles reads as follows:

> 44.06(b) - Probation Period
>
> During the probationary period, the employer may end a temporary employee's employment if it deems that the employee does not meet the requirements of the job.
>
> The decision of the Corporation shall be final unless it is grieved that it was made without just cause. In any arbitration relating to such a grievance, the burden of proof shall rest with the Corporation.
>
> 44.25 - Training
>
> The Corporation will determine the training requirements and will arrange sufficient and adequate training, where required, for any newly hired temporary employee or any temporary employee who is assigned to duties requiring new knowledge.

[7] Related to these two articles is Article 9.84 which reads as follows:

> Burden of Proof Concerning Qualifications
>
> The burden of proof shall rest with the Corporation in all cases where it alleges or claims that an employee does not possess the requisite qualifications or has not acquired the requisite knowledge to obtain or keep a position.

[8] Based on the foregoing, the two grievances were heard together before Arbitrator MacLellan on May 31 and June 1, 2010 with his award being subsequently rendered on June 24, 2010.

OVERVIEW OF THE AWARD

[9] In his award, the arbitrator upheld both grievances. His ultimate conclusion was that neither grievor received sufficient and adequate training from CPC in that it was not consistently administered for all who took the test. As a result, he stated that he was not satisfied, on the balance of probabilities, that either of the grievors were discharged for reasonable and sufficient cause.

[10] By way of remedy, the arbitrator directed CPC to reinstate both grievors as probationary employees. He further directed that they be provided with adequate and sufficient training. If that training enabled them to pass the required tests, the arbitrator further stipulated that they would have to complete the probationary period in compliance with the collective agreement and that the issue of compensation would be left for determination by the parties. He further stipulated that if the grievors were successful in passing the tests, their seniority date would run from the time of their first failed test.

REQUEST FOR JUDICIAL REVIEW

[11] CPC filed a Notice for Judicial Review on August 4, 2010. It thereby seeks an order from this court quashing or setting aside the arbitration award, alleging reviewable errors committed by the arbitrator on the following grounds:

> 1. Failed to provide justifiable, transparent and intelligible reasons for his conclusion allowing the grievance;
>
> 2. Failed to provide justifiable, transparent and intelligible reasons why he concluded that Article 44.06(b) (which provides that Canada Post may end a probationary employee's employment if it has just cause to deem that the employee does not meet the requirements of the job) was "not the applicable article in this factual situation";

> 3. Unreasonably and incorrectly concluded that Article 44.06(b) did not apply to this factual situation;
>
> 4. Applied an unreasonable and incorrect test in determining whether just cause existed for the discharge of probationary employees;
>
> 5. Reversed the onus onto Canada Post in establishing that the training it provided to its probationary employees was adequate and sufficient.

STANDARD OF REVIEW

[12] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada revamped the standard of review analysis in administrative law and established that there are now two standards of review, namely, correctness and reasonableness. In deciding which is to apply, the first step is to determine whether the existing jurisprudence has satisfactorily determined the degree of deference on the issue. If so, the standard of review analysis may be abridged.

[13] Counsel for both parties agree that the appropriate standard of review to be applied by this court in the present case is that of reasonableness. Recent jurisprudence clearly bears that out.

[14] The Nova Scotia Court of Appeal had occasion to consider the application of standard of review principles to a labour arbitrator's interpretation of a collective agreement in *Communications, Energy and Paperworkers' Union, Local 1520 v. Maritime Paper Products Ltd.*, 2009 NSCA 60. After referring to a number of cases, the Court of Appeal concluded that "Clearly the reviewing court should apply reasonableness to an arbitrator's interpretation of the collective agreement".

[15] With that recognition, it is not necessary for me to look beyond the first step set out in *Dunsmuir* in the determination of the applicable standard of review.

[16] The Nova Scotia Court of Appeal has also had several occasions in the wake of the *Dunsmuir* decision to consider and expand on what the term "reasonableness" means. For the sake of brevity, it will be sufficient to simply quote the following salient passage from *Maritime Paper Products* (at paras. 35-36):

> 35. Reasonableness tracks the tribunal's reasoning, and asks whether the tribunal's finding or conclusion inhabits the set of rational outcomes. If the answer is yes, it does not matter that there may be other rational outcomes or that the judge may prefer another interpretation of "management convenience". *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, para. 59. See also: *Ryan*, para. 51, 55; *Granite*, para. 42-44; *CBRM v. CUPE*, para. 71-72.
>
> 36. As stated in *Casino Nova Scotia* (above para. 23), intelligibility, justification and transparency in the first step of *Dunsmuir's* reasonableness analysis are not disguises for correctness. If those words signified correctness, there would be no point to a separate reasonableness standard. Correctness would govern every judicial review. Justices Bastarache and LeBel in *Dunsmuir* (para. 47) said that the first step relates to process, not outcome. The reviewing court asks whether it can understand how the tribunal reached its conclusion, and whether the tribunal's decision affords the raw material for the reviewing court to perform its second function of assessing whether the tribunal's conclusion occupies the range of reasonable outcomes.

[17] The foregoing summary is largely a reiteration of the standard of review analysis taken from my recent decision in a similar case between the same parties reported at 2010 NSSC 372, which I have simply reproduced for expedience. To that I would add, for purposes of this case, a further reference to the Nova Scotia Court of Appeal decision in *Halifax Employers Association v. International*

Longshoremen's Association et al., 2004 NSCA 101.

[18] That case involved a judicial review of the discretionary power of an arbitrator under the *Canada Labour Code* to grant a long extension of time for filing a grievance against a dismissal. In conducting that judicial review, the court was required to interpret some anomalous findings of the arbitrator over which the parties disagreed. In reading into the arbitrator's decision, Justice Cromwell commented as follows:

> [80] I would add that even if the arbitrator's reasons support more than one interpretation, it is wrong to fasten on one that is considered to be patently unreasonable when the reasons fairly support another, rational interpretation. The standard of review is not to be applied to every line of reasoning: the question for the reviewing court is whether the reasons of the tribunal disclose any line of reasoning that rationally supports the result...

[19] Although the foregoing decision pre-dates *Dunsmuir*, I consider that Justice Cromwell's comments remain apt to the application of the reasonableness standard which now prevails in a judicial review of a labour arbitrator's interpretation of a collective agreement.

[20] As further stated by the Court of Appeal in *Maritime Paper Products* (at para. 24), the reviewing judge's first task is to chart the tribunal's reasoning, which now follows.

LEGAL ANALYSIS OF AWARD AND FINDINGS

[21] After setting out the factual background of the case and the sufficiency of the form of the Cloran grievance, the arbitrator cited Articles 44.25 and 44.06 which he referred to as "the substance of this grievance". The arbitrator then went on to cite Article 9.84, noting that the Union took issue with the level of training provided by CPC. The latter article places the burden of proof upon CPC concerning qualifications of an employee to obtain or keep a position.

[22] The arbitrator then summarized the respective positions of the parties. He referred to CPC's emphasis on Article 44.06(b) which enables it to terminate the employment of a temporary employee if it deems that the employee does not meet the requirements of the job. CPC maintained that it had established an objective, quantitative standard in the tests that all temporary employees must meet, which applied equally to all in that job classification. On that basis, CPC took the position that the reason for the employment termination of the grievors, namely, their failure of the mail sortation test, was not arbitrary, discriminatory or done in bad faith. This, it was argued by CPC, constituted just cause for dismissal.

[23] In summarizing the Union's position, the arbitrator noted its emphasis on Article 44.25 as above mentioned. The Union maintained that this was principally a training issue and that the training given to the two grievors was not "sufficient and adequate" in this situation. As a result, the Union contended that CPC did not have just cause to discharge the two grievors.

[24] After then reproducing the letters of hire for the two grievors along with the

full text of their grievances, the arbitrator summarized in detail the evidence of the various witnesses called by both parties. The focal point of that evidence was the training that both grievors had been given as temporary probationary employees to become letter carriers. The evidence recited also canvassed in detail the tests that both grievors had been given, their test results, and the comparison of those test results with others who had taken the same training.

[25] Up to this point in the award, the arbitrator's path of reasoning is unassailable. However, after completing his summary of the evidence, he abruptly veered a bit off course with the following paragraphs:

> I am persuaded by the Union's argument that Article 44.06 of the Collective Agreement is not the applicable article in this factual situation. This article provides for the termination of a temporary employee if it deems that the employee had not met the requirements of the job.
>
> In these circumstances I am satisfied that the article that is most relevant to the two grievors is Article 44.25 of the Collective Agreement. In that article the Corporation is to arrange sufficient and adequate training for persons such as the grievors.

[26] In the next paragraph of the award, the arbitrator stated that CPC must meet a test of reasonableness if the training it has established is to be used to measure an employee's capabilities for continued employment.

[27] From there, the arbitrator shifted to a discussion of the standard to be employed for dismissal of probationary employees. He made specific reference, and quoted from, the decision of Arbitrator Beatty in *Re Porcupine Area Ambulance Service and CUPE, Local 1484* (1974) 7 L.A.C. (2d) 182. The key passage in the quotation taken from that case is that "the employer must affirmatively establish that his termination of a probationary employee was

reasonable in the circumstances".

[28] The arbitrator also quoted from the decision of Arbitrator Weiler in *The British Columbia Telephone Co. and Federation of Telephone Workers of British Columbia* (1977) 15 L.A.C. (2d) 310. The key passage from that quotation is that "arbitrators must not overrule management [hiring] decisions in this regard unless the decision is arbitrary, discriminatory or in bad faith".

[29] Arbitrator MacLellan then noted that the foregoing passages were cited by Arbitrator Joliffe in an arbitration award between these same two parties in 2001 that is unreported. He was also given by counsel, but did not refer to, copies of the award of Arbitrator Lauzon dated April 11, 2008 in *Canada Post Corporation and Canadian Union of Postal Workers (Vu and Demonsthenes*) and the award of Arbitrator Dulude in *Canada Post Corporation and Canadian Union of Postal Workers (Boileau)* dated August 6, 2009.

[30] In the former award, Arbitrator Lauzon found that "just cause", as read in Article 44.06(b) governing probationary temporary employees, means that the employer must not assess an employee in an unreasonable, arbitrary or discriminatory manner. In the latter, Arbitrator Dulude found that to establish just cause for the discharge of a probationary temporary employee, the employer must show that its decision was not arbitrary, discriminatory or in bad faith, nor based on deciding factors unrelated to the job. There was no issue in either of these cases concerning the sufficiency or adequacy of the training provided.

[31] Turning back to the present award, Arbitrator MacLellan then posed the question of how the test of reasonableness is to be established. It is not entirely clear, from the framing of that question, whether he was referring to the application of the test of reasonableness to the sufficiency and adequacy of the training provided or the reasonableness of the dismissals themselves. In any event, after revisiting the essential positions of the parties, the arbitrator then framed the question to be determined as follows:

> The question to be determined is whether I am satisfied that the two grievors were treated differently than others who took the course. If indeed the Corporation did treat the grievors differently then they were discriminated against and therefore the decision to discharge the grievors was unreasonable.
>
> There are a number of factors that have to be determined from the testimony as to whether the Corporation's decision to terminate the grievors was reasonable.

[32] Arbitrator MacLellan then reviewed those evidentiary factors and made a number of findings of fact, a convenient summary of which is reproduced from the Union's brief as follows:

> The grievors were not made aware of the consequences of not passing the test during the first day of class, which was especially important to Ms. Todd as her letter of offer made no mention that it was conditional or that she had to successfully pass a test.
>
> All of the students who did their training in Dartmouth failed, while all of the students who took their training in Halifax passed.
>
> The training given to both grievors in Dartmouth was substantially different from one another. Ms. Todd was given much better training in sortation than was Mr. Cloran. Mr. Cloran did not have the practice time that was accorded to Ms. Todd.
>
> Those taking the training in Halifax had additional opportunity to practice

sorting near the end of the day. The grievors were not given the same opportunity to practice and were not aware that they could, if time had permitted, travel from Dartmouth to Halifax to practice.

Taking the training and practicing in Halifax would give an advantage over those in Dartmouth.

The grievors were at some disadvantage having taken their training in Dartmouth.

The training program, included as Appendix A to the Award, was new and there were some things that had to be worked out in order that everyone would be given the same opportunity to practice.

Mr. Cloran did not receive the same practice training as Ms. Todd.

Ms. Todd was at a disadvantage because she was not made aware of having to pass the tests to continue employment and was not advised that the offer of employment was conditional.

[33] After making these findings of fact, the arbitrator then summed up his conclusions as follows:

> In the end I am satisfied that the grievors did not receive sufficient and adequate training in that it was not consistent for all that were taking the test ... As a result I cannot be satisfied, on a balance of probabilities, that either of the grievors were discharged for reasonable and sufficient cause.

[34] The arbitrator then granted the remedy of reinstatement with conditions, as earlier summarized in paragraph 10 of this decision.

[35] Counsel for CPC has forcefully argued that the arbitrator has failed to provide a justifiable, transparent and intelligible rationale for reaching a conclusion which, on its face, falls outside the range of acceptable outcomes. It is therefore

contended that neither of the two parts of the test set out in *Dunsmuir* is satisfied.

[36] Indeed, counsel describes the path of reasoning in the award as muddled in that the arbitrator has confused the applicable test for just cause for dismissal of temporary probationary employees. It is argued that the arbitrator either conflated the test for just cause under Article 44.06(b) with that of Article 10 (which prescribes the test of just, reasonable and sufficient cause for the dismissal of a non-probationary employee) or has conflated the test for just cause under Article 44.06(b) with the test of reasonableness under Article 44.25 (the training requirement).

[37] In pressing those arguments, counsel for CPC principally focuses on two passages from the award which are particularly troublesome. The first is the statement above referred to where the arbitrator said he was persuaded that Article 44.06 is not the applicable article in this factual situation. That is clearly an untenable statement on its face. However, it has to be read in the context of the decision as a whole which reveals the following:

(a) At the outset of the award, the arbitrator expressly stated that the two grievors were subject to Article 44.06 of the collective agreement that deals with the probationary period;

(b) Shortly thereafter, he expressly stated that Articles 44.06(b) and 44.25 of the collective agreement are the substance of the grievance;

(c) When he turned to the subject of the test for just cause, he identified it from the arbitral jurisprudence above mentioned, namely, whether the dismissals were

unreasonable, arbitrary or discriminatory or made in bad faith;
(d) He then applied that test from the arbitral jurisprudence, with particular focus on the facts of this case of whether the dismissals were unreasonable or discriminatory.

[38] The second passage from the award impugned by CPC is the ultimate finding by the arbitrator that he could not be satisfied that either of the grievors were discharged for "reasonable and sufficient cause". That is the language found in Article 10 of the collective agreement which deals with suspension and discharge of non-probationary employees, whose test for dismissal for just cause is somewhat broader.

[39] The use of that specific language by the arbitrator here in support of his ultimate conclusion was unquestionably another miscue. As an aside, I surmise that it was drawn from that same wording found in the grievance filed by Ms. Todd to whom he had made reference in the preceding sentence of his award.

[40] Notwithstanding these incongruent statements, and the shifting of topics in the progression of the award without clear lines of delineation, the award must be "read in the context of his whole decision and in light of the way the case was

argued to him" (quoting from Justice Cromwell in *Halifax Employers Association* at para 25).

[41] The case argued by the Union was simple and straightforward and can be

summarized as follows:

(a) CPC had the obligation under Article 44.25 to arrange sufficient and adequate training to temporary probationary employees;

(b) If CPC failed in that training obligation (as the arbitrator ultimately found) and where the sole reason for termination was the grievors' failing the sortation test, CPC could not reasonably deem that these employees did not meet the requirements of the job (per Article 44.06(b)); and

(c) It was therefore unreasonable for CPC to terminate the employment of the grievors where they had not been given sufficient and adequate training.

[42] The arbitrator obviously had a firm grasp on that argument, having succinctly summarized it at page 31 of his award. It is in that light that his earlier comment that Article 44.06 was not the applicable article in this fact situation should be viewed. While that statement was clearly untenable on its face, when taken in context it should be interpreted, in my view, as a recognition that the case turned on the underlying issue of the adequacy of the training required under Article 44.25 without which CPC could not reasonably assert just cause for dismissal.

[43] Once the entire award is read in context, and in light of the way the case was argued, I conclude that the arbitrator favourably adopted the position argued by the Union and decided the case on that basis. I am thus able to discern a sustainable and rational line of reasoning that supports the result reached in the award.

CONCLUSION

[44] While the award is obviously not a model of clarity, it is my conclusion that when read in its full context, it does reflect a sufficiently intelligible, justifiable and transparent rationale to satisfy the first part of the *Dunsmuir* test. Likewise, the remedy of reinstatement with conditions granted to the grievors falls within the range of acceptable outcomes so as to satisfy the second part of that test. In the result, this application for judicial review of the arbitrator's award is dismissed.

[45] At the conclusion of their oral submissions, both counsel indicated to the court their agreement that the successful party should be awarded costs in the amount of $1500 plus taxable disbursements in keeping with past experience in similar cases. Costs in that amount are accordingly awarded to the Union as the successful respondent.

J.