SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia Union of Public and Private Employees, Local 2 v. Halifax Regional Centre for Education*, 2019 NSSC 333

Date: 20191113
Docket: 485670
Registry: Halifax

Between:

Nova Scotia Union of Public and Private Employees, Local 2

Applicant

v.

Halifax Regional Centre for Education, Susan M. Ashley

Respondents

Decision – Judicial Review – Decision of Susan M. Ashley, Arbitrator

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	October 30, 2019, in Halifax, Nova Scotia
Counsel:	Ronald Stockton, for the Applicant Ian Pickard, Q.C. and Sara McInnes, for the Respondent, Halifax Regional Centre for Education

By the Court

Introduction

[1] This judicial review decision examines whether a labour arbitrator erred in her interpretation of the collective agreement, and: in not giving sufficient, or any, consideration to the privacy interests of employees when requesting vacation time; in not finding an appropriate reason for the requested vacation leave had been presented.[1]

[2] I conclude that the arbitrator did not err.

Background

[3] Bill Alguire is a custodial services employee of the Halifax Regional School Board – now the Halifax Regional Centre for Education [the Employer]- and the President of Local 2, Nova Scotia Union of Public and Private Employees [the Union].

---

[1] The Employer takes the position that the latter two issues are not valid issues for judicial review: "The Arbitrator is not obligated to consider the privacy of employees. The grievor did not provide a reason; as such, the privacy of the grievor has not been breached" (para. 46 brief); the Arbitrator's conclusion that the grievor did not provide an appropriate reason for the requested vacation leave, "is not a valid ground of judicial review. It is a fact that the grievor did not provide an appropriate reason for the request. That finding is not subject to judicial review… Her decision that the reason as provided was not adequate, is a conclusion that is well within the range of possible and reasonable outcomes, as stated by the court in *Dunsmuir*." (paras. 50-51 Brief)

[4] The Union filed a grievance on his behalf:

Details:

The Grievor requested vacation leave for October 6, 2017 and November 10, 2017 by faxing the required form to management on June 21, 2017. The request was denied by Stephanie Drury [Manager of Property Services (Custodial) for the Employer] by return June 23, 2017 with the suggestion that he "… book during closed period or use time in lieu." The Grievor then submitted an "Application for Leave for Lieu and Special Leave Only" form dated July 4, 2017 for the same dates, and the time in lieu leave was granted on that same date.[2]

[2] Originally the Grievor requested 25 vacation days on the Employer's "Application for Leave for Vacation"- p.131 Record Exhibits. Two of those 25 days requested, October 6 and November 10, 2017, fell within the "school open" period. An authorized employer representative insisted that the request for those two dates must be made on the "Open Period Vacation Request Form" – p. 133 Record Exhibits. In contrast to the "Application for Leave for Vacation" used for requests for vacation during "school closed" periods, the "open [school] period vacation request form", additionally has included therein the wording "reason for vacation request". He completed that form indicating the "reason for vacation request" was "time off". The Employer's response was that his request was: "denied, please book during closed period or use lieu time." Shortly thereafter he filed an "Application for Leave for Lieu and Special Leave Only" form for the dates in question, which was granted on July 4, 2017- p.134 Record Exhibits and para. 3 Arbitrator's decision. Furthermore, an authorized Employer representative confirmed to the Union on August 14, 2017 that "… As you know, employees are asked to complete an "open period vacation request form" when requesting vacation outside of the allowable time noted in the collective agreement. Mr. Alguire submitted the form, but it was not completed in full. In short, if [he] completes the request form in full (specifically, the section's 'reason for vacation request')– the Board will take this information into consideration in responding to the grievance"- para. 5 Arbitrator's decision.

The Grievor prefers to take vacation leave and was not provided with any operational reason why he could not take vacation leave on those dates.

Remedy:

The Grievor's leave be granted as vacation leave and his time in lieu will be reinstated.

Violations:

All provisions of the collective agreement or law or any other violation which may become apparent before or at arbitration, including: [Articles of the Collective Agreement] 2.01, 13.02.

[5] The matter went to arbitration before Susan M. Ashley, who registered a decision January 29, 2019. In her "Analysis and Award" she stated:

> One of the issues before me is whether the use of the [open period vacation request] form and the requirement to give the reason for the request is contrary to the collective agreement. I must also consider whether the Employer's requirement – to the extent that it may do so – that members use lieu time, if it is available, rather than take vacation and in the closed period, is in violation (para. 27)…
>
> One of the issues here is whether the reference in the collective agreement to the "wishes of the employee" in making vacation requests includes **the reason** for the request, or whether those are two separate things. (para 31)
>
> [Bolding in original]

[6] She answered these issues as follows:

"In dealing with vacation requests outside of the closed period, the Employer, since 2014, has been using a particular form, which asks the reason for the request. This form is in heavy usage, as is clear from the document put forward by the Employer which shows that a large portion of the bargaining unit (including Executive Members) has used it; it had not been grieved, until this grievance was filed in 2017. Clearly, *the Employer has the right to make rules in the workplace, so long as they are not contrary to the collective agreement*: Article 2.01(b)." (para.26)…

"The comments in paragraph 28 and 29 (in particular) of *the MacKeigan Award* [(2002) 71 C.L.A.S. 92, Re-Halifax Regional School Board and NSUPE , Local 2] *strongly suggest that the reason for the request for vacation outside the closed period is quite relevant in making the Employer's decision whether to grant the request, as it must balance those considerations against its own operational requirements. This case also suggests that the reasons for the request were accepted as relevant considerations in the balancing exercise,* well before 2014 when the new form was introduced." (para 31)…

"It is important to recall that the collective agreement requires that *in making decisions on whether vacation should be granted during the open [school] period, the wishes of the employee (a consideration which I find inherently includes the reason/circumstances surrounding the request) and operational requirements must be considered*. Whether or not the employee has lieu time available is not a relevant factor in making that decision. That is not to say an employee who has lieu time cannot agree with the Employer's suggestion that it be used to take time off in the open period. However, in my view, it is inconsistent with the collective agreement to deny a request simply because lieu time is available. *The collective agreement and the relevant case law confirm that operational requirements and the circumstances surrounding the request are appropriate factors*. The employee can be given the choice of using lieu time, but if she decides against that option, the Employer must make the decision on the basis of operational requirements and the wishes of the employee, which include the reason for the request." (para. 33)…

"*I find that the use of the Employer's form in dealing with requests for vacation in the open period was reasonable and not inconsistent with the collective agreement and the case law. Since the grievor did not provide an appropriate reason for his request, the Employer did not get to the balancing considerations*. However, if he had provided a meaningful reason for the request and it was denied because he had lieu time available, I would have allowed the grievance. Having said that, that proposition is hypothetical in this case. Because of the conclusion I have reached, it is unnecessary to deal with the past practice and estoppel arguments." (para. 34)

[My italicization added]

[7] Concisely stated, her reasons may be reduced to the following propositions:

1-the "open period vacation request form", which has been in use since 2014, is the equivalent to a "rule" made by the Employer, which is permitted by and consistent with the collective agreement;[3]

2-Article 13.02 [Scheduling of Vacations] (a) states that: "Vacations shall be granted based on *the wishes of the employee* and operational requirements. Vacation requests will not unreasonably be denied." This article applies to *all* vacation requests. Article 13.02(e) states that "Employees in Property Services (Custodial) *shall* take their vacation [in the school closed period]. Notwithstanding the foregoing, normally [such employees] *shall* not take more than one week of vacation or a combination of vacation and time off in lieu of overtime pay during the month of July. Notwithstanding the foregoing, employees *may* take vacation at other times subject to operational requirements." Vacation requests during the closed school period are the norm, and that being the case, "wishes of the employee" only requires a statement of the dates to be taken within the closed school period; however vacation requests during the open school period are extraordinary, and when such requests are

[3] See the November 24, 2014 memo sent to "all caretakers, custodians" which reiterated Articles 13.02 (e) and (f) of the collective agreement. It also included the words: "all open period vacation… requests must be accompanied by the new open period vacation request form, which will be signed off by the Staffing Supervisor and the Manager of Property Services, Ross Bruce. Vacations taken outside of the closed periods are exceptions, not the rule." – p. 4 Record Exhibits.

made for vacation, “wishes of the employee” require a statement of the dates to be taken *and* a “meaningful reason for the request” (para 34 decision).

3-the grievor’s statement in the “open period vacation request” form- “reason for vacation request: time off”- was not “a meaningful reason” for his request, therefore the Employer did not have to consider balancing the meaningful reason given underlying the request with operational requirements – and therefore the refusal to grant his request was justifiable.

Standard of review

[8] Both parties agree that a reasonableness standard of review applies to the arbitrator’s decision, because previous jurisprudence has established the appropriate standard of review (*HRM v CUPE Local 108*, 2011 NSCA 41, at para. 23, affirming 2010 NSSC 234):

> 23 If existing jurisprudence establishes the standard of review, then a formal standard of review analysis is unnecessary: *Dunsmuir*, paras. 62, 54, 57. The arbitrator's interpretation and application of the collective agreement according to principles of arbitral jurisprudence is reviewed for reasonableness: *Communications, Energy and Paperworkers' Union, Local 1520 v. Maritime Paper Products Limited*, 2009 NSCA 60, para 20; *Cape Breton (Regional Municipality) v. Canadian Union of Public Employees, Local 933*, 2006 NSCA 80, paras 28-70; *Nova Scotia Government and General Employees Union v. Capital District Health Authority*, 2006 NSCA 44, at paras 36-48; *Nova Scotia Teachers Union v. Nova Scotia Community College*, 2006 NSCA 22, para 15; *Cape Breton-Victoria Regional School Board v. Canadian Union of Public Employees, Local 5050*, 2011 NSCA 9, paras 23-26, 49, and authorities there cited. An arbitrator's interpretation and application of a statute, such as the *Trade Union Act*, that is closely connected to the arbitrator's function is

reviewed for reasonableness: *Dunsmuir*, para 54; *Cape Breton -Victoria Regional School Board v. CUPE, Local 5050*, paras 21-26 and authorities there cited.

[9] In *Egg Films Inc. v Nova Scotia (Labour Board)*, 2014 NSCA 33, the majority stated:

3. Standard of Review - Reasonableness

25 I will apply reasonableness to the issues in this appeal.

26 Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by *analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't -- What does the judge think is correct or preferable? The question is -- Was the tribunal's conclusion reasonable? If there are several reasonably permissible outcomes the tribunal, not the court, chooses among them. If there is only one and the tribunal's conclusion isn't it, the decision is set aside. The use of reasonableness, instead of correctness, generally has bite when the governing statute is ambiguous, authorizes the tribunal to exercise discretion, or invites the tribunal to weigh policy. Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, paras 50-51. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, paras 11-17. *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, paras 20, 31-41. *Coates v. Nova Scotia (Labour Board)*, 2013 NSCA 52, para 46.

…

(a) No Spectrum of Standards

29 As to degrees of deference -- since *Dunsmuir* there is only one deferential standard. In *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, para 59, Justice Binnie for the majority said "[r]easonableness is a single standard that takes its colour from the context". "Colour from the context" in my view means that, when statutory authority is in issue, the application of this single standard involves analysis of each statute's unique text, context, scheme and objectives that may widen or narrow the range of reasonable outcomes.

(b) Attention to Board's Reasons

30 Next, the judge's "treasure hunting", "zooming in", or "tracking" of the Board's reasons. Reasonableness isn't the judge's quest for truth with a margin of tolerable error around the

judge's ideal outcome. Instead, the judge follows the tribunal's analytical path and decides whether the tribunal's outcome is reasonable. *Law Society v. Ryan*, *supra*, at paras 50-51. That itinerary requires a "respectful attention" to the tribunal's reasons, as Justice Abella explained in the well-known passages from *Newfoundland and Labrador Nurses' Union*, paras 11-17.

31 In *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, Justice Abella for the majority reiterated:

> [54] The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. ...

(c) Statutory Interpretation

32 Last is what Egg Films' factum terms the "tautological ... vacuum" of introspective review. Nobody suggests that the reviewing judge should just ponder the internal circuitry of the tribunal's reasons, and disregard the statutory environment. To determine whether the tribunal unreasonably exercised its statutory authority, the reviewing judge tests the connection between the tribunal's conclusion and the statute's plain wording or ordinary meaning, context or scheme, and objectives, channelled under the accepted principles of legislative interpretation. While doing this, however, the judge doesn't drift into correctness review -- *i.e.* the judge remains attentive to the range of reasonable interpretations, instead of focussing on the judge's preference among them. The following authorities explain.

[My italicization added]

[10] Thus, Arbitrator Ashley's interpretation and application of the collective agreement, and reasons for her conclusions are reviewed for reasonableness[4].

[11] As it was concisely stated by Justices Bastarache and LeBel in *Dunsmuir*, 2008 SCC 9 at para.47:

> …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

[4] Similarly were it necessary for her to have done so, her interpretation and application of a statute, such as the *Trade Union Act*, that is closely connected to her function, is reviewed for reasonableness.

> outcomes. In judicial review, reasonableness is concerned mostly with the existence of [page221] 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.

[12] In the present case, it is the application of the standard of review that is in dispute.

The positions of the parties

The Applicant Union

[13] The Union points out that Article 13.02(e) , the wording of the specific article of the collective agreement dealing with the circumstances in this case, is unambiguous on its face ("Notwithstanding the foregoing, employees may take vacation at other times subject to operational requirements"), and therefore that interpretation should **not** be modified by the wording of the general article regarding "scheduling of vacations" 13.02(a) (Vacations shall be granted based on the wishes of the employee and operational requirements. Vacation requests will not unreasonably be denied."). The arbitrator modified the meaning of article 13.02(e) in contravention of article 20.07(c) – "An Arbitration Board or sole Arbitrator shall not have the power or authority to add to, delete from, amend, modify, render meaningless or render a decision inconsistent with the provisions of this collective agreement".

[14] Therefore, the Union says that Article 13.02(e) demands that the Employer only consider "operational requirements" in determining whether or not the employee should be permitted to take "vacation" during the school open period.

[15] It notes that there are other articles in the collective agreement where "reasons" are required before employees are entitled to leaves from employment (eg. Article 15.10 "personal leave" where the bases for allowable personal leave are specifically set out, yet still leaving also a residual discretion to the Employer for non-specified circumstances).[5]

[16] Since the Employer ultimately permitted Mr. Alguire to take time in lieu (deducted from his banked overtime- which can be taken as time off or which would otherwise have to be paid out if not taken during the financial period in question), the Union says there were no "operational reasons" for him to be denied vacation on October 6 and November 10, 2017. Therefore, the arbitrator should have permitted the grievance, and ordered a remedy.

---

[5] Article 15.10 states that "Each employee is entitled to personal leave with pay… [which] may be used for the following…". More importantly, the Article does *not* permit the Employer to deny such leaves for "operational reasons" - and a separate form, "Application for Leave for Lieu and Special Leave Only" must be used – p. 134 Record Exhibits.

[17] The Union asks this court, if satisfied the arbitrator erred, that her decision be quashed and it should be ordered that from the date of the court's decision, the Employer shall apply Article 13.02(e) as it is written, specifically it shall when considering requests for vacation leave in open periods, determine whether there is an operational reason for denying the request, and if there is not, it shall grant the request.

[18] The Union also argues that:

1. the Grievor did give a "reason" ("time off"), and that, by Article 13.02(a) the Employer was required to "not unreasonably" deny vacation requests, yet it did so here;[6]

2. the Employer was not entitled by Article 13.02(e) to require employees to disclose their private information reasons before determining whether to grant their request for open period vacation- and that doing so was contrary to its obligation under s. 24 of the *Freedom of Information and Protection of Privacy Act*, c. 5, SNS 1993 [FoiPoP], not to require personal information from employees

[6] If one accepts that it was reasonable for the arbitrator to conclude that the grievor was required to provide a meaningful reason under Article 13.02 (e) before the Employer was obligated to consider operational requirements, and the grievor did not provide one, then this freestanding argued ground for quashing the arbitrator's decision is not persuasive.

> unless it "relates directly to and is necessary for an operating program or activity of the public body.", which the Employer has not demonstrated in this case; and that requirement for "personal information" is at odds with Article 15.10(b) where the Collective Agreement *specifically* requires employees to give up privacy to get "personal leave".[7]

The Respondent Employer

[19] The Employer argues that the arbitrator reasonably interpreted "wishes of the employee" in Article 13.02(a) as including a meaningful reason(s) when considering the operation of Article 13.02(e).

[20] Ms. Ashley relied upon the 2002 decision of Arbitrator Peter MacKeigan, *Re-Nova Scotia Union of Public and Private Employees, Local 2 and Halifax Regional School Board*, (2002) 71 C.L.A.S. 92 [the MacKeigan decision]. The Employer argues that she did so properly. She used modern principles of interpretation to read all of the provisions of the collective agreement (including

[7] This argument was not extensively pursued nor did the grievor provide "personal information" reasons in support of his request for open period vacation. Furthermore, the arbitrator did not go on to consider the past practice and the potential estoppel arguments, although she contextually referenced the extensive use of the open period vacation request form since 2014 which revealed many employees, including Executive Members of the Union, used the form and provided "personal information" reasons therein. In these circumstances, I am of the view that this is not a persuasive argument in support of quashing the arbitrator's decision.

interpreting Article 13.02) together in an effort to reach a coherent and consistent interpretation, as well as relying on previous arbitral jurisprudence involving virtually the same collective agreement and parties.

[21] As well as involving the same parties and a similar earlier collective agreement, the article in question was almost identical in the MacKeigan decision. The significant portions thereof were:

> 13.2 – Scheduling of vacations
>
> (a) Vacation shall be granted subject to operational requirements.
>
> (b) *Vacations will be granted based on the wishes of the employee and operational requirements.* Vacation requests will not be unreasonably denied. [These two provisions have been combined into 13.02 (a) in the present Collective Agreement.]
>
> …
>
> (e) Employees in Property Services shall take their vacation between Christmas and New Year's, during March break and during July and August. *Notwithstanding the foregoing, employees may take vacations at other times subject to operational requirements.*

[22] Arbitrator MacKeigan resolved the issue he was called upon to determine as follows:

> "The Union has previously in its grievances for both grievors requested a declaration be issued that operational requirements cannot be used to unduly restrict the availability of vacation to a member. I am not in a position to make such a declaration. *I am in a position and do declare that vacation requests must be granted subject, however, to operational requirements and that the vacations will be granted based upon both the wishes of the employee and the operational requirements, and that vacation request will not be unreasonably denied. This is clearly the language found in Article 13.02." (para. 31)*

[My italicization added]

[23] He went on to elaborate more specifically:

> "*I am satisfied… that the Employer did consider the wishes of the employees and did make a review of the specific situations for both Mr. Baker and Mr. Rudge*. I am further satisfied that the Employer did not simply apply a blanket policy as such, but *took into account the specific situation in the schools and the specific requests of the grievors*. They then made a determination that operational requirements, as required under Article 13.02 would prevent the approval of vacation during the times previously indicated. I am therefore satisfied that the Employer did follow Article 13.02 in terms of the consideration of the vacation dates for the specific grievors. The operational requirements considered were not unreasonable or bogus in these circumstances. The Employer has demonstrated that taking a vacation at the times requested by the grievors would reasonably interfere with the efficient and effective operation of the schools. That was balanced against the wishes of the grievors." (para. 30)
>
> [My italicization added]

Why there is not a persuasive argument that Arbitrator Ashley's reasons do not reflect justification, transparency and intelligibility, and the outcome thereof does not fall within a range of possible, acceptable outcomes defensible in light of the evidence and law.

[24] It is fair to characterize Arbitrator MacKeigan's decision as being of limited value in the present case, given the nature of the dispute he was asked to resolve, the fact that since 2014 the Employer has a rule requiring use of the "open period vacation request form", and the limited use that Ms. Ashley made of his decision. Nevertheless, the MacKeigan decision provides a contextual springboard for Arbitrator Ashley's decision.

[25] She stated at paragraph 31:

> "One of the issues here is whether the reference in the collective agreement to the "wishes of the employee" and making vacation requests includes **the reason** for the request, or whether those are two separate things. The comments in paragraph 28 and 29 (in particular) of the MacKeigan award strongly suggest that the reason for the request for vacation outside the closed period is quite relevant in making the employer's decision whether to grant the request, as it must balance those considerations against its own operational requirements. The case also suggests that the reasons for the request were accepted as relevant considerations in the balancing exercise, well before 2014 when the new form was introduced."

[26] She concluded at paragraph 34:

> "I find the use of the Employer's form in dealing with request for vacation in the open period was reasonable and not inconsistent with the collective agreement and the case law. Since the grievor did not provide an appropriate reason for his request, the employer did not get to the balancing considerations."

[27] In the present case, the Employer points out, Arbitrator MacKeigan appreciated that:

> "… *It was ultimately acknowledged by both parties that operational requirements are a consideration, and that there must be a balance between operational requirements and the wishes of the employee*. Part of the difficulty arises in this matter I believe from the way in which the decision was communicated to the employees by the Employer in the Application for Leave form and in particular the statement of Mr. Rudge's form stating: 'David I cannot approve vacation in the open school period.' There was also obviously a concern as to whether the Employer had simply made an arbitrary decision not to grant vacations during a school open period regardless of the circumstances or the wishes of the employee. If that had ultimately been the reason for denial of the vacation request, without inquiry as to the balance between the wishes of the employee and the operational requirements at that time as it relates to that employee, I would have found in favour of the Union and upheld the grievance." (para 23)
>
> [My italicization added]

[28] Hence the Employer's position that, although the MacKeigan decision does not expressly equate "the wishes of the employee" with the requirement that an employee provide "reasons" for the vacation request, it does "strongly suggest"

that equivalency in the context of present Article 13.02(e); and in addition, one must recall that circumstances have changed since 2002 (eg. the use of the 2014 form), such that employees are required to provide meaningful reasons to allow a qualitative assessment to take place in determining whether operational requirements preclude the specific request presented for open period vacation.

[29] The Employer correctly emphasizes that the court itself need not be persuaded that the Arbitrator's decision is correct- it must only ask itself whether Arbitrator Ashley's reasoning process is intelligible, transparent, justified and reasonable, and her conclusion is similarly so- in which case the court *must* dismiss the Union's request to quash the arbitrator's decision.

[30] The burden is upon the Union to present a persuasive argument that the arbitrator's reasoning path was not justified, transparent and intelligible, and her interpretation of the collective agreement falls outside of the range of possible reasonable outcomes, given the wording of the collective agreement, the evidence presented, and the relevant jurisprudence.

[31] As I have alluded to earlier, I find that Arbitrator Ashley considered the entire Collective Agreement, in coming to her reasonable determination that an employee who submits an open period vacation request form must provide a

meaningful reason for the request before the Employer is required to consider whether operational requirements could be met if the request is granted. It was not unreasonable for her to conclude that the Employer was within its rights to conclude that "time off" was not a meaningful reason, and therefore not go on to consider whether operational requirements could be met if the request were granted.

Conclusion

[32] The Application is denied. The parties have agreed that costs in the amount of $1000 be payable forthwith. The Union is therefore ordered to pay $1000 to the Employer. I direct the Employer to prepare a draft order for "consent as to form" by the Union.

Rosinski, J.