SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia (Education and Early Childhood Development) v. Nova Scotia Teachers Union,* 2020 NSSC 217

Date: 20200812
Docket: Hfx No. 494863
Registry: Halifax

Between:

The Minister of Education and Early Childhood Development of the Province of Nova Scotia

Applicant

v.

The Nova Scotia Teachers Union
and
Eric Slone, an Arbitrator appointed pursuant to the Teachers' Collective Bargaining Act

Respondents

D E C I S I O N

Motion for Stay of Proceedings Pending Judicial Review

Judge: The Honourable Justice M. Heather Robertson

Heard: August 5, 2020, in Halifax, Nova Scotia

Decision August 12, 2020

Counsel: Kevin A. Kindred, for the applicant, EECD
Gail L. Gatchalian, Q.C., and Jaime Burnet for the respondent, NSTU

Robertson, J.:

[1] The applicant, the Department of Education and Early Childhood Development for the Province of Nova Scotia, has applied for judicial review of a decision and supplemental decision of Arbitrator Eric Slone, dated November 25, 2019, and December 10, 2019. The applicant seeks a stay of the decision and supplemental decision pending the outcome of the judicial review, which is currently scheduled to be heard in this Court on October 8, 2020. I grant the stay. My reasons follow.

Background

[2] In May and June 2018, the applicant took steps to remove school psychologists, speech language pathologists and social workers ("the specialists"), from being issued "special certificates" by the Register of Teacher Certification for the purpose of their inclusion in the Nova Scotia Teacher's Union ("NSTU") bargaining unit.

[3] The hiring of 60 new specialists that ensued meant that they were hired outside the NSTU under terms and conditions generally applicable to non-unionized professional employees of the various regional education centres, entities previously known as "school boards." It was the intention of the applicant that the only specialists that would be affected were new hires, not specialists who were previously members of the NSTU.

[4] The applicant has said that this step was taken so that the Department of Education and Early Childhood Development ("the Department") could offer services to students and their families outside the school year and daily school instructional hours worked by the teachers and that this was required to meet an agreed unmet demand for their services by children and their families.

[5] The NSTU filed a grievance regarding the applicant's decision of June 2018. The NSTU referred the grievance to arbitration. The parties agreed that Arbitrator Eric Slone would hear and decide the grievance. The parties agreed on a joint statement of facts and book of documents. The grievance was heard October 15, 16, and 21, 2019. The decision was released on November 25, 2019, with a supplemental decision released on December 10, 2019.

[6] The applicant filed a notice of judicial review of Arbitrator Slone's decision on January 17, 2020. Through no fault of the applicant, two adjournments of the stay application that was to be heard in early 2020 ensued and the occurrence of the Covid-19 pandemic occasioned further delay until this hearing of August 5, 2020. It is now just over 60 days before the Arbitrator's decision will be challenged by the applicant upon judicial review, certainly impacting on the immediate implementation of the Award should the stay not be granted.

[7] Had the specialists hired since June 2018 been issued special certificates, they would have been part of the NSTU's bargaining unit, with terms and conditions of employment determined under the Teachers' Provincial Agreement. The Arbitrator ordered the applicant to implement a remedy which would accomplish this before the beginning of the 2020 school year in September.

[8] On December 6, 2019, the respondent requested an urgent supplemental hearing with the Arbitrator, seeking an order for immediate implementation of certain aspects of the decision. The Arbitrator granted that request and convened a hearing via conference call on December 10, 2019. In the evening of December 10, 2019, he issued a supplemental decision, which ordered that the applicant take the following steps "forthwith":

- reintroduce the process for issuing specialist certificates, direct the specialists hired after June 2018 to apply, and process the applications (the relevant regulations require applications to be processed within 30 days);
- align the workday of specialists to the school day worked by teachers, rather than the regular office workday they were hired to work;
- allow specialists the benefit of the sick leave provisions of the Teachers' Provincial Agreement;
- more generally, apply "day to day" benefits of the Teachers' Provincial Agreement to specialists.

[9] The supplemental decision does not order any immediate changes with respect to benefits, pension plans, or insurance plans. However, the Arbitrator stated that "if a stay is not granted by the court, then further steps to implement all of the terms of the Award will have to be started, including those that deal with pension and benefits."

Law and Argument

[10] In this motion, the applicant moves for an order staying the Arbitration Award and Supplementary Award pending its application for judicial review. This Court's discretion to grant such an order arises from Rule 7.29(1):

> 7.29(1) A judge may stay a decision under judicial review or appeal and any process flowing from the decision until the determination of the judicial review or appeal.

[11] The applicant outlines the test articulated in *Purdy v. Fulton Insurance Agencies Limited*, 1990 NSCA 23, para. 28, in support of the motion:

> In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either
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> (1) satisfy the Court on each of the following:
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> (i) that there is an arguable issue raised on the appeal;
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> (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and
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> (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience.
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> OR
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> (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[12] The party seeking a stay has the burden of proving the elements required for a stay. *Landry v. Benjamin*, Beaton J.A., 2019 NSCA 73.

Serious Issue Raised

[13] The respondent points out that the arguable issue on appeal is informed by the standard of review that applies to the decision to be reviewed. *Bay of Fundy Inshore Fisherman's Assn. v. Nova Scotia (Minister of the Environment)*, 2016

NSSC 286, para. 19. They point out that the Awards of Arbitrator Slone are reviewable on the deferential standard of reasonableness, not correctness. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[14] The respondent urges me to find that there is no serious question to be tried as the applicant states that on the appeal of the Arbitrator's decision, they will argue that elements of this decision were "incorrect." They argue the applicant has made no serious effort to apply the required reasonableness standard to the Arbitrator's decision and has therefore failed to establish there is a serious issue to be tried.

[15] I take the view that I must be satisfied that there is an "arguable issue" to raise upon the judicial review and that I must establish that the application before me is not frivolous or vexatious. *Cape Breton (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2013 NSSC 41.

[16] In my view, the threshold has been met for a serious issue to be advanced by the applicant at the judicial review. The applicant has pointed out they will raise the serious issue of the level of discretion held by a public official under the relevant regulations, to determine the statutory definition of "teacher" and if it may include non teaching professionals and further whether the Arbitrator mischaracterized the motivation of the government in the steps it took to meet the needs of the students and families. These considerations all certainly not frivolous and vexatious.

Irreparable Harm

[17] As to meeting the second condition, whether the applicant will suffer irreparable harm, this must be clear from the evidence and not speculative. *Down East Vending Inc. v. Lockerbie*, 2013 NSSC 229, para. 19, and *Lavy v. Hong*, 2018 NSCA 6, para. 12.

[18] The applicant has produced the affidavit of Angela Kidney, sworn to December 13, 2019, and her rebuttal affidavit, sworn to January 23, 2020.

[19] The respondent has filed the affidavit evidence of Pamela Langille, Executive Staff Officer with the NSTU and the affidavits of Heather Boucher, a school psychologist, and Natalie Underhill, a speech-language pathologist, both employed with the Halifax Regional Center for Education, both of whom have been NSTU members from 2015 and 2006, respectively. Both these women were

employed in term contracts previous to June 2018, while holding "specialist certificates" that previously made them members of the NSTU bargaining unit. Both sought and were offered newly posted term contracts with the Halifax Regional Education entity in June 2018 and were informed that they would no longer be in the bargaining unit.

[20] The respondent also relies on the affidavit evidence of Wallace Fiander, an Executive Staff Officer employed by the NSTU dated January 24, 2020. This affidavit is intended to address the ongoing demand for specific services and how it may be met year-round while keeping the specialists in the bargaining unit. His affidavit speaks to the notice given to bargain of a new collective agreement dated November 8, 2018, and the round of bargaining meetings that took place through 2019, that dealt with, in part, the proposal to have this category of "specialists" remain in the bargaining unit but work through the calendar year. These are ongoing unresolved issues that I do not wish to evaluate on their merits, in this stay application.

[21] The respondent urges the Court to view the applicant's failure to respond this proposal as evidence of bad faith. I am not in a position to make judgments with respect to these proposals and responses that will in any event be addressed upon judicial review on October 8, 2020.

[22] With respect to the applicant's affidavit evidence, provided by Ms. Angela Kidney, she points out in her rebuttal affidavit that Ms. Boucher and Ms. Underhill are in a slightly unique position with "some others" having applied for "new positions" in June 2018. She says it was the intention of the Department to have the non-union specialist positions after June 2018 apply only to new hires, with no history of working within the NSTU bargaining unit holding "specialist certificates."

[23] Ms. Kidney, in her first affidavit, outlines the harm associated with taking, and then reversing the "specialist certificate" requirement. She states at paras. 15-18:

> 15. First, the Department anticipates there would be harm associated with taking, and then reversing, steps to extend the benefits of the Teachers' Provincial Agreement to the specialists. This includes (but is not limited to):
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> - making changes to specialists' pay and benefits to reflect NSTU benefits, only to have to undo any such changes. It would be

impractical and disruptive to the specialists to try to undo the extension of benefits to which they would not be entitled outside the bargaining unit; one can anticipate for example that paid leaves might already have been taken.

- specialists would be for a short time be considered part of the insurance, LTD, and pension plans applicable to the NSTU bargaining unit, only to be removed if the award is overturned. This would be impractical and disruptive.
- specialists would for a short time be required only to work the school day worked by teachers, rather than the regular office workday they were hired to work. This would be impractical to undo if the award is overturned, and the education entities would be unlikely to regain the lost hours.

16. If a stay is granted until the determination of the judicial review application, the affected specialists would continue to work under the terms and conditions generally applicable to non-unionized professional employees of those education entities, which were expressly agreed to by them on hire.

17. Secondly, specialists who apply for certificates would likely have them issued before any judicial review is decided. There is no clear process for revoking a certificate once granted, unless for cause.

18. The third type of harm anticipated by the Department if the Department is forced to take immediate steps to implement the Decision, and then is successful on judicial review, is the harm to students and their families if specialists' services are unnecessarily limited to hours, days, and months worked by teachers. There is a well-recognized gap in service whereby not all students and families who require the services of school psychologists, speech language pathologists, and social workers are unable to receive those services. If, even for a short while, a change in hours, days, and months of work leads to a reduction in services provided, that gap will be irreversible.

[24] Having carefully reviewed the affidavit evidence before me and heard counsels' representations respecting the irreparable harm that may occur if a stay is not granted, I am of the view that the applicant has met the threshold of irreparable harm. I believe the implementation of the Arbitrator's decision, particularly at this time, a little over 60 days before the judicial review, goes beyond mere inconvenience or some disruption or impracticability as suggested by the respondent.

[25] First and foremost, the 60 specialists newly hired would be required to be issued "Teacher's Certificates" that would make them members of the NSTU bargaining unit and this could not easily be reversed. In the result the goal of the Department to extend services to children and their families on a year round basis with a business hours (9:00 a.m. to 5:00 p.m.) model, would be completely frustrated and should the decision following judicial review be in favour of the applicant, the required extended hours of service would no longer apply with respect to this group of specialists. In effect the applicant would have to begin again with new hires, two years after the steps to expand the services were first implemented.

[26] The affidavit evidence of Ms. Langille and Ms. Underhill suggest that their services are now adequately covered in the existing ten-month school year and during the teacher's instructional school day. They further say that they do work extra hours beyond the instructional school hours as do many teachers. Their affidavits also address their own experiences with the so called "back log" or "waiting list" for children who requires services and state that in many regional centres no waiting list prevails.

[27] They also point out that in many regional centres, no extra services were provided in the summer of 2019 and none so far in 2020. 2020 is of course a different circumstance in light of the Covid-19 pandemic.

[28] The applicant disagrees with this evidence. The fact is that lost hours, when the specialists would be available to provide services, includes many tasks beyond performing assessments of students. The responsibilities of the specialists also involve therapy, counseling, meeting with student and their families, preparing reports and programme plans.

[29] The affidavit of Ms. Angela Kidney outlines at paras. 11-12 the services offered by the specialists that include services to over 300 students and their families in the summer of 2019.

[30] Although the applicant did not present affidavit evidence of any psychologist or speech pathologist specialists offering services on the new full time hours, year round model, I am satisfied that Ms. Kidney, as Director of School Board Labour Relations with the Department, is in a position to speak to the services that were offered and that her evidence is not speculative, but a factual explanation of the services offered on the full calendar year model.

[31] With respect to the respondent's representation that the collective agreement addresses after hours work in Article 62, this is intended to address limited number of Teachers School Meetings and Conferences and could not address the fact of a planned daily extension of services to students and further work intended to be carried on the business hours model.

[32] The nature of irreparable harm is rooted in evidence of the lost working time and the clear impact on students and their families.

[33] Nor do I accept that the concept of a few "catch up sessions" with students in September will achieve the intended level of expansion of services contemplated by the applicant. This is addressed by Ms. Underhill in her affidavit respecting her own experience and does not reflect the extent of the services that were actually offered by the applicant.

[34] The respondent has relied on a series of cases that address irreparable harm that is otherwise compensable by damages of a monetary award. *Down East Vending Inc. v. Lockerbie*, 2013 NSSC 229, *G.W. Holmes Trucking (1990) Ltd., (Re)*, 2005 NSCA 132, *Landry v. Benjamin*, 2019 NSCA 73, and *Lavy v. Hong*, 2018 NSCA 6. The causes are all examples of commercial situations where the harm was deemed to be compensable, such as loss of customers, loss of market share, loss of rental income, loss of commercial orders or payment of monies.

[35] The circumstances of this case, I accept, have more to do with the qualitative nature of the harm (loss of needed services to students who are most vulnerable and in need of help) as opposed to quantitative harm in terms of addressing hourly value of service hours in a future proceeding.

[36] The respondent has also advanced the argument that under the new service model that the 60 or so new hires would be able to take four weeks vacation at any time through the calendar year, thus diminishing the time available to provide services in the school year. The fact is that one group would have four weeks vacation equivalent during a calendar year versus more vacation weeks in a ten-month work calendar as provided for in the union contract.

[37] The respondent has raised the issue that the type of harm raised by the applicant, that of harm to students for the lost hours of services not available to them and their families, constitutes a public interest harm as opposed to a harm to the Minister of Education. They say this public interest harm can only be addressed in the secondary test after failure to meet the requirement of irreparable harm in the

primary test for a stay. I believe this is an overly arbitrary distinction. The Minister of Education has primarily a duty to the public of the province he serves. Apart from the "technical harm" of issuing teaching certificates to 60 or so new hires that cannot easily be revoked, there is a qualitative harm, failure of extended needed services to meet an acknowledged need, that should be considered on an analysis on the primary test for a stay, not merely as an after effect of "public interest" harm on a secondary ground of the tests' extraordinary circumstances. The extension of services on the new model is after all, the primary issue between the parties.

[38] Another issue raised by the respondent relates to the ongoing union membership of the few members of the group of 60 taken out of the union's bargaining group by the Minister's actions in 2018, by reason of their accepting new term contracts. First, the applicant says this is an anomaly as these individuals applied for new positions and that it was the intention for the new model to only apply to new hires of psychologists, speech pathologists and social workers, who would no longer be issued "teaching certificates." I note this issue of how to manage new hires with previous bargaining unit status was not addressed in the Arbitration Award.

[39] I accept argument of the applicant that the constitutional right (s. 2 of the *Charter*) to collectively bargain, will be not lost to any of the 60 affected specialists, merely the right to bargain in the NSTU bargaining unit.

Balance of Convenience

[40] I am satisfied that for the sake of a little over 60 days until the determination of the judicial review, the balance of convenience rests with the applicant. I am uncertain that if a stay were granted, it would even be possible in the time remaining to effect the changes in employment benefits, pensions, etc. that the Arbitrator's decision calls for. If successful on the judicial review there would be no required actions of compliance. The issuance of "teacher's certificates" poses a larger problem of non reversibility and weighs the balance in favour of the applicant.

Extraordinary Circumstances

[41] I have discussed the "public interest" harm related to the secondary test and find the harm to students could properly be considered under both tests for a stay in these circumstances. It is however unnecessary for me to find the stay is required

solely in extraordinary circumstances, as the first primary elements of the test for a stay having been met.

[42] In the result, the stay of a required enforcement of the Arbitrator's Award is granted pending judicial review.

Robertson, J.