<u>SUPREME COURT OF NOVA SCOTIA</u>

Citation: *Nova Scotia Union of Public & Private Employees, Local 13 v. Halifax Regional Municipality,* 2021 NSSC 171

Date: 20210518
Docket: *Hfx*, No. 492718
Registry: Halifax

Between:

Nova Scotia Union of Public & Private Employees, Local 13

Applicant

-and-

Halifax Regional Municipality

-and-

Augustus M. Richardson, Q.C., Arbitrator

-and-

Attorney General for the Province of Nova Scotia

Respondents

Decision
Contents of the Record on Judicial Review

Judge: The Honourable Justice Christa M. Brothers

Heard: March 29, 2021, in Halifax, Nova Scotia

Counsel: Nancy L. Elliot, for the Applicant
Andrew Gough, for the Defendants

By the Court:

[1] The Nova Scotia Union of Public & Private Employees, Local 13, (NSUPE), the applicant in this judicial review, brought a motion seeking three types of relief:

1. Setting the content of the Record;
2. Receiving updated directions; and
3. Appointing a time, date and place for the hearing of the judicial review.

[2] I heard the motion, set a time, date, and place for the hearing of the judicial review and gave directions with regards to the filing of briefs. I now provide this decision setting the content of the Record. I have concluded that the fresh evidence, in the form of a new affidavit proposed by the respondent Halifax Regional Municipality (HRM) will not be admitted given there are no exceptional circumstances present to permit the introduction of this new evidence on judicial review.

Background

[3] NSUPE and HRM are parties to a collective agreement entered into pursuant to the *Trade Union Act*, RSNS 1989, c 475. Two grievances, both of which were individual grievances on behalf of NSUPE member Candas Clarke ("Ms. Clarke") and policy grievances by NSUPE, were heard by Arbitrator Augustus Richardson, Q.C. The learned arbitrator rendered a written award on September 3, 2019, and it is this award for which NSUPE is seeking judicial review.

[4] Edward Gores, Q.C., advised the parties on November 13, 2019 that the respondent Attorney General would not be participating in the proceedings. The respondent arbitrator advised the parties on November 13, 2019, that he would not be participating in the proceedings.

[5] The parties have agreed on the content of the Record, with one exception. Initially, there was a request that the arbitrator's notes taken during the arbitration be obtained and the Record include those. The respondent HRM resiled from this position at the motion. The respondent did, however, maintain that the Record should include a new affidavit compiled from notes taken by an HRM manager during the arbitration. HRM proposes to include a new affidavit from Joy Ducharme that sets forth evidence compiled from her notes taken during the submissions and witness testimony at the arbitration. HRM says this is necessary in order to respond

to ground 5 of the Notice for Judicial Review, as included in the amended Notice for Judicial Review on December 9, 2019 which added a fifth ground of review:

> 5. The learned arbitrator erred in considering evidence that he had previously determined irrelevant and inadmissible and in drawing adverse inferences from such evidence with respect to material facts relevant to many of the issues before him.

[6] It is in relation to the fifth ground that the disagreement over the content of the Record has arisen.

[7] The arbitrator rendered interim evidentiary decisions concerning what evidence, both documentary and oral, could be adduced at the arbitration concerning events pre-dating the events at issue in the grievance. The arbitrator noted that during direct testimony, the grievor had referred to the events pre-dating January 2017 and to documents referring to that history. The arbitrator then determined that certain documents sought to be adduced by both parties would be excluded:

> [10] …[E]vidence as to what did or did not happen, or what should or should not have happened, prior to January 2017 is not relevant to the proceedings before me. Hence the pre-2017 emails in the Employer's book of documents at pp.1-237 in Ex. E2, Tab 1 are not relevant. Nor is the grievor's letter of February 18, 2016 and the attached mediation documents in Ex. U1, Tab 2 [Sic]. While I will leave them in the books (subject to the concerns of counsel) I will not read them. Nor will I accept them as evidence relevant to the grievances before me.

[8] In giving direction on the scope of cross-examination, the learned arbitrator said that it may be necessary from time to time during the hearing to touch on history pre-dating January 2017.

[9] The applicant argues that following the interim decision the arbitration hearing continued in accordance with that decision. There was testimony from time to time that touched on history pre-dating January 2017, including mention of a previous mediation involving the grievor. In his final decision, the arbitrator set out portions of the mediation agreement. He made the following finding:

> [232] …I was satisfied on the evidence that what motivated the grievor to post the sign when and where she did was not a desire to show support for the Employer's anti-bullying policies (though I am satisfied that she did sincerely believe in them), but rather a desire to send an express and direct message to Mr. Henwood that she considered him a bully and that she would not tolerate conduct that she considered bullying upon his return.

> [233] In taking this step the grievor was contravening what she herself had promised not to do in August 2016 at the conclusion of the mediation. She was engaging in a preemptive personal exchange with Mr. Henwood. She was not practising professionalism. She was not making any effort to "overcome anticipating negativity" toward Mr. Henwood….

[10] The grievances before the arbitrator arose from events that followed the grievor posting an anti-bullying sign on her office door. The applicant's position is that the grievor's motivation for posting the sign was a material fact, and in some cases "the" material fact, that informed the outcome of the arbitrator's decision on many of the issues before him. NSUPE intends to argue at the judicial review that the arbitrator erred in considering the content of the mediation agreement and in making inferences from the content as to the grievor's motivation for posting the sign.

[11] The arbitration hearing was not recorded and there is no transcript of the testimony given by witnesses or submissions made during the hearing.

Issue

[12] Should the affidavit of the employer's representative, Joy Ducharme, based on her notes taken during the arbitration hearing, be included in the Record?

The Affidavit

[13] The Ducharme affidavit is 34 paragraphs. In those paragraphs, Ms. Ducharme, who is employed as a "Labour Relations Specialist" in the Human Resources Business Unit of HRM says she attended the arbitration daily. She provided labour relations advice to HRM. Over this nine-day arbitration, she apparently took notes of the submissions and evidence given and heard at the arbitration. She relies on these notes to swear the information in this affidavit. In the affidavit, she refers to a prior history between the grievor and a Mr. Henwood. Their previous interactions resulted in a mediation. The affidavit goes on to reference an opening statement made by NSUPE's counsel and the direct examination of the grievor at the arbitration as well as the background information and the fact of mediation between the subjects of the arbitration. The mediation agreement was apparently referred to.

[14] The affidavit goes on to ostensibly demonstrate that both parties asked various witnesses about the prior relationship and the mediation, even after the interim ruling on the mediation's relevance and admissibility.

Positions of the Parties

[15] HRM argues that the affidavit of Joy Ducharme should be admitted on the judicial review as it demonstrates that counsel for both parties in their examinations and cross-examinations of witnesses both before and after Arbitrator Richardson's November 24, 2018 interim evidentiary ruling, *Nova Scotia Union of Public and Private Employees, Local 13 v Halifax Regional Municipality*, 2018 CanLII 143039 ("Interim Ruling"), continued to reference the mediation that had occurred between the grievor and Mr. Henwood, the pre-existing conflict between them, and the ongoing nature of that conflict.

[16] HRM argues that by identifying certain portions of the parties' conduct of their cases, the affidavit will provide the reviewing court with important insight on how evidence initially ruled as irrelevant by the arbitrator returned and remained in play through the evidence of subsequent witnesses. This evidence will negate any argument that the parties were deprived of an opportunity to call necessary evidence on these points and will provide much needed context on why certain documents and evidence were included in the arbitrator's final decision, *Nova Scotia Union of Public & Private Employees, Local 13 v Halifax Regional Municipality*, 2019 CanLII 83530 ("Final Decision").

[17] HRM further argues that without the affidavit of Ms. Ducharme, the reviewing court would be left with the impression that the arbitrator considered evidence that was earlier ruled as inadmissible without allowing any party the opportunity to respond to it. The affidavit is not being proffered to argue the truth of the evidence given by the witnesses, but to respond to any assertion of procedural irregularity or unfairness connected with the fifth ground of judicial review.

[18] This ground of review relates to paragraphs 10 and 11 of the November 25, 2018 Interim Ruling. At paragraph 10 of that ruling, Arbitrator Richardson, based on the evidence that had been placed before him at that time and the submissions of the parties, ruled that certain pre-2017 emails and other documents in the Employer's Book of Documents were not relevant. The arbitrator further ruled that he would leave these items in the book (subject to the concerns of counsel) but would not read them and that he would not accept them as evidence relevant to the grievances before him. At paragraph 12 of his decision, Arbitrator Richardson left open the possibility that some "limited cross examination may be necessary to test the sincerity of their belief in their particular version of that history."

[19] In the arbitrator's Final Decision of September 3, 2019, the arbitrator, under the headings "Context: History of Interpersonal Conflict" and "Context: The 2016 Disputes and Resulting Mediation" made reference to the materials previously referenced in the Interim Ruling. For example, at paragraph 31:

> [31] Exhibits U1 (filed by the Union) and E2 (filed by the Employer) both contained a fair amount of pre-2017 documentation. It consisted mostly of emails, together with various meeting notes and reports: Ex. U1, Tab 5; Ex. E2, Tabs 1, 3. Counsel for the parties advised me that these documents were introduced to provide context for the incidents in 2017 that led to the two grievances before me. I was not expected to make any findings of fact regarding the various events, incidents, concerns and disputes contained in the pre-2017 documentation.

[20] At paragraph 35, the arbitrator referenced a "21 – page, single-spaced, typed letter", which is the February 18, 2016 letter, identified in the Interim Ruling. At paragraph 36, he referred to the August 17, 2016, mediation agreement between Mr. Henwood and the grievor.

[21] The history of the conflict between the grievor and Mr. Henwood was identified as a relevant factor in management's assessment of the grievor's conduct giving rise to the grievance and also featured in Arbitrator Richardson's analysis in the final decision.

[22] HRM indicated that it understood that NSUPE's position, as articulated in the fifth ground of review, is that it was an error on the part of the Arbitrator to refer in his final decision to a document he initially ruled irrelevant at the beginning of HRM's cross-examination of the grievor. HRM anticipates an argument relating to procedural fairness, and says it is seeking to introduce the affidavit of Ms. Ducharme as a means of responding to any assertion of procedural unfairness or irregularity arising from Arbitrator Richardson's November 25 Interim Ruling.

[23] As indicated in her affidavit, at all material times Ms. Ducharme was a labour relations specialist employed in the Human Resources Business Unit of Halifax Regional Municipality, whose job duties included providing HRM with labour relations advice with respect to the NSUPE, Local 13, bargaining unit. In that capacity she attended every day of the oral hearing and took detailed notes. HRM submits that her affidavit addresses a number of important points:

(a) The history of conflict between the grievor and Mr. Henwood was referred to in opening arguments.

(b) The actual mediation agreement which was included in the final decision was placed before the arbitrator in the grievor's direct examination by Ms. Elliott without any objection on the part of the Employer.

(c) Arbitrator Richardson's interim ruling came at the beginning of the Employer's cross-examination of the grievor.

(d) By that point, the mediation agreement had already been placed before the Board.

(e) Following the Interim Ruling, the parties continued to reference the fact that a mediation had occurred and that it had not resolved the differences between the grievor and Mr. Henwood.

(f) None of the lines of questioning relating to the history of ongoing dispute, that a mediation had occurred, that an agreement had been reached, and that from the grievor's perspective there was still conflict between her and Mr. Henwood, was objected to by either party.

[24] HRM argues that these points provide crucial context to the reviewing court in relation to why the arbitrator would have referenced the mediation agreement in the final decision. The evidence, it is submitted, merely shows the general background of how the case proceeded and is highly relevant to the determination of whether the arbitrator's Interim Ruling led to a denial of procedural fairness that affected the final outcome.

[25] The applicant objects to Joy Ducharme's notes being included as part of the Record on the following grounds:

1. Notes taken by a representative of one of the parties do not usually form part of a record;
2. Notes taken by a representative of one of the parties cannot be presumed accurate or reliable; and
3. No exceptional circumstances exist to warrant such material being placed before the court.

Law and Analysis

[26] *Civil Procedure Rule* 7.10 states:

> 7.10 A judge hearing a motion for directions may give any directions that are necessary to organize the judicial review, including a direction that does any of the following:
>
> (a) settles what will make up the record and whether something is part of the record;
>
> …
>
> (g) rules on the admissibility of evidence sought to be introduced at the review hearing;

[27] Rule 7.28 sets out the process for a party who wishes to obtain the court's permission to introduce evidence beyond the record on a judicial review:

> 7.28 Evidence on judicial review or appeal
>
> (1) A party who proposes to introduce evidence beyond the record on a judicial review or appeal must file an affidavit describing the proposed evidence and providing the evidence in support of its introduction.
>
> (2) An applicant for judicial review, or an appellant, must file the affidavit when the notice for judicial review or the notice of appeal is filed, and a respondent must file the affidavit no less than five days before the day the motion for directions is to be heard.
>
> (3) A motion for permission to introduce new evidence must be made at the same time as the motion for directions, unless a judge orders otherwise.

Content of Record

[28] The *Civil Procedure Rules* do not provide guidance as to the content of a Record on judicial review. In *Sorflaten v. Nova Scotia (Environment)*, 2018 NSSC 7, Justice Boudreau made clear that affidavit evidence beyond the Record is generally inadmissible on a judicial review, which is a review of an administrative decision-maker's decision, not a re-trial or a search for some "universal truth". *Sorflaten* makes clear that introduction of affidavit evidence beyond the Record is an exception.

[29] In *Kelly v. Nova Scotia Human Rights Commission*, 2018 NSSC 173, Justice Arnold quoted with approval from Justice Stewart's decision in relation to what should constitute a Record for the purpose of judicial review:

> 26. In *IMP Group International Inc. v. Nova Scotia (Attorney General)* (2013), 336 N.S.R. (2d) 188, 2013 NSSC 332 (N.S. S.C.), Stewart J. provides a comprehensive overview of the meaning of "record" under the Rules:

> 21 The *Civil Procedure Rules* do not define the "record," but the decision-making authority is required to produce it: Rule 7.09(1). A judge hearing a motion for directions may make certain determinations about the content of the record. This provides no guidance as to how such a determination should be made. According to Sara Blake, in Administrative Law in Canada, 5th edn. (LexisNexis, 2011), at 202-203:
>
>> The record that was before the tribunal is the evidence on which a court bases its review of the tribunal's action or decision ... The record must include the document that initiated the proceedings before the tribunal and the tribunal order or decision. If relevant to the issues raised in the application for judicial review, the record may include the tribunal's reasons ..., interim rulings made by the tribunal, [and] the exhibits filed with the tribunal ... The record does not include communications for the purpose of settlement nor documents protected by deliberative secrecy or privilege such as drafts of the tribunal decision ... The tribunal is not obliged to create new documents as the record contains only existing documents in the possession of the tribunal that were used in making the decision.
>
> Blake goes on to say, at 204-206:
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>> Only material that was considered by the tribunal in coming to its decision is relevant on judicial review because it is not the role of the court to decide the matter anew. The court simply conducts a review of the tribunal decision. For this reason, the only evidence that is admissible before the court is the record that was before the tribunal. Evidence that was not before the tribunal is not admissible without leave of the court. If the issue to be decided on the application involves a question of law, or concerns the tribunal's statutory authority, the court will refuse leave to file additional evidence. Evidence challenging the wisdom of the decision is not admissible ... If the applicant alleges bias, use of statutory power for an improper purpose, fraud on the tribunal, absence of evidence to support a material finding of fact or failure to follow fair procedure, the court may grant leave to file evidence proving these allegations ...

[30] The proposed affidavit was not before the arbitrator. The case law is clear leave is necessary for it to be introduced and there are only certain bases for its introduction.

[31] The Record thus far agreed to by the parties includes the grievances that initiated the proceedings, the arbitrator's interim and final decisions and reasons, all the exhibits filed with the tribunal (which continue to include those exhibits the arbitrator excluded from evidence), and written submissions made by the parties.

[32] The courts have considered the question of notes forming part of a record. While made in the context of tribunal members' notes, the comments of Bryson, J.A. in *Li v. Jean*, 2012 NSCA 125, are relevant, in that he aptly points out that notes are not a verbatim account of events, as is a transcript. In *Li*, both practical and legal aspects were considered in relation to the question of whether a decision-maker's notes should be part of the record. In *Li*, the appellant was seeking to have notes taken by a member of the Labour Standards Tribunal added to the record on the grounds of alleged errors or omissions in the recording of the hearing. Justice Bryson said that one of the practical issues was that the notes of a judge or a panel member are "almost never a word-for-word record of what occurs in court. Moreover, they are not intended to be that kind of record" (para. 16).

[33] Justice Bryson went on to cite the Court of Appeal's decision in *Yorke v. Northside-Victoria District School Board,* 1992 NSCA 80:

> [3] The apparent purpose in requiring notes to be delivered up as part of the record of the proceedings is the assumption that the notes are a record of the evidence taken in the absence of a certified transcript of the proceedings. In my opinion the notes of a Board member are not a proper record of the evidence as the notes are not a verbatim record of what a witness stated under oath and are therefore likely inaccurate and unreliable. Secondly, the notes may contain tentative observations of the Board member which the Board member may subsequently decide were not well founded. Therefore, the notes could be misleading. Thirdly, the notes of a Board member are personal notations of the member made during the hearing. In short, the notes are a <u>personal</u> and unreliable record of the evidence. As a general rule, handwritten notes would serve no useful purpose for a superior court when reviewing a Board decision. [Emphasis added by court in *Li*]

[34] There is also the practical consideration of how the inclusion of such notes in the Record would affect future arbitral proceedings between these parties and others. Labour arbitration is intended to be a reasonably expeditious and inexpensive means of resolving disputes. (*142445 Ontario Limited (Utilities Kingston) v. International Brotherhood of Electrical Workers, Local 636*, (2009), 251 O.A.C. 62 (Ont. Div. Ct.) ("IBEW") at para. 31). If there is any likelihood that notes of the arbitrator or of one of the parties may form part of the record, the parties, or for that matter, the arbitrator, may consider it necessary to start having a court reporter attend and record arbitration hearings so as to enable the production of a formal transcript for the purposes of judicial review. This would increase formality and cost, contrary to some of the goals of the arbitral process.

Reasons for Not Including the Affidavit in the Record

[35] The notes that are the subject of this motion would neither have been before the arbitrator nor played any role in the arbitrator's decision-making. Rather, such notes would be evidence beyond the record for which permission for introduction must be obtained pursuant to Rule 7.28. Sara Blake states the following in her text, Administrative Law in Canada, 5th ed:

> …Only material that was considered by the tribunal in coming to its decision is relevant on judicial review because it is not the role of the court to decide the matter anew. The court simply conducts a review of the tribunal decision. For this reason, the only evidence that is admissible before the court is the record that was before the tribunal. Evidence that was not before the tribunal is not admissible without leave of the court….[As in *Bancroft, infra*, at para. 14, underlining removed]

[36] The general rule is that affidavits that were not before the original decision maker are inadmissible on judicial review. There is precedent however, for including additional material in the Record where justified.

[37] In *Bancroft v Nova Scotia (Minister of Lands and Forestry)*, 2020 NSSC 370, Justice Chipman cited with approval *Manitoba Metis Federation Inc. v Brian Pallister et al*, 2019 MBQB 118, which outlines principled exceptions to the general inadmissibility of affidavit evidence on judicial review. One such exception is where the record is incomplete, or contains gaps, as Justice Chipman described:

> [23] More recently in *Manitoba Metis Federation v. Brian Pallister et al*, 2019 MBQB 118, Chief Justice Joyal provided helpful direction as to the parameters of the record on a judicial review:
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> > 67 The "record" on a judicial review will generally not include documents that are protected by deliberative secrecy or privilege, notes made by tribunal or government members, legal opinions given to the tribunal by its counsel and other analyses done by tribunal or governmental staff to assist the tribunal in its deliberations. Nor does the record include documents filed in respect of matters other than the decision at issue in the judicial review…
> >
> > 68 The courts have recognized narrow, principled exceptions to the general inadmissibility of extrinsic evidence. Those exceptions include evidence to establish:
> >
> > i) that the record is incomplete or contains gaps;
> >
> > ii) procedural unfairness, jurisdictional error or bad faith; and
> >
> > iii) the existence, the scope and the content of the Crown's duty to consult.

…

> 83 As earlier noted, the record on a judicial review will not generally include documents that are protected by deliberative secrecy and privilege, nor will it include notes made by tribunal or government members. Neither will the record include legal opinions, recommendations or other analyses given to the tribunal or governmental staff to assist the tribunal or government with its deliberations. On the issue of what has or has not been disclosed by Manitoba, absent a motion challenging Manitoba's position, this Court will proceed on the basis that the mere fact of an assertion of Cabinet confidence or privilege should not be seen to create an uncertainty that can be then reflexively used to justify the admission of otherwise inadmissible extrinsic evidence based on suggestions of incompleteness and based on speculation or conjecture concerning what the Cabinet confidence and/or privilege might be protecting.

[38] In order to admit this affidavit as part of the Record, I would have to be convinced that there was an exceptional circumstance. Some exceptional circumstances are referred to in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22:

> 20 There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker … Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider...
>
> (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness… For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.
>
> (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding…

[39] It is within the above noted framework and case law that I consider the arguments in this matter. For the reasons that follow, HRM has not convinced me of exceptional circumstances to permit this affidavit as part of the Record on judicial review.

[40] HRM relies on cases that bear no resemblance to the case before me. For example, *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia* 2018 NSCA 83, varied at 2020 SCC 21, was not a typical administrative judicial review; there was no evidence before, and no hearing was conduced by the government when considering its reply to the recommendations of the judicial compensation tribunal. In that case, the Court of Appeal said "the reviewing court may receive evidence that is relevant to an arguable submission of either party". (para 74). The unique circumstances of that case are not transferable to assist my analysis in this matter.

[41] This is not a case like *Kelly v. Nova Scotia Human Rights Commission*, *supra*, where an affidavit was admitted on judicial review in order for the court to better understand what had been decided, given that the wrong section of the legislation had been identified as the basis for the complaint being dismissed; that reference was an error, and the complaint had actually been dismissed pursuant to a different section. This was an error by the decision maker which needed explaining, constituting an exceptional circumstance.

[42] In *Canadian National Railway v. Teamsters Canada Rail Conference*, 2017 NSSC 10, CN, the applicant, on a judicial review of a labour arbitration decision, sought to introduce an affidavit led by a human resources professional who represented CN at the arbitration. Justice Smith outlined the "general background information" exception:

> 19 The "general background information" exception applies only to neutral, nonargumentative statements that assist the reviewing court to understand the history and nature of a case. I refer to the decision of the Federal Court of Appeal in *Delios, supra*. In that case, the Court of Appeal stated:
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> > The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy — a that that is the role of the memorandum of fact and law — it is admissible as an exception to the general rule. (paragraph 45)

[43] After citing these governing precedents, Justice Smith ruled that the affidavit should not be admitted under any recognized exception. First, the affidavit contained materials already in the record, as well as submissions to the Board which duplicated its written submissions. The affidavit in CN was an attempt to bolster CN's argument that there was no factual basis on which the arbitrator could have made their her findings, and amounted to the HR representative offering further evidence and characterizations of the evidence that had already been placed before the Board. Justice Smith ruled that the contents of the affidavit did not constitute the kind of neutral, non-argumentative explanations permitted by the "general background" exception accepted by the Federal Court of Appeal in decisions such as *Access Copyright, supra*. She held that the affidavit was an attempt to invite a reweighing of the evidence heard by the arbitrator.

[44] With respect to inaccuracy and unreliability, the notes taken by a representative of a party at a hearing have the same difficulties as those taken by an arbitrator. In *Li v. Jean*, *supra* while discussing notes of judges or panel members, Justice Bryson provided instructive comments applicable in this case.

> 16. … The practical problem is this: the notes of a judge or a panel member are almost never a word-for-word record of what occurs in court. Moreover, they are not intended to be that kind of record. They are notes made by a judge for his or her own personal use highlighting points which the judge may think are especially relevant and often containing editorial comments for future use by the judge. A Judge's notes are not a record of the court proceedings and are not intended to serve that purpose. The Nova Scotia Court of Appeal has addressed this issue in the past in *Yorke v. Northside-Victoria District School Board* (1992), 112 N.S.R. (2d) 315 (N.S. C.A.). The court said:
>
>> [3] The apparent purpose in requiring notes to be delivered up as part of the record of the proceedings is the assumption that the notes are a record of the evidence taken in the absence of a certified transcript of the proceedings. In my opinion the notes of a Board member are not a proper record of the evidence as the notes are not a verbatim record of what a witness stated under oath and are therefore likely inaccurate and unreliable. Secondly, the notes may contain tentative observations of the Board member which the Board member may subsequently decide were not well founded. Therefore, the notes could be misleading. Thirdly, the notes of a Board member are personal notations of the member made during the hearing. In short, the notes are a personal and unreliable record of the evidence. As a general rule, handwritten notes would serve no useful purpose for a superior court when reviewing a Board decision.

[45] Furthermore, the *Trade Union Act* does not contemplate notes of a party as being part of the Record. In fact, there is no transcript from an arbitration for a reason.

[46] Affidavit evidence is admissible to show an absence of evidence or demonstrate a breach of natural justice that cannot be proven by reference to the Record (*Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.)) This is not such a case. It can also be adduced for general background information. But again, in this case that is unnecessary, and not what is being proposed.

[47] The decision in *IBEW, supra* is instructive. In that case, the employer sought to have notes taken at an arbitration by the employer's counsel, associate, and law clerk placed before the court on judicial review. The materials were initially deemed admissible to enable the employer to argue there was a lack of evidence with respect to findings of fact. However, the reviewing court overturned the decision on grounds that included the lack of reliability of the notes, which were not verbatim (at para. 42).

[48] Further with respect to reliability, notes taken by one of the representatives of a party have an added difficulty of not having been taken by someone who can be considered neutral in the arbitral process.

[49] As noted earlier, additional evidence may be permitted on judicial review, but only in exceptional circumstances, such as providing general background, to give evidence of a denial of procedural fairness or to establish a compete lack of evidence to support a finding. However, no such exceptional circumstances exist here.

[50] The affidavit is being proposed to defend against any potential procedural fairness argument, to demonstrate that the applicant raised the prior relationship and mediation agreement and asked questions of witnesses about the same throughout the arbitration. This information relates to ground 5. Without it HRM argues the reviewing court cannot understand the context of the arbitrator's decision and will not have the full context of the matter.

[51] How is the affidavit needed for this judicial review? Where are the exceptional circumstances? HRM says the affidavit is not controversial but simply shows lines of questioning and demonstrates how counsel conducted the hearing following the evidentiary ruling. It simply demonstrates that both sides had witnesses who spoke to the history and their knowledge of the mediation agreement.

[52] NSUPE is not actually arguing the arbitration proceeded unfairly, but that the mediation agreement was discussed by the arbitrator and addressed when an interim ruling indicated the arbitrator would not do so. NSUPE, on this motion, clarified that it will be advancing an argument that after purportedly excluding the content of the mediation agreement, the arbitrator should not have quoted it in his decision twice, interpreted it, and found that the griever had violated it.

[53] Ground 5 was advanced because NSUPE argues that it is clear on the face of the arbitrator's decision that a finding as to what motivated Ms. Clarke to place the sign, allegedly contravening the mediation agreement, informs the entirety of the decision.

[54] This is a standard judicial review. The arbitrator ruled the mediation agreement was inadmissible. He allowed the parties to address it in passing with comments and witnesses referring to it from time to time. But this does not require the affidavit be admitted. This is not an unusual or exceptional circumstance. NSUPE is not saying that it would have led its evidence differently or that witnesses did not address the mediation agreement. Counsel confirmed her client is arguing that the final decision is not in keeping with the interim decision rendered by the arbitrator.

Conclusion

[55] Given the explanation by NSUPE of ground 5 of its Notice of Judicial Review, given the case law including the cases discussing the lack of reliability of personal notes and given the fact that this proposed affidavit does not fall within one of the exceptions set forth in the case law, I have declined to include the affidavit as part of the Record.

[56] If the parties cannot agree on costs, I will receive written submissions within 30 days of the release of this decision.

Brothers, J.