SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia Health Authority v. Nova Scotia Government*, 2023 NSSC 154

Date: 20230516
Docket: *Halifax*, No. 511224
Registry: Halifax

Between:

Nova Scotia Health Authority

Applicant

v.

Nova Scotia Government and General Employees Union and Susan M. Ashley

Respondents

Decision

Judge:	The Honourable Justice Glen G. McDougall
Heard:	July 26, 2022, in Halifax, Nova Scotia
Counsel:	Patrick Saulnier, for the Applicant
	David Roberts, for the Defendant, Nova Scotia Government and General Employees Union
	Susan Ashley, not participating

By the Court:

Background and Facts

[1] The parties in this matter are the Nova Scotia Health Authority ("the Health Authority"/"the Applicant") and the Nova Scotia Government and General Employees Union ("the Union"/"the Respondent"). The Respondent is representing the nurse bargaining unit, which contains the Continuing Care Referral Agents ("CCRA") classification. The Applicant appeals the Decision of Arbitrator Susan Ashley regarding a labour grievance brought by the Respondent in relation to wage discrepancies between the Licensed Practical Nurse ("LPN") and CCRA classifications within the nurse bargaining unit that are employed by the Applicant.

[2] The origins of this dispute are premised on another grievance between the parties. On June 11, 2020, Arbitrator Lorraine Lafferty issued a consent award ("the Lafferty Decision") that raised the LPN salary by 12%. This award was made in response to a 2014 grievance brought by the Union seeking a classification review of the LPN role. The Lafferty Decision applied only to LPNs working in certain parts of the province. In response to the Lafferty Decision, the Respondent launched grievances on July 23, 2020, requesting wage parity for LPNs working in the rest of the province ("the LPN grievance"), and for certain other designations, namely CCRAs and Operating Room Technicians ("ORTs") ("the ORT grievance"). The ORT designation is similarly situated to the CCRA classification. Both are in the nurse bargaining unit, and both require the employee to possess an LPN licence. The grievances claimed that the Applicant breached the Collective Agreement by deciding not to extend the wage increase to the CCRA and ORT classifications, or to LPNs working in certain parts of the province.

[3] The Applicant and Respondent reached agreements regarding the ORT and LPN grievances. On November 4, 2020, they agreed to extend the wage raise to LPNs across the province. On January 26, 2021, the Applicant reached an agreement with the Respondent to reclassify ORTs as LPNs and to extend the wage increase to the former ORT classification. The Respondent withdrew both grievances as a result of these agreements. The only remaining grievance was that challenging the decision not to extend the wage increase to those in the CCRA classification.

[4] The relationship between the parties is governed by a collective agreement between the Nova Scotia Council of Nursing Unions and the Nova Scotia Health

Authority (NSHA) for the period November 1, 2014 to October 31, 2020, ("the Collective Agreement"), established through collective bargaining.

[5] The narrowed grievance was heard by arbitrator Susan Ashley on September 7, 2021. The Arbitrator found that the Applicant breached the Collective Agreement, determining that the decision not to expand the wage increase to CCRAs was an unreasonable "rule" that breached Article 3, the Management Rights clause, of the Collective Agreement. She retained jurisdiction to provide a remedy if the parties were unable to come to an agreement.

[6] The Applicant appeals the Arbitrator's award, arguing that her decision was unreasonable, and that she went beyond her jurisdiction to order a remedy that forces the Applicant to extend the LPN wage increase to CCRAs.

The Arbitrator's decision

[7] The Arbitrator acknowledged that this grievance was governed by the Collective Agreement and noted that her role was to interpret the Collective Agreement and determine if the Applicant's decision breached it. The Arbitrator focused her analysis on article 3 of the Collective Agreement, the Management Rights clause:

> 3.00 The Employer reserves and retains, solely and exclusively, all rights to manage the business including the right to direct the work force and to make reasonable rules provided that such rights are exercised in accordance with the terms and conditions of this Collective Agreement. All the functions, rights, power, and authority which the Employer has not specifically abridged, deleted or modified by this Agreement are recognized by the Union as being retained by the Employer.

[8] The Union (now the Respondent) argues that the Health Authority (NSHA, now the Applicant) "acted unreasonably in failing to raise the rate to [CCRAs], making it the only classification in the nursing bargaining unit requiring an LPN designation not to receive the increase" (Arbitrator's decision, at para. 3). The Health Authority argued that there was no agreement establishing wage parity between the LPN and CCRA classification and therefore there was no authority to ground a claim for wage parity.

[9] The Arbitrator referenced two Memorandums of Agreement (MOAs) that impacted the scope of the Union's grievances. The first MOA, dated November 4, 2020, expanded the wage increase from the Lafferty Award to all public sector LPNs

in the Province ("the LPN MOA"). The second MOA, dated January 26, 2021, reclassified ORTs as LPNs and gave the newly-designated LPNs the wage increase ("the ORT MOA"). The Arbitrator accepted that the ORT MOA was without prejudice to the issue of retroactivity, but not without prejudice to the entire agreement. She also reviewed Devolution Agreements arising from a 2009 departmental reorganization that moved CCRAs from the Department of Health to the District Health Authorities, and which provided that incumbent CCRAs would receive the LPN rate on a "PIO'd" basis, meaning that they would get general economic increases but would not get any special LPN adjustments or premiums. She also found that when the District Health Authorities amalgamated into the centralized NSHA, the CCRAs were placed in the nurse bargaining unit.

[10] The Arbitrator accepted the testimony of Karen Grandy, the Union Employment Relations Officer (ERO), who filed the grievances. Ms. Grandy stated that the historical wage difference between CCRAs and LPNs was between fifty (50) to sixty (60) cents per hour, but CCRAs now faced a wage discrepancy of over $4 per hour. She also heard evidence from 4 CCRAs who described their job duties. The Arbitrator found that the LPN and CCRA roles are substantially similar. She noted that the Health Authority called no evidence to dispute the testimony of the Respondent's witnesses.

[11] The parties disagreed on the definition of "rule" under the management rights clause in the Collective Agreement. The Union argued that the Health Authority's decision to pay one group of employees but not another (based on the Lafferty award) constituted a "rule" that was unreasonable because of the historic pay parity ratio between LPNs and CCRAs, and argued that the Health Authority failed to provide justification for its decision. The Union argued that classifications which require the same training and skills and perform work of equal value should be paid on a similar scale.

[12] The Health Authority argued that the Collective Agreement did not explicitly include a wage parity clause and submitted that there was no agreement that the wage ratio would always adhere to previous practices so as to keep the wage differential close to fifty (50) cents. The Health Authority focused its submissions on the differences between the LPN and CCRA classifications, and noted that the ORT MOA eliminated the ORT classification, making them LPNs, which is why they also received the wage increase.

[13] The Arbitrator held that the Collective Agreement could not be interpreted in a vacuum, and stated that the "significant changes to wage rates for all LPNs, except CCRAs, is not a decision that can meet the reasonability test" (Arbitrator's decision, at para. 36). She relied on her factual findings that it was a central job requirement for CCRAs to have an LPN licence, that CCRAs preformed LPN duties, and that CCRAs were the only remaining group in the nurse bargaining unit not to receive the wage increase.

[14] The Arbitrator characterized the Applicant's decision not to extend the wage increase to CCRAs as a "rule" because it applied the Lafferty Consent Award in a manner that differentiated one group from another that was similarly situated, severing the wage ratio between the two classifications, without offering justification (Arbitrator's Decision, at para. 38).

[15] The Arbitrator did not explain why she decided that the Applicant's decision should be classified as a "rule" under the Management Rights Clause.

Grounds for challenging the Arbitrator's decision

[16] The Applicant argues that the Arbitrator erred in her decision on three grounds:

1. That the Arbitrator exceeded her jurisdiction when ordering her remedy because it implicitly ordered the Applicant to apply the wage increase to CCRAs.

2. That the Arbitrator unreasonably concluded that the NSHA decision was a "rule" pursuant to Article 3 of the Collective Agreement, the Management Rights clause.

3. If the Health Authority's decision was a "rule" under the Management Rights clause, that the Arbitrator fundamentally misapprehended the evidence when concluding that the rule was unreasonable.

Issues

1. What is the applicable standard of review?

2. Did the Arbitrator's decision meet the standard?

3. If the Arbitrator's decision does not meet the standard, what is the appropriate remedy?

1. What is the applicable standard of review?

Positions of the Parties

[17] The Applicant argues that the appropriate standard of review is reasonableness for the substantive elements of the Arbitrator's Decision. However, the Applicant submits that the Arbitrator reserved jurisdiction to award a remedy after declaring a breach of the Collective Agreement. The Applicant suggests that by reserving jurisdiction over a remedy, the Arbitrator implicitly directed the Applicant to extend the wage increase, violating article 14.17, which prohibits an arbitrator from amending a collective agreement. This issue, the applicant submits, should attract review on a correctness standard.

[18] The Respondent agrees that reasonableness is the appropriate standard of review for the substance of the Decision and argues that reasonableness should apply to the entire decision. The Respondent submits that there is a presumption of reasonableness review for administrative decisions, and that there is no reason to rebut this presumption. The Respondent submits that reasonableness review is a robust form of review that can address jurisdictional questions.

Analysis

[19] The Arbitrator's authority derives from an arbitration clause in the Collective Agreement. The Collective Agreement is subject to the *Trade Union Act*, R.S. N.S., c475, as an enabling statute. The *Trade Union Act*, does not include a statutory right of appeal or provide any other legislated standard of review. Therefore, this Court's jurisdiction comes from its inherent jurisdiction. This Court is required to apply the common law principles of judicial review.

[20] The parties agree that the standard of review is reasonableness on the substantive issues but disagree on the standard applicable to the Arbitrator's decision to retain jurisdiction to order a remedy. The Applicant argues that this decision should be reviewed on a correctness standard. The Respondent disagrees.

[21] The leading case on the standard of review is *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653. The *Vavilov supra* majority states that the presumptive standard of review is reasonableness (para. 13) and notes the following instances that may dictate a correctness standard of review, rebutting the presumption:

> [17] The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. As a result, it is no longer necessary for courts to engage in a "contextual inquiry" (*CHRC*, at paras. 45-47; see also *Dunsmuir*, at paras. 62-64; *McLean*, at para. 22) in order to identify the appropriate standard.
>
> *(Emphasis added)*

[22] In *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30, [2022] SCJ No 30, the Supreme Court of Canada examined the *Vavilov supra* majority's comments to identify the following categories of correctness review. Rowe J., writing for the majority, stated:

> [26] *Vavilov* recognized five categories for correctness review: legislated standards of review, statutory appeal mechanisms, constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies (paras. 17 and 69).

[23] The Respondent submits that the presumption of a reasonableness standard is not rebutted, as the issue on appeal is not a question of central importance to the legal system. In *Vavilov supra*, the majority cited *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC

34, [2013] 2 SCR 458, where the Court held that an Arbitrator's analysis of an employer's exercise of their rights under a collective agreement is not a question of central importance to the legal system that would displace the presumption of a reasonableness review.

[24] The Applicant submits that the Arbitrator's order retaining jurisdiction should be reviewed on a correctness standard. In support of a correctness standard of review, the Applicant submits that this order raises a question of central importance to the justice system, to wit,: "can an arbitrator order a remedy that effectively or impliedly requires an amendment to a collective agreement, when her jurisdiction expressly limits her from amending the collective agreement?" (Applicant's rebuttal brief, at para. 9). The Applicant argues that this case may open an additional category of correctness review, as contemplated by the *Vavilov supra* majority.

[25] The Applicant submits that the Arbitrator's order opens a new category of correctness review because it allows an arbitrator to "skirt around jurisdictional limits by framing a decision and order such that there is no possible remedy other than a remedy the Arbitrator is prohibited from ordering" (Applicant's rebuttal brief, at para. 10).

[26] In its reply brief, and during oral submissions, however, the Applicant indicated that they were nevertheless prepared to argue the matter on a reasonableness standard of review. I accept the Applicant's comments, but wish to address the arguments for the correctness standard, in the hopes that it may provide clarity for future matters.

[27] The Supreme Court of Canada recently considered the establishment of a new category of correctness review in *Society of Composers supra*. The Court established a category of correctness where "administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute" (para. 28). The majority held that the rule of law requires consistency in these instances, as a court may come to a different conclusion from an arbitrator when reviewing the same issues, which would lead to legal inconsistencies.

[28] The Respondent argues that the reasonableness standard applies to the entirety of the Arbitrator's decision. According to the Respondent, *Society of Composers supra* indicates what types of circumstances give rise to a new category of correctness, and the issue here does not meet the high standard required. Rowe J. writing for the majority noted that the *Vavilov supra* majority did not "purport to change when it is appropriate to recognize a new correctness category. *Vavilov*

supra contemplated that new correctness categories could be recognized only in rare and exceptional circumstances" (para. 41).

[29] These overarching principles for recognizing a new standard of review were stated by the majority in *Vavilov supra*, as follows:

> [70] However, we would not definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case. But our reluctance to pronounce that the list of exceptions to the application of a reasonableness standard is closed should not be understood as inviting the routine establishment of new categories requiring correctness review. Rather, it is a recognition that it would be unrealistic to declare that we have contemplated every possible set of circumstances in which legislative intent or the rule of law will require a derogation from the presumption of reasonableness review. That being said, the recognition of any new basis for correctness review would be exceptional and would need to be consistent with the framework and the overarching principles set out in these reasons. In other words, any new category warranting a derogation from the presumption of reasonableness review on the basis of legislative intent would require a signal of legislative intent as strong and compelling as those identified in these reasons (i.e., a legislated standard of review or a statutory appeal mechanism). Similarly, the recognition of a new category of questions requiring correctness review that is based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in these reasons.

[30] In *Vavilov supra*, the majority explained the rationale for subjecting centrally important questions of law to a correctness review:

> [59] As the majority of the Court recognized in *Dunsmuir*, the key underlying rationale for this category of questions is the reality that certain general questions of law "require uniform and consistent answers" as a result of "their impact on the administration of justice as a whole": *Dunsmuir*, para. 60. In these cases, correctness review is necessary to resolve general questions of law that are of "fundamental importance and broad applicability", with significant legal consequences for the justice system as a whole or for other institutions of government.
> …
>
> [61] We would stress that the mere fact that a dispute is "of wider public concern" is not sufficient for a question to fall into this category -- nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue…

[31] In *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper*, Ltd., 2013 SCC 34, [2013] 2 SCR 458, Abella J., writing for the majority, noted that the presumption is that a labour arbitrator's decision will be reviewed on a reasonableness standard. She referenced a significant amount of arbitral jurisprudence on reviews of the imposition of workplace rules under management rights provisions. They had all been subject to a reasonableness analysis. Abella J. concluded that it "cannot be seriously challenged, particularly since *Dunsmuir*… that the applicable standard for reviewing the decision of a labour arbitrator is reasonableness…"

[32] The majority in *Vavilov supra* held that an Arbitrator's analysis of management's exercise of their rights under a collective agreement is not a question of central importance to the legal system that would displace the presumption of a reasonableness review (paras. 63-64).

[33] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] SCJ No 61, Rothstein J. writing for the majority, discussed the meaning of "issues of law that are centrally important to the justice system." He noted that the question at issue (relating to the interpretation of section 50 of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5) was not one that is important to the legal system as a whole, but that was specific to the personal information administrative regime (*Alberta (Information and Privacy Commissioner supra)*, at para. 32). Similarly, in my view, the question of an arbitrator's authority to retain jurisdiction over "remedial issues" is not one that is important to the legal system as a whole, but is specific to the labour arbitration regime.

[34] The Applicant has framed the question of law as a consideration of the jurisdictional limits of an arbitrator in light of constraints from their governing authority, in this case, the Collective Agreement. Though framed as a question of "central importance to the legal system," this is essentially a question of the arbitrator's jurisdiction. While questions of jurisdiction have previously been considered on a correctness standard, the *Vavilov supra* majority stated that the court "would cease to recognize jurisdictional questions as a distinct category attracting correctness review" (para. 65). The majority held that jurisdictional questions can be analyzed under a reasonableness framework:

> [67] …Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary

> assessment regarding whether a particular interpretation raises a "truly" or "narrowly" jurisdictional issue and without having to apply the correctness standard.
>
> [68] Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker -- perhaps limiting it one…

[35] In consideration of the comments of the Supreme Court majority in *Vavilov supra* and *Society of Composers supra*, I conclude that the appropriate standard of review is reasonableness for all aspects of the Arbitrator's decision, including the jurisdictional issues.

2. Does the Arbitrator's decision meet the reasonableness standard of review?

[36] Before diving into the analysis of this matter, I wish to comment on two arguments made by the parties that address preliminary issues.

The Arbitrator's jurisdiction to arbitrate wage decisions

[37] The Arbitrator's authority to govern this dispute comes from the Collective Agreement. Article 14 of the Collective Agreement governs the grievance and arbitration procedure. Article 14.00 allows a nurse to grieve any action, or lack of action, taken by the employer. There are no other limits on what is arbitrable set out in the Collective Agreement.

[38] Article 14.15 allows parties to appoint an arbitrator by mutual agreement or have an arbitrator appointed by the Minister of Labour for Nova Scotia. Article 14.17 states that all arbitration awards shall be final and binding, in accordance with the *Trade Union Act*. Section 42(1) of the *Act* states:

> Final settlement provision
>
> 42 (1) Every collective agreement shall contain a provision for final and binding settlement without stoppage of work, by arbitration or otherwise, of all

> differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation, including any question as to whether a matter is arbitrable.

[39] The Applicant argues that the Arbitrator did not have jurisdiction to consider a breach of the collective agreement because decisions related to pay rates are only subject to review if the central issue is whether the employer acted in a bad faith, or in an arbitrary or discriminatory manner. The Respondent says that that Applicant accepted the Arbitrator's jurisdiction to decide this issue during the grievance process, and submits that if the Applicant objected to jurisdiction, they should have addressed that issue before or during the Arbitration Hearing.

[40] In *Unimin Canada Ltd v Communications, Energy and Paperworkers Union of Canada, Local 306-0 (Journeyman Bonus Grievance)*, 2016 OLAA 308, 2016 CarswellOnt 12922, the arbitration board discussed an arbitrator's jurisdiction to review an employer's wage rate decisions. During the final hours of collective bargaining the employer and the union discussed a retention bonus for some employees. The union believed that an agreement had been reached, and a MOA was drafted and signed by the union. The employer refused to sign the MOA. The union brought a grievance. The Arbitration Board determined that there was no agreement to pay the bonus, and that, even though there was no specific breach of the collective agreement, the issue was arbitrable on the basis of the union's allegation of employer bad faith and arbitrary exercise of their management rights.

[41] The Arbitration Board, citing Arbitrator Surdykowski's decision in *Bell Canada and Unifor Local 34-0*, 2016 CanLII 11573 (ONLA), set out the following principles respecting an arbitrator's jurisdiction to hear grievances based on unreasonable employer conduct:

> [100] He then usefully summarized the principles emerging from the modern case law. I agree with and endorse his statement of the applicable law in cases such as this:
>
> > [46]… the exercise of management rights, both with respect to a provision in a collective agreement or generally, is an exercise of discretion which lies at the core of collective agreement rights and obligations; that is, the exercise of management rights is fundamental to the operation of a collective agreement;
> >
> > …

> 5. as a matter fundamental to the operation and functioning of a collective agreement, any exercise of management rights discretion must be subject to challenge on the basis of reasonableness, or perhaps more specifically on the basis that the management right was exercised in an arbitrary, discriminatory or bad faith manner (which I believe effectively covers the field [of] unreasonableness and good faith);
>
> a grievance arbitrator therefore has not only the exclusive jurisdiction (subject to a possible concurrent jurisdiction of the appropriate human rights tribunal with respect to an allegation that the management right was exercised in a manner contrary to the applicable human rights legislation), but the obligation to hear and determine a grievance which alleges an improper exercise of management rights, whether or not with respect to an express collective agreement provision.

[42] The Arbitration board in *Unimin supra* held that if a grievance's essential character expressly or inferentially concerns the interpretation of a collective agreement, an arbitrator will have exclusive jurisdiction over the grievance. I find these comments relevant and persuasive to the case at bar. The Arbitrator found that the Respondent's grievance concerned an alleged breach of the management rights clause of the Collective Agreement. The Arbitrator's decision that she had the jurisdiction to arbitrate the grievance was consistent with the reasoning in *Unimin supra* and I accept that she had jurisdiction to arbitrate this matter.

The impact of novel submissions

[43] The Applicant did not call any evidence at the arbitration hearing. Now, however, the Applicant seeks to introduce new arguments upon judicial review. Objecting to this procedure, the Respondent cites *Alberta (Information and Privacy Commissioner) supra*, where the majority discussed a reviewing court's ability to consider issues that are first raised on judicial review:

> [22] Just as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so: see, e.g., *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, *per* Lamer C.J., at para. 30: "[T]he relief which a court may grant by way of judicial review is, in essence, discretionary. This [long-standing general] principle flows from the fact that the prerogative writs are extraordinary [and discretionary] remedies."

[44] The record suggests that the Applicant did not make substantial submissions regarding the reasonableness of the decision not to extend the wage increase at the arbitration hearing but did address the topic superficially. Because the issues have all been addressed by the parties at the arbitration hearing, this is not a case where the issue has been raised for the first time on judicial review. I do not believe that the Applicant's submissions unfairly prejudice the Respondent. However, I will note that the Applicant's lack of detailed submissions at the Arbitration Hearing is relevant to assessing the reasonableness of the Arbitrator's decision, as she did not have the benefit of detailed submissions on this integral issue.

Law

[45] *Vavilov supra* provides guidance to Superior Courts on how to conduct a reasonableness review. The majority defined reasonableness in the following terms:

> [86] … Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid.* In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

[46] The onus is on the Applicant to demonstrate that the decision is unreasonable (*Vavilov supra* at paras. 75 and 100). The *Vavilov supra* majority noted two types of fundamental flaws that would render a decision unreasonable:

> 1. A failure of rationality in the decision-maker's reasoning; or
>
> 2. A decision that is untenable in light of the relevant factual and legal constraints.
>
> (*Vavilov supra* at para. 101)

[47] The *Vavilov supra* majority made clear that reviewing courts need not categorize errors as falling into one of the two categories when assessing the decision (*Vavilov supra* at para. 101). The factual and legal constraints that are relevant in this case include the governing statutory scheme, other statutory or common law

principles, the principles of statutory interpretation, the evidence before the decision-maker, the submissions of the parties, past practices and decisions of the administrative body, and the impact of the decision on the affected individuals.

[48] I will take the above-noted factors into consideration when reviewing the Arbitrator's decision by asking the following questions:

> A. Was it reasonable for the Arbitrator to interpret the Applicant's decision as a workplace "rule" pursuant to article 3 of the Collective Agreement?
>
> B. If it was not reasonable to determine that the Applicant's decision was a workplace rule, was the Arbitrator's decision still reasonable?
>
> i) Is the Arbitrator's decision internally coherent?
>
> C. Did the Arbitrator act beyond her jurisdiction when she reserved jurisdiction over remedial matters after finding that the Applicant breached the Collective Agreement when it declined to extend the wage increase to the CCRA classification?

A. Was it reasonable for the Arbitrator to interpret the Applicant's decision as a workplace "rule" pursuant to article 3 of the Collective Agreement?

Positions of the Parties

[49] During oral submissions, counsel for the Applicant Health Authority questioned the Arbitrator's decision to classify the Applicant's decision as a "rule" within the meaning of the Management Rights clause. The Applicant argues that their decision should have been classified as falling within the residual authority to make management decisions pursuant to the Management Rights clause, not as a "rule." The management rights clause requires "rules" to be reasonable, but does not establish a reasonableness requirement for other exercises of management authority. The Applicant submits that applying a reasonableness standard to its decision not to extend the wage increase was a misapplication of the Management Rights clause, and that the Arbitrator failed to give proper effect and weight to the evidence when coming to her decision.

[50] The Applicant notes that the Arbitrator relied on the evidence showing a history of wage parity between LPNs and CCRAs to conclude that the current wage difference was unreasonable. The Applicant says that there has always been a wage difference between CCRAs and LPNs and asserts that there was no agreement to

maintain wage relativity between the two classifications. Furthermore, the Applicant contends that the wage relativity was severed through mutual agreement, not unliterally by the Applicant.

[51] As noted earlier, Devolution Agreements included in the Hearing Record established the CCRA role as a classification separate from LPNs. The Health Authority argues that the Devolution Agreement that established the CCRA classification is evidence that the CCRA and LPN classifications are distinct and says this formed part of the justification for not extending the wage increase to CCRAs. The Applicant claims that the Arbitrator failed to consider the impact of the Devolution Agreements.

[52] The Applicant also says the LPN MOA was made "without prejudice" and that it would therefore be unreasonable to use it to prejudice the Applicant in the arbitration.

[53] In Summary, the Applicant submits that the Respondent had the onus to establish a breach of the Management Rights clause, and it did not do so.

[54] The Respondent Union argues that the Applicant is attempting to re-argue the merits of this case before this Court by contending that the Arbitrator failed to properly weigh and apply the evidence before her. The Respondent states that this Court cannot interfere with the factual findings of an administrative decision-maker, except in exceptional circumstances.

[55] Asserting that the Arbitrator's decision was reasonable, the Respondent draws attention to how she outlined the facts and evidence that formed the basis of her decision and contextualized her interpretation of the Collective Agreement by noting that a collective agreement cannot be interpreted in a vacuum. The Respondent argues that the Arbitrator provided an "internally coherent and rational chain of analysis" by considering the other classifications in the bargaining unit, the licencing requirements for the CCRA position, and the historical wage parity and the consent agreements when interpreting the Management Rights clause.

Analysis

[56] The Arbitrator held that the decision not to raise the CCRA wage by 12% was a "rule" under the Management Rights clause of the Collective Agreement. The Applicant argues that the decision not to extend the wage increase is "better characterized" as a "labour decision", not a rule.

[57] *Vavilov supra* indicates that an administrative decision-maker need not engage in formal statutory interpretation in the same way as a court would, and that the form of their reasons is flexible:

> [92] Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge -- nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision -- indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

[58] *Vavilov supra* requires administrative decision-makers to make decisions that are consistent with the common law principles that are relevant in the context of the issues before it (para. 111). The Applicant argues that the Arbitrator departed from commonly accepted definitions of "rule" in the labour context. According to the Applicant, a "rule" is something like a dress code, and the decision not to extend the wage increase falls under the broader authority provided in the management rights clause to "manage the business", not under the ruling-making authority.

[59] The Applicant suggests that to be a workplace "rule", an Employer's action must establish a workplace requirement that governs conduct, as defined in *Lenworth Metal Products Ltd., v United Steelworkers of America Local 3950 (Equipment Installation Grievance*), 1999 CarswellOnt 4015, [1999] OLAA No 382. In *Lenworth supra*, the arbitration board held that by unliterally setting up security cameras the employer created a workplace "rule" that required employees to work under camera surveillance. The *Lenworth supra* interpretation of "rule" is consistent with the *Merriam-Webster dictionary* definition of "rule" as "a prescribed guide for conduct or action" (*Merriam-Webster Dictionary*, Merriam-Webster: 2023 "rule").

[60] The Applicant also references *St. Rita's Hospital and NSNU Re*, 1988 CarswellNS 836, where the arbitration board analyzed a workplace rule that required nurses to present their employer with their registration certificate issued by the Registered Nursing Association by January 1st each year. The rule was characterized as an obligation to present their registration to be eligible to work. There was no provision in the Collective Agreement that allowed the employer to make workplace rules, as there is in the case at bar. The arbitration board discussed the various

directives issued by the employer and stated that something becomes a "rule" when consequences are attached for non-compliance (paras. 27-29).

[61] If the premise in *Lenworth supra* is followed, to be a "rule" the Applicant's decision must direct employee conduct in some way. The Applicant's decision not to raise wages does not govern or guide employee conduct, changing it from what was already contemplated in the collective agreement. The Applicant's decision also does not fit the definition created in *St. Rita's supra* because there are no consequences to employees for non-compliance, and, for that matter, there is nothing in the Applicant's decision that introduces something for the CCRAs to comply with.

[62] The Arbitrator noted that the Collective Agreement cannot be interpreted in a vacuum. She analyzed the Management Rights clause in light of the context of the LPN MOA and the ORT MOA as forming part of the Applicant's exercise of their management rights. The Management Rights clause gives the Applicant the authority to direct the work force and "manage the business". Based on the broad language of the Management Rights clause it *may* have been open to the Arbitrator to find that the decision was an exercise of authority that had the effect of creating a workplace 'rule" that CCRAs would perform their tasks, and the tasks of LPNs, at the lower pay scale. However, if the Arbitrator interpreted the Management Rights clause in a manner contrary to the jurisprudence, she would need to justify her conclusion. As noted by the *Vavilov supra* majority:

> [86]…Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

[63] The Arbitrator found that the Applicant made a workplace rule by withholding the pay raise from CCRAs. However, she did not explain why she found this decision to be a workplace rule. The decision does not provide an evidentiary or legal basis for the finding, other than the Respondent's position that it was a rule. The evidence summarized by the Arbitrator did not discuss the Applicant's rulemaking powers, policies, or address other examples of workplace rules. She did not contemplate the definition of a rule or what type of employer action would fall under the rule-making powers in the Management Rights clause. She did not suggest that any other elements of the hearing record provide guidance on this issue, or cite any caselaw that would suggest this action fits into the accepted definition of a workplace rule.

[64] In short, the Arbitrator simply stated that the decision was a rule without providing justification for this conclusion. I conclude that her finding that this was a workplace rule is akin to reverse-engineering the outcome: after determining that the Applicant's decision was unreasonable, the Arbitrator seems to have assumed that the decision was a rule, rather than first considering whether the action fit into the definition of "rule".

B. If it was not reasonable to determine that the Applicant's decision was a workplace rule, is the Arbitrator's decision still reasonable?

Positions of the Parties

[65] The Respondent submits that definition of the word "rule" in the Management Rights clause is not determinative of the reasonableness of the Arbitrator's decision, and argues that her lack of justification for finding there was a "rule" does not leave a gap in her reasoning, when considered in light of the entirety of the decision and the context. The Respondent relies on *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157, [2021] FCJ No 812:

> [15] The express reasons are only one place for reviewing courts to look. The failure of the administrator's reasons to mention something explicitly is not necessarily a failure of "justification, intelligibility or transparency": *Vavilov* at paras. 94 and 122. One must look at the reasons the administrator has written and read them "holistically and contextually" in "light of the record and with due sensitivity to the administrative regime in which they were given": *Vavilov* at paras. 97 and 103.
>
> *(Emphasis added)*

Analysis

[66] These comments were explicitly adopted by this court in *Murphy v Unifor Local 4606*, 2021 NSSC 323, [2021] NSJ No 527, at paras. 24 and 25.

[67] Given the case law discussed above it would be more appropriate to classify the Applicant's decision as a "management decision" rather than a "rule". However, it is not this Court's role to substitute my analysis for the Arbitrator's, but only to decide if the Arbitrator's decision was reasonable.

[68] The Management Rights clause provides the Applicant with the catch-all authority to make management decisions:

> 3.00 The Employer reserves and retains, solely and exclusively, *all rights to manage the business* including the right to direct the work force and to make reasonable rules *provided that such rights are exercised in accordance with the terms and conditions of this Collective Agreement*. All the functions, rights, power, and authority which the Employer has not specifically abridged, deleted or modified by this Agreement are recognized by the Union as being retained by the Employer.
>
> *(Emphasis added)*

[69] If the Applicant's decision was not a "rule" pursuant to the Management Rights clause, it could be categorized as a decision made with the residual power afforded by the Management Rights clause. Such decisions are constrained because they must be made in accordance with the terms and conditions of the Collective Agreement.

[70] During oral submissions the Applicant made statements regarding the importance of finality of the Collective Agreement because it provides certainty to the contracting parties. A decision made by the parties that alters a provision of the Collective Agreement by raising wages undermines finality. Given the Applicant's submissions on the importance of certainty in collective agreements, the Applicant's decision to depart from the wage scale for some but not other classifications in the nurse bargaining unit is arguably a decision that is not in accordance with the Collective Agreement.

[71] Because the Arbitrator reviewed the Applicant's decision on a reasonableness standard, she did not explicitly determine whether the decision accorded with the terms of the Collective Agreement. The Arbitrator emphasized the historic wage parity between the LPN and CCRA classifications, similarities between the LPN and CCRA job duties, and licensure requirements that oblige CCRAs to obtain LPN licences to be employed as CCRAs. Though not explicitly noted in her decision, the Arbitrator's finding that the Applicant established a substantially different pay scale than the one established through collective bargaining may support a finding that the Applicant's decision was not made in accordance with the terms of the Collective Agreement.

[72] In *Calgary Herald v Graphic Communications Union, Local 34M (Press Operators, Platemakers, Mailers, Paperhandlers) (Bonus Grievance)*, 2002 A.G.A.A. 59, a Labour Arbitration Board reviewed an employer's decision not to pay certain employees a bonus, leading to a grievance on the basis that the employer was exercising its residual power pursuant to the collective agreement management

rights clause in an unreasonable and discriminatory manner. The management rights clause allowed the employer to make management decisions but prohibited using the decision-making power to discriminate against any employee. The Board held that the discrimination prohibition did not require the employer to treat all employees the same, and noted:

> [43] Section 6(c) provides that the exercise of the management rights provisions contained in Section 6(b)"shall not be used to discriminate against any employee". While the decision to pay a bonus to other employees was not a management right exercised under the terms of this collective agreement, it was, in my view, an effective exercise of management rights to not pay the bonus to these employees when it posted a memorandum providing for a bonus for all "eligible staff". It exercised management rights in determining what staff would be "eligible". This, in my view, brings that action within the management rights provision and Section 6(c). This section, in my view, requires the Employer to treat members of this bargaining unit equally. That is not to say that all members of the bargaining unit are to receive the same compensation; it is clear that employees holding different job classifications receive different rates. The Employer certainly could provide a bonus to employees in some classifications and not in other classifications, but that is not the nature of the bonus which is the subject of Mr. King's memorandum.

[73] In *Calgary Herald supra*, the collective agreement included a clause that prohibited discriminatory treatment on the basis of union status. Article 18.00 of the Collective Agreement in the case at bar contains a similar prohibition:

> 18.00 The Employer and the Union agree that all Nurses will be protected against discrimination respecting their human rights and employment in all matters including age, race, colour, religion, creed, sex, sexual orientation, pregnancy, physical disability, mental disability, illness or disease, ethnic, national or aboriginal origin, family status, marital status, source of income, political belief, affiliation or activity, membership in a professional association, business or trade association, Employers' organization or Employees' organization, physical appearance, residence, or, the association with others similarly protected, or any other prohibition of the Human Rights Act of Nova Scotia.
>
> *(Emphasis added)*

[74] Though not bound by *Calgary Herald supra*, I find the reasoning of the Board persuasive, and the circumstance similar to the case at bar. In the case at bar, the Employer is empowered by a management rights clause that provides residual decision-making authority, however, the employer's authority is limited by the provisions in the Collective Agreement, which contains a provision prohibiting

discrimination. *Calgary Herald surpa* clearly establishes that providing one group of employees, within different job classifications, a wage increase but not another, does not equate to discrimination. The Applicant increased the wage rate of certain members of the nurse bargaining unit but not others; however, the Health Authority treated all members within their classification equally. The ORT MOA that amalgamated the ORT into the LPN classification establishes that the Applicant turned its mind to the issue of extending the LPN wage increase beyond the scope of the LPN classification.

[75] The Applicant did not lead any evidence during the arbitration hearing. It relies on the hearing record which includes, the Collective Agreement, the LPN MOA, the ORT MOA, and the Devolution Agreements. The Applicant submits that the Arbitrator mischaracterized its actions by finding that it unilaterally severed the wage parity ratio, when it was actually the LPN MOA and consent awards (negotiated agreements) that altered the wage parity ratio. As such, the Applicant argues, the LPN and ORT MOAs show that it did genuinely consider the Respondent's grievances, and reached a negotiated settlement for two-thirds of those grievances, which is contrary to the Arbitrator's finding that the Applicant offered no justification for its decision.

[76] The Applicant argues that the LPN and ORT MOAs severed the wage parity by agreement. However, the CCRA bargaining unit was not included in the MOAs, so the CCRA classification did not have a chance to consent to the wage change. In fact, the grievance suggests that the CCRA bargaining unit does not agree to the change in the wage parity relationship.

Evidence before the Arbitrator

[77] Both parties made submissions about the evidence that was before the Arbitrator. Her decision indicated that the Applicant did not call any evidence or address the reasonableness of the "rule" in any detail. The Applicant contends that the Arbitrator simply accepted the Respondent's submissions at face value without independent analysis.

[78] The role of this court is not to reassess the evidence that was before the Arbitrator. A reviewing court must defer to the arbitrator's findings of fact, only departing from them when "the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov supra*, at para. 126).

[79] The Applicant says that the Arbitrator fundamentally misinterpreted the evidence, by placing excessive weight on the Applicant's extension of the wage increase to the ORT classification, and by placing undue reliance on the historical wage parity relationship between the CCRA and LPN classifications.

[80] The Arbitrator found that the LPN and ORT MOAs were binding and that they were incorporated into the Collective Agreement. She found that the decision to change the classification of the ORTs, to amalgamate them into the LPN classification was made in response to the Respondent's grievances requesting that the wage increase be extended to the ORT and CCRA classifications.

[81] Rather than providing a basis to extend the wage increase outside the LPN classification, the Applicant argues that the MOA indicates that the Applicant intended to keep the wage increase solely within the LPN classification and did so by eliminating the ORT classification, amalgamating them into the LPN classification. Rather than extending the wage increase outside the LPN classification, the Applicant submits that it actively chose to keep the wage increase in the LPN classification by making ORTs LPNs. At paragraph 25 of her decision the Arbitrator noted that the decision to move ORTs to the LPN classification was an important choice, that distinguishes ORTs from CCRAs. This comment suggests that the Arbitrator did consider the impact of the ORT MOA.

[82] A decision-maker must "meaningfully grapple with key issues or central arguments raised by the parties" *(Vavilov supra*, at para. 128*)*. The Respondent provided ample submissions, including testimony from four witnesses, about the background to the wage parity relationship and the similarities between LPN and CCRA job duties. The Arbitrator summarized these submissions in her decision, and accepted the witnesses' testimony as valid.

[83] The Arbitrator concluded that CCRAs do the work of LPNs and that the decision not to extend the wage increase threw off the wage parity ratio between CCRAs and LPNs that was established in the Collective Agreement. The Applicant argues that the Arbitrator unreasonably, and without authority, equated a historical wage relationship as akin to a wage parity right or quasi-right.

[84] There is no dispute that there has historically been a wage parity ratio as between LPNs and CCRAs. The Applicant argues that this parity ratio was established through collective bargaining, and that the Respondent does not have a freestanding right to wage parity. The Respondent agrees that the Collective Agreement does not include a wage parity clause, but submits that parity is a factor

that has influenced the history of bargaining between the parties. The Arbitrator noted that her role was to interpret the collective agreement, and used the evidence before her, which included submissions on the historical wage parity relationship, to come to her conclusion.

[85] Given the deference this Court must show to the findings of fact, I am not prepared to conclude that the Arbitrator's conclusion was untenable in light of evidence, and I am not prepared to quash the decision on this basis.

[86] However, this Court's role is not to analyze the Arbitrator's conclusion that the Applicant acted unreasonably. This Court must determine if the Arbitrator should have assessed the Applicant's decision on a reasonableness standard (because the management rights clause requires rules to be reasonable) or whether she should have assessed the decision in light of its accordance with the Collective Agreement, and to assess whether the Arbitrator provided justification for her conclusion.

i) Is there internally coherent reasoning in the Arbitrator's decision?

[87] Internal rationality requires a reviewing judge to be able to trace the decision-maker's' reasons and find a line of analysis that leads to the decision-maker's conclusion. A decision-maker cannot simply summarize the arguments made and state a peremptory conclusion. A decision-maker is expected to find facts, analyze, make inferences, and come to a conclusion. If the decision-maker's reasons "exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise", this is a sign of an internally irrational decision (*Vavilov supra*, at paras. 102-104)

[88] The Supreme Court of Nova Scotia applied the *Vavilov supra* reasonableness standard in *Murphy supra*, using the framework outlined by Justice Stratas in *Alexion Pharmaceuticals Inc. supra*:

> [12] *Vavilov* tells us that a reasoned explanation has two related components:
>
> * Adequacy. The reviewing court must be able to discern an "internally coherent and rational chain of analysis" that the "reviewing court must be able to trace" and must be able to understand. Here, an administrator falls short when there is a "fundamental gap" in reasoning, a "fail[ure] to reveal a rational chain of analysis" or it is "[im] possible to understand the decision maker's reasoning on a critical point" such that there isn't really any reasoning at all: *Vavilov* at paras. 103-104.

> * Logic, coherence and rationality. The reasoning given must be "rational and logical" without "fatal flaws in its overarching logic": *Vavilov* at para. 102. Here, the reasoning given by an administrator falls short when it "fail[s] to reveal a rational chain of analysis", has a "flawed basis", "is based on an unreasonable chain of analysis" or "an irrational chain of analysis", or contains "clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise": *Vavilov* at paras. 96 and 103-104.
>
> *(Emphasis in original)*

[89] Without justification for her determination that the decision was a "rule", the Arbitrator's decision contains a gap in the logic chain that led to the conclusion that the Applicant breached the Collective Agreement by refusing to extend the wage increase. Other management decisions made under the management rights clause are not subject to reasonableness scrutiny but must be made in "accordance with the terms and conditions of the collective agreement" (Collective Agreement, Article 3). The unjustified conclusion that the Applicant's decision was a rule substantially impacted the remainder of the Arbitrator's decision, as she directed her analysis to the reasonableness of the rule rather than considering other possible breaches of the Collective Agreement, such as whether the Applicant's decision was a use of their residual management authority, and if that decision was made in accordance with the terms of the Collective Agreement

[90] Despite the possibility that the Arbitrator came to the correct conclusion that the Applicant breached the Collective Agreement, her finding was based on an unjustifiable premise. If this Court upheld the Arbitrator's decision based on reasonableness of the outcome, it would be an improper exercise of judicial discretion, as discussed by the *Vavilov supra* majority:

> [96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an

> approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision…
>
> *(Emphasis added)*

[91] For these reasons I conclude that the Arbitrator's decision cannot meet the reasonableness standard of review.

C. Did the Arbitrator exceed her jurisdiction by making an order retaining jurisdiction over remedial matters?

Position of the Parties

[92] The Arbitrator found that the Applicant breached the Collective Agreement. She then reserved jurisdiction to issue a remedy. The Applicant argues that the Arbitrator exceeded her jurisdiction, because the Collective Agreement prohibits an arbitrator from altering or amending the agreement. The Applicant alleges that the Arbitrator's reservation of jurisdiction implicitly directs it to extend the wage increase to CCRAs, which is akin to altering the terms of the Collective Agreement.

[93] The Respondent submits that the Arbitrator's remedy was limited to declaring a breach of the Management Rights clause. According to the Respondent, judicial review on a theoretical outcome (such as retaining jurisdiction to order a remedy) is outside this court's jurisdiction. The court's role, is to review the rationale and the outcome of the Arbitrator's decision to ensure that it meets the reasonableness standard, not pass judgment on issues that have not materialized.

[94] In its rebuttal brief, the Applicant argues that by retaining jurisdiction for remedial issues, the Arbitrator went beyond merely declaring a breach. In support of this position, the Applicant notes that the Respondent's grievance requested three remedies, one of which was that CCRAs receive compensation at the wage rate of LPNs. The Arbitrator's decision disposed of the first two remedies requested, but left unaddressed the request that CCRAs be paid at the same rate as LPNs. The Applicant argues that if the Arbitrator retained jurisdiction on remedial matters, she retained jurisdiction to award (or to deny) the compensation requested by the Respondent. The Respondent maintains that this amounted to an implicit direction to provide the wage increase to CCRAs.

Analysis

[95] In *Unimin supra*, the Arbitration Board determined that there was no remedy that would put the Union in the same position as it would have been but for the employer's breach, as the breach was primarily procedural in nature. The Board concluded that remitting the matter would not likely lead to agreement between the parties. In this case, the Arbitrator departed from the *Unimin supra* precedent by retaining jurisdiction over remedy.

[96] By retaining jurisdiction over remedial matters, the Arbitrator left the door open for a subsequent order that would require the Applicant to extend the wage increase. If the Arbitrator made that subsequent order, or a similarly-worded order, she would be acting beyond her jurisdiction, breaching clause 14 of the Collective Agreement, which prohibits an arbitrator from making an award that alters the Collective Agreement. However, at this time, the Arbitrator has not explicitly ordered the Applicant to extend the wage increase and thus modify the Collective Agreement.

[97] The majority in *Vavilov supra* identifies the governing statutory scheme as an important legal constraint on the decision-maker's authority. The majority discussed this issue in relation to the scope of a decision-maker's authority, noting that a reasonableness analysis is capable of addressing wrongful arrogation of powers and that these jurisdictional questions need not be assessed on a correctness standard (*Vavilov supra*, at paras. 108 and 109). The majority held that a decision-maker's interpretation of their governing statute will be entitled to deference, but that interpretation must be properly justified. It will be impossible to justify an interpretation or decision that goes beyond the scope of the limits provided in the statutory authority (*Vavilov supra*, at paras. 108-110).

[98] In *Northern Regional Health Authority v Horrocks*, 2021 SCC 42, [2021] SCJ No 42, the majority held that when labour legislation provides for the final settlement of disputes, and when the essential character of the dispute, arises from a collective agreement, the arbitrator has exclusive jurisdiction over the issue (paras. 15 and 25).

[99] The *Trade Union Act* states that a Collective Agreement is binding upon employers and employees who enter into the agreement (s 41). The *Act* also requires every collective agreement to have a provision that directs the settlement of grievances (s 42(1)).

[100] The *Trade Union Act* gives an arbitrator authority to interpret and decide on issues related to a collective agreement. Additionally, the Collective Agreement gives an arbitrator the authority to make a final and binding decision on disputes arising between the employer and the union. These documents comprise the statutorily-mandated scheme that governs and constrains the Arbitrator. Article 8.15 provides an Arbitrator with the authority to determine rates of pay in limited circumstances, such as when there has been a new classification created during the life of the Collective Agreement. This provision does not apply to the case at bar, however it establishes that there may be circumstances where wage rates may need to be altered during the life of the Collective Agreement. Article 14.17 forbids an Arbitrator from altering, modifying or amending the Collective Agreement. Rates of pay are governed by Article 8.00. Articles 8.00 and 14.17 state as follows:

> 8.00 The rates of pay set out in Appendix "A" shall form part of this agreement.
>
> 14.17 All arbitration awards shall be final and binding as provided by Section 42 of the Trade Union Act. An arbitrator may not alter, modify or amend any part of this Agreement, but shall have the power to modify or set aside any unjust penalty of discharge, suspension or discipline imposed by the Employer on a Nurse.

[101] The Arbitrator knew the limits of her jurisdiction and clearly stated her role in the arbitration process. Her decision not to order a remedy suggests that she was attuned to the jurisdictional limitations of her decision. The exact wording of her decision is:

> [38] I conclude that the decision not to extend the rate increase to CCRAs amounts to an unreasonable rule, following the Lafferty award. The "rule" is the decision to apply the award in a manner that differentiates one group from another similarly situated and which severs the longstanding wage ratio, without justification being offered. For these reasons, I allow the grievance and declare that the Employer has breached the collective agreement, retaining jurisdiction concerning remedial issues.

[102] By defining the "rule" in such a way, the Arbitrator left open to interpretation the question of what "remedial" issues she was referring to. Contrary to the Applicant's assertion, the only possible interpretation of the order is not that the wage increase must be extended to the CCRA classification. The parties were free to negotiate a wage increase in light of the order or discuss alternate remedies. The Arbitrator did not direct the parties to take any specific action in light of the breach,

suggesting that she contemplated the parties attempting to reach some agreement on remedies themselves.

[103] Even if the parties could not reach an agreement and returned to the Arbitrator for remedial issues, it does not necessarily follow that the Arbitrator would order the wage increase. She could, for instance, order the Applicant to provide the Respondent with justification for their decision not to extend the wage increase, having held that the decision was unreasonable because it was made *without justification.*

[104] The Applicant contends that the order is nevertheless beyond the Arbitrator's jurisdiction because if the parties negotiate a new wage rate, this would require an amendment to the Collective Agreement, and an arbitrator is prohibited from altering, amending or modifying the Collective Agreement by clause 14. If this reasoning were adopted, the LPN and ORT MOAs would face similar problems, both having been negotiated after grievances were filed, and both involving adjustments to the wage rates for the affected classifications thus amending the terms of the Collective Agreement. If all amendments to wage rates arising from the grievance process were considered to be orders from arbitrators, even where the parties come to agreement without explicit arbitral direction, they would all breach clause 14 of the Collective Agreement. This would create absurdities within the labour arbitration scheme and would seriously impact the ability to enforce agreements made within the scope of a grievance.

[105] I conclude that the decision does not direct the Applicant to extend the wage increase to CCRAs. It is limited to finding that the Collective Agreement has been breached.

[106] Setting aside the reasonableness of the decision, the Arbitrator was acting within her jurisdiction when she found that the Applicant had breached the collective agreement. It is within an arbitrator's jurisdiction to interpret the terms of a collective agreement and state when they have found breaches of the agreement. Without a specific order from the Arbitrator directing the parties to amend the Collective Agreement, I am not satisfied that the Arbitrator's order was beyond her jurisdiction.

Premature Judicial Review

[107] The Respondent argues that the Applicant is raising new issues that could have been addressed in the arbitration, and that it is outside the scope of judicial review to address arguments based on theoretical outcomes. In *Wilson v Atomic Energy of*

Canada Limited, 2015 FCA 17, [2015] 4 FCR 467, Stratas J.A., writing for the Court, discussed premature judicial review. During an arbitration hearing, the arbitrator found that the grievor was wrongfully dismissed and adjourned the matter to allow the parties to discuss a remedy for the breach, with the proviso that the parties could remit the matter for a hearing if they could not agree. Stratas J.A. affirmed the general rule articulated in *CB Powell Limited v Canada (Border Services Agency)*, 2011 FCA 61, [2011] 2 FCR 332, that a court should interfere in administrative proceedings "only after all adequate remedial recourses in the administrative process have been exhausted" (*Powell supra*, at para. 30). Justice Stratas specifically considered if a jurisdictional issue is an exception to the general rule and found that it is not (*Powell supra*, at paras. 39-40).

[108] In *Powell supra*, the parties could have appealed to another administrative decision-maker but instead brought an application for judicial review to the Federal Court. In the case at bar, the Collective Agreement states that an arbitrator will make a final and binding decision and does not provide any right to appeal to another arbitrator or to an arbitration board.

[109] *Wilson supra* indicates that the rule against premature interference will not apply when the circumstances suggest that judicial review is not premature. In determining that the general presumption against premature judicial review was not applicable in that case, Stratas J.A. held:

> [36] Administrative decision-makers, like courts, occasionally bifurcate the merits and the remedy. That sort of bifurcation - at a natural break between two separate phases of the proceedings - often does not cause the ills identified in *C.B. Powell*, above, unlike bifurcations in the middle of hearings on the merits, which often do. Certainly the adjudicator considered the bifurcation to be natural and practical, as is evident from his emails in the record before us. Also of significance is the absence of any objection or submissions to the contrary to the adjudicator by the appellant.
>
> [37] As the Federal Court correctly noted, this case is very different from *C.B. Powell*, *supra*, where the administrative decision-maker stopped his hearing in the middle of the merits phase of the proceeding to hive off a so-called jurisdictional issue for judicial review when it was, in reality, an issue of statutory interpretation that he should have decided himself. His decision ran counter to the rationales underlying the bar against prematurity and sent the parties on a harmful detour to the Courts. It was a procedural choice that could not be respected.

[110] The Arbitrator in this case similarly bifurcated her decision at a "natural break" by declaring that the Collective Agreement had been breached and reserving jurisdiction over remedies. This case has not stagnated for years, as was the case in *Wilson supra*. The Arbitrator also did not adjourn the arbitration but released a decision on the merits, declining to grant a remedy and directing the parties to discuss the potential remedies themselves. These circumstances suggest that it was not premature to move for judicial review.

Conclusion on Issue 2

[111] I conclude that the Arbitrator's decision is not internally coherent. She unreasonably characterized the Applicant's decision as a "rule" under the Management Rights clause and wrongfully applied a reasonableness standard when assessing the decision without justifying her decision or conclusions. I note the irony in making this determination, as the Arbitrator's conclusion was that the Applicant's decision was an unreasonable rule because the Applicant denied the wage increase without offering justification, and, I have in turn found the Arbitrator's decision to be unreasonable because she did not offer justification for her conclusions.

[112] The parties did not argue, and the Arbitrator did not consider, whether the Applicant's decision breached the Management Rights clause because the decision was not made in accordance with the terms of the collective agreement. I decline to rule on this issue as it was not addressed before me. However, this avenue of analysis would be of relevance to an arbitrator assessing this matter.

3. If the Arbitrator's decision does not meet the standard, what is the appropriate remedy?

[113] As to remedy, the Applicant asks the Court to quash the Arbitrator's decision but does not suggest that the matter should be remitted for reconsideration. The Respondent submits that the appropriate remedy, if this court finds the Arbitrator's decision unreasonable, is to remit the matter to the Arbitrator for reconsideration.

[114] I would quash the Arbitrator's decision and remit this matter for another hearing by a different arbitrator with the benefit of this Court's reasons.

McDougall, J.