SUPREME COURT OF NOVA SCOTIA

Citation: ThyssenKrupp Elevator (Canada) Ltd. v. International Union of Elevator Workers, Local 125, 2014 NSSC 134

Date: 20140411
Docket: Hfx. No. 422151
Registry: Halifax

Between:

ThyssenKrupp Elevator (Canada) Limited

Applicant

- and -

International Union of Elevator Workers, Local 125

Respondent

DECISION

Judge:	The Honourable Justice James L. Chipman
Heard:	March 18, 2014, in Halifax, Nova Scotia
Written Decision:	April 11, 2014
Counsel:	M. Patrick Moran for the Applicant Raymond F. Larkin, Q.C. for the Respondent

By the Court:

INTRODUCTION

[1] ThyssenKrupp Elevator (Canada) Limited (the "Employer") applies for judicial review of Arbitrator George Filliter's award dated November 1, 2013 (the "Award"). The Employer seeks to have the Award quashed.

[2] The Employer is a member of the Nova Scotia Construction Labour Relations Association and is bound by the terms of the Elevator Collective Agreement Province of Nova Scotia 2012-2015 (the "Collective Agreement") with The International Union of Elevator Constructors on behalf of Local 125 (the "Union").

[3] The grievors, Steven Thomas and Bradford Perry (collectively the "Grievors") are members of the Union and employed by the Employer at its New Brunswick operations.

[4] The Award interpreted the Collective Agreement as requiring the Employer to pay the Grievors travel expenses according to a schedule in the Collective

Agreement. The Union is of the view that the interpretation fell within the range of possible outcomes based on the facts and language of the Collective Agreement. It therefore takes the position that the Award should not be disturbed.

BACKGROUND

[5] Articles 3.01, 15.01 and 15.02 of the Collective Agreement are germane to this matter and read:

> 3.01 The union agrees and acknowledges that the employer has the exclusive right to manage the business and to exercise such right without restriction, save and except such prerogatives of Management as may be specifically modified by the terms and conditions of this Agreement.
>
> . . .
>
> 15.01 It is agreed that when employees covered by this Agreement in Nova Scotia perform work beyond the jurisdictional territory described in Article 16.02 of this Agreement, travelling time will be paid at single time rates for the actual hours travelled during regular working hours. Additional travelling time up to five (5) hours will be paid at single time rates for the actual hours travelled beyond regular working hours. Expenses incurred during the trip and in the performance of the work described in this Agreement shall be borne by the employer in accordance with the following schedule:

(a) Ninety dollars ($90.00) per man, per day, for work performed beyond fifty (50) kilometres radius and within a one hundred and forty-five (145) kilometre radius of the centre of the Angus L. MacDonald Bridge in Halifax. Effective May 1, 2013, one hundred ($100.00) per man, per day and effective May 1, 2014 one hundred and ten ($110.00) per man, per day.

(b) Six hundred and thirty dollars ($630.00) per week, per man, for work performed beyond the foregoing one hundred and forty-five (145) kilometre radius. Effective May 1, 2013, seven hundred ($700.00) per week, per man and effective May 1, 2014, seven hundred an d seventy ($770.00) per week, per man.

(c) If, at any time, it is found that the living allowance provided by this Agreement is not adequate to cover reasonable expenses, the employers agree to increase same proportionately after the increase has been approved by the Superintendent in charge, along with the representatives of te union. It is also understood where expenses fall below the allowance agreed on, the employer(s) reserves the right to pay only the costs involved.

(d) Travelling time for employees will be as laid down in Article

(e) The method of transportation from job to job during regular working hours, overtime hours or travelling time authorized by the employer shall be that for which the employer will accept responsibility and gives monetary recognition. It is agreed that when men use their own vehicles for transportation as outlined above, they shall be reimbursed in accordance with the applicable Canada Customs and revenue Agency guidelines and regulations.

At no extra expense, said vehicle shall be permitted to carry two (2) persons in addition to the driver, but no tools or materials which would normally be shipped by the employer. Ownership of a personal auto shall not be a requirement of employment.

15.02 All other employees covered by this Agreement shall receive expenses according to the following schedule:

(a) Ninety dollars ($90.00) per man, per day, for work performed beyond fifty (50) kilometres radius and within the one hundred and forty-five (145) kilometre radius of Kings Square, Saint John, New Brunswick. Effective May 1, 2013, one hundred dollars ($100.00) per man, per day and effective May 1, 2014 one hundred and ten dollars ($110.00) per man, per day.

(b) Six hundred and thirty dollars ($630.00) per week, per man, for work performed beyond the foregoing one hundred and forty-five (145) kilometre radius. Effective May 1, 2013, seven hundred dollars ($700.00) per week, per man and effective May 1,2014, seven hundred and seventy dollars ($770.00) per week, per man and effective May 1, 2014, seven hundred and seventy dollars ($770.00) per week, per man.

(c) If, at any time, it is found that the living allowance provided by this Agreement is not adequate to cover reasonable expenses, the employers agree to increase same proportionately after the increase has been approved by the Superintendent in charge, along with the representatives of the union. It is also understood that where expenses fall below the allowance agreed on, the employer(s) reserves the right to pay only the costs involved.

[6] From January to July 2013, the Grievors worked on job sites outside of the 145 kilometer radius described in 15.02 (b). During the first four of these months,

the Employer reimbursed the Grievors $700 per week for the expenses they incurred, pursuant to the same article (albeit, at the rate effective May 1, 2013).

[7] On May 1, 2013, the Employer informed the Grievors that they would now be required to submit detailed expenses so that the Employer could reimburse them for the actual costs incurred where this amount was less than the amounts set out in 15.02. This was confirmed in a May 16, 2013 memorandum which read:

> As stated in our memo sent out the week of May1st 2013 we began requiring detailed receipts for out of town expenses as of that date.
>
> As most of you are aware TKE has had to be very aggressive in the marketplace and to further our efforts we are making this request so we can remain as aggressive as possible moving forward.
>
> The purpose of this memo is to clarify that out of town, eligible expenses will only be paid if they are accompanied with a detailed receipt (itemized receipt) with the HST showing; all other receipts are not valid.
>
> I also want to point out that we will reimburse you for reasonable expenses for work-related incurred costs only, for example, hotel/motel accommodations, parking, approved supplies and tools for jobs and reasonable breakfast, lunch and supper meals. We will not be reimbursing drinks or food outside reasonable meals.
>
> Again, please ensure you collect **all** of the detailed receipts necessary to reimburse for expenses incurred while performing work **outside** of your primary. Also please note the expenses must be "reasonable" as per the collective agreement so if you are unsure as to what is covered please contact me to discuss before incurring any costs.

[8] The Grievors submitted receipts in accordance with the Employer's request. For most weeks, their receipts exceeded the $700 set out in 15.02(b).

[9] When the receipts were provided, the Employer fully reimbursed the hotel and meal expenses, even where the receipted expenses exceeded the allowances set out in the Collective Agreement.

[10] Nevertheless, the Grievors preferred the living allowance they had earlier received and submitted a grievance with respect to the Employer's request for detailed receipts of expenses.

[11] The grievance was heard by Arbitrator Filliter in Halifax on September 30, 2013. The Award was released November 1, 2013.

[12] The Arbitrator upheld the grievance, determining the request to provide receipts violated the Collective Agreement, and held the Grievors were entitled to $700.00 per week.

[13] The Employer now seeks judicial review of the Award.

ISSUE

[14] The parties agree, as I find, the standard of review is reasonableness. The sole issue is whether the Award was unreasonable.

DECISION UNDER REVIEW

[15] The decision comprises 94 paragraphs and 11 pages. In his conclusion, the Arbitrator states:

> 94. In conclusion I therefore declare
>
> 1. The employer violated article 15.02 (c) of the collective agreement by requiring the grievors to supply receipts to support their travel claims
>
> 2. The employer should have paid the grievors 'expenses according to' the schedule set forth in paragraph 15.02(b). In other words, the grievors were entitled to receive $700 a week allowance.

[16] Within his decision, the Arbitrator acknowledged the management rights clause (3.01) preserved the Employer's right to request receipts to support claims for reimbursement "if not otherwise fettered" in the Collective Agreement (p. 16).

[17] He extensively reviewed 15.02 (a), (b) and (c) and found as follows at pp. 16-18:

- that the evidence established that a practice existed between the parties under the Collective Agreement which supported the contention of the Grievors that the Employer had not requested receipts in the past, but that the Collective Agreement was not ambiguous

- that 15.02 (a) and (b) required that employees who worked between 50-145 kilometers from Saint John would be reimbursed for travel expenses in accordance with 15.02(a) and, that similarly, employees who worked beyond the 145 kilometer radius would be reimbursed for travel expenses in accordance with 15.02(b)

- that 15.02 (c) did not apply because the Grievors did not ask for a proportionate increase in the travel allowance and in most cases the amounts incurred did not fall below the scheduled amount ($700/week)

- that the Employer should have paid the Grievors expenses pursuant to the schedule set out in 15.02(b), so that the Grievors were entitled to receive an allowance of $700 per week

- that the Employer violated 15.02(c) by requiring the Grievors to supply receipts to support their travel claims

POSITIONS OF THE PARTIES

Employer

[18] The Employer submits that the Award fails the most basic test of reasonableness because the conclusion is not supported by logical and transparent reasons. They argue that the Arbitrator did not turn his mind to the distinction between a travel allowance and a travel expense, "... or has failed to appreciate the impact of the distinction or the proper interpretation of ThyssenKrupp's rights, under Articles 3.01 and 15.02." The Employer therefore asserts the Arbitrator unreasonably interpreted the Collective Agreement.

Union

[19] The Union argues the Award is reasonable in all respects. They take the position that the Arbitrator's reasoning path was rational and understandable and

demonstrates that his conclusions fell within the range of possible outcomes in the arbitration.

ANALYSIS/DISPOSITION

[20] Once again, the standard of review to be applied is one of reasonableness.

[21] The Nova Scotia Court of Appeal dealt with the applicable standard of review in *Communications, Energy and Paperworker's Union Local 1520 v. Maritime Paper Products Ltd.*, 209 NSCA 60. The Court of Appeal considered the appropriate standard of review of an arbitrator's interpretation of a collective agreement. Fichaud J.A. reviewed the standard at para. 20:

> In *Dunsmuir v. New Brunswick*, 2008 SCC9 (CanLII), [2008] 1 S.C.R. 190, at paras 62, 54, 57, Justices Bastarache and Lebel said that, if existing jurisprudence has satisfactorily established the standard, the formal standard of review may be abridged. I refer to this court's summary of the Dunsmuir principles in *(Casino Nova Scotia v. NSLRB, 2009 NSCA 4 (CanLII),* 2006 *NSCA 44* (CanLII)*,* 2006 NSCA 44 t paras 36-48; Nova Scotia Teacher's Union at para. 15, and the authorities cited in those decisions. Clearly, the reviewing court should apply reasonableness to an arbitrator's interpretation of the collective agreement.

[22] More recently, our Court of Appeal approved the use of the reasonableness standard to review a labour arbitration award in *Halifax Regional Municipality v. Canadian Union of Public Employees*, Local 1088, 2014 NSCA 19. At para. 14, Scanlan, J.A. noted:

> [14] Justice Moir held that the applicable standard of review he was to apply in reviewing the decision of the arbitrator was one of reasonableness saying: 'This court must track the arbitrator's reasoning path and decide whether the result fell within the range of reasonable outcomes." (*Referencing Dunsmuir v. New Brunswick*, 2008 SCC9 and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62). I am satisfied that Justice Moir correctly identified the standard of review.

[23] Given that the appropriate standard of review is reasonableness, the question arises as to how to apply the standard. In *Dunsmui*r, *supra*, the Supreme Court of Canada explained that reasonableness is a deferential standard and one which recognizes that the questions before administrative tribunals may have the potential for a number of reasonable conclusions. Reviewing courts must respect the decision making process of adjudicative bodies with regard to both the facts and the law as well as the reasons offered in support of a decision.

[24] In *Casino Nova Scotia v. NSLRB*, 2009 NSCA 4, the Court of Appeal elaborated on the *Dunsmuir* reasonableness test:

> [29] In applying reasonableness, the court examines the tribunal's decision, first for process to identify a justifiable, intelligible an transparent reasoning path to the tribunal's conclusion, then second and substantively to determine whether the tribunal's conclusion lies within the range of acceptable outcomes.
>
> [30] Several of the Casino's submissions apparently assume that the 'intelligibility' and 'justification' attributed by *Dunsmuir* to the first step allow the reviewing court to analyze whether the tribunal's decision is wrong. I disagree with that assumption. 'Intelligibility' and 'Justification' are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to the process (*Dunsmuir*, para. 47). They mean that the reviewing court can understand why the tribunal made its decision, and that the tribunal's reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes. *Nova Scotia (Director of Assessment) v. Wolfson*, 2008 NSCA 120 (CanLII), 2008 NSCA 120, para. 36.
>
> [31] Under the second step, the court assesses the outcome acceptability, in respect of the facts and the law, through the lens of the deference to the tribunal's 'expertise or field sensitivity to the imperatives or nuances of the legislative regime'. This respects the legislators' decision to have certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. *Dunsmuir*, paras 47-49; Lake, para 41; *PANS Pension Plan (Police Association of Nova Scotia Pension Plan v. Amherst (Town)*, 2008 NSCA 74, leave to appeal denied by the SCC Jan. 22, 2009), para. 63; *Nova Scotia v. Wolfson*, para. 34.

[25] It has often been repeated by courts that the reviewing judge must not set his own course in assessing reasonableness. Rather, the first task is to chart the decision maker's reasoning. See *Law Society of New Brunswick v. Ryan,* 2003 SCC 20 (CanLII) at paras. 47-55; *CBRM v. CUPE*, *supra* and, more recently, v. Maritime Paper *Communications, Energy and Paperworker's Union Local 1520*

Products Ltd., *supra,* at para. 24 and *Halifax Regional Municipality v. Canadian Union of Public Employees, Local 108*, *supra*, at para. 14. Accordingly, I will now chart Arbitrator Filliter's reasoning.

[26] The heart of the decision is contained within paras. 61-93 under the heading, "Analysis". The Arbitrator, with reference to authorities, asserts:

- the true intent of the parties at the time they entered the contract should be identified
- the meaning of words as used by the contracting parties should be referred to
- the context in which the words are used must be considered

[27] Applying his analysis to 15.02, the Arbitrator finds:

- the clause represents the definition of a benefit for all employees of the Employer not working in Nova Scotia
- subclause (c) was added to the Collective Agreement in the most recent round of collective bargaining
- the article is not ambiguous
- were it not for this article, the management rights clause (3.01) would provide the Employer the authority to require employees to provide receipts to support their claims for reimbursement for travel

- the phrase ‘shall receive expenses according to the following schedule’ appears in the opening portion of 15.02 and that this terminology ‘must mean something’

- that ‘the following schedule’ can only refer to subclauses 15.02 (a) and (b) as sub-clause 15 (c) is not a schedule

[28] In oral argument, Mr. Moran, on behalf of the Employer, acknowledged the decision is reasonable until a point when he says it becomes unreasonable. In his words, “I don’t disagree that he’s filled it with reasons and followed it through”, until what he characterizes as a “jump” or a “leap” at paragraph 73.

[29] Before addressing Employer’s counsel’s argument, to provide context, I have chosen to set out paragraph 73 along with the 20 paragraphs that follow:

> 73. However, the parties in the opening portion of article 15.02 the parties used the phrase ‘shall receive expenses according to the following schedule’. This terminology must mean something.
>
> 74. In my view, the ‘following schedule’ can only refer to sub clauses 15.02 (a) and (b) as sub clause 15.02 (c) is not a schedule.

75. Accordingly, I conclude the parties intended the employees who worked between 50 and 145 kilometers from Saint John would be reimbursed for travel expenses in accordance with article 15.02(a). Similarly, employees who work beyond the 45 kilometer radius from Saint John would be reimbursed for travel expenses in accordance with article 15.02(b).

76. This is fetter on the right of the employer to request receipts to support travel claims. This fetter is further outlined in article 15.02(c).

77. I view the first sentence of article 15.02 (c) as providing a protection for employees who claim the 'living allowance provided by this agreement' are inadequate to cover reasonable expenses. In such a case any increase in the allowance needs both the approval of the Superintendent in charge, as well as the representative of the union.

78. I accept if an employee claimed under this portion of the article the employer would be entitled to require receipts to confirm the veracity of the claim of the employee. However, the grievors did not claim the living allowance was inadequate, so this portion of the clause is not relevant.

79. It is the last sentence of article 15,02(c) that is relevant. Where expenses fall below the allowance agreed on, the employer has the discretion to either pay the allowance or to pay the costs incurred.

80. In the case before me the employer requested receipts from the grievors. The memorandum (exhibit 2 tab 2) did not suggest the actual costs incurred were less than the allowance agreed to, but rather made reference to the competitive nature of the business. In my view this memorandum violated the collective agreement.

81. In support of this conclusion it is interesting to note during the period of time for which evidence was adduced the costs incurred by the grievors often exceeded the allowance provided for in article 15.02(b). Despite this fact, the grievors did not request an increase in the allowance, as would have been their apparent right.

82. Even if the employer had the right to request receipts to determine whether the actual costs incurred by employees were less than the allowance, such a request would by its very nature be for a short duration.

83. At some point in time the employer should have been satisfied the actual expenses incurred by the employees did not fall below the allowances provided for in the collective agreement. At this point in time it made sense the employer should revert to paying its employees according to the schedule, which they agreed to in the first place.

84. In my view, well before the expiry of the period of 6 to 8 weeks the employer should have been in a position to determine how the costs incurred by the compared to the allowance provided for in the negotiated schedule. The employer was then obliged to either entertain a request from the employees for a proportionate increase in the allowance set forth in the schedule, pay the lesser amount of actual costs incurred or revert to paying the scheduled amount of $700 a week.

85. The facts indicate the grievors did not ask for a proportionate increase and in most cases the amounts incurred did not fall below the scheduled amount of $700 a week as defined in article 15.02(b).

86. If there was no dispute respecting the mileage claims of the grievors, in all cases the expenses claimed by the grievors would have exceeded the scheduled amount of $700 a week.

87. The secondary question is whether the grievors were entitled to claim mileage when they were required to produce receipts. Counsel for the grievors viewed this as an important component to his argument.

88. In my view, the first thing I must consider is the collective agreement. Counsel for the grievors did not point to an article granting this entitlement and in my

> independent review of the collective agreement I was unable to find such an article.
>
> 89. That said, it s without dispute the employer on occasion does pay mileage from Saint John to the work site. For instance at the beginning of the job in Charlottetown the grievors received mileage for the week ending June 12, 2013 (exhibit 2 tab 13 and 21).
>
> 90. However no evidence was put forward respecting when the employer should or would pay mileage. Suffice to say it is obvious mileage was paid in some circumstances. The mileage paid was based upon the distance from Saint John to the work place, not from the residence of the employee.
>
> 91. When the grievors received the scheduled allowance of $700 a week they did not claim mileage from Saint John to the work site, but that changed when they were required to provide receipts and choose between staying at the job site for the weekend and incur significant costs, which would not have been reimbursed by the employer or travel to their own home.
>
> 92. In my view more evidence and argument is required to render a decision as to whether the grievors were entitled to claim mileage to and from Saint John to the work site. In saying this I do conclude there certainly is an element of fairness and reasonableness that must be considered when the employer takes steps to change an existing practice. However, given the paucity of evidence, I am not able to determine if the decision fo te employer not to reimburse the grievors for their mileage claims is unreasonable.
>
> 93. In my view this issue is one, which should be fully negotiated at the collective bargaining table.

[30] The above quoted paragraphs are within the "Analysis" section of the decision. In response to the Employer's argument, I do not see a leap of logic in the analysis. On the contrary, I find the Arbitrator has laid a proper foundation for

his interpretation of 15.02. His award is thus founded by a well laid out reasoning path that, accordingly, should not be disturbed.

[31] As a reviewing court, I can understand how the Arbitrator was able to conclude sub clauses 15.02 (a) and (b) are a schedule but sub clause 15.02(c) is not a schedule. I can also understand how he was able to conclude the first sentence of 15.02(c) "as providing a protection for employees who claim ...".

[32] In adopting the words of Justice Fichaud in *Communications, Energy and Paperworkers' Union, Local 1520*, *supra*, at para. 37, I can find in the Award the "raw material to move to the second step of the Court's analysis - i.e. assessing the reasonableness of the Award's outcome". In so doing, I find that the Award satisfies the process requirements of intelligibility, transparency and justification.

[33] On balance, I find the Arbitrator's reasoning path is clear. In arriving at his conclusion, he cited appropriate authorities in the context of what he had before him.

CONCLUSION

[34] I find the Award meets the first stage of the reasonableness standard as it is procedurally sound. The analysis is thorough, justifiable, intelligible and transparent. From a substantive review, I find the decision on all fronts falls within the range of acceptable outcomes.

[35] The Application of the Employer is dismissed. I award to the Union $2,000.00, inclusive of disbursements, as costs.

Chipman, J.