IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia Government and General Employees Union v. Capital District Health Authority, 2008 NSSC 83

Date: 20080325
Docket: S.H. No. 270615
Registry: Halifax

In the Matter of: The *Arbitration Act*, R.S.N.S., 1989, c. 19

- and -

In the Matter of: An Application by the Nova Scotia Government and General Employees Union for an Order to quash and set aside a portion of the Arbitration Award of Peter Lederman dated July 14, 2006.

Between:

Nova Scotia Government and General Employees Union

Applicant

and

Capital District Health Authority

Respondent

D E C I S I O N O N C O S T S

Judge: The Honourable Justice Gerald R P Moir

Heard: 8 February 2007 at Halifax

Date of Last Written Submissions: 28 February 2008

Counsel: Mr. Gordon N Forsyth, QC and Ms. Heather L Totton for the applicant
Ms. Kenda L Murphy for the respondent

Moir, J.:

[1] The union was successful in its application to set aside an arbitrator's preliminary award. It requests costs.

[2] The employer's primary position is that the parties should bear all of their own costs. I am referred to *Labourers' International Union of North America, Local 1115* v. *International Union of Bricklayers and Allied Craftsmen, Local No. 2*, [1990] N.S.J. 505 (C.A.). Ms. Murphy argues:

> The *Labourers'* case is relevant to this Application in that neither the Employer nor the Union asked Arbitrator Lederman to render a decision on the classification issue yet he did. The preliminary issue was whether the Union was required to file a grievance before a matter was sent to Arbitration. Unlike the submissions, evidence, and argument led in the *Labourers'* case, there was a complete absence of those elements during the preliminary hearing of this case.
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> Although procedural fairness was accorded to the parties and the Panel was empowered to make the decision that it did in the *Labourers'* case, the Court of Appeal determined that no costs were to be awarded to any party on the Appeal. The Respondent submits that both parties were denied natural justice and procedural fairness in the Case before your Lordship and accordingly neither should be assessed costs against the other party in the Application.

The difficulty with this argument is that the employer supported the learned arbitrator's preliminary award, including the part of it now said to have been based

on a denial of procedural fairness to the employer. The employer argued that the subject of the ruling had been sufficiently put before Arbitrator Lederman.

[3] In support of the employer's primary position, Ms. Murphy also submits "...rather than proceed to Judicial Review, this matter could have been remitted to the Arbitrator for classification considering that it was a Preliminary Award." However, either party could have asked Arbitrator Lederman to reconsider the issue after hearing evidence and submissions.

[4] In the circumstances of this application and the outcome, I am of the view that costs should follow in the usual way.

[5] The secondary issue is whether costs should be increased above the scale provided in Tariff C of the Tariffs of Costs and Fees. The hearing took more than an hour and less than a half-day. So, the standard scale is $750 - $1,000. Tariff C applies to both interlocutory applications and an application started by an originating notice. It provides three factors for increasing an award by a multiple of two, three, or four times the scale amount for an application that "... is

determinative of the entire matter in the proceeding ...". It gives examples that include "judicial review". The three factors are:

> (a) the complexity of the matter,
>
> (b) the importance of the matter to the parties,
>
> (c) the amount of effort involved in preparing for and conducting the application.

[6] For the union, Mr. Forsyth submits:

> The matter before your Lordship in Chambers was of significant importance to the parties. It involved determining whether the Respondent's classification of positions could be arbitrated under Article 41.01 based on the interpretation of the collective agreement. Arbitrator Lederman's interpretation of this issue created precedent and would have lasting implication for both parties. It was critical that his decision be in accordance with prior arbitral decisions on this point and reflected the purpose of Article 41.01. The amount of effort the Union expended in preparing the Application was, therefore, significant as the matter was of significant importance to it and its members.
>
> The matter was also complex as the Union was required to not only outline the purpose of the article for this Honourable Court, but also to set out the appropriate standard of review to use to determine whether Arbitrator Lederman's decision should stand or be quashed.

[7] For the employer, Ms. Murphy submits:

> With respect to the complexity consideration, the question judicially reviewed resulted from a preliminary award. It did not necessitate an in-depth review of evidence and legal analysis. The issue before the court was of low complexity.
>
> Regarding importance, by Mr. Forsyth's own admission a subsequent grievance addressing the same subject matter has been filed. Thus there was another avenue, apart from judicial review, for the Union to have the classification issue addressed.
>
> The matter before Your Lordship involved the question of whether Arbitrator Lederman was "allowed" to make the award that he did despite neither party having argued that specific matter before him and without the benefit of having received evidence and/or argument in relation to the subject matter of the award which he rendered. While the issue had potential ramifications if it was to remain as is, the Union rectified that potential problem by filing a grievance that specifically addressed the classification issue. That second arbitration process could have nullified the necessity for judicial review.
>
> Finally, to turn to the criteria of the effort required to prepare for the Application, the Respondent submits that the "record" was minuscule. It comprised several documents (few of which were ever argued in front of the Arbitrator) and the Preliminary Award issued by Arbitrator Lederman. The Chambers Application proceeded on a very narrow technical question.

[8] Mr. Forsyth points out the importance of this issue to the union. The value of Arbitrator Lederman's decision as a precedent required intervention. Otherwise, as Ms. Murphy points out there has never been anything holding the union back from obtaining a classification through the grievance process. Indeed, it was my understanding that process would have been finalized before now.

[9] The explanation of importance aside, I substantially adopt Ms. Murphy's submissions on the three factors.

[10] I assess costs at $1,000 plus disbursements and will grant an order for judgment in favour of the union.

J.