



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *Canada Post Corporation v. Canadian Postmasters
and Assistants Association*, 2017 NLCA 63

Date: November 2, 2017

Docket: 201601H0078

BETWEEN:

CANADA POST CORPORATION

APPELLANT

AND:

CANADIAN POSTMASTERS AND
ASSISTANTS ASSOCIATION

RESPONDENT

Coram: White, Harrington and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 2015 01G 6638
(2016 NLTD(G) 101)

Appeal Heard: April 6, 2017

Judgment Rendered: November 2, 2017

Reasons for Judgment by Harrington J.A.

Concurred in by: White and Hoegg JJ.A.

Corrected Decision: The citation of the original judgment was corrected on
November 3, 2017. A description of the correction is appended.

Counsel for the Appellant: Daniel W. Ingersoll Q.C.

Counsel for the Respondent: Sean T. McGee

Harrington J.A.:

INTRODUCTION

[1] The appellant, Canada Post proposed the closure, on Saturdays, of its rural post office in Englee, Newfoundland and Labrador. The Canadian Postmasters and Assistants Association (CPAA), the collective bargaining agent for post office employees, refused to give the required consent to the closure mandated under the terms of the collective agreement (agreement) between the parties. Canada Post grieved the refusal claiming that consent was improperly withheld by CPAA for reasons inconsistent with the provisions of the agreement. An arbitrator dismissed the Canada Post grievance having found that the CPAA's consent was not unreasonably withheld.

[2] Canada Post applied for judicial review before an applications judge of the Trial Division who upheld the arbitrator's decision. In dismissing the application, the applications judge held that the arbitrator's decision was reasonable. For reasons which follow, the decision of the applications judge is affirmed by this Court and the appeal is dismissed.

BACKGROUND

[3] The collective agreement between the parties provides for consultation between Canada Post and CPAA with respect to decisions affecting the allocation of hours of operation and work for employees at rural post offices and more specifically contains provisions dealing with post office hours of operations on Saturdays.

[4] The collective agreement included two letters of understanding (LOU) and a memorandum of agreement (MOA). The first letter addressed Saturday hours of post office service (Saturday LOU) and the second letter addressed the allocation of hours pursuant to Article 12 of the Agreement. The MOA addressed the filling of positions which had been vacant for more than six months.

[5] The Saturday LOU was found by the arbitrator and affirmed by the applications judge to give CPAA a role in the scheduling of hours of work

by Canada Post workers which the arbitrator found had evolved to the degree that it was more than a mere consultative role.

[6] The Saturday LOU provided:

... the Corporation will consult with CPAA locally if it desires to make changes to the Saturday hours of an office. Where the Corporation determines that it will continue to offer postal service in the office during the week, it will not reduce Saturday hours of service unless it first obtains the agreement of CPAA. Such agreement shall not be unreasonably withheld.

(Emphasis added.)

[7] Subject to the requirement of CPAA consent regarding the reduction of Saturday hours of operation, Canada Post has primary authority to direct its operations whether it be the opening or closing hours of post offices or dictating the need for personnel and particularly the hours of work of post office workers in accordance with the needs of the general public in the areas in which the post offices operate. Communities in rural Newfoundland and Labrador, like many parts of Canada, have seen declines in population and migration to larger centers which have affected the operations of rural post offices particularly with respect to the amount of staffing that is required for the hours of operation.

[8] The grievance which led to arbitration and ultimately judicial review centered on the number of hours, if any, when the Englee post office would be open on Saturdays to enable members of the community to pick up mail including small parcels that could only be delivered by unionized workers inside the post office.

[9] Canada Post took the position that reduced attendance by townspeople at its Englee post office, particularly on Saturdays, did not justify the presence of an employee on that day of the week and requested consent of CPAA to discontinue that service. CPAA advised Canada Post that it would not agree to the alteration of Saturday service primarily because the Town of Englee objected.

[10] Canada Post submitted to arbitration the CPAA refusal to consent to the reduction of hours at the Englee post office. The parties agreed that one of the two arbitrators named under the collective agreement for the resolution of grievances affecting postal operations in the Province would arbitrate the dispute. Canada Post submitted that there was no specific

labour relations purpose supporting CPAA's refusal to consent since the opposition to Saturday closure in the view of Canada Post arose solely from the demands of the citizens of Englee.

[11] In dismissing the grievance, the arbitrator concluded that the matter of the Saturday closure was not only a matter of interest to the population of Englee in preserving access to the post office on Saturday, but also affected the long-term job security of inside workers at many other remote postal stations. A companion arbitration award by the same arbitrator had earlier found that the matter of Saturday hours of operation was a collective agreement issue as it would result in a reduction of work of the part-time assistant postmaster from fifteen to six hours per week.

[12] Canada Post sought judicial review of the arbitrator's decision. The applications judge found the arbitrator's decision met the test of reasonableness. He found that the provisions of the agreement between Canada Post and its inside workers gives the CPAA an effective right of veto in the scheduling of Saturday hours of work which would reduce the working hours of personnel such as the assistant postmaster.

[13] Canada Post raises the following issues regarding the decision of the applications judge:

1. CPAA acted unreasonably by withholding consent to the altering of Saturday hours at the post office solely based upon objections from the towns people of Englee which reasons are not related to a labor relations purpose and thus were not within the terms and conditions of the collective agreement.
2. The applications judge erred in failing to find insufficient "justification, transparency and intelligibility" within the arbitrator's decision-making process so as to satisfy the first branch of the "reasonableness" standard of review articulated by the Supreme Court of Canada in *Dunsmuir v. New Brunswick (Board of Management)*, 2008 SCC 9.
3. The applications judge committed reviewable errors of both law and fact when he found that the arbitrator's decision fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".
4. Canada Post submitted that the applications judge:

- (a) gave so much deference to the arbitrator that he failed to assess whether the outcome was, in fact, “defensible in respect of the facts and law”;
- (b) allowed the arbitrator to look beyond the evidentiary record in determining the basis for CPAA’s refusal to consent; and
- (c) took into account irrelevant factors and failed to take relevant factors into account when he:
 - (i) misinterpreted the law and allowed the arbitrator and CPAA to rely on non-labour relations issues unsupported by evidence to justify the refusal to consent to Saturday closure of the Englee post office;
 - (ii) misinterpreted the law and the evidence when he allowed the arbitrator to rely on reasons for withholding consent created and relied upon by CPAA only during the arbitration hearing, such reasons being in contradiction to the agreed statement of facts and the testimony of the President of CPAA;
 - (iii) misinterpreted the law, the evidence and the parties’ collective agreement by allowing the arbitrator and the CPAA to rely on:
 - (a) factors listed in a document which had no relevance to the case (Letter of Understanding entitled “Article 12 – Allocation of Hours”);
 - (b) the alleged loss of four Saturday hours of part-time work; and
 - (c) the alleged loss of business to the applicant; and
 - (iv) misinterpreted the law and committed a reviewable error when he failed to recognize that the arbitrator was required to balance the interests of Canada Post and CPAA in determining whether the latter’s refusal was reasonable.

STANDARD OF APPELLATE REVIEW

[14] In *Layman v. Layman Estate*, 2016 NLCA 13, 375 Nfld. & P.E.I.R. 106, this Court held at paragraph 18:

... as in an appeal of a judicial review of an administrative tribunal, the question on appeal of a review of an arbitrator's decision is whether the lower court selected and applied the correct standard of review (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at para. 43; *Burke v. Newfoundland and Labrador Association of Public and Private Employees*, 2010 NLCA 12, 294 Nfld. & P.E.I.R. 230 at paras. 49-50).

[15] The Supreme Court in *Dunsmuir* articulated the steps a reviewing court is to take in determining the applicable standard of review on judicial review:

[62] ... First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[16] At judicial review, both parties agreed that the standard of review was that of reasonableness. The applications judge applied the reasonableness standard of review, relying upon the Supreme Court of Canada trilogy of decisions in *Dunsmuir*, *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, which hold that reasonableness is the presumptive standard of review.

[17] In *Dunsmuir*, the Supreme Court acknowledged that given the expertise of labour arbitrators in interpreting collective agreements, they should be afforded deference when exercising their core jurisdiction. Since *Dunsmuir*, the Supreme Court of Canada has affirmed that arbitral awards dealing with the interpretation of collective agreement terms and conditions are, as a general rule, subject to a reasonableness standard of review.

[18] The focus of this appeal is on the interpretation and application by the arbitrator of the words "[CPAA] agreement shall not be unreasonably withheld" within the collective agreement. As jurisprudence has already established that arbitral interpretation of collective agreement provisions is afforded deference, and therefore the reasonableness standard applies, there is no need to move to the second step of the *Dunsmuir* analysis.

[19] Relying on the same law, I agree the applications judge was correct in reviewing the arbitrator's decision on a reasonableness standard. The standard of review to be applied by this Court when reviewing the applications judge's decision is correctness.

ISSUE

[20] The issue in this appeal is whether the applications judge correctly decided that the arbitrator's decision was reasonable. The focus is therefore on the interpretation by the arbitrator of the words "[CPAA] agreement shall not be unreasonably withheld" referring to CPAA's refusal to consent to the Saturday closure for the reasons it gave.

ANALYSIS

[21] The applications judge succinctly summarized the core issues raised by Canada Post on judicial review as follows:

[22] Canada Post argues that in concluding as he did, the arbitrator set the bar for a reasonable refusal so low as to accord the Association an effective right of veto over Saturday closures. Canada Post further says that the expressed rationale for the refusal — the objection of the Town — is not a labour relations purpose reflective of the Association's purpose and objectives. Further, and to the extent that the arbitrator relied on other reasons for the refusal, they are 'manufactured' reasons without evidentiary support. Absent a legitimate labour relations purpose, it is unreasonable for the Association to refuse to approve a business decision by Canada Post. Finally, argues Canada Post, the arbitrator failed to balance the interests of Canada Post and the Association in determining whether the refusal was unreasonable.

[22] The applications judge referred to the decision of the Supreme Court of Canada in *Newfoundland & Labrador Nurses' Union* which held that the reasonableness standard is less concerned with the reasoning process than with the range of acceptable outcomes. Having cited the reasoning in *Newfoundland and Labrador Nurses Union*, the applications judge concluded that:

[26] ... if an arbitrator is "alive to the question at issue" and the result falls within an acceptable range, a reviewing judge should respect the speed, economy and informality of the grievance arbitration process and should avoid correction other than for "egregious errors" ...

[23] The applications judge then turned to the specific issue of unreasonable refusal by the CPAA to give consent. Canada Post submitted that an arbitrator faced with an unreasonable refusal issue should assess the refusal on the basis of “objective criteria”. Canada Post relied upon the decision in *Treasury Board and CATCA, Re*, [1984] C.P.S.S.R.B. No. 176 (Can. P.S.S.R.B.) in which J.H. Brown, Q.C., chairman of the Canada Public Service Staff Relations Board, opined at paragraph 31:

Whether consent has or has not been unreasonably withheld must be decided on the basis of objective criteria. It would not be reasonable to withhold consent to a proposed change in a shift cycle solely on the basis that the proposed change would be less convenient to the employees than their current schedule. Rather, the withholding of consent must be based on criteria which reflect the legitimate interests and concerns of the Bargaining Agent and the employees it represents. In the application of such criteria it was not unreasonable for the controllers to withhold their consent to the Employer's proposal on the grounds that it would result in their losing 40 full "free time" days off work in each year which they now enjoy under the 5/4 repeat shift cycle. I say this notwithstanding that the proposed 6/3 repeat cycle would mean that they would have more daily "free time" as a result of a shorter regular work day. The difference involves a real change in their existing conditions of employment which the controllers did not wish to voluntarily relinquish. Further, the possibility of fewer controllers on a shift and the probable sequential reduction in the size of the bargaining unit were not prospects to which they could have readily been expected to accede. Changes of this nature transcend mere inconvenience and relate to matters that would be of justifiable concern to any bargaining agent.

[24] The applications judge found that the withholding of consent by CPAA to Saturday closures need not necessarily be determined on the basis of objective criteria, particularly since the *Treasury Board* decision referred to considerations such as “legitimate interests and concerns”, the “possibility” of fewer employees on a shift, the “probable” reduction in the size of the bargaining unit, and “matters of justifiable concern”. The applications judge rejected the position taken by Canada Post that these types of issues demanded an analysis of purely objective criteria, concluding that “the passage does no more than demonstrate the flexible and contextual approach that an arbitrator may reasonably choose to adopt when assessing an issue of ‘unreasonable withholding of consent’” (paragraph 31).

[25] The applications judge referred to the fact that the CPAA was concerned not just with the loss of hours on Saturday but also a reduction of hours for the assistant postmaster. The applications judge elaborated on his reasons at paragraphs 33 to 37 as follows:

The first part of the arbitrator's considerations - reproduced above – refers to the Association's concern over the loss of hours of work resulting from the Saturday closure.

It is uncontradicted that the proposed Saturday closure would mean reduced hours of work for the Assistant Postmaster. In July 2011, when a 15-hour part-time position became vacant, the part-time hours were reduced, pending review, to 10 hours per week. The proposal in 2012 to close on Saturdays and otherwise adjust the part-time hours would further reduce the weekly part-time hours to six.

The arbitrator found that the Association objected to the loss of hours of work that resulted from the Saturday closure. This is accurate. The Association filed a separate grievance specifically directed to the loss of hours, not just the Saturday hours but also the reduction in the allocated hours for the rest of the week. However, the arbitrator went on to conclude that the loss of hours of work was a relevant reason for the Association to object to the Saturday closure. This is somewhat different from objecting to the loss of hours in and of itself.

Canada Post says that the evidence before the arbitrator did not support the conclusion that the reduction of hours was among the reasons given by the Association for not agreeing to the Saturday closure. Canada Post says that the evidence - in particular paragraph 28 of the agreed statement of facts - was that the sole reason for the Association's refusal was the objection, with reasons, of the Town. The argument is that the arbitrator, in effect, supplemented the reasons given by the Association based on his own review of the circumstances. Accordingly, the arbitrator did not limit his review of the reasonableness of the Association's refusal to those reasons actually given by the Association.

I was not provided with a transcript of the September 2014 arbitration hearing. As noted, the parties agreed that the evidence from this hearing would form part of the evidence before the arbitrator in the matter now under review. They also agreed that the agreed statement of facts was not "intended to contradict" any of the previous evidence.

[26] While acknowledging that he was not provided with a transcript of the first hearing which dealt with the question as to whether or not a reduction of hours of work had actually occurred, the parties nevertheless essentially agreed that the evidence from both arbitration hearings would apply.

[27] The applications judge reached the following conclusions at paragraphs 39 to 41:

I take from this that the arbitrator had before him some evidence of a labour relations purpose — the loss of the Saturday hours — for the refusal. The fact that a separate grievance was filed to address the full loss of the part-time hours, including the Saturday hours, does not take away from the fact that the loss of the Saturday hours was raised as a reason to object to the Saturday closure.

This evidentiary reference, although it might be a thin reed, is sufficiently strong to conclude that there was some evidence before the arbitrator that the loss of the Saturday hours was at least part of the reason for the Association's refusal.

Accordingly, and bearing in mind the requirement for judicial deference to the findings of the arbitrator, I do not accept the premise of the argument advanced by Canada Post.

(Emphasis added.)

[28] The applications judge concluded that the objection of the Town of Englee respecting the reduction of hours was not a relevant factor in assessing the reasonableness of the refusal of the CPAA to consent to the reduction of hours. CPAA adopted the Town's reasons as its own, thereby basing the refusal to consent, at least in part, on the inconvenience to the elderly residents of Englee and those who weekly commute to work away from the Town. The applications judge found that the reasonableness of the refusal to accept the reduction of hours on Saturday "must be considered in light of the full labour relations environment" (paragraph 51).

[29] The applications judge concluded at paragraphs 54 to 59:

The Letter of Understanding addressing Saturday hours of service reflects a change in Canada Post policy from one where Canada Post would only eliminate Saturday hours following a community request to one where Canada Post would itself initiate a closure, but subject to Association agreement. Saturday closures thus went from being governed by policy to being governed by the collective agreement. It is not unreasonable to conclude that the fact that the parties agreed to the requirement for Association consent rather than a requirement for consultation as in Article 12 suggests a willingness by Canada Post to accept a greater degree of involvement by the Association, in this very limited area, than would otherwise be the case.

I note also that the requirement is to consult locally and obtain local agreement, rather than to engage the national Association. Such explicit recognition of local involvement and the need for local agreement at least opens the door to a consideration of community interests. It is not far-fetched to conclude that community concerns in a small rural community the size of Englee would be of more interest to the local Association than those in a larger centre.

Further, the Letter refers to a reduction in “Saturday hours of service”, and not to a reduction in the hours of work for Association members. In other words, even if the total authorized hours for a post office were unchanged, with Saturday hours being added to other working days, Association agreement must still be obtained. Again, this suggests that Association agreement or otherwise may reflect broader community-oriented considerations not limited to labour relations issues.

In reviewing the exercise of the right of refusal given to the Association under the collective agreement, the arbitrator was acting within his core jurisdiction. He was not assessing the wisdom or otherwise either of the Saturday closure or of the Association’s refusal. He was not evaluating the Saturday closure. He was assessing the reasonableness of the Association’s refusal in the context of the cooperation-oriented provisions of the collective agreement and the purely local circumstances before him.

...

In my view, and particularly given the arbitrator’s experience and his inclusion in Article 7.22 as one of two arbitrators agreed by the parties to hear arbitrations in this province, it was not unreasonable for him to take a broad view of the grounds which could support a reasonable Association refusal. Further, it was not unreasonable for him to conclude that the Association could include in its considerations issues relevant to the broader community of Englee.

(Emphasis added.)

[30] The applications judge addressed the submission by Canada Post that the arbitrator failed to balance the relative interests of the parties. The applications judge concluded at paragraphs 68 to 70 as follows:

Thus the focus is on the position of the party withholding consent and not on the merits of the request in question. It was not unreasonable for the arbitrator in the present case to adopt this approach and to assess the Association’s refusal on its own merits.

The range of outcomes in this case is narrow. Either the refusal was unreasonable or it was not. In my view, both possible outcomes are defensible.

The arbitrator was required to assess reasonableness. The concept of reasonableness does not lend itself to the formulation of fixed and immutable conclusions or to a particular reasoning process. One arbitrator’s assessment of reasonableness might differ from that of another arbitrator. I am bound to give significant deference to the decision of an arbitrator operating within his core jurisdiction. This direction applies with even more force when reviewing an arbitrator’s own determination of reasonableness. The reviewing judge must look at the decision as a whole, not be critical of arguments not addressed and, where

appropriate, supplement the reasons given by the arbitrator. The underlying policy is to allow the effective and efficient operation of the grievance resolution process without undue interference, intervening only when absolutely necessary.

(Emphasis added.)

[31] I agree with the findings by the applications judge. The facts of the matter are that Canada Post agreed to the inclusion of the term in the collective agreement which requires CPAA to consent to Saturday closures subject to the proviso that such consent will not be unreasonably withheld. The parties also agreed that the record and evidence respecting the earlier related arbitration by the same arbitrator were admissible on this arbitration. In these circumstances, the applications judge's conclusion that the arbitrator's decision was reasonable cannot be said to be wrong.

[32] The CPAA's decision to refuse consent is doubly insulated from judicial review. First, under the terms of the Saturday LOU an arbitrator can only overturn the CPAA's refusal of consent if it was unreasonable. That level of insulation gives the CPAA room to make decisions on behalf of its members. And second, the court can only overturn the arbitrator's decision if it was unreasonable. That level of insulation reflects the arbitrator's expertise. These two levels of insulation have different sources and different purposes. They are not redundant and cannot be collapsed together. The two levels of deference stack on top of each other, creating a formidable barrier for Canada Post.

SUMMARY AND DISPOSITION

[33] I conclude that the applications judge did not err in finding that the arbitrator's decision was reasonable on the following points.

[34] The applications judge:

- (i) did not err in applying a standard of review of reasonableness with respect to the findings by the arbitrator;
- (ii) did not err in concluding that labour relations considerations relating to a reduction of working hours for inside postal workers was a relevant justification for CPAA to refuse to consent to the planned reduction by Canada Post of Saturday hours of operation; and

- (iii) did not err in affirming the terms of the CPAA collective agreement governing the withholding of CPAA consent to reduction of hours of operation or closure.

[35] In the result, I would dismiss the application of the appellant with costs to the respondent on column 3 of the scale of costs.

M. F. Harrington J.A.

I concur: _____

C. W. White J.A.

I concur: _____

L. R. Hoegg J.A.

Correction Notice

Correction made on November 3, 2017:

1. On page 1, the citation was changed from: *Canada Post Corporation v. Canadian Postmasters and **Assistant** Association*, to now read: *Canada Post Corporation v. Canadian Postmasters and **Assistants** Association*.