



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

Citation: *Resource Development Trades Council of
Newfoundland and Labrador v. Muskrat Falls Employers’
Association Inc.*, 2020 NLCA 32

Date: September 18, 2020

Docket Number: 201801H0086

BETWEEN:

RESOURCE DEVELOPMENT TRADES COUNCIL
OF NEWFOUNDLAND AND LABRADOR

APPELLANT

AND:

MUSKRAT FALLS EMPLOYERS’ ASSOCIATION INC.

RESPONDENT

Coram: Green, White and O’Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division
(2018 NLSC 181)

Appeal Heard: December 16, 2019

Judgment Rendered: September 18, 2020

Reasons for Judgment by: O’Brien J.A.

Concurred in by: Green and White JJ.A.

Counsel for the Appellant: Michael Gillingham

Counsel for the Respondent: Chris King

O'Brien J.A.:

OVERVIEW

[1] This appeal arises in the context of a labour dispute that occurred during construction of the Lower Churchill Hydroelectric Generation Project at Muskrat Falls, on the Lower Churchill River in Labrador (the project).

[2] The Muskrat Falls Employers' Association Inc., the respondent, is an employers' organization as defined by the *Labour Relations Act*, RSNL 1990, c. L-1, acting on behalf of the contractors involved in the project. The Resource Development Trades Council of Newfoundland and Labrador, the appellant, is a council of trade unions as defined by the *Act*, acting on behalf of the unions involved in the project. The project itself has been declared a "special project", as that term is defined by and used in the *Act*.

[3] The dispute in question generated two decisions, one made by an arbitrator and the other by an administrative committee. The Trades Council sought judicial review of both decisions in the Supreme Court of Newfoundland and Labrador, and the applications judge dismissed the application for judicial review with respect to both decisions. The Trades Council appeals the judge's decision.

[4] For the reasons that follow, I would dismiss the appeal relating to the arbitrator's decision. I would allow the appeal relating to the administrative committee's decision and remit that matter to the Supreme Court.

BACKGROUND

[5] The construction work on the project was subject to a Collective Agreement between the Employers' Association and the Trades Council, dated March 14, 2013.

[6] By virtue of a Memorandum of Agreement dated September 15, 2015, signed by the Employers' Association, the Trades Council and others, it was agreed that jurisdictional disputes regarding work performed at the project were to be resolved in accordance with a specific regime and system for the resolution of trade jurisdiction disputes in the construction industry. This dispute resolution system is contained in the *Plan for the Settlement of Jurisdictional Disputes in the Construction Industry Covering the U.S. and Canada*, commonly referred to as the "Green Book Plan" or the "Canadian Plan" (the Plan).

[7] Notably, such jurisdictional disputes were to be resolved by reference to the provisions of the Plan, and not the Collective Agreement.

[8] The Trades Council claimed that certain work at the project was being assigned to the wrong union. Specifically, it alleged that “fire watch” work was not being done by members of the Hotel Restaurant Workers Union Local 779 (HRW 779), when that work had been previously assigned to that union.

[9] As a result, on April 28, 2017, the Trades Council filed a grievance under the Collective Agreement, on behalf of HRW 779. The Trades Council did not use the dispute resolution process under the Plan.

[10] The Employers’ Association took the position that filing a grievance under the Collective Agreement was specifically prohibited under the Plan, and that this constituted an “impediment to job progress”, a defined term in the Plan.

[11] On June 2, 2017, the Employers’ Association filed a Notice of Impediment to Job Progress pursuant to the Plan, and requested a hearing to determine whether the grievance could proceed under the Collective Agreement or whether it was an impediment to job progress. An arbitrator was appointed pursuant to the Plan to conduct the hearing and decide the issue.

The Decision of the Arbitrator – June 8, 2017

[12] The hearing was held on June 8, 2017 and the Employers’ Association and the Trades Council participated. The arbitrator provided his written decision the same day. The arbitrator agreed with the Employers’ Association that the grievance was an impediment to job progress under the Plan, and that it could not proceed. He determined that the filing of a grievance under the Collective Agreement in this circumstance was “specifically forbidden by the Plan”. He reached the following conclusion: “I find that the HRW and the RDTC [the Trades Council] to be in violation of Section 3 of the Plan, and hereby order them to cease and desist.”

[13] The arbitrator further noted that access could be had to the Plan with respect to this dispute, stating that “the Parties are not without recourse. Since the work is ongoing, an application may be made to the Plan.”

[14] While the arbitrator’s decision was brief, at two pages, it indicated that “more detailed reasons/opinion may be requested by either party”. There is nothing to indicate that more detailed reasons were requested.

[15] An application for judicial review of the arbitrator’s decision was filed by the Trades Council in the Supreme Court on November 22, 2017, more than five months after the decision was made.

The Decision of the Joint Administrative Committee (JAC) – September 27, 2017

[16] The Trades Council did not withdraw its grievance under the Collective Agreement. As a result, on July 27, 2017, the Employers' Association requested that a determination be made that HRW 779 was in violation of the Plan by failing to withdraw the grievance. Under the Plan, such a determination could be made by an entity known as the Joint Administrative Committee (JAC), which was established to "oversee the operation of the Plan".

[17] The JAC received submissions from the parties and determined on September 27, 2017 that HRW 779 was in violation of the Plan. The JAC noted that the union "had the option of pursuing a remedy under the Plan" but did not do so. The decision stated:

... Instead, it chose to bypass the Plan, and it continues to pursue a grievance that involves jurisdictional issues despite [the Arbitrator's] decision that the grievance constitutes an impediment to job progress.

[18] In the result, the JAC decided that HRW 779 was prohibited from processing a case before the Plan until the grievance was withdrawn:

Accordingly, pursuant to Article VII, Section 1, of the Plan, the JAC hereby denies Local 779 the right to process a case before the Plan during the period of violation. ... The bar will be lifted when Local 779 withdraws the grievance in accordance with [the Arbitrator's] decision.

[19] The Trades Council applied to the Supreme Court for judicial review of the JAC's decision. This request for judicial review was also made on November 22, 2017, in the same application in which it requested judicial review of the arbitrator's June 8, 2017 decision.

[20] The applications judge dismissed the requests for judicial review with respect to both the arbitrator's decision and the JAC's decision.

[21] He dismissed the application for judicial review of the arbitrator's decision because he determined that the application was not filed within the time required by statute. Having dismissed the application for judicial review of the arbitrator's decision, the judge stated that it was unnecessary to review the decision of the JAC. He therefore dismissed the applications for judicial review with respect to both decisions.

[22] The Trades Council has appealed the judge's determinations.

ISSUES

[23] The following issues will be addressed:

1. Did the judge err in dismissing the application for judicial review of the arbitrator's decision?
2. Did the judge err in dismissing the application for judicial review of the Joint Administrative Committee's decision?

ANALYSIS

Issue 1: Did the judge err in dismissing the application for judicial review of the arbitrator's decision?

[24] The judge dismissed the application for judicial review of the arbitrator's decision because the application was commenced outside the 60 day time limit for bringing such an application, set out in section 14(2) of the *Arbitration Act*, RSNL 1990, c. A-14:

14(2) An application in respect of an arbitration or award referred to in subsection (1) may be made to the Trial Division [now the General Division] within 60 days of the receipt of that arbitration or award by the parties to the application.

[25] The judge noted that the parties agreed that the 60 day limit applied to the Trades Council's application for judicial review of the arbitrator's decision:

[36] The parties were in agreement that pursuant to 14(2) of the *Arbitration Act*, R.S.N. 1990, c. A-14, an application to set aside an arbitration award must be made within 60 days of receipt of the award, which was confirmed by the Court of Appeal in *N.A.P.E. v. Memorial University of Newfoundland* (1998), 167 Nfld. & P.E.I.R. 72, 513 A.P.R. 72 (N.L.C.A.).

[26] He dismissed the application for judicial review of the arbitrator's June 8, 2017 decision as it was filed on November 22, 2017, and therefore not within the 60 day limitation period:

[40] The application to review the arbitrator's decision of June 8, 2017 is dismissed as it was initiated beyond the 60 days required by section 14(2) of the *Arbitration Act*.

[27] The Trades Council did not argue that the *Arbitration Act* limitation period was not applicable in this context. Rather, it argued that the arbitrator's decision and the JAC's decision were connected, and that the 60 day period should run from the later decision, made by the JAC on September 27, 2017.

[28] The judge considered and rejected this argument. He decided that the JAC's September 27, 2017 decision did not extend the 60 day period to apply for judicial review of the arbitrator's June 8, 2017 decision:

[38] Counsel for the Trades Council argues that the subsequent decision of the Joint Administrative Committee on September 27, 2017 had the effect of extending the 60 day limitation period.

[39] I do not agree. That decision arose when the Employers' Association initiated a new and separate action before a different body to enforce sanctions for non-compliance with the arbitrator's decision.

[29] On appeal, the Trades Council submitted that the judge erred in deciding that judicial review of the arbitrator's decision was barred by the 60 day statutory limit.

[30] It argued that it was required to exhaust all remedies under the Plan before seeking judicial review. The Trades Council's position is that the arbitrator's decision and the JAC's decision, both made pursuant to the Plan, were "intertwined", and that the JAC proceeding was "interconnected to and dependent upon the proceeding before the arbitrator". As such, the Trades Council argued, it could only seek judicial review after the entire process ended, when the JAC released its decision on September 27, 2017. As a result, it argued, the 60 day limitation period for seeking judicial review of the June 8, 2017 arbitrator's decision was extended, and did not begin to run until the JAC decision was made on September 27.

[31] However, this argument is not supported by the factual circumstances in this case.

[32] The arbitrator's award of June 8, 2017 determined that the filing of a grievance was an impediment to job progress which constituted a violation of the Plan, and the Trades Council and HRW 779 were ordered to cease and desist.

[33] Implicit in the Trades Council's argument, that it must exhaust the dispute resolution process under the Plan before seeking judicial review, is the notion that the process under the Plan provided for a right of appeal of the arbitrator's decision to the JAC, and that this appeal process had to be followed and exhausted.

[34] However, for this type of jurisdictional decision by the arbitrator (dealing with an impediment to job progress), the Plan does not provide for an appeal, to the JAC or to any other entity.

[35] The JAC specifically noted in its decision that there is no appeal process regarding the arbitrator's decision, and that the only recourse would be by way of a judicial review:

“...the Plan does not have a process of appealing from a Plan Arbitrator's decision in an impediment to job progress case. The only remedy for disputing a Plan Administrator's decision in such a case is a court action to vacate the award.”

[36] Notably, any right to seek judicial review in this circumstance would be subject to the statutory 60 day limitation period.

[37] It was the Employers' Association, not the Trades Council, who wrote to the JAC to advise that, despite the arbitrator's decision that filing a grievance was a violation of the Plan, the grievance had not been withdrawn. The Employers' Association contacted the JAC, in accordance with the Plan, in light of the violation. The JAC, after considering submissions from the parties, confirmed that the grievance had not been withdrawn, noted that the failure to withdraw the grievance was a violation of the Plan, and determined that, as a result, HRW 779 was prohibited from processing a case under the Plan until the grievance was withdrawn. This was the sanction provided for non-compliance with the arbitrator's decision.

[38] In no way could the request by the Employers' Association to the JAC be characterized as an appeal or review of the arbitrator's decision. As such, the September 27, 2017 JAC decision did not extend the statutory 60 day limitation period in the *Arbitration Act* for seeking judicial review of the arbitrator's June 8, 2017 decision. The decisions are distinct, and there was a right to seek judicial review of both, which the Trades Council exercised in this case.

[39] However, with respect to the arbitrator's decision, that right is subject to the statutory 60 day limitation period. Otherwise, the Trades Council could potentially remain in non-compliance with the arbitrator's award (by not withdrawing the grievance) and take the position that the 60 day period for challenging the arbitrator's decision did not run until such time, if any, that the Employers' Association requested the JAC to address this non-compliance.

[40] On this logic, if the Employers' Association's request to the JAC was made months or even years after the arbitrator's award, the argument would be that the 60 day limitation period for seeking judicial review of the arbitration decision would still not have expired. Under this interpretation, some action by the Employers' Association (requesting the JAC to address the ongoing non-compliance with the arbitrator's decision) would be required in order to trigger the commencement of the limitation period. Taken to extreme, under this interpretation it might be argued that, if the Employers' Association never

requested the JAC to deal with the non-compliance, the 60 day limitation period for challenging the arbitrator's decision would never begin. The result would be unworkable, and an untenable interpretation in light of the statutory limitation period.

[41] The Trades Council also argued that the judge failed to reconcile his interpretation of the *Arbitration Act's* 60 day limitation period with the direction from this Court in *Transport and Allied Workers, International Brotherhood of Teamsters, Local 855 v. Labourers' International Union, Local 1208*, 2014 NLCA 45, 358 Nfld. & P.E.I.R. 322, leave to appeal to the SCC refused, [2015] S.C.C.A. No. 28.

[42] In the *Transport and Allied Workers* case, the Trades Council submits, this Court held that, in matters involving disputes covered by the Plan, a party must "exhaust all possible remedies" under the Plan's scheme before seeking judicial review. The Trades Council argues that the decision in that case means that the Trades Council was obliged to complete all processes under the Plan, and could not circumvent these processes, before commencing the judicial review process.

[43] In the Trades Council's interpretation of the *Transport and Allied Workers* decision, the dispute resolution procedures would need to have been fully engaged pursuant to the Plan before any application for judicial review could be entertained. Therefore, the Trades Council submits that, as the dispute resolution process under the Plan included the JAC, there was a requirement to await the JAC's decision before seeking judicial review. Citing *Transport and Allied Workers* as authority, the Trades Council argues that prior to the JAC's decision of September 27, 2017 an application for judicial review of the arbitrator's decision would have been dismissed as premature because the Plan's dispute resolution process would not have been exhausted.

[44] However, nothing in the decision in *Transport and Allied Workers* displaces the statutory requirement to apply for judicial review of the arbitrator's decision within 60 days. The statutory time limit was not in issue in that case. The decision in *Transport and Allied Workers* recognizes the discretionary nature of judicial review and indicates that judicial discretion to provide a remedy might be tempered in circumstances where a remedy could have been obtained through an alternative dispute resolution process available to an applicant (perhaps by agreement or statute) and the applicant chose not to avail of that alternative process before seeking judicial review.

[45] *Transport and Allied Workers* identifies the reality that a judge, in that circumstance, might want to consider the availability of the alternative dispute

resolution mechanism in exercising discretion to grant or dismiss the application for judicial review. The decision in *Transport and Allied Workers* confirms that an applicant's failure to utilize an alternative process which is available, and which may provide a potential remedy, is a proper factor for a judge's consideration once a judicial review application has been properly commenced.

[46] However, the decision does not stand for the proposition that an applicant seeking judicial review need not comply with a statutory requirement, in this case a limitation period, before commencing the application for judicial review.

[47] The factual circumstances in *Transport and Allied Workers* are also very different than the present situation. In that case, the applicant for judicial review had a right to appeal the decision in question through an alternative process (and indeed there was an agreement that any appeal of the decision in question would proceed through that appeal process). Despite this, the applicant in *Transport and Allied Workers* failed to seek recourse under the appeal process, and instead sought judicial review. There is also some indication in the decision, at paragraph 52, that the applicant "suspected that it would have difficulty" in succeeding through the available appeal process, and judicial review was viewed as a more attractive option. The Court viewed negatively the applicant's failure to use an appeal process that was available in that context.

[48] Further, even on the Trades Council's interpretation of *Transport and Allied Workers*, the process to determine whether filing the grievance constituted a violation of the Plan was completed, and exhausted, when the arbitrator made his decision on June 8, 2017. There was nothing further to decide. The arbitrator had no further mandate or authority, and there was no appeal process provided for within the Plan to appeal a decision involving this type of jurisdictional dispute. Thus, even applying the Trades Council's broad interpretation of the decision in *Transport and Allied Workers*, there would be no impediment to proceeding to judicial review after June 8, 2017.

[49] In the result, I would conclude that the judge made no error in dismissing the application for judicial review of the arbitrator's decision. I would dismiss the appeal on this issue.

Issue 2: Did the judge err in dismissing the application for judicial review of the Joint Administrative Committee's decision?

[50] After dismissing the application for judicial review of the arbitrator's decision, the judge determined it was "unnecessary" to review the application for judicial review of the JAC's decision (para. 41).

[51] The Trades Council appeals this determination. It notes that, as the application for judicial review of the September 27, 2017 JAC decision was made on November 22, 2017, there was no issue regarding the timeliness of commencing that application. The Trades Council submits that the dismissal of the application to review the arbitrator's decision (because it was commenced after the 60 day limitation period), should not preclude a judicial review of the JAC decision.

[52] The Trades Council argues that the judge erred in two respects: by failing to provide adequate reasons as to why it was unnecessary to review the JAC decision, and by failing to deal with the judicial review application of the JAC decision when that application was properly before the Court.

Providing Reasons

[53] The Trades Council first argues that the reasons provided were insufficient. The Supreme Court of Canada has discussed the requirement for sufficiency of reasons in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, and *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3.

[54] In *R.E.M.*, at paragraph 11, the Court stated that reasons for judgment serve various purposes; they should “tell the parties affected by the decision why the decision was made”, “provide public accountability of the judicial decision”, and “permit effective appellate review”.

[55] Further, at paragraph 35 of *R.E.M.*, the Court made the following observations respecting the requirement to provide sufficient reasons:

[35] In summary, the cases confirm:

- (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, ...
- (2) The basis for the trial judge's verdict must be “intelligible”, or capable of being made out. ...
- (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the “live” issues as they emerged during the trial.

[56] While *Sheppard* and *R.E.M.* considered the sufficiency of reasons in a criminal context, the considerations also apply in the civil context. (See for example *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007

SCC 41, [2007] 3 S.C.R. 129; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *Brake-Patten v. Gallant*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 257).

[57] The Trades Council argues that the reasons provided in paragraph 41, the sole paragraph in which the judge references the JAC decision and states that it is unnecessary to deal with it, are insufficient. Paragraph 41 states:

[41] It is therefore unnecessary to review the other grounds of appeal [which related to the arbitrators' decision] or the decision of the Joint Administrative Committee.

[58] The Employers' Association argues that, while not explicitly stated, the reason why the judge felt it was unnecessary to deal with the JAC decision is implied. The Association submits that the JAC's decision was relevant only with respect to the Trades Council's argument that the JAC's decision had the effect of extending the limitation period to review the arbitrator's decision. As such, the Employers' Association argues, when the judge rejected the Trades Council's argument that the limitation period had been extended by the September 27, 2017 JAC decision, it was unnecessary to undertake a separate judicial review of that decision.

[59] The Employers' Association's submission in this regard might best be characterized as speculative because the judgment does not indicate why a review of the JAC decision was deemed unnecessary. There is inadequate information provided to enable the parties to ascertain why the judge decided as he did, which is central to the requirement to provide sufficient reasons. It is not possible to discern from the reasons why it was unnecessary to review the JAC decision or why the JAC application should be dismissed as a consequence of the other application having been dismissed. As such, the requirements outlined by the Supreme Court regarding the sufficiency of reasons were not satisfied in this regard, and this constituted an error.

Review of the JAC Decision

[60] The Trades Council also argues that the failure to judicially review the JAC decision, in and of itself, was an error.

[61] The Employers' Association's position on this issue is similar to the position advanced on the issue of sufficiency of reasons; that is, the JAC decision was only relevant in the context of whether it extended the period for commencing judicial review of the arbitrator's decision, and it was unnecessary to undertake a separate review of the JAC decision once the application to review the arbitrator's decision was dismissed.

[62] The Trades Council argues that the application to judicially review the JAC decision raised arguments about the reasonableness of the JAC decision, unrelated to the other application, which were not considered when the judge decided a review was unnecessary.

[63] For example, the Trades Council argued that the JAC decision was unreasonable in stating that the failure to withdraw the grievance meant there was non-compliance with the arbitrator's decision, and the Plan. The Trades Council submitted on appeal that this was an unreasonable conclusion. It argued that the arbitrator's direction to "cease and desist" was satisfied when no further steps were taken to advance the grievance, and that, accordingly, it was unreasonable for the JAC to have concluded that the grievance had to be withdrawn in order to comply with the "cease and desist" order.

[64] The Trades Council further argued that, as the application regarding the JAC was properly before the Court, live issues relating to the merits and reasonableness of the JAC decision should have been addressed in the judicial review process but were never considered. There is merit in this submission.

[65] The judge's conclusion (that it was unnecessary to review the JAC decision because the application to review the arbitrator's decision had been dismissed) conflated two distinct applications for judicial review, dealing with different issues, decision makers and circumstances, and was an error.

[66] In the result, I would allow the appeal with respect to the judicial review of the JAC's decision.

[67] On appeal, the Court heard only limited and tangential submissions regarding the merits of the JAC's decision and whether it was reasonable or unreasonable. These arguments were not fully developed as they were not the focus of the appeal.

[68] In order to permit the parties to fully consider and address all matters relating to the JAC's decision, I would remit the issue of judicial review of that decision to the Supreme Court, General Division for consideration and determination, in accordance with the standards of review enunciated by the Supreme Court of Canada in the trilogy of cases referred to as the *Vavilov* trilogy. These are *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66; and *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67.

SUMMARY

[69] In summary, I would dismiss the appeal with respect to the application for judicial review of the arbitrator’s decision. I would allow the appeal with respect to the application for judicial review of the JAC’s decision and remit that matter to the Supreme Court, General Division.

[70] As there was mixed success on the appeal, I would make no order as to costs.

F. P. O’Brien J.A.

I concur: _____
J. D. Green J.A.

I concur: _____
C. W. White J.A.