Date: 2020 08 05
Docket: S-1-CV-2019-000 029

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE GOVERNMENT OF THE NORTHWEST TERRITORIES

Applicant

-and-

THE UNION OF NORTHERN WORKERS

Respondent

MEMORANDUM OF JUDGMENT

I) INTRODUCTION

[1] This judicial review application stems from a disagreement between the Government of the Northwest Territories (GNWT) and the Union of Northern Workers (UNW) about the administration of Special Leave.

[2] The facts leading to the dispute are not contentious. A.L. was a nurse employed with the GNWT. Like many health care practitioners, she worked shifts. Because she worked part-time, she did fewer shifts in a year than a full-time nurse would, but when she worked her shifts were 12 hours, the same as her full-time colleagues.

[3] A.L. was getting married. She applied for Special Leave. An issue arose about how many hours she was entitled to be paid for those leave days. The GNWT

took the position that she was entitled to be paid for each day of leave on the basis of a 7.5 hour work day, pro-rated to reflect her part-time status.

[4] A.L. filed a grievance challenging the GNWT's interpretation. The UNW filed a policy grievance raising the same issues and seeking declaratory relief as to the correct interpretation of the Collective Agreement. Both grievances were heard together.

[5] The Arbitrator concluded that health care practitioners are entitled to be paid for 12 hours for each day of Special Leave that they take and that this amount is not subject to proration based on part-time status.

[6] The GNWT seeks to have this decision quashed.

II) STANDARD OF REVIEW

[7] Over the years, some areas of the law of judicial review have been controversial. The standard of review that applies to decisions of labour arbitrators, however, is not one of them. It has long been established that when challenged, such decisions are to be reviewed on a standard of reasonableness. *Nurse's Union v Newfoundland and Labrador*, 2011 SCC 62; *International Association of Machinists and Aerospace Workers (Local Lodge No.99)*, 2009 NWTSC 58; *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals*, 2011 SCC 59; *Northwest Territories v Union of Northern Workers*, 2015 NWTSC 61.

[8] Recently, in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, the Supreme Court of Canada clarified the principles that govern the standard of review to be applied when administrative decisions are challenged. A significant portion of the decision deals with the framework to be applied in identifying the proper standard of review. That aspect of the decision is not relevant here because the parties agree that the standard of reasonableness applies. However, *Vavilov* also provided additional guidance on the application of the reasonableness standard. That guidance informs how this Court should approach the task at hand in this case.

[9] Reasonableness has long been, and remains, a deferential standard of review. When it applies, reviewing courts must show restraint and intervene only where it is truly necessary to safeguard the legality, rationality and fairness of the administrative decision-making process. *Vavilov*, para 13.

[10] The hallmarks of reasonableness are justification, transparency and intelligibility. In considering whether a decision is reasonable, the issue is not whether the reviewing court would have arrived at the same result or would have followed the same path of reasoning. As the Federal Court of Appeal put it, the reviewing court must not "make its own yardstick and use it to measure what the administrator did". *Delios v Canada (Attorney General)*, 2015 FCA 117, para 23.

[11] The issue for the reviewing court is whether the decision is reasonable, from the point of view of both the outcome and the reasoning process that led to it. The decision must be not only justifiable, but also justified. In other words, the reasons must show that the decision was not reached on an improper basis. *Vavilov*, paras 83 and 86.

[12] It follows that regardless of the outcome, if there are fundamental gaps in the reasons given, or if those reasons reveal an unreasonable chain of analysis, the decision cannot stand. Not every flaw or shortcoming, however, is a basis for intervention. The reviewing court must be satisfied that the flaw is sufficiently central or significant to render the decision unreasonable. This could be, in the words of the Supreme Court of Canada, "a failure of rationality internal to the reasoning process", or the fact that a decision is "untenable in light of the relevant factual and legal constraints that bear on it". *Vavilov*, paras 100-101.

[13] A failure to meet the "internal rationality" criterion can manifest itself in different ways: the reasons, read holistically, fail to reveal a rational chain of analysis; they disclose an irrational chain of analysis; the conclusion reached cannot flow from the analysis undertaken; or the reasons, read in conjunction with the record, do not make it possible to understand the decision maker's reasoning on a critical point. *Vavilov*, para 103.

[14] A decision is also internally illogical if the reasons "exhibit clear or logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise: the decision maker's reasoning must "add up". *Vavilov*, para 104.

[15] The reviewing court must also examine the decision against factual and contextual considerations, including the statutory framework, principles of interpretation, evidence, submissions of the parties, past decisions of the administrative body and the potential impact on those affected by the decision. *Vavilov*, para 106.

[16] These principles inform the approach that this Court must take in examining the Arbitrator's conclusions in this case.

III) ANALYSIS

A) The relevant provisions of the Collective Agreement

[17] The Arbitrator's decision must of course be examined in light of the provisions of the Collective Agreement that she was called upon to interpret.

[18] The Agreement is divided in two parts. The first part consists of general provisions that apply to all unionized government workers. It is followed by a number of Appendices that deal with specific groups of employees.

[19] Special Leave is provided for at Article 19, in the main part of the Agreement:

> ARTICLE 19
> SPECIAL LEAVE
>
> CREDITS
>
> 19.01 (1) An employee shall earn special leave credits up to a maximum of thirty (30) days at the rate of 0.023077 hours for each hour that an employee receives pay. (...)
>
> (2) Special leave will be taken in hours, on the basis of the employee's regularly scheduled hours of work for the day the leave is taken.

[20] Article 19.02 sets out the circumstances when Special Leave can be granted and provides, at paragraph 19.02(1), that when sought in conjunction with a marriage, it must be granted for a period of up to 5 consecutive working days.

[21] Article 22, also in the main part of the Agreement, deals with hours of work. Article 22.02 provides that the standard working hours are 7.5 hours per day for employees whose work week is 37.5 hours, and 8 hours per day for employees whose work week is 40 hours. Although Article 22.02 sets down certain parameters for shift work (for example, a daily shift cannot exceed 16 hours), it does not stipulate a standard number of hours to be worked in a day.

[22] Appendix 10 applies to health care practitioners. Its preamble makes it clear that in case of inconsistency between the general provisions of the Agreement and the Appendix, the provisions of the Appendix prevail:

> APPENDIX A10
> HEALTH CARE PRACTITIONERS
>
> All of the provisions of the Collective Agreement shall apply to the employee of Government hospitals and health care facilities except as modified by this Appendix. In any case where a provision contained in this Appendix conflicts with a provision of the Collective Agreement, the provision contained in this Appendix shall prevail.
> (...)

[23] Article A10.B3 deals with hours of work. It provides that the regular daily hours of work for full-time employees are 12 consecutive hours per day. The regular yearly total of hours is the same as the regular yearly total of hours set out in Article 22.

[24] This gives rise to the first issue that the Arbitrator had to decide: when a health care practitioner takes Special Leave, is that employee entitled to be paid for 7.5 hours per leave day (the standard working hours pursuant to Article 22.02), or for 12 hours (the daily hours of work set out at Article A10.B3).

[25] The second issue is whether the corresponding amount is then subject to proration for employees who do not work full time. Article 4.02 of the main part of the Agreement deals with proration of benefits for part-time employees. Its relevant portion reads as follows:

> 4.02 Part-time employees shall be entitled to all eligible allowances and benefits provided under this Agreement except as expressly modified by specific language in this Collective Agreement (...) in the same proportion as their yearly hours of work compared to the standard yearly hours of work for their position.

B) The Arbitrator's Award

[26] As noted above at Paragraph 10, the Arbitrator's decision is the key to this Court's review process, and must remain its focus.

[27] The Arbitrator first dealt with preliminary objections that had been raised by the GNWT. Her conclusions on those issues are not challenged.

[28] She then turned to the analysis of the merits. She set out general principles of interpretation that apply in labour disputes. Again, the GNWT does not allege that she made any errors in doing so.

[29] The Arbitrator referred to various provisions of the Agreement. She first referred to Articles 22 and 19. She also referred to the provisions that deal with sick leave and vacation leave which use the same language as Article 19, namely, that "leave is taken in hours, on the basis of the employee's regularly scheduled hours of work for the day the leave is taken".

[30] The Arbitrator noted that Appendix 10 includes certain specific provisions dealing with certain types of leave. For example, Article A10.B5 states that employees working extended work days and compressed work weeks are entitled to vacation time equivalent to those working 7.5 hour days, and that leave credits are paid, on termination, on the basis of 7.5 hours per day. It further states that the earned leave "is converted into hours owed and utilized according to the schedule shift pattern". Similarly, Articles A10.B6 and A10.B7 provide the particulars of how sick leave and designated paid holidays are administered for employees covered by this Appendix.

[31] The Arbitrator noted, correctly, that there is nothing in Appendix 10 that addresses Special Leave. She found this to be significant:

> There were three leaves which had the contentious language in the body of the Collective Agreement - Article 18 and 20 were modified but not Article 19 which continued to have the same language as before. I have to assume that sophisticated parties such as these would not forget about special leave if they wanted to replace the contentious clause in all three of the mandatory leaves. Regardless we are left with the language as to how Article 19.01(2) must operate.
>
> *Arbitrator's Award*, p. 22.

[32] The Arbitrator also referred to Article A10.B3 which, as I already noted, states that the regular hours of work for full-time employees covered by Appendix 10 is 12 consecutive hours per day. She concluded:

> In my view this is the definition that should be applied to the dates in the special leave requests, not the standard hours of work which defines "Day Work" according to Article 22 in the main body of the Collective Agreement.
>
> *Arbitrator's Award*, p.23.

[33] On the issue of proration, the Arbitrator dismissed the GNWT's contention that Special Leave should be prorated for part time workers. She gave two reasons for doing so.

[34] First, she noted that Special Leave is inherently prorated because it is earned on the basis of the hours for which the employee receives pay. Part-time employees work fewer hours and necessarily accumulate a proportionally lower number of credits.

[35] Second, the Arbitrator found that specific language is required for a benefit to be prorated. She noted that Article 19 does not include any reference to Special Leave being subject to proration, and concluded that Article 4.02 was not specific enough to extend to that type of leave.

C) Errors and reasoning gaps alleged by the GNWT

[36] The GNWT points to a number of aspects of the Arbitrator's reasons which, in its view, demonstrate serious errors and reasoning gaps that render the decision unreasonable.

1. The Arbitrator's treatment of the evidence adduced by the GNWT

[37] At the arbitration hearing, the GNWT adduced evidence from the manager who had administered Special Leave at Stanton Hospital for several years. She explained that the approach she used in dealing with A.L.'s request was the same as she always had, and that this approach had never been challenged before. The GNWT acknowledges that the Arbitrator considered this evidence when she dealt with the preliminary issues, but argues that she did not properly take it into account when she dealt with the merits. I disagree.

[38] The Arbitrator referred to this evidence at some length when she was dealing with one of the GNWT's preliminary objections, which was estoppel: the GNWT argued that the UNW could not challenge the government's interpretation of the relevant portions of the Agreement because that interpretation had been used for years and had in effect been accepted by the union. As already noted, this objection was dismissed and that conclusion is not challenged on this review.

[39] In my view, the Arbitrator's failure to refer to the same evidence again in detail when she dealt with the merits is of no consequence. It would be unrealistic

to suggest that the Arbitrator, having just referred to the evidence, was not still cognizant of it when she turned to the merits of the grievances. Moreover, the Arbitrator did mention this evidence when she was dealing with the merits. Clearly, she was not ignoring it or casting it aside. *Arbitrator's Award*, pp.15-16.

[40] In addition, it is entirely understandable that the Arbitrator did not refer to this evidence at length or spend a lot of time analyzing it when she was dealing with the merits, because, ultimately, it was not determinative at all of the issues before her.

[41] These grievances did not stem from a factual dispute. There was no conflicting evidence that the Arbitrator needed to resolve in order to make her decision. This case stemmed from a disagreement on a pure issue of interpretation of the Agreement. The evidence adduced by the GNWT, in effect, was the description of its own interpretation of how Special Leave should be administered. This was the very issue that the Arbitrator had to decide. She was not, obviously, bound by either party's position.

[42] There is nothing to suggest that the Arbitrator overlooked or misunderstood the GNWT's interpretation of the Agreement. She simply did not agree with it. In my view, the Arbitrator's treatment of the evidence does not give rise to any concerns and is not a basis for this Court to intervene.

2. Inequitable consequences of the Arbitrator's interpretation

[43] The GNWT argues that the Arbitrator's interpretation leads to inequitable results because health care practitioners who take Special Leave will be paid more hours per day of leave than other employees, despite the fact that their total yearly work hours are the same.

[44] The GNWT is correct. The Arbitrator's interpretation means that health care practitioners get paid for 12 hours when they take a day of Special Leave, whereas many other employees only get paid for 7.5 hours. This creates a discrepancy, and the apparent unfairness it could lead to is well illustrated by the hypothetical used by counsel for the GNWT at the hearing: if a health care practitioner and another GNWT employee whose regular working hours are 7.5 hours a day were to marry each other, and both took Special Leave days on that occasion, one would be paid for more hours for each day of leave than the other. That said, the question is not whether the Arbitrator's interpretation creates a discrepancy. Rather, it is whether this discrepancy is such that her decision is unreasonable.

[45] The UNW argues that the short answer is no, because irrespective of this alleged inequity, the Arbitrator's interpretation is in line with the language of the Agreement and with principles of interpretation that apply in this area. The UNW goes further, though, and argues that the interpretation advocated by the GNWT would result in a much greater inequity because the purpose of Special Leave is to allow employees to be absent from work without being penalized by loss of pay in special, extenuating circumstances. If the GNWT's interpretation were to prevail, shift workers would get fewer paid days away from work in these circumstances.

[46] On a review based on a standard of reasonableness, it is not this Court's role to analyze the Agreement afresh and decide which interpretation it prefers, whether one or the other results in inequity, or decide which of the two interpretations results in the greater inequity. The focus of the inquiry is whether the Arbitrator's reasoning path and conclusions are reasonable. I have concluded that they are, for a number of reasons.

[47] First, the Agreement itself provides that in some areas different employees are subject to different conditions. The parties negotiated the terms of the various Appendices and modified the general provisions of the Agreement for certain groups of employees. Inherent in this is the recognition that different treatment does not necessarily imply unfairness. In addition, as the UNW points out, the Arbitrator's interpretation does not result in increasing the yearly total of hours for which health care practitioners get paid. Special Leave may only be taken on a day where the employee was scheduled to work. It replaces, and is not in addition to, a scheduled day of work. Therefore, at the end of the year, a health care practitioner who has taken Special Leave will not be paid for more hours than another employee.

[48] Second, the parties chose to address the effect that the different work schedule for employees covered by Appendix 10 would have on other benefits such as vacation leave, sick leave, and mandatory paid holidays. They did not do the same for Special Leave. It was no more unreasonable for the Arbitrator to find that this was by design than it would have been to find that it was an oversight. If anything, her conclusion that it was by design is much more in line with general interpretation principles: the words used in a collective agreement should be given meaning, and the use of different words suggests that the parties intended different meanings. D. Brown and D. Beatty, *Canadian Labour Arbitration*, 4th ed. (Thomson: Toronto, 2017), para 4:2100; *Press and Graphic Communications International, Local 25-C*, [1995] B.C.C.A.A.A. No. 637.

[49] Third, the Arbitrator's conclusion is also consistent with principles identified in other arbitration cases about the purpose of Special Leave, which, as I already mentioned, is to provide employees with time away from work to deal with personal and family needs, without having to worry about loss of pay. *Chelsea Park Oxford v LDSWU*, [1990] OLAA 25; *Ottawa-Carleton (Regional Municipality) v CUPE, Local 503*, CarswellOnt 6635.

[50] In that context, I agree with the UNW that that the key benefit for the employee is to have time away from work to deal with these personal matters, without facing the hardship of a financial shortfall. This type of leave is not a "bonus". It is a means whereby an employee is permitted to attend to personal and often very emotional matters *instead* of being at work, without suffering financial consequences.

[51] Given all of this, in my view, the Arbitrator's finding that a day of Special Leave represents the number of hours where the employee would actually have been at work and been paid for had she not taken the leave, can hardly be said to be unreasonable. On the contrary, it is consistent with the conclusion of other arbitrators who have had to interpret similar language in a variety of contexts. *Woodland Enterprises Ltd. v International Woodworkers of America*, [1975] SLAA 4; *Canada Tungsten Mining Corporation Ltd. v United Steelworkers*, [1977] NWTLAA 1; *Breitenmoser v Canada (Treasury Board),* 2004 PSSRB 103; *King v Canada Customs and Revenue Agency*, [2001] CPSSRB 89

[52] I conclude that the Arbitrator's decision as to the number of hours for which employees covered by Appendix 10 are entitled to be paid when they take Special Leave was reasonable both in its outcome and with respect to the path of reasoning that led to it.

3. Alleged errors in dealing with proration

[53] The GNWT argues that Article 4.02 was the central provision to consider on the issue of proration, and that the Arbitrator unreasonably dismissed its importance. The GNWT also argues the Arbitrator's decision is unreasonable because she relied on arbitration decisions that were not relevant to the issue she had to decide.

[54] It is clear that the Arbitrator did not overlook Article 4.02 in her decision,

because she quoted it. She then said:

> The Employer would have me interpret Article 4.02 of the Collective Agreement as limiting the amount of special leave for the part-time employees like Ms. [L.]. However, nothing in this article references proration of leaves. There is an automatic proration of sorts since the part-time employees would accumulate fewer credits based on the fact that they work fewer twelve hour shifts than do full time employees. However they continue to work their regularly scheduled hours of work in twelve hour shifts. Nothing in Article 4.02 speaks to a part time employee receiving less pay for special leave than the hours they worked on the dates in question.
>
> *Arbitrator's Award*, p.24.

[55] The Arbitrator later referred to an arbitration decision that dealt with proration of a different type of benefit. However, the principle that she extracted from that decision, and correctly so in my view, is that specific language is required for a benefit to be prorated. She concluded that Article 4.02 was not specific enough to modify the Special Leave entitlement set out in Article 19.

[56] The GNWT argues that this finding was unreasonable because Article 4.02 is very precise: it refers specifically to proration of benefits for part-time workers, A.L. was a part-time worker and Special Leave is a benefit, just like other forms of leave.

[57] It bears repeating that the issue on this judicial review is not whether I agree with the Arbitrator's decision, but whether the outcome she arrived at, and the path she followed to get there, are reasonable.

[58] The interpretation advanced by the GNWT is not unreasonable. Article 4.02 sets a general rule of proration of benefits for part-time employee. It could have been interpreted to be designed to apply to all types of leave. At the same time, the Arbitrator's interpretation is consistent with that of other arbitrators who have been asked to examine the issue, albeit in other contexts, of whether leave credits earned in a prorated manner should be further prorated when they are used. *Royal Columbian Hospital v British Columbia Nurses' Union (Paille Grievance)*, [1994] BCCAAA 69; *Grace Maternity Hospital Board (Board of Management) v NSNU*, 1990 CarswellNS 769; *Peace Arch District Hospital v Nurses' Bargaining Assn.*, CarswellBC 4051; *Northwest Territories (Minister Responsible for the Public Service Act) v Union of Northern Workers (Statutory Holiday Pay Grievance)*, [2007] NWTLAA 1. These decisions dealt with proration in a variety of contexts, but that does not make them irrelevant.

[59] I also find that, given the nature of Special Leave and the circumstances when it is used, it was not unreasonable for the Arbitrator to conclude that for this particular benefit to be prorated, language tying proration specifically to Special Leave was required.

[60] I am satisfied that the conclusions the Arbitrator reached were in the range of reasonable outcomes in light of the relevant provisions of the Agreement. I am also satisfied that her reasons do not suffer from gaps in logic, unreasonable chain of reasoning, or other flaws referred to above at Paragraphs 12 to 15, that would render her decision unreasonable within the parameters outlined in *Vavilov*.

IV) CONCLUSION

[61] The Application for judicial review is dismissed.

[62] At the hearing, the parties indicated that they did not wish to make any particular submissions as to costs, as they agree the successful party should be entitled to costs in accordance with the usual rules. Accordingly, I grant the UNW costs under Column 3 of Tariff.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
5th day of August, 2020

Counsel for the Applicant: Karen Lajoie

Counsel for the Respondent: Morgan Rowe

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MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU