CITATION: Ottawa Police Services Bd. v. Ottawa Police Assn., 2023 ONSC 6225
DIVISIONAL COURT FILE NO.: DC-23-2793
DATE: 20231107

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

McCarthy, Sheard and Schabas JJ.

BETWEEN:	
Ottawa Police Services Board Applicant	Jock Climie and Sophie Kassel, for the Applicant
– and –	
Ottawa Police Association, Kelly Waddingham, in her capacity as Arbitrator, and Attorney General of Ontario Respondents	Christine Johnson, for the Respondent, Ottawa Police Association No One appearing for other Respondents
	HEARD: at Ottawa, virtually, on September 11, 2023

REASONS FOR JUDGMENT

SHEARD J.

Overview

[1] This application for judicial review is brought by the Ottawa Police Services Board (the "Board"), which seeks to quash the decision of the grievance arbitrator, Kelly Waddingham (the "Arbitrator"), dated March 27, 2023 (the "Decision").

[2] The Board and the respondent, Ottawa Police Association (the "OPA"), are parties to two 2020-2024 Collective Agreements, one respecting civilian members and one respecting police personnel (the "Collective Agreements").

[3] The OPA filed two grievances against the Board claiming that the Board had violated the Collective Agreements by failing to recognize September 19, 2022, as a paid holiday after the Governor General "proclaimed" that day as a national day of mourning to honour the memory of Her late Majesty Queen Elizabeth the Second, who died on September 8, 2022 (the "Grievances").

[4] In the Decision, the Arbitrator allowed the Grievances, determining that the Board had breached the Collective Agreements when it failed to recognize September 19, 2022, as a paid holiday. The Arbitrator granted retroactive statutory holiday benefits to all OPA members for September 19, 2022.

Issue to be determined

[5] The issue on this application for judicial review is whether the Arbitrator's interpretation of the Collective Agreements was reasonable.

Positions of the parties

[6] The Board submits that the Decision is unreasonable for the following reasons:

(a) the Arbitrator failed to apply the fundamental rules of collective agreement interpretation in that she failed to consider the mutual intention of the parties, ascertained by reading the Collective Agreements as a whole and in their proper context; and

(b) the Arbitrator failed to avoid an interpretation of the Collective Agreements that led to an absurd result.

[7] The OPA submits that the Decision is entirely reasonable and discloses "justification, transparency and intelligibility and falls within the range of possible acceptable outcomes."

Disposition

[8] For the reasons that follow, the application is allowed: the Decision is quashed and the Grievances are dismissed.

Factual Background

[9] The OPA agrees with the facts as stated in the Applicant's factum, excerpted, in part, and set out below:

(i) The Board is a civilian body that oversees the Ottawa Police Service (the "OPS").

(ii) The OPA represents civilian and sworn members of the OPS.

(iii) On September 8, 2022, Queen Elizabeth II died.

(iv) On September 13, 2022, the Governor General in Council directed that a proclamation be issued requesting that the people of Canada set aside September

19, 2022, as the day on which to honour the memory of the Her late Majesty Queen Elizabeth the Second.

(v) A proclamation was published in the Canada Gazette, stating the following:

> Whereas Our Privy Council for Canada has directed that a proclamation be issued requesting that the people of Canada set aside September 19, 2022, as the day on which they honour the memory of Her late Majesty Queen Elizabeth the Second, who passed away on September 8, 2022.
>
> Now Know You that We, by and with the advice of Our Privy Council for Canada, do by this Our Proclamation request that the people of Canada set aside September 19, 2022, as the day on which they honour the memory of Her late Majesty Queen Elizabeth the Second, who passed away on September 8, 2022.
>
> Of All Which Our Loving Subjects and all others whom these presents may concern are required to take notice and to govern themselves accordingly.

(vi) On September 13, 2022, the Prime Minister's office issued a news release, which included the following paragraphs:

> The National Day of Mourning is an opportunity for Canadians from coast to coast to coast to commemorate Her Majesty. It will be designated a holiday for the public service of Canada, and other employers across the country are also invited to recognize the National Day of Mourning.
>
> …
>
> Statutory Holidays in Canada can only be granted through legislation, which must pass through the House of Commons and the Senate, and receive Royal Assent. The Government of Canada has consulted the provinces and territories, who will determine an appropriate way to mourn Her Majesty Queen Elizabeth II in their jurisdictions.

(vii) The Board did not recognize the National Day of Morning as a holiday under either Collective Agreement.

The Collective Agreements

[10] The Grievances related to the interpretation of the following:

(a) Article 9 of the 2020-2024 Collective Agreement between the OPS and the OPA respecting civilian members; and

(b) Article 17 of the 2020-2024 Collective Agreement between the OPS and the OPA respecting police personnel.

[11] Article 9 reads, in part, as follows:

> **Article 9 – DESIGNATED HOLIDAYS**
>
> (a) That the following days be designated as statutory and declared holidays:
>
> | | |
> |---|---|
> | New Year's Day | Labour Day |
> | Good Friday | Thanksgiving Day |
> | Easter Monday | Remembrance Day |
> | Victoria Day | Christmas Day |
> | Canada Day | Boxing Day |
> | Civic Holiday (August) | One (1) Floating Day |
> | Family Day | |
>
> (b) In addition to those set out in the following paragraph, any day proclaimed by the Governor General in Council or the Lieutenant Governor in Council for the Province of Ontario, or the City of Ottawa shall be a statutory holiday.

[12] Article 17 reads, in part, as follows:

> Article 17 – STATUTORY HOLIDAYS
> …
> **17:02** In addition to those set out in the following paragraph, any day proclaimed by the Governor General in Council or the Lieutenant Governor in Council for the Province of Ontario, or the City of Ottawa shall be a statutory holiday:
>
> | | |
> |---|---|
> | New Year's Day | Good Friday |
> | Easter Monday | Victoria Day |
> | Canada Day | Civic Holiday (August) |
> | Labour Day | Thanksgiving Day |
> | Remembrance Day | Christmas Day |
> | Boxing Day | One (1) Floating Day |
> | Family Day | |

[13] The National Day of Mourning was not made a holiday under the *Canada Labour Code*, R.S.C. 1985, c. L-2, the *Holidays Act*, R.S.C. 1985, c. H-5, the Ontario *Employment Standards Act, 2000*, S.O. 2000, c. 41, or any other legislation.

[14] Proclamations have been issued by the Governor General or Administrator of the Government of Canada for a variety of reasons, including for the following:

(a) Day of Mourning following the death of Prince Philip (registered April 28, 2021) (non-recurring);

(b) in remembrance of the 2017 Québec Mosque Attack (registered April 28, 2021);

(c) in recognition of the efforts of Canadians during the pandemic (registered March 31, 2021);

(d) in honour of the memory of victims of air disasters (registered January 20, 2021);

(e) in honour of the memory of victims of terrorism (registered July 13, 2005); and

(f) in honour of the contributions of firefighters (registered October 4, 2017).

[15] Grievances seeking to have any of the proclamations made in 2021 (i.e., within the timeframe of the Collective Agreements) treated as statutory holidays under the OPA's respective collective agreements were not advanced.

[16] The pivotal issue for the Arbitrator was whether the language used in the Collective Agreements should be interpreted to require that the day be "proclaimed as a holiday", or whether for that day to be designated a statutory holiday under Articles 9 and 17 of the Collective Agreements, it was enough for the day simply to be "proclaimed".

[17] The Arbitrator concluded that a "proclamation" alone was sufficient, stating the following at paras. 40 and 41:

> …the language of Articles 9 and 17:02 does not require that a "day" be "proclaimed *as a holiday*" in order to fall within the provisions. It only requires that it be "proclaimed" by the Governor General in Council.… The inescapable fact is that by issuing a Proclamation, the Governor General in Council "proclaimed" a "day" – September 19, 2022 – to honour the memory of the Queen. Accordingly, I find that the National Day of Mourning is a "day proclaimed by the Governor General in Council" within the meaning of Articles 9 and 17:02 of the Collective Agreements.
>
> On their clear wording, Articles 9 and 17 do not require anything more than that in order for a day such as the National Day of Mourning to be captured by them. While I am compelled to give all of the words of the provisions meaning and to consider the "labour relations context" of the provisions, such considerations do not lead me to a different conclusion. No evidence was presented (and no argument was made) suggesting that ascribing the word "proclaimed" its plain and ordinary meaning (in relation to a government action) would result in the holiday provisions being in conflict with (or inconsistent with) other provisions of the Collective Agreement, the overall scheme of the agreement, or the legislative framework under which it was made.

[18] The Arbitrator concluded that, had the parties intended that only days "proclaimed as holidays" be captured, they would have included that wording in the Collective Agreements, stating the following at para. 43:

> In the end, I must presume that the parties have chosen the words of their collective agreements intentionally. The OPA and the OPSB have bargained into the Collective Agreements broad language with respect to the designation of additional statutory holidays. **Whatever unfairness may now be apparent to the OPSB in that situation, it must live with the wording it agreed to.** The OPSB has provided no basis for me to infer additional words into the agreements' holiday provisions, and I otherwise have no authority to amend the provisions, or to imply into them conditions the OPSB might now wish were there. [Emphasis added.]

Standard of Review

[19] The parties agree that the appropriate standard of review in this case is reasonableness and that the court ought to be guided by the principles articulated in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, when reviewing the Arbitrator's decision. They also agree that in conducting a reasonableness review, the reviewing court must consider the decision made and whether both the rationale for the decision and the outcome to which it led were unreasonable: *Vavilov*, at para. 83.

[20] *Vavilov*, at para. 105, provides that "in addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision".

[21] In *Morningstar v. WSIAT*, 2021 ONSC 5576, 158 O.R. (3d) 739 (Div. Ct.), at para. 43, with reference to *Vavilov*, the court set out the hallmarks of unreasonableness:

> Hallmarks of unreasonableness in a tribunal's decisions can include:
>
> a. logical flaws, circular reasoning, unfounded generalization, or an absurd premise (*Vavilov*, at paras. 102-104);
>
> b. failing to take into account the governing statutory scheme, including by interpreting the scope of delegated authority more broadly than the legislature intended, and by not attending to the language chosen by Parliament to delineate the limits of that authority (*Vavilov*, at paras. 108-110);
>
> c. failing to recognize the constraints that precedent and court interpretations concerning relevant provisions impose or failing to justify a departure from precedent or past decisions (*Vavilov*, paras. 111-114, 129-132);
>
> d. taking an approach to statutory interpretation that is inconsistent with the text, context, and purpose of a provision (*Vavilov*, at paras. 119-124);

e. failing to justify a decision in light of the general factual matrix of a case or failing to account for the evidence before it (*Vavilov*, at para. 126);

f. failing to meaningfully grapple with key arguments or central issues raised by a party (*Vavilov*, at paras. 127-128); and

g. failing to consider the significant consequences of a decision for an affected individual (*Vavilov*, at para. 133).

[22] *Mammoet Canada Eastern Ltd. v. International Union of Operating Engineers, Local 793*, 2022 ONSC 3447, [2022] O.L.R.B. Rep. 658 (Div. Ct.), reminds this court that caution must be exercised when conducting a reasonableness review of a decision made by a decision-maker with "specialised knowledge". In particular, labour arbitrators should be given "the highest degree of deference in their interpretation of collective agreements": *Mammoet*, at para. 28, citing *Electrical Power Systems Construction Association v. Labourers' International Union of North America*, 2022 ONSC 2313, [2022] O.L.R.B. Rep. 497 (Div. Ct.).

Positions of the parties

[23] The Board submits that the Decision is unreasonable. It alleges that the Arbitrator did not apply the fundamental rules of collective agreement interpretation because she failed,

(a) to consider the mutual intention of the parties, which can be readily determined by reading the collective agreement as a whole and in its proper context; and

(b) to avoid an interpretation of the Collective Agreements that creates an absurd result.

[24] The Board asserts that the Arbitrator failed to consider "whether the parties ever intended the members of the bargaining units to receive a statutory/designated day every time the Governor General 'proclaims' a day for some particular symbolic reason."

[25] A clear statement of the Board's position is found at para. 39 of its factum, which reads as follows:

> As presented to the Arbitrator at the hearing, the Applicant submits that it is plain and obvious that the parties could not have intended that the Applicant's employees would be entitled to a statutory/designated paid day off for all days that are simply "proclaimed" by the Governor General in Council. It is utterly inconceivable that the parties would have intended employees to receive paid designated/statutory holidays based simply on a day being "proclaimed" by the Governor General when commemorating a person, cause, or event. The Respondent did not (and cannot) point to a single example of another collective agreement in which this intention has been articulated and applied.

[26] The Board submits that had the Arbitrator placed the parties' common intention at the centre of her analysis, she would have reached a conclusion in keeping with those reached by the

arbitrators interpreting similar collective agreements in *Association of Law Officers of the Crown (ALOC) v. His Majesty the King as represented by the Treasury Board Secretariat*, 2023 CanLII 62805 (Ont. G.S.B.) ("*ALOC*") and in *Alberta Union of Provincial Employees v. Covenant Health*, 2023 CanLII 54527 (Alb. G.A.A.) ("*Alberta v. Covenant*").

[27] The Board submits that the Arbitrator erred when she drew no inference as to the parties' common intention respecting the Collective Agreements from the fact that the OPA had never previously sought to have a day "proclaimed" by the Governor General recognized as a holiday. The Board submits that if the Arbitrator's interpretation of the Collective Agreements were to stand, whether or not a grievance were made, the Board, as the employer, would be "duty bound" to give the OPA a holiday for each and every day "proclaimed", resulting in an additional 14 to 20 additional holiday days each year. The Board asks the court to note that in 2021 alone there were four proclamations in total, three of which would lead to recurring holidays each year. The Board submits that the Arbitrator's interpretation would add multiple holidays each year, both an absurd (unreasonable) result and one which could never have been intended by the parties.

[28] In oral submissions, the OPA acknowledged that the interpretation given to the Collective Agreements by the Arbitrator – that each and every time a "proclamation" was made for symbolic reasons the OPA would be entitled to a holiday – could mean that OPA members would be provided with multiple additional paid holidays each year. The OPA submitted that this would be a *reasonable* outcome, not an unreasonable or absurd outcome as suggested by the Board.

[29] In response to the Board's submission that the Arbitrator erred by refusing to consider that the OPA has never before grieved when proclamations had been made and no holiday given, the OPA submitted that it "picks its battles" and that no inference ought to be drawn that this past conduct was consistent with the parties' understanding and intentions respecting their rights and obligations under the Collective Agreements.

[30] The OPA submits that the "Arbitrator articulated the relevant principles of collective agreement interpretation (which the parties had agreed upon) and thoughtfully applied those principles to the facts of this case". The OPA submits that, as evidenced in the Decision, the Arbitrator did not "ignore" or "fail to acknowledge" the arguments advanced by the Board but, in fact, explained why she did not find them to be persuasive. The OPA submits that underlying the Board's complaint is that the Arbitrator refused to adopt the interpretation of the Collective Agreements urged upon her by the Board.

[31] The OPA submits that a reviewing court cannot interfere with a decision simply because it would have decided the matter differently or because an alternative interpretation would have been open to the arbitrator: *Vavilov*, at para. 83.

[32] A clear statement of the OPA's position is found at para. 20 of its factum:

> Here, the Arbitrator reasonably interpreted the words of the Collective Agreements in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme of the agreements, their object and the intention of the parties.

> While she did not adopt the interpretation urged on her by the Applicant, she provided reasons for her interpretation that disclose justification, transparency and intelligibility. In considering whether the Arbitrator's decision is within the range of reasonable outcomes, it should also be noted that her decision is in line with other arbitral decisions which have found the National Day of Mourning to be captured under collective agreement holiday provisions.

Principles of collective agreement interpretation

[33] At para. 24 of the Decision, the Arbitrator referenced the principles of collective agreement interpretation, quoting at length from *Ontario Power Generation v. Society of Energy Professionals*, 2015 CanLII 56079 (Ont. L.A.), a decision on which both parties relied. Those principles include the following:

(i) the contractual intent of the parties must be determined by an objective contextualized approach to the words they used in the contract document;

(ii) collective agreement language must be given its plain and ordinary purposive labour relations interpretation. This means that a literal, dictionary, or corporate commercial approach to interpretation is not necessarily appropriate. However, although the overall labour relations context (including the applicable legislative framework) in which a collective agreement is bargained is important, the most important contextual consideration is that of the particular provision(s) in issue within the broader context of the particular collective agreement;

(iii) a general guiding "principle" requires that the language used must be interpreted in a manner which best preserves the spirit and intent of the collective agreement;

(iv) the fundamental rules of collective agreement interpretation can therefore be summarized as follows:

(a) the words used must be given their objective, plain, and ordinary contextual labour relations meaning;

(b) all words must be given meaning, and different words are presumed to have different meanings unless this would lead to a result that is illegal, absurd, or inconsistent with the overall scheme and structure of the collective agreement; and

(c) words or phrases cannot be inferred unless they are essential to the purposive operation of the collective agreement, or to make the collective agreement consistent with mandatory legislation which constitutes the statutory labour relations framework in the jurisdiction.

Analysis

[34] In the Decision, the Arbitrator correctly sets out the principles of interpretation yet fails to correctly apply these principles. At para. 24, the Arbitrator accepts the principles of collective

agreement interpretation including the "general 'guiding' principle" that the language used in the agreement "must be interpreted in a manner which best preserves the spirit and intent of the collective agreement".

[35] However, the Arbitrator failed to consider the evidence and the submissions made by the Board that the OPA had never previously demanded a holiday (under the Collective Agreements) when a proclamation was made.

[36] The Arbitrator appears to ignore that evidence when, at para. 41 of the Decision, she states:

> No evidence was presented (and no argument was made) suggesting that ascribing the word "proclaimed" its plain and ordinary meaning (in relation to a government action) would result in the holiday provisions being in conflict with (or inconsistent with) other provisions of the Collective Agreement, the overall scheme of the agreement, or the legislative framework under which it was made.

[37] I accept and agree with the Board's submissions that the Arbitrator's interpretation of the Collective Agreements leads to an unreasonable outcome, namely, that any proclamation would entitle OPA members to an additional paid holiday day in the year of the proclamation and, in some cases, annually thereafter. This would create an accumulating and significant expense for which the Board, as employer, could not plan or budget.

[38] At para. 43 of the Decision, reproduced in its entirety above, the Arbitrator appears to recognize that her interpretation of the Collective Agreements will lead to unfairness, without at the same time recognizing that such an interpretation could not have been intended by the parties, or, certainly, not intended by the Board:

> Whatever unfairness may now be apparent to the OPSB in that situation, it must live with the wording it agreed to.… I otherwise have no authority to amend the provisions, or to imply into them conditions the OPSB might now wish were there.

[39] In *Alberta v. Covenant*, the question addressed by the arbitrator is whether the language used in the collective agreement reveals a "plain and clear intention" that any day that is "proclaimed" will be added to the list of holidays set out in Articles 9 and 17 of the Collective Agreements.

[40] I accept and agree with the Board's submissions that the approach taken in *Alberta v. Covenant* case is the correct approach, consistent with the principles of interpretation that the parties have agreed apply here.

[41] A similar approach was taken in *ALOC*. At para. 77 of *ALOC*, the arbitrator identifies that the "critical question" is what the parties intended when they entered into their collective agreements. That approach is repeated at para. 79, at which the arbitrator states the following:

"[w]hat really matters, though, is what the parties themselves thought when they entered into the agreements."

[42] That question was not asked by the Arbitrator. Instead, as submitted by the Board, the approach taken by the Arbitrator was to determine the "plain and ordinary meaning" of the word "proclaimed", without asking whether the parties intended that a holiday would be granted every time a "proclamation" was made for symbolic reasons.

[43] I conclude that the approach taken by the Arbitrator was not in keeping with applicable principles and jurisprudence.

Conclusion

[44] For the reasons set out, I conclude that both the rationale for the Decision and the outcome to which it led were unreasonable. The Decision is hereby set aside and the Grievances dismissed.

Costs

[45] Costs are awarded to the Board payable by the OPA in the agreed-upon amount of $10,000.

_____
Sheard J.

I agree _____
McCarthy J.

I agree _____
Schabas J.

Released: November 7, 2023

CITATION: Ottawa Police Services Bd. v. Ottawa Police Assn., 2023 ONSC 6225
DIVISIONAL COURT FILE NO.: DC-23-2793
DATE: 20231107

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

McCarthy, Sheard and Schabas JJ.

BETWEEN:

Ottawa Police Services Board

Applicant

– and –

Ottawa Police Association, Kelly Waddingham, in her capacity as Arbitrator, and Attorney General of Ontario

REASONS FOR JUDGMENT

SHEARD J.

Released: November 7, 2023