IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

2024 NLSC 11 (CanLII)

Citation: *Unifor Local 2002 v. Exploits Valley Air Services Ltd.*, 2024 NLSC 11
Date: January 22, 2024
Docket: 202101G3077

BETWEEN:

UNIFOR LOCAL 2002

APPLICANT

AND:

EXPLOITS VALLEY AIR SERVICES LTD.

RESPONDENT

Before: Justice Vikas Khaladkar

On Judicial Review From: A Decision of Arbitrator Scott Sterns, an arbitration pursuant to the *Canada Labour Code* dated the 8th day of March, 2021.

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: January 15, 2024

Summary:

The Arbitrator's award in favour of Exploits Valley Air Services Ltd. was upheld. Unifor's application for *certiorari* was dismissed with costs.

Appearances:

Anthony F. Dale	Appearing on behalf of the Applicant
Ruth E. Trask	Appearing on behalf of the Respondent

Authorities Cited:

CASES CONSIDERED: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27

STATUTES CONSIDERED: *Canada Labour Code*, R.S.C. 1985, c. L-2

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REASONS FOR JUDGMENT

KHALADKAR J.:

INTRODUCTION

[1] The COVID-19 pandemic caused considerable mischief in the aviation industry. The business carried out by Exploits Valley Air Services Ltd. ("EVAS") was particularly hard hit. Whereas EVAS had been supplying Air Canada with 58 regional flights per day, the COVID-19 pandemic caused Air Canada to cancel 56 of them. EVAS was forced to lay off not only flight crew members ("FCMs"), but also a whole host of administrative, quality control, maintenance and management employees.

[2] There is no dispute on the facts in this matter. There was no dispute before Arbitrator Sterns. There is a dispute regarding the interpretation of Article 16 of the Collective Agreement and, in particular, whether the permanent layoff of FCMs results in a corresponding loss of recall rights.

[3] The union, Unifor Local 2002 ("Unifor") argued before Arbitrator Sterns, and before me, that Article 16 of the Collective Agreement requires that recall rights can be lost if the FCMs refuse to accept a recall of more than 30 days in duration. If the recall is less than 30 days and refused or, if there is no recall, then Unifor said that the agreement is silent with respect to rights of recall and, therefore, that recall rights do not terminate with the cessation of the employment relationship but continue indefinitely.

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[4] EVAS disagreed. It stated before Arbitrator Sterns, and also before me, that Article 16.3 of the Collective Agreement was a complete answer to the question of recall rights. Article 16.3.1 provides that laid off FCMs shall receive severance in accordance with the *Canada Labour Code*, R.S.C. 1985, c. L-2, which provides, modified somewhat by Regulations where the layoff is of a shorter duration, that the payment of severance, and the termination of employment, must occur after 12 months following a layoff notice.

[5] Arbitrator Sterns heard from two witnesses – one called by each of the parties. They testified concerning negotiations leading up to the drafting, and acceptance, of Article 16 of the Collective Agreement by the parties. Arbitrator Sterns found that both of these witnesses were credible and he accepted their testimony.

[6] Ashley Watkins, called by Unifor, testified that Unifor had proposed that FCMs who were not recalled within 12 months would receive severance at a rate greater than stipulated by the *Canada Labour Code*. In effect, found Arbitrator Sterns, that Unifor proposed that FCMs would lose their recall rights after 12 months.

[7] The response of EVAS was: "16.3 Severance (Per the *Canada Labour Code*)". Troy Freeborn, called by EVAS, testified that the *Canada Labour Code* required the payment of severance after 12 months. If severance is paid, the employment relationship is terminated – along with rights of recall. EVAS proposed the terms stipulated in the legislation – which was accepted by Unifor.

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[8] In his decision, Arbitrator Sterns refused to accept the extrinsic evidence called by either party. He found that the terms of the Collective Agreement were clear and unambiguous. As such he felt that there was no need to rely upon extrinsic evidence to ascertain the intention of the parties. He disregarded the evidence of Ashley Watkins and Troy Freeborn.

[9] In the alternative, if there was ambiguity and a need to clarify, Arbitrator Sterns said at paragraph 68 of his decision:

> I find as fact that the Employer rejected the Union's proposal that an employee would lose their recall rights after 12 months and receive an enhanced severance payment as set out in the Union's proposal. Instead, the Employer, knowingly counter proposed and proposed that the employee would lose their recall rights consistent with the Canada *Labour Code* and be entitled to severance payments consistent with the Canada *Labour Code*. I find as fact that the Union accepted that counter proposal and it is presently contained in Article 16.3.1 of the Collective Agreement.

ISSUES

1. **What is the standard of review to be applied?**
2. **Is Arbitrator Sterns' decision unreasonable?**

STANDARD OF REVIEW

[10] The parties agreed that the standard of review is reasonableness. There is a presumption that the standard is one of reasonableness on account of the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. The exceptions to the reasonableness standard set out in *Vavilov* are inapplicable to the case at hand.

[11] *Vavilov* instructs that a reviewing court is constrained to determine whether the administrative decision-maker's decision, and the rationale for making it, was unreasonable. In doing so the reviewing court must pay careful attention to the decision-maker's reasoning process as evidenced by its written reasons.

[12] *Vavilov*, at paragraph 85 further instructs that:

> … a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

ANALYSIS

[13] Arbitrator Sterns analyzed the evidence that was presented to him. He was cognizant of the Article in the Collective Agreement that dealt with Layoff, Bumping and Recall. He found that Unifor had drafted the impugned provisions in Article 16.2 and 16.3. While he did not say so specifically, implicit in his reasoning is that the *contra proferentem* rule applied – if there is ambiguity, then the preferred meaning should be the one that works against the drafting party.

[14] The Arbitrator correctly set out the positions of the parties in relation to recall, and I see no evidence of his having misunderstood what each of the parties was advocating.

[15] Arbitrator Sterns was cognizant of the parol evidence rule. He correctly noted that oral evidence ought not to be accepted that tends to vary or contradict the terms of a written agreement in the absence of ambiguity. He found, in this case, that the terms of the agreement were unambiguous – a finding that he was entitled to make and which, upon reading the provisions in question, I cannot dispute. As a result, Arbitrator Sterns indicated that he would not be influenced by the extrinsic evidence tendered on behalf of both parties. He noted, however, that if he was wrong in his assessment that there was no ambiguity, then the extrinsic evidence that he had heard

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would impel him to find that the parties intended that the severance of the employer/employee relationship would, in turn, result in a concomitant cessation of recall rights.

[16] Arbitrator Sterns reviewed a number of arbitration and court decisions concerning the meaning of the term “severance”. As a result of that legal analysis he concluded that severance means an end of the employer/employee relationship together with all that entails – including the ability to be recalled in the event that the employer wishes to hire again.

[17] Arbitrator Sterns quoted the Supreme Court of Canada’s decision, at paragraph 26, in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 – wherein the Supreme Court of Canada characterized severance as the compensation that is paid to an employee to compensate for the special losses that the employee suffers when employment is terminated – including the loss of seniority.

[18] Arbitrator Sterns found that the Collective Agreement between EVAS and Unifor is not silent on the issue of the duration of recall rights. Article 16.3.1 refers directly to a comprehensive legislative scheme that terminates all of an employee’s rights at the conclusion of 12 months after layoff by deeming the employment at an end. The end of employment can only mean the end of all rights associated with employment – including the right to recall.

[19] Arbitrator Sterns held that all of the words in the Collective Agreement, when construed, should be presumed to have been intended to have some meaning. He stated, at paragraph 80 of his decision, that he would read the words used by the parties in context, with their ordinary meaning and in the scheme of the agreement. He found that the parties had specifically included the *Canada Labour Code* into Article 16.3.1 of the Collective Agreement. The parties mandated that the provisions of the *Canada Labour Code* would apply and, therefore, the Arbitrator was bound to give meaning to Article 16.3 – which requires the payment of severance – an action that severs the employment relationship.

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[20] *Vavilov* instructs that the decisions of administrative decision-makers must be given deference when their decisions are intelligible, transparent and justifiable.

[21] In this case I find that the Arbitrator's decision was coherent and followed a rational chain of analysis. I cannot find fault in his logic and I cannot find fault in the outcome. The decision was within the range of potential, reasonable outcomes and is not one that I am able to censure.

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CONCLUSION

[22] Unifor's application for *certiorari* is dismissed with costs.

[23] The Arbitrator's award in favour of EVAS is upheld.

[24] The Respondent shall have its costs calculated under Column III of the Schedule of Costs.

VIKAS KHALADKAR
Justice