

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE *Canada Labour Code*, RSC 1985, C L-2;

AND IN THE MATTER OF the Final Award of Arbitrator John Moreau, from Moreau Arbitration Inc., in the Grievance 20-P-02613 (Denial of Education Allowance), dated August 30, 2022

BETWEEN:

HAY RIVER HEALTH AND SOCIAL SERVICES AUTHORITY

Applicant

-and-

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

### MEMORANDUM OF JUDGMENT

[1] The Hay River Health and Social Services Authority (the “Employer”) seeks judicial review of an arbitration award in a policy grievance concerning the Employer’s obligation to pay an education allowance to registered nurses with a baccalaureate degree (“nurses”).

#### BACKGROUND

[2] The facts are not in issue. The Employer and the Respondent have a long-standing bargaining relationship and have entered into a number of collective agreements over the years. The 2009-2012 collective agreement between the parties contained provisions governing payment of education allowances for various employees, including the following:

57.05 A Registered Nurse who has received a Baccalaureate Degree in nursing approved by the Hospital will receive an additional fifty dollars (\$50.00) per month.

[3] At arbitration, the Employer adduced evidence of the parties' bargaining history through its Manager of Human Resources, Jennifer Croucher, who led negotiations on the 2012-2016 collective agreement. She provided the Employer's proposal and her notes of the bargaining sessions as part of her testimony. When the parties met to negotiate that collective agreement, the Employer proposed the entire education allowances article be removed. The Respondent rejected this. The Employer then modified its position and proposed Article 57.05 would remain in the agreement but would apply only to nurses who were members of the bargaining unit when the collective agreement was ratified. Finally, the parties agreed Article 57.05 would apply to nurses who were members of the bargaining unit at the time the collective agreement was signed. This was recorded in a Memorandum of Settlement the parties executed on October 4, 2012, as follows (bold in original):

**Grandfathering of existing employees benefit and NEW Numbering of this Article**

57.01 A Registered Nurse who has received a Baccalaureate Degree in nursing approved by the Hospital will receive an additional fifty dollars (\$50.00) per month **provided the employee was a member of the Bargaining Unit upon date of signing of this Collective Agreement.**

[4] Ms. Croucher's notes made reference to "grandfathering" and she testified she took it to mean nurses hired after the date the collective agreement was signed would not be entitled to the benefit.

[5] Subsequently, the new Article 57.01 was incorporated into the 2012-2016 collective agreement, which was signed January 21, 2013, as follows:

**ARTICLE 57: EDUCATIONAL ALLOWANCES**

57.01 A Registered Nurse who has received a Baccalaureate Degree in nursing approved by the Hospital will receive an additional fifty dollars (\$50.00) per month provided the employee was a member of the Bargaining Unit upon date of signing of this Collective Agreement.

[6] Ms. Croucher confirmed nurses hired after the collective agreement was signed on January 21, 2013 were not paid the allowance.

[7] In June of 2017, the parties were once again engaged in negotiations and exchanged proposals for what would be the 2016-2021 collective agreement. Neither party's proposal mentioned any changes to Article 57.01, nor was there any evidence of discussions at the bargaining table. The parties signed the new collective agreement on January 14, 2020 with no modification to Article 57.01.

[8] Nurses who were members of the bargaining unit the day the 2016-2021 collective agreement was signed were not paid the education allowance. The Respondent brought a policy grievance.

### **THE PARTIES' POSITIONS AT ARBITRATION**

[9] At arbitration, the Respondent argued the Employer was required to pay the education allowance to nurses who were members of the bargaining unit as of the day the 2016-2021 collective agreement was signed. It submitted the language in Article 57.01 is clear and unambiguous; there is nothing within that provision, nor elsewhere within the collective agreement, which would limit the allowance to nurses who were members of the bargaining unit when the previous collective agreement was signed; neither party proposed any changes to Article 57.01 during bargaining; and the parties were experienced and had negotiated several collective agreements with each other in the past years. The Respondent also argued the interpretation urged by the Employer would be tantamount to the arbitrator altering the collective agreement, which is prohibited.

[10] The Employer provided evidence of the bargaining history which resulted in the current Article 57.01, through Ms. Croucher and her notes of the bargaining sessions, and the proposals which were tabled. The Employer submitted there is a latent ambiguity surrounding the intention of Article 57.01 and that it was thus important to consider the history and circumstances of its negotiation. The Employer argued that evidence supported the conclusion the parties intended to limit the nurses to whom the education allowance was payable to those who were members of the bargaining unit as of January 21, 2013, the date the 2012-2016 collective agreement was signed. It also pointed out there was no evidence of an agreement to carry the provision over into the next collective agreement which, it argued, would suggest neither party turned its attention to whether there would be an obligation to pay the education allowance to any nurses hired after the 2012-2016 collective agreement was signed.

[11] The Employer also sought to invoke the doctrine of estoppel. Particularly, it argued the Respondent made clear representations during bargaining in 2012 that it was negotiating a benefit limited to nurses on strength the date the collective agreement was signed for the life of the 2012-2016 collective agreement. The Employer relied on this representation to its detriment when negotiating the 2016-2021 collective agreement.

[12] Finally, the Employer argued it was incumbent on the Respondent to provide evidence to support its position on how Article 57.01 should be interpreted, and it had not done so. It asked the arbitrator to draw an adverse inference from the Respondent's failure to call witnesses who participated in bargaining on its behalf at the relevant times.

## THE ARBITRATOR'S DECISION

[13] The arbitrator began by instructing himself on the principles applicable when considering extrinsic evidence or surrounding circumstances to aid in collective agreement interpretation. Specifically, he cited *Sattva Capital Corporation v Creston Moly Corporation*, [2014] SCC 53, relying on the following passages (emphasis mine):

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and *Hall*, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (*Hall*, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085 (BC CA), 101 B.C.A.C. 62).

[58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the

words of Lord Hoffmann, “absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man” (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[14] The arbitrator acknowledged the Respondent’s position that Article 57.01 is clear and unambiguous. He then examined the Employer’s evidence and found the Employer had not established that during the negotiations for the 2016-2021 collective agreement it was the parties’ *mutual intention* to limit Article 57.01 to nurses who were members of the bargaining unit when the previous collective agreement was signed. He noted neither party submitted proposals suggesting any change to Article 57.01 and there were no discussions about it during those negotiations. Further, there was no evidence to suggest the Employer’s subjective intention about the employees to whom Article 57.01 would apply under the 2016-2021 collective agreement, was recognized and accepted by the Respondent. The arbitrator concluded Article 57.01 was clear and unambiguous, not contradicted by any other provisions in the collective agreement, and that under its terms, the Employer was required to pay the education allowances to nurses who were in the bargaining unit when the 2016-2021 collective agreement was signed.

[15] The arbitrator then turned to the Employer’s estoppel argument. Again, he began by instructing himself on the legal elements, which can be summarized as follows: one party, by words or conduct, makes a promise or assurance to a second party with the intention of affecting legal relations between; if the second party acts on that assurance or promise, the first party is not then permitted to revert back to the previous legal relations as though the promise or assurance was not made. The arbitrator dismissed the estoppel argument, stating:

In this case, there is no evidence, as noted, that the Employer represented during the critical round of negotiations for the 2016-2021 collective agreement that the education allowance was to be restricted to only those who [*sic*] RN’s with a BSN degree who were members of the bargaining unit at the time of signing of the 2012-2016 collective agreement. Nor was there ever any mutual understanding to that effect during the negotiations that preceded the signing of the 2016-2021 collective agreement on January 14, 2020. Accordingly, in the absence of such promise or assurance by the union at the time of negotiations of the 2016-2021 collective agreement, there is no basis for invoking the doctrine of estoppel.

## STANDARD OF REVIEW

[16] The parties submit, and I agree, that the standard of review is reasonableness, in accordance with the presumption stated in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23. This is a deferential standard and the Court’s role is not to hear the case afresh and substitute its own decision. Rather, it is to *review* the decision to determine if it is reasonable or unreasonable. *Vavilov*, at para 83.

[17] A “reasonable” decision will be characterized by justification, transparency, and intelligibility. *Vavilov*, para 99.

[18] *Vavilov* identifies two categories of fundamental flaws which will render a decision unreasonable. The first, as explained in *Vavilov*, is where the reasoning process is internally irrational (emphasis mine):

. . . Reasonableness review is not a “line-by-line treasure hunt for error”: *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that “there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived”: *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that “simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion” will rarely assist a reviewing court in understanding the rationale underlying a decision and “are no substitute for statements of fact, analysis, inference and judgment”: R. A. Macdonald and D. Lametti, “Reasons for Decision in Administrative Law” (1990), 3 *C.J.A.L.P.* 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras. 57-59.

*Vavilov*, para 102

[19] The second type of fundamental flaw is where the decision is untenable, given relevant factual and legal constraints. These include the applicable statutory scheme; other relevant statutes and case law; principles of statutory interpretation; the evidence presented at the hearing; the parties’ submissions; past practices and previous decisions of the administrative body; and the potential effect on those to whom the decision pertains. *Vavilov*, paras 105-135.

## THE PARTIES' POSITIONS

### *The Employer*

[20] The Employer argues the arbitrator reached an unreasonable conclusion by relying only on the text of Article 57.01 as it appears in the 2016-2021 collective agreement and disregarding evidence, including that of bargaining history, which the Employer says clearly demonstrates that the parties intended the education allowance would not be payable to any nurse hired after January 21, 2013. It says the conclusion the arbitrator reached – that those nurses who were in the bargaining unit when the 2016-2021 collective agreement was signed were entitled to the allowance – leads to an absurd result. Specifically, those nurses hired *after* each consecutive collective agreement is signed will be denied the allowance until the next one is signed, when they would be “grandfathered” into a benefit they should never have received.

[21] The Employer also argues the arbitrator’s conclusion that the doctrine of estoppel could not be invoked was unreasonable. It says in remaining silent on Article 57.01 during negotiations for the 2016-2021 collective agreement, the Respondent represented it did not intend to expand eligibility for the allowance beyond those nurses who were members of the bargaining unit on the date the 2012-2016 collective agreement was signed.

[22] It is convenient at this point to deal with the Employer’s argument, made before the arbitrator, that an adverse inference should have been drawn against the Respondent due to its failure to call evidence in that forum. Respectfully, on the record before the arbitrator, it would not have been appropriate to draw that inference.

[23] An adverse inference may be drawn against a party who, without explanation, fails to call a material witness over whom that party has exclusive control. The adverse inference arises from the implication the evidence of the absent witness would be contrary to that party’s case. *Elleze v Norn et al*, 2020 NWTSC 3 at para 135. In this case, the Employer adduced evidence about what happened during the negotiations. There was no suggestion anything more than what the Employer laid out in its evidence happened. The Respondent did not contest the Employer’s evidence, other than to point out it did not share the Employer’s subjective intention and that there was no evidence to suggest it ever had. The Respondent relied on the wording of the collective agreement to support its position. In the circumstances, there was no need for it to call additional evidence.

## ***The Respondent***

[24] The Respondent's position is the arbitrator's decisions, both with respect to the interpretation of Article 57.01 and on estoppel, are reasonable and should remain undisturbed. It argues the decision bears the required characteristics of being justifiable, transparent, and rational. It aligns with arbitral case law and responds to the parties' submissions.

## **ANALYSIS**

### ***Are the arbitrator's reasons and conclusions internally rational?***

[25] The arbitrator began his analysis by examining the legal principles engaged in collective agreement interpretation. His conclusions with respect to those legal principles reveal no error. He expressly accepted that extrinsic evidence can be admitted to assist in determining the parties' intentions in the face of a latent or patent ambiguity. He also recognized that such evidence cannot be used to add to, vary, contradict, or take away from the agreement and, importantly, that evidence of one party's subjective intent is not helpful unless that intention was recognized and accepted by the other party.

[26] The arbitrator did not disregard the Employer's evidence about the parties' bargaining history and the Employer's intention on the education allowance. It is clear from the reasons that he examined it carefully; however, he found the evidence was of no assistance in interpreting Article 57.01 in the 2016-2021 collective agreement (emphasis in original):

As noted above, the evidence of one party's subjective intent cannot be accepted absent "*its recognition and acceptance by the other party*". The extrinsic evidence led by the Employer's Ms. Croucher in my view is of no assistance in interpreting the rights and obligations found in article 57.01 of the 2016-2021 collective agreement. Ms. Croucher's understanding of the term "grandfathering" of article 57.01 was never advanced at the crucial time of the negotiation and subsequent signing of the 2016-2021 collective agreement.

In the absence of such evidence, I am unable to accept the Employer's submission that the earlier reference to "grandfathering" as part of the parties' proposal and agreement for the 2012-2016 collective agreement provides any interpretative assistance to ascertaining the meaning of article 57.01 in the 2016-2021 collective agreement.

*Reasons*, p 12



[27] The arbitrator approached the estoppel argument the same way: he set out, correctly, the relevant legal principles and examined the evidence within that framework. As noted, he found that during negotiations for the 2016-2021 collective agreement, the Employer did not bring up Article 57.01, nor did the Respondent make any promises or assurances respecting the employees to whom it would apply. Put simply, the elements required to invoke the doctrine of estoppel were not there.

[28] The Employer suggests the Respondent's silence was tantamount to a promise or assurance it would not seek to expand the group of employees to whom Article 57.01 would apply. This argument cannot succeed. While silence or acquiescence may in some circumstances amount to a representation or assurance upon which estoppel can be based, the representation or assurance must nevertheless be unequivocal. That threshold was not supported by the evidence put before the arbitrator. Article 57.01 was not included in the Employer's proposal and the Employer did not bring it up. There was nothing to which the Respondent could acquiesce, even by silence.

[29] The arbitrator's decisions on both the interpretation of Article 57.01 and the Employer's estoppel argument are internally rational. The reasoning in each case is logical and transparent. The conclusions reached are based on a correct interpretation of the law, and they are supported by the evidence. The arbitrator considered the Employer's evidence of what happened during negotiations for both the 2012-2016 and the 2016-2021 collective agreements. He found this provided no assistance, as the evidence reflected the Employer's subjective intention, not the parties' *mutual* intention. Having found the Employer's evidence unhelpful in the interpretative exercise, the arbitrator was left to determine the meaning of Article 57.01 based on its wording. He concluded the wording was clear and unambiguous in granting those nurses who were members of the bargaining unit when the 2016-2021 collective agreement was signed. This is a rational and logical conclusion.

***Are the arbitrator's reasons and conclusions untenable?***

[30] The Employer's argument suggests the arbitrator's conclusions are untenable. Specifically, they lead to an interpretation of Article 57.01 that is "manifestly absurd" and serves no operational purpose. Nurses hired after January 21, 2013 were denied the education allowance until the 2016-2021 collective agreement was signed on January 14, 2020. Nurses hired after that date would then have to wait for a further collective agreement to be signed to gain the benefit (assuming Article 57.01 would remain as it is).

[31] Respectfully, I disagree. Certainly, the interpretation the arbitrator gave to Article 57.01 does not align with the Employer's intentions; however, it does not rise to the level of being legally absurd. The arbitrator's interpretation is based on clear and unambiguous language negotiated by sophisticated parties. While it presents an anomaly, it is not untenable.

## CONCLUSION

[32] The arbitrator's decisions meet the standard of reasonableness set out in *Vavilov* and should remain undisturbed.

[33] The Employer's application is dismissed. The Respondent is entitled to party and party costs in accordance with r 606.1 of the *Rules of the Supreme Court of the Northwest Territories*.

K. M. Shaner  
J.S.C.

Dated at Yellowknife, NT, this  
5<sup>th</sup> day of June, 2024

Counsel for the Applicant, Hay River Health  
and Social Services Authority:

Marie-Pier Leduc

Counsel for the Respondent, Public  
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Michael Penner

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MEMORANDUM OF JUDGMENT OF  
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