IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Braya Renewable Fuels (Newfoundland) LP v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 9316*, 2024 NLSC 124
Date: September 16, 2024
Docket: 202301G3264

BETWEEN:

BRAYA RENEWABLE FUELS (NEWFOUNDLAND) LP

FIRST APPLICANT

AND:

BRAYA RENEWABLE FUELS (NEWFOUNDLAND) GP INC.

SECOND APPLICANT

AND:

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 9316

RESPONDENT

Before: Justice Philip Osborne

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

Date of Hearing: June 17, 2024

Summary:

On judicial review of an arbitration award, the Court found the Arbitrator decided a determinative issue without submissions from the parties resulting in a denial of procedural fairness. The matter was remitted back to the Arbitrator.

Appearances:

Stephanie M. Sheppard	Appearing on behalf of the Applicants
Bettina Quistgaard	Appearing on behalf of the Respondent

Authorities Cited:

CASES CONSIDERED: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Index Investments Inc. v. Paradise (Town)*, 2024 NLCA 25; *Seraj v. Memorial University of Newfoundland*, 2022 NLCA 42; *Baker v. Canada (Minister of Citizenship and Immigration*), 1999 SCC 699; *Canada Post Corp*. *v. Public Service Alliance of Canada*, 2019 ONSC 3676

STATUTES CONSIDERED: *Labour Relations Act*, R.S.N.L. 1990, c. L-1

REASONS FOR JUDGMENT

OSBORNE, J.:

INTRODUCTION

[1] The Applicants, Braya Renewable Fuels (Newfoundland) LP and Braya Renewable Fuels (Newfoundland) GP Inc. ("Braya" or the "Employer") seek judicial review of an arbitration award.

[2] The Employer is the owner and operator of a refinery at Come by Chance, Newfoundland and Labrador. It is a party to a collective agreement (the "Collective Agreement") with the Respondent, the certified bargaining agent for the relevant employees working for the Employer (the "Union").

[3] The Union grieved the Employer's decision to treat a work shift as scheduled overtime as opposed to treating it as a new work schedule, which attracts a different rate of pay under the Collective Agreement (the "Grievance"). In a decision dated May 18, 2023 (the "Decision"), the Arbitrator allowed the Grievance in part.

[4] On judicial review, the Employer argues that the Arbitrator's interpretation of the Collective Agreement is unreasonable, and the Arbitrator breached procedural fairness because his decision turns on an issue that he determined without hearing from the Parties.

[5] For the reasons that follow, I have determined that there was a breach of procedural fairness and that the matter should be remitted to the Arbitrator. In explaining my reasons, I will review the background facts, list the issues and provide my analysis.

BACKGROUND

[6] In this section I will provide the necessary background facts about the Grievance and the Arbitration Decision to provide context for discussing the issues.

The Grievance

Snow closure Friday and the Sunday shift

[7] The Grievance has its genesis in a work closure caused by a snowstorm. On Thursday, February 3, 2022, in anticipation of a forecasted snowstorm, the Employer decided to cancel the regularly scheduled work shift for Friday, February 4, 2022. For operational reasons the Employer decided to require employees to work on Sunday, February 6, 2022 (the "Sunday shift") (Decision, para. 12).

[8] On Thursday, February 3, 2022, the Employer sent an email advising of the plan. In part, the email stated the Friday shift was cancelled and "Next week we will return to the schedule of 5 x 10 hrs Monday-Friday and Sunday (February 6th) will be a scheduled OT shift for all" (Decision, para. 13).

[9] Immediately following receipt of the email, there was discussion between the Parties to interpret the impact of the closure on scheduling. The Parties were unable to reconcile their differences and the Union filed the Grievance on behalf of a group of 46 employees (35 Regular Employees and 11 Temporary Employees) stating that the Employer was required to pay a shift change premium for the Sunday shift pursuant to the Collective Agreement.

The Union says the Sunday shift is a new work schedule, the Employer says it is scheduled overtime.

[10] Pursuant to the Collective Agreement, the standard weekly hours of work for the grievers was 40 hours paid at straight time. The regular schedule for Regular Employees was Monday to Friday at 10 hours per day. Temporary Employees did not have a regular schedule, rather, they were called in as needed.

[11] The Union claims because the Employer required the employees to work the Sunday shift, pursuant to the Collective Agreement, the employees were "assigned to work a new schedule" triggering the obligation of the Employer to pay 1.5 times the regular rate for the work completed on the Sunday shift. The net result of this interpretation is that each employee is owed five hours of pay.

[12] The Employer's position was that the Sunday shift was scheduled overtime and not a change in schedule as the regular schedule remained Monday to Friday at 10 hours per day. The Employer argued that the Sunday shift was properly paid as scheduled overtime pursuant to Article 13:01 of the Collective Agreement.

The Overtime Distribution List

[13] The Union challenged the Employer's ability to treat the Sunday shift as scheduled overtime as the Employer did not follow the provisions of Article 13:01 of the Collective Agreement, that require the Employer to offer overtime to each employee following an Overtime Distribution List before the Employer is permitted to schedule overtime.

[14] The Parties agree that Article 13:01 requires the Employer to offer available shifts to the qualified person with the fewest accumulated hours of overtime pursuant to an Overtime Distribution List. Article 13:01 stipulates if an employee refuses the offered overtime shift, the employer is to offer the shift to the next person on the list and follow that pattern until the list is exhausted. If the shift is not filled after the

Employer exhausts the Overtime Distribution List, then the Employer is entitled to schedule the person with the fewest overtime hours to work a scheduled overtime shift. If this process is followed, then Article 13:01 provides that the scheduled overtime shift is not to be considered a change in the employees' schedule within the meaning of Article 18.01.

[15] The Employer's position was that, as it required every employee to work the Sunday shift, there was no purpose in going through the motions of using the Overtime Distribution List, because regardless of whether an employee agreed to accept the Sunday shift or not, the Employer required all employees to work. Rather than going through the exercise of contacting everyone on the list, the Employer simply required all the employees to work the Sunday shift.

The Arbitrator's Decision

[16] The Arbitrator framed the issue as follows:

> Should the work performed by the employees on Sunday, February 6, 2022, have been paid at the shift change premium rate of 1.5 times the straight time rate of pay as opposed to the overtime rate of double time (for Regular Employees) and straight time rate (for Temporary Employees)? (Decision, para. 34)

[17] The Arbitrator partially allowed the Grievance. The Arbitrator determined that the scheduling of the Sunday shift resulted in a new schedule for the Regular Employees, triggering the requirement to pay them a shift change premium of 1.5 times the straight time rate. He determined that the Temporary Employees were not entitled to the shift change premium unless they were working a regular schedule the week prior.

[18] In explaining his reasons, the Arbitrator noted that the Parties' arguments were focused on whether the Employer had to utilize the Overtime Distribution List (Decision, para. 60) before it could properly characterize the Sunday shift as

overtime. However, the Arbitrator stated that he arrived at his "conclusion in a different manner than suggested by the Union" (Decision, para. 61).

[19] For payroll purposes, the Collective Agreement defines the work week as starting at 7:00 AM on Sunday and ending 6:59 AM the following Sunday.

[20] The Collective Agreement provides that "overtime" is defined as hours worked over and above the regular employees regularly scheduled workday or work week.

[21] The Arbitrator rejected the Employer's argument that the Sunday shift should be considered scheduled overtime. He found that scheduling the first shift of the work week as overtime made no sense because on the first day the Employer had no way of knowing if employees would work over and above the required 40 hours to trigger the obligation to pay overtime. The Arbitrator's reasoning is premised on the theory that the first shift of a work week cannot be considered overtime, and that overtime only applies if the hours actually worked exceed 40 hours.

ISSUES

The Applicant seeks to quash the Arbitrator's Decision on two grounds:

i. because it was a breach of procedural fairness for the Arbitrator to reach a decision based on an issue that neither party had raised and on which the Parties were not given an opportunity to provide submissions; and

ii. because the Decision was unreasonable.

[22] Where there is a duty of procedural fairness owed, the procedural requirements the duty imposes is determined with reference to all the circumstances (*Index Investments Inc. v. Paradise (Town)*, 2024 NLCA 25 at para. 24).

[23] The Parties agree that if I find there was a breach of procedural fairness, then the Decision should be quashed and remitted to the Arbitrator for reconsideration with the benefit of the Court's reasons.

[24] If I find there was no breach of procedural fairness, the Parties submit that the standard of review of the Decision is reasonableness.

[25] Reasonableness is the presumptive standard to be used unless the matter falls into an exceptional category (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, paras. 16, 17, 23, 30-72). I agree, as this review does not fit into one of the situations where the presumption of reasonableness is rebutted.

[26] In considering the application of the reasonableness standard, I have reviewed paragraphs 12-15 and 100 of *Vavilov* and I am aware that my review must entail a sensitive and respectful but robust evaluation of the Decision and that intervention is required only where it is truly necessary.

[27] I have started by reading the reasons of the Arbitrator in conjunction with the record provided contextually and holistically. I have focused on the reasoning process used by the Arbitrator. I have not considered if the Decision is correct, or what I would do if I were deciding the Grievance myself (*Vavilov*, para. 83).

[28] I am conscious of the fact that I should consider the outcome of the Decision in light of its underlying rationale and that in order to set aside a decision as unreasonable there must be sufficiently serious shortcomings in the Decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency.

[29] Accordingly, the issues to be determined are:

i. Did the Arbitrator breach procedural fairness by making his decision based on an issue that neither party raised and on which the Parties were not given an opportunity to provide submissions?

ii. If the answer to the first question is no, then, was the Arbitrator's Decision reasonable?

ANALYSIS

Did the Arbitrator breach procedural fairness by making his decision based on an issue that neither party raised and on which the Parties were not given an opportunity to provide submissions?

[30] The procedural fairness issue is subject to judicial scrutiny to ensure that a fair and just process was followed. To determine if the duty of fairness has been breached requires consideration of the context in which the duty arises (*Seraj v. Memorial University of Newfoundland*, 2022 NLCA 42 at para. 64). The central issue for questions of procedural fairness is whether the procedure was fair having regard to all the circumstances (*Baker v. Canada (Minister of Citizenship and Immigration*), 1999 SCC 699, para. 22).

[31] The principle that the individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness (*Vavilov*, para. 127).

[32] The right to be heard on the determinative issue is a central component of even limited procedural protections. The right to be heard in labour arbitrations is codified in subsection 88(1) of the *Labour Relations Act,* R.S.N.L. 1990, c. L-1, as follows:

> 88(1) An arbitration board appointed under a collective agreement or in accordance with this Act
>
> (a) may determine its own procedure, but shall give full opportunity to the parties to the proceeding to present evidence and make submissions to it; . . .

[33] The Parties agree that the arbitration is an adversarial process that attracts a high degree of procedural fairness. Considering the *Baker* factors in the context of the arbitration, I agree.

[34] The Employer submits that it was a breach of procedural fairness for the Arbitrator to reach a decision based on a determination of overtime not being available for the first shift of the week when neither party raised or addressed the issue. The Employer states that the Arbitrator's reasoning was not based on the submissions of either party and that the Arbitrator did not otherwise raise the issue with the Parties during the hearing.

[35] The Union argues that the Arbitrator's reasons meaningfully account for the central issue raised by the Parties, that is whether the Sunday shift was a change in shift schedules. The Union states that the Arbitrator's Decision satisfies the requirement of justification and transparency. The Union submitted that the Arbitrator's reasons demonstrate that he considered the central issue and he responded to the concerns raised by the Parties.

[36] The Union argues that there was no denial of natural justice. The Union argues that the Arbitrator was asked to interpret the Collective Agreement to determine whether the Sunday shift constituted a "schedule change" or "overtime". The Union submits that both Parties were given full opportunity to present evidence and make submissions in support of their positions on the proper interpretation of the

Collective Agreement and its application to the facts of this case and therefore there was no denial of natural justice.

[37] Further, the Union states that the Employer had the opportunity at the arbitration to submit the cases it advanced on judicial review in support of the interpretation of overtime. The Union argues that the Arbitrator did not raise a new issue, rather, he answered exactly the question that he was asked.

[38] While the Arbitrator ultimately did answer the question he was asked, that is whether the Sunday shift constituted a schedule change or overtime, I agree with the Employer that critical to his conclusion was a determination of an issue that was not put before the Parties.

[39] This is not a situation where the Arbitrator simply considered new authorities while making his decision (*Canada Post Corp*. v. *Public Service Alliance of Canada*, 2019 ONSC 3676). Nor is it a case of the Arbitrator arriving at a conclusion different than the precise positions taken by the parties to the arbitration, rather, the Arbitrator determined whether overtime can be paid for the first shift of a work week without hearing from the Parties.

[40] While the Arbitrator is not tied to the precise positions advanced by the Parties, in this case he relied on a principle that was not squarely considered or addressed in argument or the submissions of the Parties. The problem is that this became the dispositive issue, and it was not anchored in the pleadings or submissions of the Parties. The Arbitrator recognized this when he said in his reasons that he arrived at his "conclusion in a different manner than suggested by the Union" (Decision, para. 61). In fact, he arrived at the conclusion in a different manner than argued by either Party.

[41] The Parties submitted that provisions for employees' entitlement to overtime fall into two general patterns: the first is where overtime is payable only after an employee has worked a specified number of hours per shift or per week. The second

type is where overtime is payable for hours worked “in excess of” or outside an employee’s normal workday or week as set out in the collective agreement.

[42] The Parties did not raise whether overtime could be paid for the first shift of a work week. The Arbitrator determined that question himself and based on his own answer to that question, the Arbitrator proceeded to answer the central question in the arbitration. This causes me to lose confidence in the outcome of the Decision. On judicial review, the Employer submitted authorities, that may or may not be determinative of the issue of whether overtime could be payable for the first shift of the work schedule. If the Arbitrator invited submissions from the Parties, presumably the Employer would have relied on those authorities at the arbitration.

[43] The Parties should have had notice that this issue would be determinative and should have been given an opportunity to make submissions on this issue. It is unfair and possibly unreliable for the Arbitrator to reach a conclusion based on an issue that has not been pleaded or relied on by either Party.

[44] It is unfair, because the losing party, in this case, the Employer, had no opportunity to know the case it had to meet or to address the issue that was determined to be decisive.

[45] While the ultimate determination of the Arbitrator, may end up being within the range of possibilities open to him, it is possibly unreliable because, his theory that it does not “make sense” for a shift scheduled for the first day of the work week to attract overtime has not been tested in the adversarial framework of the arbitration process and it cannot be trusted to have its flaws exposed and addressed.

[46] The Arbitrator should consider submissions of the Parties on this issue and determine if the submissions change or impact his analysis and his ultimate determination.

DISPOSITION

[47] As the Arbitrator decided a determinative issue without submissions from the Parties, I find that there was a denial of procedural fairness. Given my finding that there was a denial of procedural fairness, I do not need to determine if the Arbitrator's decision was otherwise reasonable.

[48] The matter is remitted back to the Arbitrator to determine the issue with the benefit of these reasons.

[49] The Employer has been successful on this application and is awarded cost of the application on column 3 of the Scale of Costs.

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PHILIP OSBORNE
Justice