SUPREME COURT OF NOVA SCOTIA

Citation: *Unifor Marine Workers Federation, Local 1 v. Halifax Shipyard*, 2024 NSSC 369

Date: 20241202
Docket: Hfx No. 529857
Registry: Halifax

Between:

Unifor Marine Workers Federation, Local 1

Applicant

v.

Halifax Shipyard, a Division of Irving Shipbuilding Inc. and Scott Sterns, Arbitrator

Respondents

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	November 18, 2024, in Halifax, Nova Scotia
Written Decision:	December 2, 2024
Counsel:	Ronald E. Pizzo, for the Applicant Rebecca Saturley, K.C., for the Respondents

By the Court:

INTRODUCTION

[1] By Notice for Judicial Review filed January 12, 2024 the applicant, Unifor Marine Workers Federation, Local 1 (Union or Applicant) requests judicial review of a December 8, 2023 arbitration award made by arbitrator Scott Sterns (the Award). On January 25, 2024 Mr. Sterns filed a Notice of Participation confirming that he takes no position and will not participate in the matter. On February 1, 2024 the respondent, Halifax Shipyard, a Division of Irving Shipbuilding Inc. (Irving or Respondent) filed a Notice of Participation stating that the Court should not disturb the Award.

[2] The Award dismissed a policy grievance filed by the Union (the Grievance). The Grievance alleged that Irving breached Article 14.08 of the Collective Agreement between the parties when it stopped paying double time on "early starts". An early start occurs when an employee is required to start work before the start time for their regular shift.

[3] At arbitration, Irving argued that it had paid double time for early starts as a matter of practice and not because the Collective Agreement required it to do so. The Union asserted that pay at a double time rate was required by the express terms of Article 14.08 of the Collective Agreement. Accordingly, the issue was one of Collective Agreement interpretation.

[4] The Award dismissed the Grievance and found that the Union had not discharged its burden of proving that Article 14.08 provided for the payment of double time for early starts.

[5] The arbitrator found that the evidence on the factual dispute between the parties – whether double time for early starts was a "practice" or not – was equivocal, and he accordingly relied on the plain language of Article 14.08.

[6] The Union says that the Award does not meet the requirements of reasonableness set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. They allege that the arbitrator failed to properly apply the law governing collective agreement interpretation. Specifically, the Union maintains that the arbitrator failed to give meaning to the entirety of Article 14.08 and adopted an interpretation that rendered part of the Article superfluous.

[7] Irving takes issue with the Union's characterization of the Award. They say that the arbitrator carefully set out the principles of collective agreement interpretation and applied them to the facts of the case before him. Irving states that the arbitrator properly found that the wording of the Collective Agreement did not support that payment of double time was required for early starts. Irving says that the Award is reasonable because it is transparent, intelligible and justified. Accordingly, Irving asks for a dismissal, with costs.

BACKGROUND

[8] The Applicant is a trade union as defined in s. 2(1)(w) of the *Trade Union Act*, RSNS 1989, c. 475, representing "all employees of the [Halifax Shipyard]". The Respondent employer is a shipbuilder located in Halifax, Nova Scotia.

[9] The Union and the Respondent are parties to a Collective Agreement. The Collective Agreement relevant to this application for judicial review dates from June 30, 2022 to January 31, 2027.

[10] Traditionally, Irving (and predecessor employers) paid employees double time for early starts, and had been doing so for at least thirty years.

[11] On August 3, 2022, Irving wrote to the Union, providing the Union notice that it would stop its practice of paying double time on early starts. Irving wrote as follows:

> *RE: Notice of Practice Changes*
>
> This will confirm the Halifax Shipyard's intention to introduce the following changes to existing practices in the Yard that do not align with the collective agreement.
>
> These changes will take effect on ratification of the new collective agreement currently being bargained between the parties.
>
> […]
>
> 5. Early starts will be eliminated and, if re-introduced during the life of the next collective agreement, will be payable at time and one-half only.

[12] The Union responded by filing the Grievance. The arbitrator was appointed on consent of the parties to hear and decide the Grievance filed by the Union pursuant to the arbitration process set out in the Collective Agreement.

[13] The Grievance alleged that Irving breached Article 14.08 of the Collective Agreement because Irving stopped paying employees double time for early starts.

[14] Article 14 of the Collective Agreement deals with hours of labour. Article 14.01 defines the regular hours of work. That article provides, in part:

> (a) When operating on a three shift per day model, the hours of work shall be eight (8) hours per day, five (5) shifts per week, Monday to Friday inclusive for all shifts.
>
> Start times for these shifts will be maintained as they currently are for the life of this collective agreement unless changed in writing by the parties.

[15] Article 14.08 deals with overtime pay and reads as follows:

> 14.08 Overtime Pay
>
> (a) Any work performed other than during the regular hours of work herein provided shall constitute overtime and shall be paid for at a rate of time and one half, except where double time is payable provided, however, that if such overtime does not exceed fifteen (15) minutes, it shall be paid for at straight time.
>
> (b) Overtime worked over four (4) hours shall be paid at the rate of double time.
>
> For all hours worked in the overtime period which starts four (4) hours after the end of the regular shift, employees shall be paid at the double time rate of pay.

[16] The day shift is one of the three shifts operated by Irving. The day regular hours consist of an eight hour period of work which starts at 7:30 a.m. and ends at 4:00 p.m. The parties did not dispute that for an employee working the day shift, any hours worked between 4:00 p.m. (i.e. from the end of the shift) to 7:30 a.m. the following day were overtime hours and payable at an overtime rate. The dispute was over the rate to be paid for the overtime work.

[17] The Respondent took the position that Article 14.08 meant that for the first four hours of overtime, the employee would be paid at rate of 1.5 times their regular hourly rate of pay. Any additional overtime was to be paid at double time, or two times the hourly rate of pay. Therefore, if a day shift employee had to start work early at 5:30 a.m. (i.e. an early start), the two hours of overtime between 5:30 a.m. and 7:30 a.m. were paid at the rate of 1.5 times the hourly rate of pay.

[18] The Union’s position differed. It was not just the number of overtime hours worked that determined the rate of pay. When the overtime worked was another

deciding factor on whether the overtime rate of pay should be calculated at 1.5 or 2 times the regular rate of pay. The Union's argument was grounded in the express wording used in Article 14.08.

[19] Once again, Article 14.08 states that overtime was paid at the 1.5 rate except where double time pay was provided for in the Collective Agreement. There are two periods of time when double time was provided for in Article 14.08:

> i) For all overtime hours worked in excess of 4 hours; and
>
> ii) As set out in the last sentence of 14.08. "For all hours in the overtime period which starts four (4) hours after the end of the regular shift..."

[20] For a day shift worker, the end of the regular shift is 4:00 p.m. The double time period commences four hours after 4:00 p.m., or at 8:00 p.m. The Union's position was that the period "four hours after the end of the regular shift" was a period of time which ran from 8:00 p.m. to 7:30 a.m., when the regular shift commenced the following day. Accordingly, the Union argued that overtime worked in this period was to be paid at the double time rate.

[21] In the Union's submissions day shift employees called back to work between the hours of 8:00 p.m. and 7:30 a.m. the following day ought to receive double time pay for the overtime work – those hours were hours that started four hours after the end of their shift. From this, the Union submitted that it follows that the early start rate of pay (i.e. pay for employees who have been asked to work before the set time for their regular shift) should also be paid at the double time rate. For the day shift, then, any work performed before the 7:30 a.m. start time should be double time.

[22] The arbitrator disagreed with the Union. The Award is to the effect that double time pay for overtime work was only payable after an employee worked four hours of overtime.

ISSUES

[23] There are two issues before the Court:

1. What standard of review is applicable to the Award?
2. Is the Award reasonable?

What is the Standard of Review?

[24] The reasonableness standard of review applies to the Award in accordance with the Supreme Court of Canada's decision in *Vavilov*.

[25] Our Court of Appeal recently applied the reasonableness standard of review in the context of an arbitration decision in *United Food and Commercial Workers Union Canada, Local 864 v. Sproule Lumber*, 2024 NSCA 27. In *Sproule* the Court of Appeal found an arbitrator's decision to be reasonable and overturned the trial judge's decision on judicial review which had found the decision to be unreasonable. At para. 9, Chief Justice Wood quoted at length from a 2023 decision of Justice Fichaud which helpfully summarizes the principles from *Vavilov* which govern the reasonableness review:

> [9] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*") the Supreme Court of Canada revisited the standard to be used for review of administrative decisions. Fichaud, J.A., recently summarized the principles governing a reasonableness review in *Paladin Security Group Limited v. Canadian Union of Public Employees, Local 5479*, 2023 NSCA 86:
>
> > [39] In *Vavilov*, the majority's judgment set out the principles of reasonableness review. In *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, Justice Jamal for the majority reiterated *Vavilov's* ruling. I will summarize the principles from *Vavilov* and *Mason*.
> >
> > [40] Reasonableness is a "reasons first" approach. The reviewing court "must begin its inquiry into the reasonableness of the decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion". "Reasons first" means the reviewing court does not start with its view, i.e. it does not fashion its "own yardstick ... to measure what the administrator did", and then proceed with "disguised correctness review". (*Vavilov*, paras. 83-84. *Mason*, paras. 8, 58, 60 and 62-63).
> >
> > [41] Both the administrative decision's outcome and its reasoning matter. The outcome must be justifiable and, where reasons for the decision were required, the outcome must be "justified" by the reasons. The reviewing court "must consider only whether the decision made by the administrative decision maker - including both the rationale for the decision and the outcome to which it led - was reasonable". (*Vavilov*, paras. 86-87. *Mason*, paras. 58-59)
> >
> > [42] Reasonableness is "a single standard that accounts for context". Reviewing courts are to analyze the administrative decisions "in light of the history and context of the proceedings in which they were rendered". The history and context may show that, after examination, an apparent shortcoming is not a failure of justification. History and context include the evidence, submissions, record, the policies and guidelines that informed the

decision-maker's work and past decisions. Context also includes the administrative regime, the decision maker's institutional expertise, the degree of flexibility assigned to the decision maker by the governing statute and the extent to which the statute expects the decision maker to apply the purpose and policy underlying the legislation. (*Vavilov*, paras. 88-94, 97, 110; *Mason*, para. 61, 67, 70. See, for instance, *Labourers' International Union, Local 615 v. Grafton Developments Inc*., 2023 NSCA 25, paras. 104-108, for how these factors affect the Nova Scotia Labour Board.)

[43] The "hallmarks of reasonableness" are "justification, transparency and intelligibility". Consequently, a decision will be unreasonable where "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*, paras. 99 and 103; *Mason*, para. 60)

[44] More specifically, 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' [citation omitted]". A question-begging gap on a critical point may impair intelligibility. Mere repetition of the statutory language, followed by a peremptory conclusion "will rarely assist a reviewing court" and is "no substitute for statements of fact, analysis, inference and judgment". (*Vavilov*, para. 102; *Mason*, para. 65)

[45] A "minor misstep" or a "merely superficial or peripheral" shortcoming will not suffice to overturn an administrative decision. Rather, the flaw must be "sufficiently central or significant to render the decision unreasonable". To determine whether there is a sufficiently central or significant flaw, the reviewing court asks whether the administrative decision "is based on an internally coherent and rational chain of analysis and ... is justified in relation to the facts and law that constrain the decision maker". If yes, "[t]he reasonableness standard requires that a reviewing court defer to such a decision". If no, the decision "fails to provide a transparent and intelligible justification for the result" and is unreasonable. (*Vavilov*, para. 84-85, 99, 100-107; *Mason*, paras. 8, 59, 64).

[46] *Vavilov*, paras. 105-135, and *Mason*, paras. 65-76 elaborated on the factors that "constrain the decision maker", under this test, and their utility in a particular case: the governing statutory scheme, other statutory or common law, principles of statutory interpretation, evidence before the decision maker, submissions of the parties, past practices and decisions, and the impact of the decision on the affected individuals. The factors are "not a checklist" and will vary in application and significance from case to case (*Vavilov*, para. 106; *Mason*, para. 66).

[26] As *Vavilov* instructs at para. 83, the role of the Court is to review and "…to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker…conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem".

[27] The Collective Agreement is a contract. Therefore, this Court's review of the Award must be informed by the Supreme Court of Canada's guidance on contractual interpretation as established in *Sattva Capital Corporation v. Creston Moly Corp*, 2014 SCC 53. In particular, the Supreme Court of Canada directs at para. 47:

> 47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed... . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, per Lord Wilberforce)

Is the Award Reasonable?

[28] The Union's submission is that although the arbitrator properly instructed himself on the principles of collective agreement interpretation, he failed to correctly apply these principles to his interpretation of Article 14.08.

[29] Having carefully examined the Award in the context of the applicable standard of review, I categorically reject the Union's argument. The Award is a detailed 16-page decision. The arbitrator decided the matter under the following headings:

- Introduction
- Collective Agreement
- Evidence
- Interpreting the Collective Agreement
- Estoppel Letter
- Position of the Parties
- Findings of Fact
- Decision

[30] The parties agree and I find that the arbitrator accurately outlined the key principles of collective agreement interpretation.

[31] A fair reading of the Award reveals that the arbitrator was reasonably focused on the Union's framing of its Grievance as an entitlement to overtime for early starts. Once again, "early starts" refers to an employee being called into work one or more hours contiguous to the employee's next regular shift. The arbitrator described it (at para. 59 of the Award) as when "an employee works outside the regular hours for one or two hours before their shift".

[32] Given the Union's focus on "early starts", the arbitrator's analysis appropriately focused on extrinsic evidence relating to early starts and any reference to "early starts" in other Collective Agreement articles as contrasted with the absence of "early starts" in Article 14.08.

[33] Concerning extrinsic evidence, the Arbitrator noted at para. 42 that the sole witness called, Union executive member Jamie Vaslet, "…did not say, we nailed down double time for early starts. He said, we nailed down 'double time after four hours'. That is consistent with the Employer's argument". Later at para. 58, the arbitrator noted again that the Union's evidence contradicted their position that the Collective Agreement prescribed double time for early starts:

> In the evidence of the Union, the Union was able to nail down double time after four hours. That is clearly expressed. However, double time for early starts when the overtime only amounts to an hour or two before your shift, was not "nailed down" in Article 14.08.

[34] The arbitrator found nothing in the extrinsic evidence provided by the Union's witness supported its position that Irving had agreed with the Union that double time would be payable for "early starts". In fact, Mr. Vaslet's evidence supported Irving's

position. In the result, there is no fatal flaw in the arbitrator's logic or reasoning and I find that arbitrator's conclusion to be reasonable.

[35] With respect to "early starts" and the Collective Agreement, the arbitrator focused on the fact that any reference to "early starts" is missing from Article 14.08. For example at para. 51 he noted:

> Importantly, this grievance is about double time for "early starts". The grievance states expressly, "the Union is grieving the company's decision to stop paying double time on 'early starts'". Unfortunately for the Union, "early starts" are not mentioned in Article 14.08. It would have been very easy to require the payment of double time for "early starts" if that is what Article 14.08 said.

[36] Further, the arbitrator abided by another principle of collective agreement interpretation by considering the words of the Article in question (14.08) and of the Collective Agreement as a whole. In this regard, he referred to Article 14.09 which contains an express reference to "early starts". Article 14.09 is entitled "Overtime Selection" and Article 14.09(b) states the following:

> Overtime shall be distributed fairly and impartially among qualified employees in the following manner:
>
> 1. The Company will maintain two seniority lists for the purpose of overtime – one for weekdays and one for weekends.
> 2. To the employee performing the job if their have volunteered for overtime on that day or weekend.
> 3. To qualified employees of the crew responsible for that job, among those who have volunteered for overtime on that day or weekend and to be assigned on a rotational basis among those putting in.
> 4. To qualified employees in the yard who have volunteered for overtime on that day or weekend. Volunteering for and notification of overtime will be done electronically and employees may choose to be available by classification for which they are qualified, early starts (if applicable) or stay lates.

[37] The parties' express reference to "early starts" in Article 14.09 was significant for the arbitrator, as he subsequently noted at para. 54:

> I note that the concept of early starts is not unknown to the parties or in this Collective Agreement. Early starts are expressly referenced in Article 14.09(b)4. If early starts are referenced in Article 14.09, why are they not referenced in Article 14.08. If they are going to attract double time, why not say so? …

[38] The arbitrator continued at para. 57:

> In the context of this case, double time for early starts was a live issue for the parties. They bargained this issue in 2018 and 2022. It is an important issue. It would be very easy to say in the Collective Agreement, "overtime worked for an early start shall be paid at a rate of double time." That is clear and unequivocal but is not in Article 14.08.

[39] In my view, the conspicuous absence of "early start" from Article 14.08 was significant for the arbitrator and in keeping with appropriate collective agreement interpretation. For example, he earlier (para. 48) correctly set forth and applied the *West Fraser Mills* principles including:

> Words should be given their plain meaning. It is notable that Article 14.08 uses the term "overtime period" but does not use the important term "early start".

[40] From reviewing the entirety of the Award it is apparent that the arbitrator also appropriately considered other principles of collective agreement interpretation. In this respect, he repeatedly noted that "a very important promise is likely to be clearly and unequivocally expressed" and he expressly found that "[if]f the parties intended [an early start] to attract double time, surely that is an important promise which must be clearly and unequivocally expressed".

[41] It is well established in arbitral jurisprudence that "overtime is a monetary benefit" and "express language is required in a collective agreement to confer such a benefit" so that "the burden is on the Union to show in clear and unequivocal terms that the benefit is part of the compensation package" (*Extendicare (Canada) Inc. v. SEIU-West (Ferguson),* 2016 CarswellSask 866 at para. 109, aff'd 2017 SKQB 204). Again, the arbitrator found that the parties to the Collective Agreement had not clearly and unequivocally agreed that an "early start" would be paid double time.

[42] At para. 50, the arbitrator recognized the Union's focus on the third para. of Article 19.08 which reads:

> For all hours worked in the overtime period which starts four (4) hours after the end of the regular shift, employees shall be paid at double time rate of pay …

[43] Nevertheless, he rejected the submission on the basis that the entire Collective Agreement must be considered:

> I am also mindful that I must read the Collective Agreement and Article 14.08 as a whole. I find this is particularly relevant when dealing with the Union's argument.

> The Union has focused almost exclusively on the third paragraph of Article 14.08. The Union focuses on "overtime period" and the payment of double time for all hours worked in the overtime period which starts four hours after the end of the regular shift. However, that provision of Article 14.08 must work with the other two provisions of Article 14.08. If I dissect Article 14.08:
>
> > The first part requires work performed other than during regular hours shall be paid at time and one-half.
> >
> > The second part requires overtime work over four hours shall be paid at double time including all hours worked which starts four hours at the end of a regular shift.

[44] The arbitrator was alive to proper collective agreement interpretation principles (i.e. a collective agreement must be read as a whole and different words have different meaning). His main concern was Article 14.08's absence of the reference to "early starts", but its presence in 14.09.

[45] In the result, when I examine the entirety of the Award I must dismiss the Union's position that the arbitrator unreasonably applied collective agreement interpretation principles.

[46] Further, the Union's submission that the Award "renders the last sentence of Article 14.08 superfluous [or redundant]" is unpersuasive for a number of reasons. Again, the Grievance's focus was that Article 14.08's last sentence created double time for an early start. The arbitrator rejected this position because this sentence did not contain the phrase "early start" whereas another Article did contain this phrase. In my view this reasoning reflects the arbitrator's reasonable conclusion that this sentence does not provide for double time for an "early start". Accordingly, I do not believe it can be said that his reasoning renders the sentence superfluous.

[47] Further, my reasonableness review requires that the Award be read as a whole. When I read the Award in the proscribed manner, I find that the arbitrator's analysis does not reflect a redundancy, but rather, a conclusion that is in accordance with the agreed upon collective agreement interpretation principles.

CONCLUSION

[48] In the result, I find the Award to be reasonable. The outcome is justifiable. Having analyzed the arbitrator's decision in light of the history and context contained in the Record, I do not find any shortcomings. The Award is transparent

and intelligible. The reasoning is such that there exist no fatal flaws. Accordingly, I dismiss the application for judicial review with costs to the Respondent.

[49] If the parties cannot agree on costs I invite written submissions prior to the end of 2024.

Chipman, J.