Federal Court  Cour fédérale

Date: 20141105

Docket: T-1957-13

Citation: 2014 FC 1042

Ottawa, Ontario, November 5, 2014

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

STEPHANIE DELIOS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review by the Attorney General of Canada [the applicant] under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of *Delios v Canada Revenue Agency*, 2013 PSLRB 133, a decision by Adjudicator David P. Olsen of the Public Service Labour Relations Board [the Board], dated November 1, 2013, which allowed Stephanie Delios' [the respondent] grievance of a decision refusing her request for a day of personal leave.

[2] This application for judicial review is allowed for the reasons set out below.

II. Facts

[3] As a separate employer, Canada Revenue Agency [CRA] negotiates or sets the terms and conditions of employment for its employees separate and apart from the negotiating or setting of terms and conditions of employment for employees of the core public administration.

[4] CRA's workforce is comprised of approximately 45,000 employees, approximately 40,000 of which are unionized. Approximately 28,000 of the unionized employees belong to a bargaining unit represented by the Public Service Alliance of Canada [PSAC] and approximately 12,000 employees belong to a bargaining unit represented by the Professional Institute of the Public Service of Canada [PIPSC]. There is a collective agreement between CRA and PSAC and another collective agreement between CRA and PIPSC.

[5] Every year, CRA experiences approximately 5,000 temporary and permanent staffing actions between bargaining agents, which involve employees moving from a PSAC represented bargaining unit to a PIPSC represented bargaining unit or vice-versa.

[6] At the time this dispute arose, each member of each union was entitled to 7.5 hours of personal leave under either collective agreement "in each calendar year". This application concerns the legal effect, if any, of this contractual provision. The average salary paid to a CRA employee represented by PIPSC is $327.71 per day and $262.54 per day for a CRA employee represented by PSAC.

[7] The background information (number of employees, number of unionized employees, number of temporary and permanent staffing actions between bargaining agents occurring annually within CRA, and average daily salary for CRA employees) set out in paragraphs 4 to 6 were supplied in an affidavit filed by the applicant on this judicial review. There is a dispute regarding the admissibility of some parts of this affidavit. There is no dispute regarding the accuracy of the information nor its admissibility as general background information, but only as to its admissibility for the purposes of any "absurd result" analysis.

[8] The respondent worked for CRA as a Tax Auditor at the PM-02 occupational group and level from November 14, 2005 to October 31, 2007. The position was converted to the SP-05 occupational group and level on November 1, 2007 and was covered by the Program Delivery and Administrative Services collective agreement between CRA and PSAC [the CRA-PSAC collective agreement].

[9] On January 4, 2008, the respondent took 7.5 hours of personal leave pursuant to article 54.02 of the CRA-PSAC collective agreement.

[10] Subsequently, effective January 29, 2008, the respondent accepted a position as an Income Tax Auditor with the CRA at the AU-01 group and level. This position fell under the Audit, Financial and Scientific Collective Agreement between CRA and a different union, namely PIPSC [the CRA-PIPSC collective agreement].

[11] On March 20, 2008, the respondent sent a request to the Team Leader of Audit for a day of personal leave on March 31, 2008 pursuant to article 17.21 of the CRA-PIPSC collective agreement.

[12] On March 25, 2008, the Audit Manager denied the respondent's request for a day of personal leave on the basis that she had already taken a day of personal leave in the 2007-2008 fiscal year. The 2007-2008 fiscal year ran from April 1, 2007, to March 31, 2008, inclusively.

[13] A grievance of the March 25, 2008 decision was filed by the respondent on March 28, 2008, and denied at the 1st level on April 25, 2008, 3rd level on June 19, 2008, and 4th (final) level on January 5, 2010.

[14] An adjudicator was appointed to adjudicate the respondent's grievance, which he did on the basis of an agreed statement of facts and written submissions filed by the parties.

[15] In its decision dated November 1, 2013, the Board allowed the respondent's grievance. The applicant filed a notice of application for judicial review of that decision on November 26, 2013.

III. Decision under Review

[16] The issue before the Board was whether the respondent was entitled to 7.5 hours of personal leave with pay under article 17.21 of the CRA-PIPSC collective agreement in spite of

the fact that she had already and previously taken 7.5 hours of personal leave with pay under the CRA-PSAC collective agreement in the same fiscal year.

[17] The Board noted and it is common ground that the respondent was an "employee" as defined by article 2.01(j) of the CRA-PIPSC collective agreement:

> *(j) "employee" means a person so defined by the* Public Service Staff Relations Act *and who is a member of the bargaining unit…*

The *Public Service Staff Relations Act* is now called the *Public Service Labour Relations Act* but there are no material differences for the purposes of this application.

[18] The Board allowed the respondent's grievance for the following reasons.

[19] First, the Board noted that the source of the personal leave benefit was the CRA-PIPSC collective agreement itself, which meant that the words "in each fiscal year" in article 17.21(a) related to the entitlement to the leave prescribed by that provision and applied to all employees covered by the collective agreement. The fact that the respondent had benefited from a similar type of leave under another collective agreement was found by the Board to be of no material relevance.

[20] Second, because there were different articles in the CRA-PIPSC collective agreement that placed other restrictions on the accumulation of leave entitlements under collective agreements which were not present in the case of article 17.21, the Board considered that it had no reason to look beyond the plain and ordinary wording.

[21] The Board held that accepting the employer's position amounted to reading in restrictions in article 17.21 of the CRA-PIPSC collective agreement, which it is prohibited from doing by the *Public Service Labour Relations Act*, SC 2003, c 22, s 229 [*Public Service Labour Relations Act*].

[22] In the Board's view, any perceived unfairness or inequity resulting from the application of the collective agreement should be resolved at the bargaining table.

IV. Issues

[23] This judicial review raises the question of whether the Board's decision was reasonable. A secondary issue arises, namely whether certain additional material should be considered by the Court in deciding the case at bar.

V. Standard of Review

[24] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question".

[25] It is well established that the Board's interpretation and application of collective agreements to the facts of a grievance should be reviewed under the reasonableness standard of

review: *Chan v Canada (AG)*, 2010 FC 708 at para 17, aff'd 2011 FCA 150; *Public Service Alliance of Canada v Canada (Canadian Food Inspection Agency)*, 2005 FCA 366 at para 18.

[26] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VI. Relevant Provisions

[27] Article 54.02 of the CRA-PSAC collective agreement provides:

> 54.02 Personal Leave
>
> Subject to operational requirements as determined by the Employer and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, a single period of up to seven decimal five (7.5) hours of leave with pay for reasons of a personal nature.
>
> The leave will be scheduled at times convenient to both the employee and the Employer. Nevertheless, the Employer shall make every reasonable effort to grant the leaves at such times as the employee may request.
>
> [emphasis added]

[28] Article 17.21 of the CRA-PIPSC collective agreement provides:

> 17.21 Personal Leave

> (a) Subject to operational requirements as determined by the Employer, and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, up to seven decimal five (7.5) hours of leave with pay for reasons of a personal nature.
>
> (b) The leave will be scheduled at times convenient to both the employee and the Employer. Nevertheless, the Employer shall make every reasonable effort to grant the leaves at such times as the employee may request.
>
> [emphasis added]

VII. Submissions of the Parties and Analysis

A. *Preliminary point: New material filed on judicial review*

[29] The respondent submitted that the Court should disregard facts submitted by the applicant regarding the impact analysis of the financial consequences of the Board's decision (paragraphs 5 to 8 of the Affidavit of Todd Burke, and paragraphs 40 (iii), (iv), (v), (vi), 41 and 42 of the applicant's Memorandum of Fact and Law) because that information was not before the Board when the grievance in question was reviewed. However, the respondent limited its objection to the "absurd result" analysis at the hearing.

[30] The respondent relies on *Ochapowace First Nation v Canada (AG)*, 2007 FC 920 at para 9, aff'd 2009 FCA 124, leave to appeal to SCC ref'd [2009] SCCA no 262, in which this Court held:

> It is trite law that in a judicial review application, the only material that should be considered is the material that was before the decision maker […]. The only exceptions to this rule have been made in instances where the evidence was introduced to support an argument going to procedural fairness or jurisdiction […], or

> where the material is considered general background information that would assist the Court […].

[31] Therefore, there are three categories of acceptable additional filings: material supporting an argument going to procedural fairness, or going to jurisdiction, and material providing general background information that would assist the Court.

[32] The material before the Board consisted of the Agreed Statement of Facts between the PIPSC and the CRA, the respondent's Written Argument, the Employer's Written Argument, and the Union's Rebuttal to Employer's Written Submission.

[33] I will begin with a review of the context in which the disputed evidence arises. In essence, it is undisputed information that sets out details of one of the arguments made before the Board. In a word, the additional evidence puts some flesh on the frame constructed by both parties before the Board.

[34] It was in fact the respondent which opened what I might call the economic impact argument. In its written argument filed with the Board at page 5, the respondent union argued that its position "does not pose an onerous burden on the employer, as the circumstances would only apply to a relatively small number of employees of the Agency who move between bargaining units each year".

[35] CRA replied to the respondent's position by stating the following in its written argument at paragraphs 31 and 34:

> 31. It is clear that any other interpretation would lead to an absurd and unfair result.
>
> […]
>
> 34. […] the Union's interpretation would also defy the principle of cost-neutrality. It is important to recognize the cost-neutrality principle because it was not the intention of the parties to require the Employer to provide a benefit – in this case, *doubling* the employee's allotted paid leave within a given fiscal year – to a select number of employees working within the Public Service. Again, the parties would not have envisaged such a result.

[36] At paragraphs 45-47, CRA added:

> 45. The similar language used in the provisions relating to all unearned paid leave means that any decision relating to the interpretation of the personal leave provision found in the CRA-PIPSC Collective agreement will have direct bearing on the future interpretation and application of the family-related leave and volunteer leave provisions.
>
> 46. In other words, if the Tribunal adopts the Union's interpretation of Article 17.21 (b), an employee who has used up all of his or her unearned leave under a previous collective agreement will not only be "entitled" to an additional 7.5 hours of paid personal leave but additionally, he or she will <u>also</u> be "entitled" to a maximum of 75 hours for paid family-related leave under Article 17.13 <u>and</u> another 7.5 hours for paid volunteer leave pursuant to Article 17.22. In such a situation, the Employer would be required to grant this employee *105 hours* of paid leave in one fiscal year.
>
> 47. Clearly, the financial consequences arising from the Union's interpretation would be quite serious and costly for the Employer, especially when one takes into account the fact that the language used in the above-mentioned unearned leave provisions is to be commonly found in other Public Service collective agreements. Thus, the Employer must reject the Union's argument that this result does not pose an onerous burden on the Employer and would only apply to a "relatively small number" of employees who move between bargaining units each year.

[37] The applicant submits, contrary to the respondent's contentions, that paragraphs 5 to 8 of the Affidavit of Todd Burke, and paragraphs 40 (iii), (iv), (v), (vi), 41 and 42 of the applicant's Memorandum of Fact and Law are in essence grounded in the material that was before the Board and should not be disregarded by this Court. The applicant takes the position this information is general background information that would assist the Court.

[38] It is also worth mentioning that the Affidavit of Neil Harden in support of the respondent provides similar background information about PIPSC's membership.

[39] As noted, the parties at the hearing did not disagree on the accuracy of the disputed material. Indeed the respondent accepted the material as general background material but argued that it should not be relied on in any "absurd result" analysis.

[40] I find the additional material of some assistance. It is clear that the cost consequences of this decision are material, contrary to the respondent's representation. The respondent's position, if successful, has the clear potential to double the entitlements to this particular leave for those employees of the CRA who transfer between the two collective agreements in the same fiscal year. This fact alone may not have great significance. However, when the actual dollars are added into the equation as per the additional material, they are significant in that they could be worth over one million dollars annually.

[41] The test is whether it is general background information that would assist the Court, and I find it is per *Chopra v Canada (Treasury Board)* (1999), 168 FTR 273 at para 9 (FC). The

respondent is familiar with this information, it is credible, its accuracy was not challenged, it was disclosed in a timely way and no prejudice is occasioned to the respondent. Moreover, this general background information assists the Court in that it puts the Board's decision in the correct light and in a light which is very different from the respondent's assertion that it would only affect a "relatively small number" of employees. Admission of this general material allows the case to proceed on an accurate footing. I see no reason to limit the admissibility of what is admitted to be general background information in these circumstances. Therefore the affidavit material adduced by the applicant is admitted for all purposes.

B. *Was the Board's decision reasonable?*

[42] A board's decision may be found unreasonable where it ignores the plain and ordinary meaning of a term of a collective agreement (*Lamothe et al v Canada (AG),* 2009 FCA 2 at para 13 [*Lamothe*]), and where it interprets a collective agreement in a manner that produces an absurdity (*Saint John (City) v Saint John Firefighters' Assn*, 2011 NBCA 31 at paras 41, 45 [*Saint John Firefighters' Association*]).

[43] Both parties rely on the law of collective agreement interpretation as set out in *Communications, Energy and Paperworkers Union of Canada v Irving Pulp & Paper Ltd*, 2002 NBCA 30 at para 10:

> It is accepted that the task of interpreting a collective agreement is no different than that faced by other adjudicators in construing statutes or private contracts […]. In the contractual context, you begin with the proposition that the fundamental object of the interpretative exercise is to ascertain the intention of the parties. In turn the presumption is that the parties are assumed to have intended what they have said and that the meaning of a provision

> of a collective agreement is to be first sought in the express provisions. In searching for the parties' intention, text writers indicate that arbitrators have generally assumed that the provision in question should be construed in its normal or ordinary sense unless the interpretation would lead to an absurdity or inconsistency with other provisions of the collective agreement […]. In short, the words of a collective agreement are to be given their ordinary and plain meaning unless there is a valid reason for adopting another. At the same time, words must be read in their immediate context and in the context of the agreement as a whole. Otherwise, the plain meaning interpretation may conflict with another provision.

[44] The respondent states that the Board correctly construed the collective agreement, alleges the Board was only resisting the adding in of conditions that were not inserted by the parties, and properly referred to differing provisions in the collective agreement, all so as to give no effect to the words "in each fiscal year" in article 17.21 in this case.

[45] The applicant submits that the Board failed to consider the true intent of the parties when they entered into the collective agreement, gave an unsound interpretation of the plain and ordinary meaning of article 17.21 of the CRA-PIPSC collective agreement, failed to consider that its interpretation created absurd results and failed to consider similar applicable case law. These errors, according to the applicant, on their own and when taken together, render the Board's decision unreasonable.

VIII. Analysis

[46] In my view there are three reasons why the Board's decision should be set aside as unreasonable: it failed to apply the plain and ordinary meaning of the words chosen by the parties, it failed to construe the words of the agreement having regard to its definitions and

created a result which was absurd, and the Board's decision is contrary to relevant precedent and authority.

A. *Plain and ordinary meaning*

[47] In terms of applying the plain and ordinary meaning of the words "in each fiscal year", in my view, the Board made several unreasonable decisions in coming to its conclusion. First, it failed to apply the plain and obvious meaning of the clause to the circumstances of this case, which was to limit employees of CRA to one personal day "in each fiscal year" as expressly provided in both the PSAC collective agreement and the PIPSC collective agreement in issue here. Second, the Board miscategorized its duty as resisting an employer's request to read into the collective agreement a limitation which was not there, when in fact what the Board did was to ignore and read out of the agreement words of limitation negotiated and inserted by the parties that capped or limited employees of CRA to one personal day "in each fiscal year".

[48] The starting point in any analysis of a collective agreement is to ascertain the intention of the parties. In turn, the presumption is that the parties are assumed to have intended what they actually said, and that the meaning of a provision of a collective agreement is to be first sought in its express provisions. In searching for the parties' intention, arbitrators have generally assumed that the provision in question should be construed in its normal or ordinary sense unless the interpretation would lead to an absurdity or inconsistency with other provisions of the collective agreement. In my view this is the correct test, that is, the test that will produce a reasonable result per *Dunsmuir*.

[49] In this case, article 17.21 of the collective agreement between the parties confers an entitlement "in each fiscal year" for each employee covered by it to, among other things, 7.5 hours of paid leave for reasons of a personal nature (or one personal day). In the case at bar, this benefit is the same as found in the collective agreement between the employer and PSAC. Article 17.21 contains express and material words of limitation on the entitlement that precedes the description of the benefit namely, "in each fiscal year".

[50] The plain and obvious meaning of article 17.21 is that each employee has one personal day of paid leave "in each fiscal year". An interpretation that results in the same employee being entitled to two, or perhaps three or even four personal leave days per year is neither plain and ordinary, nor is it within the range of reasonable outcomes per *Dunsmuir*.

[51] The Board appears to have reached this unreasonable result in part because it looked elsewhere in the collective agreement to find different words of limitation in clauses creating different entitlements, and then asked itself whether those words should be "read into" article 17.21 such that the words "in each fiscal year" could be read out. That was not a reasonable approach. Neither was it the task of the Board. The Board's task was to determine and construe the article at hand to the case before it. Here, the employee had already taken one personal leave day in that fiscal year. Therefore, she was not entitled to a second. The decision at the fourth (and final) level of grievance should not have been disturbed by the Board.

[52] In terms of the Board's so-called declining to read in an issue, a point made by the respondent and the Board, I observe as follows. It is true that there are words on limitation in

article 14.08 (excluding "leave has already been credited to him under the terms of any other collective agreement"), and counsel referred to articles 17.11(c) (words of limitation are "total period of employment in the Public Service") and 17.14(b) (words of limitation are "total period of employment in the Public Service"). While each of these articles contains words of limitation, none refers to "in each fiscal year". In my view, relying on words of limitation elsewhere to read out the words inserted by the parties was unnecessary and was not a reasonable approach. Each set of words of limitation in each of the many entitlement provisions has an intended purpose, that is, to be applied to the circumstances they embrace in accordance with their terms. Therefore on the plain and ordinary meaning principle, each set of words of limitation should be given effect according to their specific terms.

[53] In this case, instead of applying the words of the collective agreement and holding that the employee, having taken one personal day in that particular fiscal year, was not entitled to a second day in the same fiscal year, the Board chose to read out of the collective agreement the words "in each fiscal year". However, those words were put into the agreement by the parties as a result of negotiations. These words are assumed to manifest the express consent of the parties, and nothing in the evidence suggests they do not. The plain and ordinary meaning of these words is that the specified number of personal leave hours are available to an employee only once "in each fiscal year".

[54] The Board's interpretation unreasonably defeated the express intentions of the parties. The Board had no mandate to rewrite the agreement by reading out express and material

limitations inserted by the parties during the course of their negotiations. As noted above, the agreement states:

> 17.21 Personal Leave
>
> (a) Subject to operational requirements as determined by the Employer, and with an advance notice of at least five (5) working days, the employee shall be granted, in each fiscal year, up to seven decimal five (7.5) hours of leave with pay for reasons of a personal nature.
>
> [emphasis added]

[55] While reading out the words "in the fiscal year", the Board attempted to justify its position by saying instead that it was trying *not* to read new words *into* the clause. As explained by the Board, the new words allegedly "not read in" were in fact words of limitation of equal intended legal effect but found in other of the many employee leave provisions in the same collective agreement, but not in article 17.21. In my view, the Board's decision to read out this material term fell outside the range of possible, acceptable outcomes that are defensible in respect of the facts and law per *Dunsmuir*.

B. *True construction of the terms of the collective agreement*

[56] The applicant submits and I agree that the Board also erred in its plain and ordinary meaning interpretation by failing to apply the definition of "employee" as contained in article 2.01(j) of the collective agreement (""employee" means a person so defined by the *Public Service Labour Relations Act* and who is a member of the bargaining unit"), and by ignoring the words "up to" and "in each fiscal year" in article 17.21 of the CRA-PIPSC collective agreement.

[57] According to the applicant, and I agree, had the Board:

(a) properly utilized the collective agreement's express definitions of "employee", which is in part provided by the *Public Service Labour Relations Act*, s 2(1):

"employee", except in Part 2, means a person employed in the public service, other than	« fonctionnaire » Sauf à la partie 2, personne employée dans la fonction publique, à l'exclusion de toute personne :
(a) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act;	a) nommée par le gouverneur en conseil, en vertu d'une loi fédérale, à un poste prévu par cette loi;
(b) a person locally engaged outside Canada;	b) recrutée sur place à l'étranger;
(c) a person not ordinarily required to work more than one third of the normal period for persons doing similar work;	c) qui n'est pas ordinairement astreinte à travailler plus du tiers du temps normalement exigé des personnes exécutant des tâches semblables;
(d) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members;	d) qui est membre ou gendarme auxiliaire de la Gendarmerie royale du Canada, ou y est employée sensiblement aux mêmes conditions que ses membres;
(e) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature;	e) employée par le Service canadien du renseignement de sécurité et n'exerçant pas des fonctions de commis ou de secrétaire;
(f) a person employed on a casual basis;	f) employée à titre occasionnel;
(g) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed	g) employée pour une durée déterminée de moins de trois mois ou ayant travaillé à ce titre pendant moins de trois mois;

for a period of three months or more;	
(h) a person employed by the Board;	h) employée par la Commission;
(i) a person who occupies a managerial or confidential position; or	i) occupant un poste de direction ou de confiance;
(j) a person who is employed under a program designated by the employer as a student employment program.	j) employée dans le cadre d'un programme désigné par l'employeur comme un programme d'embauche des étudiants.

(b) properly utilized the definition of "employer", provided by article 2.01(k) of the CRA-PIPSC collective agreement:

> "Employer" means Her Majesty in right of Canada as represented by the Canada Revenue Agency (CRA), and includes any person authorized to exercise the authority of the Canada Revenue Agency.

(c) properly utilized the definition of "fiscal year" provided by the *Interpretation Act*, RSC 1985, c I-21, s 37(1)(b):

"financial year" or "fiscal year" means, in relation to money provided by Parliament, or the Consolidated Revenue Fund, or the accounts, taxes or finances of Canada, the period beginning on April 1 in one calendar year and ending on March 31 in the next calendar year	« exercice » s'entend, en ce qui a trait aux crédits votés par le Parlement, au Trésor, aux comptes et aux finances du Canada ou aux impôts fédéraux, de la période commençant le 1er avril et se terminant le 31 mars de l'année suivante

the Board should have read article 17.21 of the CRA-PIPSC collective agreement as follows:

> Subject to operational requirements as determined by the **Canada Revenue Agency**, and with an advance notice of at least five (5) working days, **the person employed in the Public Service (and not excluded by section 2 of the *Public Service Staff Relations Act*) and who is a member of the bargaining unit** shall be granted, in each **period beginning on April 1 in one calendar year and ending on March 31 in the next calendar year**, up to seven decimal five (7.5) hours of leave with pay for reasons of a personal nature.

[58] Had this been done, the plain and ordinary meaning of the clause is to limit the number of hours of personal leave for an employee to once "in every fiscal year" regardless of transfer between bargaining agent groups. This error also resulted in a decision that fell outside the range of possible, acceptable outcomes that are defensible in respect of the facts and law per the Supreme Court of Canada's decision in *Dunsmuir*.

C. *Absurd results*

[59] The applicant further submits that even if the Board's plain and ordinary interpretation of article 17.21 was reasonable, which I found it was not, the Board erred in failing to look beyond the plain and ordinary wording of the collective agreement and its failing to do so led to ambiguous, incongruous or absurd results.

[60] In my view, this raises a preliminary issue, namely whether an "absurd result" analysis is necessary in the modern context of judicial review after the Supreme Court of Canada's decision in *Dunsmuir*. In my view, the new "range of reasonable results" approach for judicial review established by *Dunsmuir* effectively replaces the older "absurd result" case law in the context of judicial reviews such as this. In my view, an absurd result is simply a characterization of a

particular result that must be assessed in accordance with the new approach established in *Dunsmuir*. It is likely that all cases in which an interpretation creates an absurd result will constitute an unreasonable decision for the purposes of judicial reviews, because I consider an absurd result to be a more extreme case of unreasonableness. To this effect, I note that the Supreme Court of Canada in *Pointe-Claire (City) v Quebec (Labour Court)*, [1997] 1 SCR 1015, held that in the context of a labour tribunal interpreting its governing legislation, the concept of an interpretation leading to "absurd results" was properly used to support a finding of patent unreasonableness in the pre-*Dunsmuir* context.

[61] Because I have found the Board's conclusion to be unreasonable, there is no need to proceed further to an "absurd result" analysis in this judicial review.

[62] If, however, I am wrong, it is my view that the Board's interpretation led to absurd results. Factors leading me to this conclusion are those noted above, namely the failure to honour the express terms negotiated by the parties, and the failure to properly define and consider the true meaning of the clause. I add that absurdity results from the consequences of the Board's interpretation, including: the result that a personal leave day would be enjoyed by most employees only once a year, but employees who change bargaining units within the fiscal year would enjoy such leave benefits twice, resulting in an unintended windfall; the significant doubling of personal leave costs for the respondent as employees "double up" on leave benefits on changing bargaining units; the significant fiscal unpredictability for the respondent in terms of leave and related/salary envelope costs; and the possibility there will be similar doubling up regarding other types of leave entitlements when employees change bargaining units if the

Board's approach is extended elsewhere in CRA's collective agreements. In the case at bar, there is no evidence any of these results were contemplated by the parties, and as noted, the parties themselves expressed the exact reverse in the collective agreement.

[63] The starting point in an analysis of potentially absurd results is that the single day of personal leave (one in "in each fiscal year"), if the Board is correct, doubles to two days of personal leave for those employees who move from one bargaining unit to another. This may not seem significant and therefore not absurd, and at the outset may appear to be reasonable i.e., within the range of possible intended results of the collective bargaining process. However, that analysis is flawed for three reasons.

[64] First, as may be seen from the background material, some 5,000 employees annually transfer between bargaining units. Each of these 5,000 employees becomes entitled to double the normal personal days available to their colleagues. In this scenario the result is an additional 5,000 days pay, totally in the aggregate more than one million dollars.

[65] Second, if the Board's approach is confirmed and the parties negotiate additional days, those employees transferring from one union to the other will have a multiple of increased personal days. This would be a pure windfall over and above what their colleagues receive.

[66] Finally, in my view, it is relevant to consider the resulting impact on other leave benefits including 75 hours of paid family-related leave under Article 17.13, and 7.5 hours for paid volunteer leave pursuant to article 17.22. The Board's approach to read out the words "in the

fiscal year" opens the door to more widespread discrimination, as a result of additional unshared windfalls together with unfairness and imbalance between employees in CRA's workplace.

[67] The respondent submitted that a party concerned with these difficulties should deal with them at the bargaining table. The answer to this objection is that the parties did just that in the collective agreement, and did so in the express terms they chose and concretized in the collective agreement itself. There is no need for further negotiations on a matter settled in plain language by the parties.

D. *Precedent and authority*

[68] Finally, the relevant case law supports the applicant. The Federal Court of Appeal, in *Lamothe*, reviewed a clearly analogous situation where the Board attributed a different meaning to the plain, ordinary and unambiguous wording of a clause in a collective agreement resulting in a decision that was wrong and unreasonable. The Court of Appeal set aside that decision; see paragraphs 9 to 15:

> [9] The appellants argue that the standard of reasonableness applies in the case.
>
> [10] The respondent is of the opinion that the standard of review of correctness in this case applies according to the principles established in *Dunsmuir*.
>
> [11] Whether it is the standard of review of correctness or the standard of reasonableness that applies, the adjudicator's decision was wrong and unreasonable.
>
> [12] For greater certainty, even if the degree of deference allows us to conclude that we must defer to the adjudicator's decision and apply the standard of reasonableness, we cannot conclude that her decision, considered as a whole, was reasonable.

> [13] As to the travel time involved when a public servant travels to a training course, the adjudicator ignored the rules on interpreting collective agreements by attributing a different meaning to the plain, ordinary and unambiguous wording of clause B7.08, which stipulates:
>
> > Compensation under this Article shall not be paid for travel time to courses, training sessions, conferences and seminars unless so provided for in the Article 18, Career Development.
>
> [14] The clause is clear: employees who travel for the purpose of training will not be compensated for the time they spend traveling to training sessions.
>
> [15] As to the travel time between accommodation once an employee has reached his or her destination and the training centre, the adjudicator failed to consider those clauses of the collective agreement that unequivocally state the circumstances in which travel time is compensated. In particular, the adjudicator failed to consider clause B7.02 of the collective agreement, which provides for compensation when an employee travels between his or her residence and workplace; clause B7.01, which deals with compensation only where the employee travels outside his or her employment area for the purpose of performing duties; and clause B7.07, which includes time necessarily spent at each stop-over, to a maximum of three hours, as travel time.

[69] I am also of the view that the decision in *Professional Institute of the Public Service of Canada v Treasury Board*, 2011 PSLRB 46 is directly on point. There, PIPSC attempted to transform a contractual entitlement to a "one-time" vacation leave of 37.5 hours into multiple 37.5 hour vacation entitlements, arising each time an employee changed bargaining units. This is analogous to the situation in the case at bar. There however, the Board correctly rejected PIPSC's arguments in words that are applicable here:

> 43 If I am to respect the apparent intent of the parties that the grant of 37.5 hours under clause 15.18 of the collective agreement is a "one-time entitlement," how, for example, do I address the situation of an employee who has previously earned the same entitlement to 37.5 hours under another collective agreement and

> who has retained that entitlement as a new member of the AV group by virtue of clause 14.02 of its collective agreement? If I accept the bargaining agent's position, that employee emerges with two one-time entitlements at the same time, both of which are sanctioned by the same collective agreement (one by clause 15.18 and the second by clause 14.02). In my respectful view, it strains credibility to conclude that the parties intended that outcome.
>
> 44 My assessment has led me instead to the view that the employer's interpretation of clause 15.18 is more consistent with the architecture of the collective agreement as a whole, although perhaps not for all the reasons that it urges. Through clause 15.03, the parties purposively tied the operation of the vacation leave article to a public-service-wide definition of "service." By dint of clause 15.03, the process of accumulating service for vacation purposes is not AV-group specific. The other provisions of article 15 need to be interpreted in harmony with that key element of the vacation leave regime negotiated by the parties. The effect of clause 14.02, which reinforces a public-service-wide approach, must also be reconciled as part of the framework of the collective agreement.
>
> 45 Against that context, I do not believe that it is reasonable and consistent to interpret clause 15.18 of the collective agreement in a fashion that accepts that a one-time entitlement can happen multiple times. For me, the reference to "one-time" in clause 15.18 acquires its meaning from the context of a single public-service-wide continuum of service accumulation for vacation leave purposes as set out in clause 15.03. There are points along that continuum at which employees earn new or additional vacation entitlements. They do not change their positions on the continuum — in terms of service accumulation — when they move from one bargaining unit to another. As the collective agreements adduced in this case show, there is a commonly identified point on the continuum at two years of service at which a commonly described special entitlement of 37.5 hours of vacation leave is earned. Each employee crosses that service threshold only once. Within those parameters, I do not believe that a one-time entitlement re-occurs.

[70] In this case, there is no ambiguity, confusion or uncertainty resulting from limiting the benefit (personal day) to once in each fiscal year as the collective agreement provides.

IX. Costs

[71] I asked counsel to provide quantum of costs; the applicant asked for $2,500 and the respondent requested $2,000.

X. Conclusion

[72] Judicial review is granted because the Board's decision was unreasonable in that it was not within the range of acceptable outcomes which are defensible in respect of the facts and law. Further, if it is necessary to reach a conclusion on this point, the Board's interpretation results in an absurdity. Therefore the decision is set aside and remitted to a different Adjudicator, with costs to the applicant of $2,500.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Judicial review is granted in respect of decision 2013 PSLRB 133 made by Adjudicator David P. Olsen of the Public Service Labour Relations Board, dated November 1, 2013;
2. The said decision of the Board is set aside and the matter is remitted to a different adjudicator for re-determination; and
3. The applicant shall have its costs fixed at $2,500.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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