

In the Court of Appeal of Alberta

**Citation: Alberta Union of Provincial Employees v. Health Sciences Association of Alberta,
2009 ABCA 266**

**Date: 20090807
Docket: 0803-0172-AC
Registry: Edmonton**

Between:

Alberta Union of Provincial Employees

Respondent (Applicant)

- and -

Health Sciences Association of Alberta

Appellant (Respondent)

- and -

Capital Health Authority and Alberta Labour Relations Board

Respondent (Respondent)

And Between:

Alberta Union of Provincial Employees

Respondent (Applicant)

- and -

Health Sciences Association of Alberta

Appellant (Respondent)

- and -

Capital Health Authority and Alberta Labour Relations Board

Respondent (Respondent)

The Court:

**The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Keith Ritter
The Honourable Madam Justice Patricia Rowbotham**

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice R.A. Graesser
Dated the 15th day of May, 2008
Filed on the 19th day of June, 2008
(2008 ABQB 279; Docket: 0603-06314; 0603-15203)

Memorandum of Judgment

The Court:

[1] This is an appeal from an order of Graesser J. quashing two related decisions of the Alberta Labour Relations Board (the “Board”). The Board had to decide whether employees occupying the positions of Dental Assistants II/Registered Dental Assistants, Physical Therapy Assistants/Rehab Assistants, and Speech Language Pathology Assistants, were to be included or excluded from the Paramedical Professional or Technical Services Unit, the Auxiliary Nursing Care Unit, or the General Support Services Unit. The Capital Health Authority took the position that the employees all fell into the General Support Services Unit. The Alberta Union of Provincial Employees (“AUPE”) argued that they all fell into the Auxiliary Nursing Care Unit. The Health Sciences Association of Alberta (“HSAA”) argued that they all fell into the Paramedical Professional or Technical Services Unit.

[2] In its original decision, the Board concluded as follows:

- Registered Dental Assistants - included in the Paramedical Professional and Technical Unit.
- Rehab Assistants - included in the Paramedical Professional and Technical Unit.
- Speech Language Pathology Assistants - included in the General Support Services Unit.

[3] AUPE sought reconsideration of that decision. That application was dismissed.

[4] As to standard of review, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 57 confirmed that an exhaustive analysis is not required in every case. In matters engaging the attention of the same tribunal respecting identical issues previously decided, the standard of review analysis may be dispensed with: the reasonableness standard applies to questions of fact; discretionary and policy matters that engage the tribunal’s expertise are questions of law involving the tribunal’s interpretation of its own statute; the reasonableness standard also applies to questions where the legal issues cannot be easily separated from the facts of the case.

[5] The case law makes clear that labour relations boards are generally entitled to the highest level of judicial deference.

[6] The Supreme Court in *Dunsmuir* clearly and unequivocally stated that the move to a single reasonableness standard was not intended to signal any decrease in the degree of deference afforded to tribunals pre-*Dunsmuir*. At para. 48, the majority stated:

“The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts ...”

[7] The concurring reasons of Binnie J. at para. 155 are to a like effect. He stated:

“... Adoption of a single ‘reasonableness’ standard should not be seen by potential litigants as a lowering of the bar to judicial intervention.”

[8] The reasons for judgment in the Court below are tainted by a fundamental flaw. *Dunsmuir* was misinterpreted and misapplied. Graesser J. read the decision as lowering the standard of review - giving less deference - to labour relations board decisions.

[9] The decision of the Supreme Court of Canada was issued between the time the judicial review hearing was argued before the chambers judge and the time when he issued the JR decision. It follows that he did not have the benefit of binding judicial precedent regarding the interpretation and application of the *Dunsmuir* principles.

[10] Graesser J. set out some of the *Dunsmuir* principles in the JR Decision (A.B. Digest, Vol. 1, F15 at paras 34-38); however, his reasons show that while he recognized that labour relations boards have historically been shown the highest of judicial deference, it seemed to him that “[w]hile the majority has not expressly said so, ... the new ‘reasonableness’ standard must be more akin to ‘reasonableness *simpliciter*’ than to the ‘patently unreasonable’ standard.” (A.B. Vol. 1, F15 at para. 37). The following statements show that, were it not for the *Dunsmuir* decision, Graesser J. would have shown the Board the highest of judicial deference:

“But for the *Dunsmuir* decision, I would have found that the appropriate standard of review is patent unreasonableness. ...

The designation of bargaining agents and the determination as to which bargaining unit various employees belong in go to the very core of the expertise of the ALRB (s-s. 12(3)(o) and s. 48 of the Code).

The ALRB’s jurisdiction and authority to determine which bargaining unit various employees belong in is clear under s-s. 12(3)(o) of the Code: ... This is a function that the ALRB performs regularly and it is safe to say that this is in an area where the ALRB enjoys far more expertise than does any court. ...

[G]enerally speaking, labour relation boards are to be given the highest level of deference ... This is so even where the precedential value of the ALRB’s analytical approach may equate to a question of law: ...

I find that the above factors mandate considerable deference with respect to all aspects of the decisions under review including any questions of law related to the interpretation of the Code, Act and Regulation. All decisions made were within the jurisdiction of the ALRB and they are entitled to significant deference with respects to all aspects of their decisions.” [emphasis added] (paras. 24 - 29)

[11] The HSAA also argues that the reviewing judge erred by justifying his interference based on the inadequacy of the ALRB’s reasons when there was no claim before him that a breach of natural justice had occurred as a consequence of insufficient reasons.

[12] The chambers judge reasoned as follows:

“The Original Panel did not provide a clear and rational explanation for narrowing the definition of ANC, expanding the scope of the PPT unit to include its assistants, and expanding the GSS unit to include more ‘hands-on’ employees. It may be that the Original Panel had valid reasons for changing its policies in this fashion. It did not clearly and rationally explain its reasons and the labour relations purposes for doing so. For these reasons, the Original Panel decision cannot stand. Without such an explanation, on the basis of existing Board precedent and sound labour relations principles, it was unreasonable to allocate the registered dental assistants and rehabilitation assistants to the PPT unit. It was also unreasonable to assign the speech language pathology assistants to the GSS unit. There may be valid policy reasons and changing circumstances for the Panel to have made these significant policy changes. However, its reasons for doing so were not articulated.” (at para. 134)

[13] Had there been no previous policy and Board decisions on the subject, the reviewing judge would have found the Board’s ruling reasonable: at para. 140.

[14] The flaws in the judgment below require appellate interference. In *Calgary (City) v. International Assn. of Fire Fighters, Local 255*, 2008 ABCA 77, [2008] A.J. No. 190, this Court stated:

“An appeal from an administrative judicial review requires this Court to assess whether the reviewing judge chose and applied the correct standard of review, and if she did not, to review the administrative board’s decision in light of the correct standard: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at para. 43; *U.N.A., Local 115 v. Calgary Health Authority*, 2004 ABCA 7, 339 A.R. 265 at para. 9; *Health Sciences Association of Alberta v. David Thompson Health Region*, 2004 ABCA 185, 348 A.R. 361 at para. 7. If the reviewing judge did

choose the correct standard, whether or not she properly applied it is a question of law, reviewable by this Court on a correctness standard: *Alberta (Minister of Municipal Affairs) v. Municipal Government Board*, 2002 ABCA 199, 312 A.R. 40 at para. 2; *C.U.P.E., Local 784 v. Edmonton School District No. 7*, 2005 ABCA 74, 363 A.R. 123.”

[15] We are all agreed that the reviewing judge improperly interpreted *Dunsmuir* and, as a consequence, afforded the Board less deference than was warranted. The reviewing judge, in effect, mistakenly applied a correctness standard. Prior to *Dunsmuir*, this Court and others consistently held that Board decisions interpreting and applying provisions of the Alberta Labour Relations Code are entitled to the highest level of deference - the patently unreasonableness standard. (See *Alberta v. Alberta (Labour Relations Board)*, 2001 ABCA 299, [2002] A.J. No. 4 (Alta. C.A.) (successorship and reconsideration), *Alberta Union of Provincial Employees v. Alberta Provincial Health Authorities*, [2006] Alta. L.R.B.R. 276, *International Assn. of Machinists and Aerospace Workers, Local Lodge No. 99 v. Finning International Inc.*, 2007 ABCA 319, [2007] A.J. No. 1129, *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 at para. 57, *International Assn. of Machinists and Aerospace Workers, Local Lodge No. 99 v. Finning International Inc.*, 2008 ABCA 400, [2008] A.J. No. 1311.

[16] It follows that Board decisions such as the one under review involving the interpretation and application of the Code’s provisions should continue to attract the highest level of deference now available - the reasonableness standard.

[17] The Board’s bargaining unit determinations involve questions of fact, discretion and policy; questions where the legal issues cannot easily be separated from the facts; and questions that require the Board to interpret and apply its home legislation and regulations. As this case involves issues which the Court in *Dunsmuir* has identified as automatically attracting the reasonableness standard, we conclude that this Court can and does adopt this standard without further analysis.

[18] *Dunsmuir* (per Bastarache and LeBel, JJ.) sets out the meaning of the new collapsed “reasonableness” standard as follows (at para. 47):

“Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquiries 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.”

[19] The factual and legal matrix in the instant case provides ample support for the conclusion that the test for reasonableness is satisfied.

[20] In addition, we also find that the reviewing judge erred by justifying his interference based on the inadequacy of the Board’s reasons when there was no claim before him that a breach of natural justice had occurred as a consequence of insufficient reasons.

[21] The appeal is allowed. The order below is quashed. The decisions of the Board are restored.

Appeal heard on May 28, 2009

Memorandum filed at Edmonton, Alberta
this 7th day of August, 2009

Berger J.A.

Ritter J.A.

As authorized by: Rowbotham J.A.

Appearances:

S.M. Renouf, Q.C.

S. Desbarats

for the Respondent (Applicant)

W.J. Johnson, Q.C.

for the Appellant (Respondent)

R.S. Hofer - for the Respondent - Capital Health Authority (not participating in the appeal)

S.W. McLeod - for the Respondent - Alberta Labour Relations Board