CITATION: Unifor Local 200 v. Nemak of Canada Corp., 2020 ONSC 5944
COURT FILE NO.: DC 667/19
DATE: 20201006

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. Corbett, Lederer and Sutherland JJ.

B E T W E E N:	)	
	)	
UNIFOR LOCAL 200	)	*Anthony F. Dale and Jenna Meguid*, for the Applicant
Applicant	)	
	)	
- and -	)	
	)	
NEMAK OF CANADA CORPORATION and NORMAN L. JENIN	)	, *Michael A. Wills and Nancy Jammu-Taylor*, for the Respondent
	)	
Respondent	)	**Heard at Toronto:** February 7, 2020

REASONS FOR DECISION

D.L. Corbett J.:

[1] Nemak of Canada Corporation makes aluminum engine blocks at its plant in Windsor Ontario. Unifor Local 200 is the bargaining agent for Nemak's employees.

[2] In July 2019, Nemak announced that it would close its Windsor plant in mid-2020. Unifor grieved this decision: it argued that plant closure would violate a promise made by Nemak to produce certain engine blocks at its Windsor plant, a promise it gave in exchange for substantial wage and other concessions from the union.

[3] In a decision dated November 29, 2019, Arbitrator Jesin found that Nemak was not precluded from closing its plant in Windsor if it became uneconomic to operate and then producing the engine blocks elsewhere. Unifor applies to this court to quash the Arbitrator's decision and to uphold its grievance or, alternatively, to remit its grievance back to the Arbitrator for a fresh determination.

[4] For the reasons that follow I would quash the Arbitrator's decision. It turned on an unreasonable inference premised on proposed contract language that was rejected during negotiations. This reasoning is not sound and, in addition, does not take account of the overall context of the contractual negotiations. The traditional reluctance to admit extrinsic evidence of this kind is because it can be misused in precisely the way it was misused here.

[5] In respect to remedy, I would not decide the grievance on the merits, as argued by Unifor. Rather, I would send the case back to the Arbitrator for a decision in accordance with the reasoning of this decision.[1]

Context of the Arbitration

[6] The respondent, Nemak, is an automotive parts manufacturer with affiliated operations in several jurisdictions. The applicant, Unifor, is the bargaining agent for Nemak's employees at its facility in Windsor Ontario. In 2015, Nemak and the Unifor entered into a collective agreement to run until 2019 (the "CA").

[7] Toward the end of 2015, Nemak's Windsor plant management concluded that work for which the Windsor plant then had contracts would run out by 2019. An opportunity arose to take over a General Motors contract that had been received by Nemak's Mexico operations starting around December 2015. This could provide the Windsor plant with sufficient work until 2023.

[8] Chris Taylor, the union President, attended a meeting with Nemak management on February 8, 2016 and saw a slide presentation showing the precarious financial position of the Windsor plant and work projections if the Windsor plant performed the General Motors contract. Mr Taylor was told by Nemak that, to obtain this work at the Windsor plant, Nemak would need Unifor's agreement to extend the CA for another four years (to 2023) with wages frozen and relief from some provisions of the CA (such as terms regarding overtime work). Nemak told Mr Taylor that, in exchange for these concessions, Nemak would promise that work obtained under the General Motors contract would be performed at the Windsor plant.

[9] On February 20, 2016, Nemak sent a draft proposal to Mr Taylor that included the following term:

> Nemak commits to placing [the work under the General Motors contract] in Windsor if the extension Agreement is ratified. Cast Line D [at the Windsor plant] will be fully utilized for the product before any other facility is awarded the same product.

[10] In response, on February 26, 2016, the Union proposed the following language for this term:

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[1] The parties agreed that if the case was remitted below, it should return to the Arbitrator.

> The Company agrees that Cast Line D at [the Windsor factory] is the only facility that is being sourced for these products and further agrees that Cast Line D will be fully utilized for the product before any other facility is awarded the same product.

[11] The Union and Nemak discussed this term. Management was concerned about the "sole source" language proposed by the union if the Windsor plant could not handle the work if volume turned out to be greater than expected. The Union sought a meaningful commitment that, in exchange for the requested concessions, the contract work would be done at the Windsor plant.

[12] Nemak and the Union agreed on an extension to the CA including the following term:

> Nemak commits to placing the [work] in Windsor if the extension Agreement is ratified.
>
> Based on the current volume projections the Company will designate the [Windsor Plant] as the sole source for the… [work]. This assumes that the WAP Cast Line will be able to meet customer demand, delivery and quantity requirements.

[13] Things did not turn out as hoped. General Motors experienced difficulties and orders fell significantly short of projections. Because of the reduced volume of production, Nemak projected a $12 million loss at the Windsor plant in 2019, and losses between $5 million and $9 million in each of 2020 and 2021. Nemak then announced that it would close operations at the Windsor plant in mid-2020. Then Nemak announced that it would move production of the General Motors work to a factory in Mexico and the union filed a grievance for breach of the amended CA.

The Arbitration Award

[14] The Arbitrator dismissed the grievance on the basis that (a) Nemak is not required to continue to operate an uneconomic plant and (b) the "sole sourcing" term permits Nemak to move the General Motors work to another plant if demand is too low to do the work in Windsor.

[15] The first premise of the Arbitrator's decision is reasonable and is grounded in the language of the CA.

[16] In respect to the meaning of the "sole sourcing" term, the Arbitrator reached his conclusion by comparing the language of the union's proposed wording (Feb. 26, 2016) and the final wording agreed between the parties. The Arbitrator found that there were material differences between the proposed language and the final agreed language, and he found that "that change must be given meaning", a meaning he found to include an ability on the part of Nemak to close the Windsor plant and have the work performed in Mexico. It is this aspect of the Arbitrator's decision that is in issue in this application.

Jurisdiction and Standard of Review

[17] This application for judicial review comes to this court pursuant to s.2(1) of the *Judicial Review Procedure Act*, RSO 1990, c. J.1.

[18] The parties agree that the standard of review of the Arbitrator's Award on the issues before this court is reasonableness.[2]

[19] In *Vavilov*, the Supreme Court re-emphasized the importance of a tribunal's reasons in assessing the reasonableness of its decision. This emphasis reinforces an underlying goal of judicial review, which is to enforce the requirements of justification, transparency and intelligibility in administrative decisions:

> ... Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" .... In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons....[3]

[20] *Vavilov* has not supplanted the principle stated in *Newfoundland Nurses*[4] that reasons are to be read generously and are not to be subjected to an atomistic search for minor errors. However, *Vavilov* has made it clear that it is not sufficient for this court to be satisfied that the underlying decision could be justified on facts as found below. A reviewing court must be able to trace the decision-maker's reasoning without encountering fatal flaws in the overarching logic, and the reviewing court must be satisfied that there is a line of analysis within the reasons that reasonably leads to the conclusion reached below.[5]

[21] Where a foundational finding in a tribunal's decision is untenable, in light of the applicable principles of contractual interpretation, the decision cannot stand. This does not mean that every legal error will undermine the decision. But where the tribunal fails to respect a central legal principle of interpretation, and the reasons for decision turn on this failure, there is a fatal flaw in the overarching logic.[6]

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[2] *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65 ("*Vavilov*").
[3] *Vavilov*, para. 86. See also *Scarborough Health Network* v. *Canadian Union of Public Employees, Local 5852*, 2020 ONSC 4577 (Div. Ct.).
[4] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708.
[5] *Vavilov*, paras. 101-102.
[6] *Vavilov*, paras. 101-106.

Misuse of Negotiation History

[22] This case turns on the use the Arbitrator made of one pre-agreement draft of the "sole source" term.

[23] No inference can be drawn that the Union believed the term, as agreed, had a materially different meaning than the term it had proposed previously, let alone the meaning vested in it by the Arbitrator. As a matter of logic, it can be presumed that Unifor would agree to language that it believed came close to or corresponded substantively to its initial position. One might suppose that Nemak must have thought that there was a material difference between the term, as agreed, and the term, as proposed by the union – otherwise it might be reasonable to suppose that Nemak would simply have agreed to the Union's language as initially proposed. However, even that inference would have to be approached with great caution. Proposed terms are not prior versions of a collective agreement and the parties are not legislative draftspersons. The Arbitrator was wrong as a matter of law to find that the differences between one draft and the final version of the contract "must be given meaning". As a matter of fact, the Arbitrator was entitled to weigh the different drafts and final version in the entire context of the negotiations.

[24] Modern principles of contractual interpretation require a tribunal to construe the agreement in context, and this requirement may allow the tribunal to consider the course of negotiations, among other things.[7] But a contextual approach in this case cannot be reduced to the kind of close textual analysis of a contractual term based one prior draft of that term: the context includes the *entire* context, of which the Union's proposal was but a part.

[25] This point is made clear by other aspects of the Arbitrator's decision. The Arbitrator found that a concern that arose respecting the Union's proposed language was the potential inability of the Windsor plant to meet high demand for the work. That is, Nemak expressed its concern that it did not want to be restricted to doing the work at the Windsor plant if that plant was unable to meet demand for product. The Union agreed that, to the extent that the Windsor plant could not meet demand, then work could be done elsewhere.

[26] The Arbitrator found that the parties did not put their minds to what would happen if demand for the work was materially lower than anticipated and that finding is amply supported by the record. This finding runs counter to the Arbitrator's conclusion, apparently drawn solely from misuse of negotiating history, that the terms agreed include an "economic sustainability" term that is not apparent on the face of the term and was broader than the concern actually negotiated about demand exceeding the Windsor plant's capacity.

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[7] *Sattva Capital Corporation* v. *Creston Moly Corp.*, 2014 SCC 65; *Halton Recycling Ltd.* v. *Labourers' International Union of North America, Local 183*, [2019] OLAA No. 56, paras. 17-19; *1079268 Ontario Inc.* v. *Goodlife Fitness Centres Inc.*, 2017 ONCA 12, paras. 24-26, leave to app. dismissed 2017 CanLII 35124.

[27] This was the "context" in which the words were agreed between Nemak and the Union. It is through the prism of this context that the words that were actually agreed should be interpreted. Instead, the Arbitrator narrowed the focus of analysis to a textual comparison between two versions of the language proposed in order to construe the effect of the provision in circumstances that the Arbitrator found were not in the parties' minds when they agreed on the language of the "sole source" term.

[28] It is trite law that the starting place for contractual interpretation is the language agreed by the parties. The Union argues that the plain language of the agreed "sole source" term is that it contains two components.

a. Nemak agrees to place the work at the Windsor plant; and

b. Nemak agrees that Windsor will be the "sole source" for the work, "based on current volume projections" and assuming that the Windsor plant "will be able to meet customer demand, delivery and quantity requirements."

On the plain language of the term, the Union argues, the work must be placed at Windsor, and Windsor will be the sole place the work is done, subject only to the caveat expressed about being able to fulfill demand for the work.

[29] The Union's reading of the term is strengthened by comparing the language originally proposed by Nemak, the language originally proposed by the Union, and the final language agreed. The two original proposals were very close, the primary difference being the use of the phrase "sole source" in the Union's language. The caveat to the "sole source" requirement was to address the need to produce more product than could be made at Windsor.

[30] The Arbitrator was entitled to place the extension agreement within the context of the CA as a whole, of course, including the principles that would apply to plant closure. But this, itself, had to be done contextually. The Union made substantial concessions at Nemak's request. Those concessions were made to avoid plant closure at the end of 2019. The Union bargained for something in return – an assurance that the work would be done at Windsor – and only at Windsor – so long as the Windsor plant could meet demand.

[31] On this reading Nemak must do the work at Windsor if it is going to do the work at all. If volumes for the work fall so far that it is not economic to do the work at all, then Nemak could stop doing the work anywhere. It was for Nemak to protect itself in its contract with General Motors – to receive a contractual assurance of sufficient volume for the work to be economic – and it was for Nemak to do this in the context of the "sole source" promise it made to Unifor in exchange for the concessions it received.

[32] The Arbitrator acknowledged this point indirectly when he found:

> I would add that if the Employer was able to maintain operations by obtaining other contracts, then I would agree that the work under the contract would have to be performed in Windsor, regardless of how little was being produced. (*Award*, p.12)

It is a short step from this observation to a finding that management agreed to do the work at Windsor and to forego the work entirely if volumes rendered it uneconomic, including whatever arrangements could be made to place other work at the Windsor plant. If this short step is not taken, it can be argued, Unifor did not receive much in the way of assurances in exchange for the substantial concessions to which it agreed.

Remedy

[33] During oral argument the court made it clear that it was not persuaded by Unifor's argument that the court should decide the underlying issue if the court granted the application for judicial review. The underlying issue involves a complex matrix of facts, law, and requires interpretation of the CA, as amended by the parties. There is more than one interpretation available on the text of the words agreed between the parties and the context described above. It will be for the Arbitrator to construe the term, in *all* of the surrounding circumstances. This is precisely the task directed to an arbitrator under the *Labour Relations Act*.

[34] Unifor's alternative position on remedy was that the case ought to be remitted back to the Board, for decision by the same Arbitrator, on a schedule to be set by the Arbitrator in consultation with the parties. Nemak agreed that if the application for judicial review was granted, the case ought to be remitted to Arbitrator Jesin. It is so ordered.

Order and Costs

[35] The application is granted, and the Arbitrator's decision is quashed. Unifor's grievance is remitted back to Arbitrator Jesin for decision in accordance with these reasons. Nemak shall pay Unifor's costs of the application in the agreed amount of $5,000, inclusive.

D.L. Corbett J.

I agree: Federer J. per D.L. Corbett J.

Federer J.

I agree:

Sutherland J.

Date of Release: October 6, 2020

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BETWEEN:

Unifor Local 200

Applicant

– and –

Nemak of Canada Corporation and Norman L. Jenin

Respondents

REASONS FOR DECISION

D.L. Corbett J.

Date of Release: October 6, 2020