# Judicial review of arbitral decisions: How much deference is reasonable

***By Adam Beatty***

In *Dunsmuir* the Supreme Court held that labour arbitrators' decisions will generally be reviewed on a standard of reasonableness. In the context of judicial review, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process". The reviewing court must also determine whether the decision under review "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (at para. 47). To be reasonable, a decision must be supported by reasons that can withstand a "somewhat probing analysis". Decisions reviewed according to the standard of reasonableness, which fall within the range of possible, acceptable outcomes, are entitled to deference from the reviewing court.

In *Dunsmuir* the Court went on to hold that:

[deference] does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision making process of adjudicative bodies with regard to both the facts and the law. ... (at para. 48).

Despite this guidance, based on a number of judicial review decisions of arbitral awards, it is not clear that the lower courts have been able to formulate a consistent approach to the level of deference owed under the reasonableness standard. In particular, the Divisional Court has released some decisions which have subjected arbitrators' decisions to a far more exacting and intrusive review than was traditionally seen under the standard of patent unreasonableness. By subjecting arbitral decisions to this intrusive level of review, these decisions are approaching the type of review expected under a standard of correctness.

In *Thames Valley District School Board v. Elementary Teachers' Federation of Ontario, 2011 ONSC 2021*, the Divisional Court was called upon to review the three aspects of the arbitrator's decision: (1) did the arbitrator fail to make findings of fact and credibility; (2) did he apply the incorrect test for harassment; and (3) did he carry out the wrong inquiry by failing to determine if the proven conduct amounted to just cause for discharge.

As a whole, Herman J's decision engaged in an intrusive review of the arbitrator's decision, according it very little deference. For example, Herman J. failed to accord deference to the arbitrator's findings of fact and his articulation of those findings. Emblematic of the intrusive nature of the analysis is her conclusion that the arbitrator applied the incorrect test to determining if harassment had occurred, despite the fact that the jurisprudence has established that this type of question should be reviewed on a standard of reasonableness. Taken as a whole, this level of analysis is reflective of the type of review typically carried out under the standard of correctness.

The decision of Molloy J. in *1425445 Ontario Ltd. (c.o.b. Utilities Kingston) v. International Brotherhood of Electrical Workers, Local 636*, 2010 ONSC 1946 reveals a similar intrusive quality to the decision in *Thames Valley*. Molloy J. was asked to review an arbitrator's determination that three employees who had submitted fake receipts had not engaged in fraudulent behaviour and therefore did not deserve to be terminated.

Here too, despite claiming that the majority of the arbitrator's findings should be reviewed according to the standard of reasonableness, the level of analysis is characteristic of that traditionally carried out under the standard of correctness. Molloy J. engaged in an exhaustive review of the arbitrator's decision challenging her factual findings, her interpretation (and rejection) of the precedential jurisprudence, her characterization of the alleged misconduct and finally, the penalty imposed. Although Molloy J. repeatedly invoked the standard of reasonableness, the depth and content of the analysis are, once again, more appropriate to the standard of correctness.

In the decisions reviewed above, despite ostensibly reviewing the arbitrators' decisions according to the standard reasonableness, the Divisional Court appears to have taken a more intrusive approach than it has in the past. While it may be too early to draw any definitive conclusions it seems that some of the lower court decisions have failed to

heed the warning in *Dunsmuir* that “the move towards a single reasonableness standard does not pave the way for a more intrusive review by courts” (at para. 48).

These two decisions should be contrasted with the dissenting opinion of Swinton J. in *Greater Essex District County School Board v. Ontario Secondary School Teachers’ Federation, District 9*, [2008] O.J. No. 2663 (Ont. Sup. Ct. of Just.) (adopted by the Court of Appeal, at 2009 ONCA 502). At issue here was the proper interpretation of several provisions of the Collective Agreement dealing with “top up pay” during pregnancy leave. In her dissenting opinion, Swinton J. emphasized that the arbitrator's conclusions were “within a range of reasonable outcomes” and that “there was a line of analysis evident throughout” the reasons. Her reasons also acknowledge and build upon the Supreme Court's description of “deference as respect” for the decision-making process. As such, Swinton J. found that the standard of reasonableness was satisfied and the arbitrator's decision should stand.

Swinton's reasons are more reflective of the traditional approach to judicial review of arbitrator's decisions. It is difficult, if not impossible, to reconcile these two divergent approaches. However, it the emergence of a more intrusive approach should not surprise us. In *Dunsmuir* Binnie J. warned that labelling the most deferential standard as “reasonableness” might (wrongly) result in judges re-weighing the “input that resulted in the administrator's decision as if it were the judge's view of “reasonableness” that counts. It is hoped that courts will heed Binnie J.'s warning and follow the approach set out in *Dunsmuir* more consistently in the future.

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