

**SUPREME COURT OF CANADA**

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| **Citation:** Newfoundland and Labrador Nurses’ Union *v.* Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708 | **Date:** 20111215  **Docket:** 33659 |

**Between:**

**Newfoundland and Labrador Nurses’ Union**

Appellant

and

**Her Majesty The Queen in Right of Newfoundland and Labrador, represented by**

**Treasury Board and Newfoundland and Labrador Health Boards Association,**

**on behalf of Labrador-Grenfell Regional Health Authority**

Respondents

**Coram:** McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**  (paras. 1 to 26) | Abella J. (McLachlin C.J. and LeBel, Deschamps, Fish, Rothstein and Cromwell JJ. concurring) |

Newfoundland and Labrador Nurses’ Union *v.* Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708

Newfoundland and Labrador Nurses’ Union *Appellant*

v.

Her Majesty The Queen in Right of Newfoundland and Labrador,

represented by Treasury Board, and

Newfoundland and Labrador Health Boards Association,

on behalf of Labrador‑Grenfell Regional Health Authority *Respondents*

**Indexed as: Newfoundland and Labrador Nurses’ Union *v.* Newfoundland and Labrador (Treasury Board)**

2011 SCC 62

File No.: 33659.

2011:  October 14; 2011:  December 15.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ.

on appeal from the court of appeal for newfoundland and labrador

*Administrative law — Role and adequacy of reasons — Procedural fairness — Whether reasons satisfy Dunsmuir requirements for “justification, transparency and intelligibility”.*

The union disputed an arbitrator’s award which involved the calculation of vacation benefits. The issue the arbitrator had to decide was whether time as a casual employee could be credited towards annual leave entitlement if that employee became permanent. In his decision, the arbitrator concluded that it was not to be included in calculating the length of vacation entitlements. On judicial review, the arbitrator’s reasons were found to be insufficient and therefore unreasonable and the decision was set aside. The majority of the Court of Appeal agreed with the arbitrator.

*Held*: The appeal should be dismissed.

*Dunsmuir* confirmed that in determining whether a decision is reasonable, the inquiry for a reviewing court is about “justification, transparency and intelligibility”. This represents a respectful appreciation that a wide range of specialized decision‑makers render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decision that are often counter‑intuitive to a generalist. *Dunsmuir* does not stand for the proposition that the “adequacy” of reasons is a stand‑alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result. It is a more organic exercise — the reasons must be read together with the outcome, and serve the purpose of showing whether the result falls within a range of possible outcomes. Reasons need not include all the arguments or details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result. If the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met. It is an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness. Any challenge to the reasoning/result of the decision should be made within the reasonableness analysis. Here, the reasons showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes.

**Cases Cited**

**Referred to:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Service Employees’ International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382; *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, rev’d in part 2011 SCC 57, [2011] 3 S.C.R. 572; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

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Bryden, Philip.  “Standards of Review and Sufficiency of Reasons: Some Practical Considerations” (2006), 19 *C.J.A.L.P.*191.

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APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Cameron, Welsh and Mercer JJ.A.), 2010 NLCA 13, 294 Nfld. & P.E.I.R. 161, 908 A.P.R. 161, 190 L.A.C. (4th) 385, 2010 CLLC ¶220‑017, [2010] N.J. No. 63 (QL), 2010 CarswellNfld 49, reversing a decision of Orsborn J., 2008 NLTD 200, 283 Nfld. & P.E.I.R. 170, 873 A.P.R. 170, [2008] N.J. No. 364 (QL), 2008 CarswellNfld 332. Appeal dismissed.

*David G. Conway* and *Tracey L. Trahey*, for the appellant.

*Stephen F. Penney* and *Jeffrey Beedell*, for the respondents.

The judgment of the Court was delivered by

1. Abella J. — The transformative decision of this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, explained that the purpose of reasons, when they are required, is to demonstrate “justification, transparency and intelligibility” (para. 47). The issues in this appeal are whether the arbitrator’s reasons in this case satisfied these criteria and whether the reasons engaged procedural fairness.
2. The dispute underlying the arbitrator’s award involved the calculation of vacation benefits. The arbitrator concluded that under the collective agreement, the grievors’ time as casual employees was not to be included in calculating the length of their vacation entitlement when they became permanent employees.
3. The definition of “Employee” in the collective agreement includes all paid employees, including casual employees. Casual employees are defined in Article 2.01(b) as employees who work on an “occasional or intermittent basis”. They are under “no obligation . . . to come [to work] when they are called” and the Employer, in turn, has “no obligation” to call them.
4. Notably, that definitional provision states that while casual employees are generally entitled to the benefits of the collective agreement, they are *expressly excluded* from a number of benefits, including the vacation entitlement calculations applicable to permanent employees under Article 17. Instead, they receive 20 percent of their basic salary in lieu.
5. The issue the arbitrator had to decide was whether time as a casual employee could be credited towards annual leave entitlement if that employee became permanent. In the 12-page decision, the arbitrator outlined the facts, the arguments of the parties, the relevant provisions of the collective agreement, a number of applicable interpretive principles, and ultimately agreed with the Employer that the time an employee spent as a casual could not be used in calculating that employee’s length of service towards vacation entitlement when he or she became a permanent, temporary or part-time employee.
6. The arbitrator reasoned that casual employees, defined in Article 2.01(b), work on an occasional, intermittent basis, and are not required to come to work even when called. Article 2.01(b) also sets out a list of benefits to which casual employees are *not* entitled. In lieu of those benefits, casual employees receive the benefit of 20 percent of their basic salary. One of the benefits from which they are expressly excluded and for which they receive the additional 20 percent is Article 17, which determines the length of vacation time to which an employee is entitled.
7. These points, it seems to me, provided a reasonable basis for the arbitrator’s conclusion, based on a plain reading of the agreement itself.
8. On judicial review, the parties acknowledged that the standard of review was reasonableness. The chambers judge was of the view that such a review is based not only on whether the outcome falls within the range of possible outcomes,in accordance with *Dunsmuir*, but also requires that the reasons set out a line of analysis that reasonably supports the conclusion reached. The chambers judge concluded that the arbitrator’s reasons required “more cogency” and that his conclusion was “unsupported by any chain of reasoning that could be considered reasonable”. They were, in short, insufficient. As a result, the chambers judge found the result to be unreasonable and set it aside.
9. The majority in the Court of Appeal overturned the decision of the chambers judge, concluding that while “a more comprehensive explanation” would have been preferable, the reasons were “sufficient to satisfy the *Dunsmuir* criteria” of “justification, transparency and intelligibility”. In their words:

. . . reasons must be sufficient to permit the parties to understand why the tribunal made the decision and to enable judicial review of that decision. The reasons should be read as a whole and in context, and must be such as to satisfy the reviewing court that the tribunal grappled with the substantive live issues necessary to dispose of the matter.

1. The dissenting judge agreed with the chambers judge. In her view, the arbitrator’s reasons disclosed no line of reasoning which could lead to his conclusion. As a result, there were “no reasons” to review.

Analysis

1. It is worth repeating the key passages in *Dunsmuir* that frame this analysis:

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 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.

. . . What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It 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. The notion of deference “is rooted in part in respect for governmental decisions to create administrative bodies with delegated powers” . . . . We agree with David Dyzenhaus where he states that the concept of “deference as respect” requires of the courts “not submission but a respectful attention to the reasons offered or which could be offered in support of a decision” . . . . [Emphasis added; citations omitted; paras. 47-48.]

1. It is important to emphasize the Court’s endorsement of Professor Dyzenhaus’s observation that the notion of deference to administrative tribunal decision-making requires “a respectful attention to the reasons offered or which could be offered in support of a decision”. In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:

“Reasonable” means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal’s proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added.]

(David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

See also David Mullan, “*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let’s Try Again!” (2008), 21 *C.J.A.L.P.* 117, at p. 136; David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law* (5th ed. 2009), at p. 380; and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63.

1. This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for “justification, transparency and intelligibility”. To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. That was the basis for this Court’s new direction in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir*’s conclusion that tribunals should “have a margin of appreciation within the range of acceptable and rational solutions” (para. 47).
2. Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the “adequacy” of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at “the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes” (para. 47).
3. In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show “respect for the decision-making process of adjudicative bodies with regard to both the facts and the law” (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
4. Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees’ International Union, Local No. 333 v. Nipawin District Staff Nurses Assn*., [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
5. The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator’s decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay “respectful attention” to the decision-maker’s reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.
6. Evans J.A. in *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, explained in reasons upheld by this Court (2011 SCC 57, [2011] 3 S.C.R. 572) that *Dunsmuir* seeks to “avoid an unduly formalistic approach to judicial review” (para. 164). He notes that “perfection is not the standard” and suggests that reviewing courts should ask whether “when read in light of the evidence before it and the nature of its statutory task, the Tribunal’s reasons adequately explain the bases of its decision” (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:

When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties’ submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]

1. The Union acknowledged that an arbitrator’s interpretation of a collective agreement is subject to reasonableness. As I understand it, however, its argument before us was that since the arbitrator’s reasons amounted to “no reasons”, and since the duty to provide reasons is, according to *Baker* *v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, a question of procedural fairness,a correctness standard applies.
2. Procedural fairness was not raised either before the reviewing judge or the Court of Appeal and it can be easily disposed of here. *Baker* stands for the proposition that “in certain circumstances”, the duty of procedural fairness will require “some form of reasons” for a decision (para. 43). It did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness. In fact, after finding that reasons were required in the circumstances, the Court in *Baker* concluded that the mere notes of an immigration officer were sufficient to fulfil the duty of fairness (para. 44).
3. It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, “courts must be careful not to confuse a finding that a tribunal’s reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it” (“Standards of Review and Sufficiency of Reasons: Some Practical Considerations” (2006), 19 *C.J.A.L.P.* 191, at p. 217; see also Grant Huscroft, “The Duty of Fairness: From Nicholson to Baker and Beyond”, in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 115, at p. 136).
4. It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.
5. The arbitrator in this case was called upon to engage in a simple interpretive exercise: Were casual employees entitled, *under the collective agreement*, to accumulate time towards vacation entitlements? This is classic fare for labour arbitrators. They are not writing for the courts, they are writing for the parties who have to live together for the duration of the agreement. Though not always easily realizable, the goal is to be as expeditious as possible.
6. As George W. Adams noted:

The hallmarks of grievance arbitration are speed, economy and informality. Speedy dispute resolution is important to the maintenance of industrial peace and the ongoing economic needs of an enterprise. Adjudication that is too expensive contributes to industrial unrest by preventing the pursuit of meritorious grievances that individually involve small monetary values but collectively constitute a weathervane of employee satisfaction with the rules negotiated. The relative informality of grievance arbitration is facilitated by much less stringent procedural and evidentiary rules than those applicable to court proceedings. Informality permits direct participation by laymen, enhances the parties’ understanding of the system and minimizes potential points of contention permitting everyone to focus on the merits of a dispute and any underlying problem. . . .

. . . appeal to a higher authority by way of judicial review may be needed to correct egregious errors, to prevent undue extension of arbitral power and to integrate the narrow expertise of arbitrators into the general values of the legal system. The very existence of judicial review can be a healthy check on the improper exercise of arbitral responsibility and discretion. [Emphasis added.]

(*Canadian Labour Law* (2nd ed. (loose-leaf)), vol. 1, at §§4.1100 to 4.1110)

1. Arbitration allows the parties to the agreement to resolve disputes as quickly as possible knowing that there is the relieving prospect not of judicial review, but of negotiating a new collective agreement with different terms at the end of two or three years. This process would be paralyzed if arbitrators were expected to respond to every argument or line of possible analysis.
2. In this case, the reasons showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes. I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant:  David G. Conway, St. John’s.

Solicitors for the respondents:  Stewart McKelvey, St. John’s.