Court of Queen's Bench of Alberta

Citation: Shepherd's Care Foundation v. Alberta Union of Provincial Employees, 2011 ABQB 281

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In the Matter of the *Labour Relations Code*, R.S.A. 2000, c. L-1, As Amended

And in the Matter of a Collective Agreement Between the Alberta Union of Provincial Employees and Shepherd's Care Foundation

And in the Matter of an Award Dated 31 May 2010 by an Arbitration Panel Appointed Pursuant to the Collective Agreement with Respect to a Grievance

Between:

Shepherd's Care Foundation

Applicant

- and -

Alberta Union of Provincial Employees

Respondent

Reasons for Judgment
of the
Honourable Madam Justice S.J. Greckol

I. Introduction

[1] The Alberta Union of Provincial Employees ("AUPE") represents auxiliary nursing care employees at the Shepherd's Care Foundation ("SCF"), Millwoods Care Centre (Millwoods). The grievor, Blanca Tobar, has been employed by SCF since June 9, 1987. For a time, she was in

a regular full-time position and participated in the Local Authorities Pension Plan (LAPP)). Later, she occupied a regular part-time position, working 27.125 hours per week. During that period, she was not eligible to participate in the LAPP.

[2] On February 2, 2007, Ms. Tobar temporarily assumed a .80 full-time equivalent (FTE) position, working 31 hours per week, as a replacement for an employee on disability leave.

[3] Article 24.01 of the collective agreement between the parties (Agreement) provided that SCF would contribute to the LAPP for regular full-time employees in accordance with the *LAPP Regulation*, AR 366/93 under the *Public Sector Pension Plans Act*, R.S.A. 2000, c. P-41. The Agreement defined a regular full-time employee as an employee who worked 38.75 hours per week, while s. 2(1)(u) of the *LAPP Regulation* defines full-time basis as meaning "... a basis where the regularly scheduled hours of work in the employment are not fewer than 30 hours per week."

[4] SCF did not permit Ms. Tobar to participate in the LAPP while she was in the temporary FTE position as it took the view that Article 24.01 (and other relevant provisions) of the Agreement required that she be a regular full-time employee to be eligible and LAPP guidelines required that she be a permanent employee to be eligible. Since her permanent part-time position was less than 30 hours per week and she was currently in a temporary position, she did not qualify for participation.

[5] Ms. Tobar grieved, arguing that Article 24.01 must be interpreted in a manner consistent with the *LAPP Regulation*. AUPE took the view that Ms. Tobar was a regular employee in a temporary position working full-time hours as required by the *LAPP Regulation* and, therefore, should have been eligible to participate in the LAPP. The Arbitration Board (Board) agreed with AUPE.

[6] The SCF now seeks judicial review of the Board's decision.

II. Facts

[7] The following were facts agreed to by the parties at the arbitration hearing:

(a) At all relevant times, there was a collective agreement between AUPE, Local 47, Chapter 014 and SCF Millwoods, with a term of September 1, 2006 to August 31, 2009. At all times, the grievor was covered by the collective agreement.

(b) AUPE is the union which represented auxiliary nursing care employees at SCF Millwoods. SCF was the employer.

(c) SCF Millwoods is a continuing care facility and is an approved hospital. As an approved hospital, it participates in the LAPP, which is a defined benefit pension plan. For those who are eligible, LAPP requires contributions by both an employer and employee.

(d) The grievor is Blanca Tobar. On June 9, 1987, Ms. Tobar began employment with SCF Millwoods. Subsequently, Ms. Tobar became a regular full-time Health Care Aide (HCA). She participated in LAPP after serving a qualifying period.

(e) The regular hours of work for a full-time HCA at SCF Millwoods were 38.75 hours per week and 77.50 regular hours every two weeks. Ms. Tobar worked such regular hours when she was a full-time HCA.

(f) On October 10, 2001, Ms. Tobar applied for and was accepted into a posted regular part-time .70 FTE HCA position. In that position, she worked seven 7.50 regular hour shifts in a two week period, working 54.25 regular hours every two weeks and 27.125 regular hours every week. Participation in LAPP was discontinued when Ms. Tobar went into the .70 FTE position.

(g) On February 2, 2007, Ms. Tobar applied for and was accepted into a posted [temporary] .80 FTE HCA vacancy. In that capacity, she worked 62 regular hours in a two week period or 31 regular hours in a week. In that capacity, Ms. Tobar temporarily replaced another employee who went on disability leave.

(h) That employee had been a regular full-time employee of SCF Millwoods, and after serving a qualifying period, she had participated in LAPP. For some time before that employee went on disability (short-term and then long-term), she occupied a regular part-time .80 FTE position and worked 62 regular hours every two weeks or 31 regular hours per week. She participated in LAPP when she was in that [regular part-time] position and both she and SCF contributed to LAPP. That employee did not return to work from disability.

(i) In about April 2007, Ms. Tobar approached SCF Millwoods Human Resources about participating in LAPP. Ms. Tobar was advised that she could not participate in LAPP, as she held a temporary position (emphasis added).

(j) Until May 2009, Ms. Tobar and SCF did not make any contributions to LAPP for her when she was a .80 FTE HCA.

(k) AUPE filed a grievance on May 15, 2007. On October 5, 2007, the grievance was referred to arbitration.

(l) Other than the provisions in the collective agreement, in 2007 and 2008 SCF Millwoods did not have any policy about participation in LAPP.

(m) In 2009, SCF implemented a policy which permitted eligible employees, other than full-time, to participate in LAPP. As a result of this policy, on May 22, 2009, Ms. Tobar began participating in LAPP. Both Ms. Tobar and SCF have been making contributions to LAPP since May 22, 2009.

[8] In its decision dated May 31, 2010, the Board identified the issues before it as being whether the Agreement conflicted with the statutory provisions concerning participation in the LAPP; if so, which provisions governed; and whether the grievor had temporary status which precluded her from participating in the LAPP. The majority concluded that Ms. Tobar was entitled to participate in the LAPP between February 2007 and May 2009. It directed that she be made whole and remitted the question of how best to achieve that to the parties to negotiate, reserving jurisdiction if the parties were unable to find a solution that approximated her financial loss. The employer representative dissented, holding that Ms. Tobar was not eligible to participate in the LAPP as she was not employed on a "continuous basis" when she temporarily occupied the FTE HCA position.

III. Issues

[9] The issues to be determined are:

1. What is the standard of review to be applied to the Board's decision?

2. Did the Board's decision meet the appropriate standard of review?

IV. Legislation

[10] The *LAPP Regulation* provides in part:

2(1) In these plan rules,

. . .

(k) "continuous basis" means, in relation to employment, a basis where no date or event, other than by reference to the attainment of the mandatory retirement age, if any, fixed with reference to the

employment, has been established for the termination of the employment;

. . .

(p) "employee" means

(i) a person employed on a full-time continuous basis by a local authority or by a public board, commission or other public body listed in Part 1 of Schedule 2,

(ii) a person who is employed by a body referred to in subclause (I) under a contract of service if that contract provides either for his employment on a full-time but not a continuous basis or alternatively his employment other than on a full-time basis where

(A) the regularly scheduled hours of work are not fewer than 14 hours per week or 728 hours per year,

(B) the employment is on a continuous basis, and

(C) the employer, pursuant to his established policy for pension coverage of persons or classes of persons employed by him, applies to the Minister for the person's participation in the Plan,

. . .

(q) "employer" means a local authority or other person who employs a participant or otherwise occupies an employer or former employer relationship in relation to a person who is or was a participant and, in relation to a person who is a participant by virtue of being a member of a corporation, includes that corporation, but does not include a bargaining agent that employs a participant who is on period on loan to it;

. . .

(u) <u>"full-time basis" means, in relation to an employment, a basis where the regularly scheduled hours of work in the employment are not fewer than 30 hours per week</u>; [emphasis added.]

3. . . .

(6) Before an employer makes an application under section 2(1)(p)(ii), he shall formulate in writing a policy for determining, subject to that provision, the basis on which persons are eligible to become employees by virtue of that provision, and shall, on being requested to do so by the Minister, furnish the Minister forthwith with a copy of that policy.

10. Subject to sections 11 and 11.1, the following are the persons who are to participate in the Plan:

(a) all the employees of a body that

(i) was an employer immediately before January 1, 1994, and...

11.1(1) Subject to subsection (2), an employer may require that an employee, before becoming a participant, complete a period of service with the employer.

(2) The period of probationary service must not exceed one year less the aggregate of

(a) any previous period of service with the employer, and

(b) a period of service with another employer immediately preceding the service with the employer.

IV. Analysis

A. Standard of Review

[11] SCF contends that the issue before the Board involved interpretation of the *LAPP Regulation*, promulgated pursuant to the *Public Sector Pensions Act*, and certain provisions of the Agreement. It maintains that the main question was one of general law so that the correctness standard of review applies, no deference should be granted, and the decision should be quashed because it is incorrect. Alternatively, if the reasonableness standard applies, SCF says that the decision was not reasonable.

[12] AUPE contends that the issue before the Board was fundamentally one of interpretation of the Agreement and a statutory enactment closely connected to it, so that the standard of review to be applied is one of reasonableness. It maintains that the decision is reasonable. Alternatively, if the correctness standard applies, AUPE says that the decision was correct.

[13] In ***Dunsmuir v. New Brunswick***, 2008 SCC 9 at para. 62, [2008] 1 S.C.R. 190, Bastarache and LeBel JJ., for the majority, identified a new analytical approach for determining

the appropriate standard to apply on review or appeal from the decision of an administrative tribunal. First, the court is to ascertain whether existing jurisprudence already has satisfactorily determined the degree of deference to be accorded with regard to a particular category of question. Second, if that inquiry proves unfruitful, the court must proceed to a full standard of review analysis of the factors set out in ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982.

[14] In ***Smith v. Alliance Pipelines Ltd.***, 2011 SCC 7 at para. 26, Fish J., for the majority, summarized the categories of questions which attract either the correctness or reasonableness standard of review:

> Under ***Dunsmuir***, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law" that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise (***Dunsmuir***, at para. 60 citing ***Toronto (City) v. C.U.P.E., Local 79***, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or vires" (paras. 58-61). On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (para. 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras. 51 and 53-54).

[15] Existing case law has established that the reasonableness standard applies to a labour arbitrator's interpretation of the terms of a collective agreement: ***Alberta v Alberta Union of Provincial Employees***, 2008 ABCA 258, 433 AR 159; ***United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Bantrel Constructors Co***, 2009 ABCA 84, 448 AR 194; ***Alberta Union of Provincial Employees v. Alberta***, 2010 ABCA 147, 194 L.A.C. (4th) 1.

[16] The issues before the Board in the present case involved an interplay between the Agreement and the *LAPP Regulation*. The question is whether that attracts a different standard.

[17] In ***Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79***, 2003 SCC 63, [2003] 3 S.C.R. 77 (***Toronto (City)***), the court referred to the following statement made by Cory J. for the majority in ***Toronto (City) Board of Education v. O.S.S.T.F., District 15***, [1997] 1 S.C.R. 487 at para. 39,:

> It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. The findings of a board pertaining to the interpretation of a statute or the common law are generally

> reviewable on a correctness standard... . An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result. [Emphasis added.]

[18] The issue before the arbitrator in ***Toronto (City)*** involved consideration of the doctrines of *res judicata* and abuse of process. The court held at para. 15 that the application of those rules, doctrines and principles was outside the sphere of the labour arbitrator's expertise and, as a result, the arbitrator had to correctly answer the question of law raised.

[19] More recently, in ***Calgary (City) v. International Assn. of Fire Fighters, Local 255***, 2008 ABCA 77, 429 A.R. 235, the Court of Appeal agreed with the chambers judge's selection of correctness as the standard of review to apply to an arbitration board's decision that firefighters could maintain their employment status while collecting permanent disability benefits under the Firefighters Supplementary Pension Plan (FSPP), a plan created to supplement the LAPP by bridging a certain age gap and by providing enhanced benefits. The collective agreement in that case expressly stated that the FSPP was incorporated by reference and formed part of the collective agreement. The chambers judge concluded that the arbitration board was not merely interpreting the collective agreement, but also was dealing with pension issues, including the interplay of pensions and the *Income Tax Act*. She considered those issues to involve questions of law outside the arbitration board's expertise.

[20] The union in ***Calgary (City)*** relied on ***Bisaillon v. Concordia University***, 2006 SCC 19, [2006] 1 S.C.R. 666, arguing that it stood for the proposition that where a pension plan is incorporated into a collective agreement, it falls within the jurisdiction of the arbitrator and, therefore, is within the arbitrator's expertise. The Court of Appeal distinguished ***Bisaillon*** on the basis that that case involved an issue of jurisdiction only and a standard of review analysis was not undertaken. Also, the governing legislation in that case was fundamentally different. The Quebec *Labour Code* gave arbitrator's the power to "interpret and apply any Act or regulation to the extent necessary to settle a grievance," whereas the Alberta *Labour Relations Code* does not grant any similar power to arbitrators, suggesting a less deferential standard when reviewing an arbitrator's decision regarding interpretation of external statutes .

[21] The Court of Appeal in ***Calgary (City)*** referred to ***Trent University Faculty Assn. v. Trent University*** (1997), 35 O.R. (3d) 375 (C.A.), in which the Ontario Court of Appeal determined that despite the extended powers granted to arbitrators under the Ontario *Labour Relations Act*, a pension plan question relating to contribution holidays was not within the arbitrator's expertise and, therefore, should be reviewed on a correctness standard reasoning at p. 387 that:

> Contribution holidays and similar issues of pension law raise a hybrid of trust law and contract law questions under the umbrella of a statutory regime entirely outside labour relations legislation. Although the pension plan was incorporated by reference into the collective agreement in this case, it is an external stand-alone document and its interpretation is not a core part of labour arbitration

> jurisprudence or collective bargaining law. Indeed, a body of pension law has grown up independently of ordinary arbitration jurisprudence. In short, a labour arbitration board has no particular expertise on the issue of contribution holidays and the court is as well suited and perhaps better suited to decide this issue.

[22] The Court of Appeal in ***Calgary (City)*** at para. 21 held that the chambers judge was correct to conclude that the expertise of the arbitration board relative to that of the court regarding the questions at issue warranted little deference as the appeal before it involved clear questions of law, the Alberta *Labour Relations Code* gave even fewer powers to an arbitrator than the Ontario legislation, and there was no evidence that the arbitration board had any expertise regarding the interplay of pension plans and the *Income Tax Act*.

[23] Unlike the situation in ***Calgary (City)***, in which the primary interpretative task centred on the pension plan (*albeit* the plan was incorporated into the collective agreement), in the present case, the focus of the Board was on ascribing a meaning to Article 24.01 of the Agreement. In my view, that is not a question of law of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker so as to attract a correctness standard: ***Toronto (City)*** at para. 62. The Board's interpretation of article 24.01 took into consideration the eligibility requirements in the *LAPP Regulation*. However, SCF did not raise an argument as to the meaning of the *LAPP Regulation* provisions, only their effect on the Agreement. Interpretation of the provisions of the Agreement is a subject that falls within the home territory of the Board.

[24] The need to identify whether it is the language of the collective agreement or of the pension plan which is in issue in order to ascertain the appropriate standard of review is supported by two decisions of the New Brunswick Court of Appeal, both of which were issued after arguments were made in this case.

[25] In ***Bowater Maritimes Inc. v. Communications, Energy and Paperworkers Union, Locals 117, 146, 164 and 263***, 2011 NBCA 22, the issue was the status of company employees in terms of the company pension plan after the company announced the closure of its facility. The arbitrator agreed with the union that the employees continued to accrue pensionable service based on a 36-month recall provision in the parties' collective agreement, finding that there was nothing in the collective agreement to support the contrary position taken by the company. The chambers judge applied the correctness standard and held that the arbitrator had erred. Her decision was based on an interpretation of the pension plan itself, which she found lay outside the arbitrator's expertise.

[26] On appeal, the company took the position that as labour arbitrators lack expertise in the area of pension law, their related decisions are owed no deference, relying on a line of cases including ***Calgary (City)***; ***Trent University Faculty Association*** and ***Saint John (City) v. Saint John Fire Fighters' Association, International Association of Fire Fighters, Local 771***, 2010 NBQB 159, 361 N.B.R. (2d) 50 (the latter of which was under appeal at the time).

[27] The Court of Appeal noted at para. 20 that the arbitrator had "dealt with the ultimate issue in terms of interpreting the provisions of the collective agreements and pension plans as interconnected or interlocking documents." The Court of Appeal rejected the suggestion that it take a bifurcated approach to the application of the deference doctrine, explaining at paras. 21 and 22:

> Applying ***Bisaillon v. Concordia University***, 2006 SCC 19, [2006] 1 S.C.R. 666, we know that when a pension plan is incorporated into a collective agreement, grievance arbitrators possess the jurisdiction to deal with both. The question remains, however, whether they possess a relative expertise when it comes to interpreting the provisions of the Pension Plans. The answer to that question depends upon the context in which the pension issue arises. This is not a case where the pension plan applies to both unionized and non-unionized workers and, hence, the need for consistency in interpretation is a valid consideration. This is not a case where the arbitrator is being asked to decide a discrete issue of pension law involving questions of general contract law or trust law. This is not a case dealing with the registration, regulation, administration or termination of a pension plan as referred to in Ari N. Kaplan, *Pension Law* (Toronto: Irwin Law Inc., 2006), at pp. 8 and 9. Finally, this is not a case where the labour arbitrator is being called on to interpret an "external statute" as was the case in ***Saint John (City) v. Saint John Fire Fighters' Association, International Association of Fire Fighters, Local 771***. I appreciate why the application judge chose the correctness standard. The jurisprudence reflects a hesitancy to grant deference to administrative decision-makers when it comes to pension issues. On point is ***Calgary (City) v. International Association of Fire Fighters (Local 255)*** in which the pension plan issue also involved consideration of the *Income Tax Act* and *Regulations*. That is why that case is clearly distinguishable.
>
> This is not a case where the arbitrator can look to the pension plans as external stand-alone documents. This is not a case where the pension issue involves consideration of issues outside the deemed expertise of labour arbitrators and traditionally decided by the courts. This is a case where the arbitrator must look to two contracts to determine the effect of a mill closure on status as an employee and as a member of the pension plan. This is a case where the arbitrator is being asked and is obligated to interpret two interrelated contracts and to see whether the presumption of consistency has been displaced. The arbitrator's deemed expertise in regard to the interpretation of collective agreements extends to negotiated pension contracts which the parties have chosen to incorporate into the collective agreement. The question of whether an employee is still an employee and the question of whether the employee is still a member of a pension plan do not invite consideration or application of a different expertise or skill set. For these reasons, reasonableness is the proper standard of review.

[28] In ***Saint John (City) v. Saint John Fire Fighters' Assn.***, 2011 NBCA 31, the City appealed a decision of the chambers judge upholding a determination by the arbitration board that certain City firefighter who had been granted permanent disability pensions had not lost their employment status. The chambers judge applied a standard of reasonableness to the board's interpretation of the collective agreement and a standard of correctness to its interpretation of the applicable pension legislation.

[29] The Court of Appeal acknowledged that Supreme Court of Canada jurisprudence required that a reviewing court determine whether the external statute involved was closely connected to the arbitration board's functions and was one with which the board had familiarity. It concluded that labour arbitrators in New Brunswick were not regularly called on to interpret provisions of the pension legislation at issue and, therefore, did not have greater expertise than the court in that regard. It applied a correctness standard.

[30] In my view, the Board's decision here, focussed as it was on interpretation of the Agreement, is one that must be reviewed based on the reasonableness standard. There was no dispute between the parties about the meaning of the LAPP *Regulation*.

[31] According to the majority in ***Dunsmuir*** at paras. 47:

> 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.

B. Reasonableness of the Board's Decision

[32] The Board outlined the arguments of the union and SCF.

[33] SFC's argument, in summary, is that:

(a) There was a two-part test for LAPP eligibility under Article 24.04 of the Agreement. First, the employee had to be a regular full-time employee as defined in the Agreement. Second, if the employee met that criteria, the *LAPP Regulation* determined whether the employee was eligible to participate in the LAPP. Article 24.01 was SCF's policy on participation in the LAPP.

(b) A full-time employee was one who worked 38.75 hours per week. Ms. Tobar did not fit into that category in either her temporary .80 FTE position or in her regular .70 FTE position.

(c) When Ms. Tobar went into the .80 FTE position, she was not working on a regular or "continuous basis" as she was in a temporary position.

(d) Not allowing her to participate in the LAPP when she was in the temporary .80 FTE position was in compliance with Article 24.01 and with the management rights set out in Article 5.

[34] The Board began its analysis by considering the statutory and contractual provisions governing pension participation in the SCF workplace. It noted that SCF is an approved hospital pursuant to the *Hospitals Act*, R.S.A. 2000, c. H-12 and therefore a participating employer in the LAPP. The LAPP is established and governed by Schedule 1 of the *Public Sector Pensions Plan Act* and the *LAPP Regulation*.

[35] The Board observed that s. 10 of the *LAPP Regulation* mandates that all employees of participating employers must participate in the Plan, but there is an overriding exception in relation to employees completing probationary service (s. 11(1)(j)). It noted that the term "employee" is defined in s. 2(1)(p) of the *LAPP Regulation* as meaning a person employed on a "full-time continuous basis" or someone who does not fall into that category but who works no fewer than 14 hours per week and who falls within the employer's policy for pension coverage. It noted that "full-time basis" is defined in s. 2(1)(u) of the *LAPP Regulation* as meaning , "in relation to employment... a basis where the aggregate of the regularly scheduled hours of work in that employment are not fewer than 30 hours per week." Section 2(1)(k) of the *LAPP Regulation* defines "continuous basis" as meaning, "in relation to employment... a basis where no date or event, other than by reference to the attainment of the mandatory retirement age... has been established for the termination of the employment."

[36] The Board referred to the *LAPP Pension e-guide*, an electronic resource for participating employers published on the LAPP website, which stated that membership in the LAPP was "mandatory for full-time, permanent employees except those who are specifically excluded from membership," and that "[t]o be full-time for the purposes of determining membership in the Plan, regularly scheduled hours of work must be not fewer than 30 hours per week...over the course of an entire service year... ." The *e-guide* further provided that "[t]o be permanent for the purposes of determining membership in the Plan, there must be no fixed date or event that has been established for the end of the employment. ..."

[37] The Board then set out the following provisions of the Agreement defining the terms "continuous employment" (Article 2.05) and "employee" (Article 2.06):

2.05 "Continuous Employment" shall mean the period of uninterrupted employment within the Bargaining Unit.

2.06 "Employee" shall mean a person covered by this Collective Agreement and employed by the Employer. At the time of hire the employment status of each Employee shall be determined in accordance with the following:

(a) "Regular Employee" is one who works on a full-time or part-time basis on regularly scheduled shifts of a continuing nature.

(i) "Full-time Employee" is one who is regularly scheduled to work the full specified hours in the "Hours of Work" Article of this Collective Agreement;

(ii) "Part-time Employee" is one who is regularly scheduled for less than the regular hours specified in the "Hours of Work" article of this Collective Agreement.

(...)

(c) "Temporary Employee" is one who is hired on a temporary basis for a full-time or part-time position:

(i) for a specific job of more than three (3) months but less than six (6) months; or

(ii) to replace a full-time or part-time Employee who is on approved leave of absence for a period in excess of three (3) months; or

(iii) to replace a full-time or part-time Employee who is on leave due to illness or injury where the Employee has indicated that the duration of such leave will be in excess of three (3) months;

Alteration of employment status thereafter will be regulated by the terms of this Collective Agreement.

[38] The Board took into consideration that Article 11.01 of the Agreement set the regular hours of work for full-time employees at seven and three-quarters consecutive hours per day or 38 ¼ hours per week averaged over a complete shift cycle.

[39] It referred to Article 10 of the Agreement, governing "Appointments, Vacancies and Promotions:"

10.01 The Employer shall post notices of all vacancies required to be filled for not less than seven (7) calendar days in advance of filling the vacancy. Preference shall be given to current bargaining unit Employees.

The Posting shall contain the following information:

(a) qualifications and competencies required;

(b) employment status (Regular, Temporary, Casual).

. . .

> 10.05 A regular Employee who applies for and is successful on a temporary posting shall maintain her status as a regular Employee. A casual Employee who applies for and is successful for a temporary position shall receive all entitlements and benefits applicable to a temporary Employee. At the completion of the temporary term, the regular Employee shall return to her former position. At the completion of her temporary term, the casual Employee shall resume the normal terms and conditions of employment applicable to a casual Employee.

[40] The Board considered Article 24.01 of the Agreement, which stated: "The Employer will contribute to the Local Authorities Pension Plan for Regular Full-time Employees in accordance with the regulations of the Plan." The Board noted that the phrase "in accordance with the regulations of the Plan" was added to that article in 2006, late in the bargaining that produced the Agreement.

[41] The Board summarized the facts, analysed them in relation to the Agreement, and found that Ms. Tobar was entitled to participate in the LAPP during the period in dispute. It disagreed with SCF's assertion that the statutory rules on pension participation were fluid and allowed it the freedom to depart from those rules, concluding:

> There is nothing apparent to us in the *Regulation* that allows an Employer to treat continuous, permanent, non-probationary employees working more than 30 hours per week as ineligible for LAPP. Section 10 of the *Regulation* uses strong mandatory language to say that the enumerated categories of employees "are to participate in the Plan." There is no provision for an employer to "opt in" to the LAPP for such employees, as there is for employees working between 14 and 30 hours per week. It is therefore difficult to see how Article 24.01 of the Agreement could be allowed to have effect if it were truly in conflict with the *Regulation*.
>
> We find, however, that Article 24.01 of the Agreement is not in conflict with the *Regulation.* It is a truism that collective agreement interpretations that comply with legislation should generally be preferred over interpretations that do not, and we find that Article 24.01 properly interpreted adopts the eligibility rules of the *Regulation*...

[42] The Board did not accept SCF's position that a full-time employee for purposes of Article 24.01 of the Agreement was one who worked 38.75 hours per week. It found that while capitalization of the terms "Regular Employee" and "Full-time Employee" in Article 24.01 raised a presumption that those terms were to be interpreted as defined in Article 2.06 of the Agreement, thereby excluding employees who worked less than 38.75 hours per week, that presumption was displaced by the contrary intention apparent in Article 24.01 and the Agreement as a whole. The Board noted that Article 2.06 identified a number of employment statuses and

specified that the status of each employee was to be determined at the time of hire. It also provided that "[a]lteration of employment status thereafter will be regulated by the terms of the Collective Agreement." The Board concluded that the intention apparent in Article 2.06 was that the definition would only establish an employee's initial status but, thereafter, the substantive terms of the Agreement would define employee status. It offered the example of Article 10.05, which provided that "[a] regular Employee who applies for and is successful on a temporary posting shall maintain her status as a regular Employee." The Board saw no reason why the Agreement could not be interpreted as altering an employee's status for a limited purpose (i.e for pension purposes), if that was the evident intent.

[43] The Board considered the phrase "in accordance with the *Regulations* of the Plan" as found in Article 24.01 and ascribed the natural meaning to it of "in agreement with," "conforming to," or "complying with." The Board found that the entire connotation of the phrase was that there was to be no conflict between the statute and the Agreement, and that the statutory meaning would prevail. The Board concluded that: "[t]he natural and, we find, the intended meaning of Article 24.01 is that the parties have adopted the *Regulation*'s definition of "full-time employee" for the limited purpose of pension eligibility." It therefore determined that Ms. Tobar met the first requirement of LAPP eligibility ("a person employed on a full-time... basis") when she moved into the 0.80 FTE position in February of 2007.

[44] The Board also found that Ms. Tobar met the second requirement of being "a person employed on a ... continuous basis." While it agreed with SCF that she had accepted a temporary position, it distinguished between a temporary position and temporary employment, noting that the definition of "continuous basis" in s. 2(1)(k) of the *LAPP Regulation* referred to "termination of employment" (emphasis added). The Board was of the view that interpreting that phrase to mean the end of the employer-employee relationship accorded with the intention apparent in the *LAPP Regulation* to mandate LAPP coverage for those employees with the strongest employment ties to their employer in terms of duration and hours. The Board held that Ms. Tobar was a "continuous" employee, having been employed in the workplace for 22 years and there being no date or event that had been established for the termination of her employment.

[45] In addition, the Board noted that Ms. Tobar had not been hired into the temporary position within the meaning of the definition of "temporary employee" in Article 2.06(c) of the Agreement, but rather had been transferred into it. According to the Board, the question of whether Ms. Tobar should be considered a temporary employee was resolved by Article 10.05 of the Agreement, which provided that: "[a] regular Employee who applies for and is successful on a temporary posting shall maintain her status as a regular Employee." This article recognized the phenomenon of "regular" employees working in temporary positions and remaining as regular employees. "Regular Employee" was defined in Article 2.06(a) of the Agreement as one working "regularly scheduled shifts of continuing nature."

[46] The Board concluded that a regular employee under the Collective Agreement was a category coterminous with an employee working on a "continuous basis" under the *LAPP Regulation*. Ms. Tobar was regularly scheduled and her employment with SCF would not end at

the conclusion of the cover-off, temporary assignment. In the Board's view, this compelled the conclusion that Ms. Tobar was a "continuous" as well as a "full-time" employee, and so was both permitted and required to participate in the LAPP.

[47] As the ***Dunsmuir*** case emphasizes, on judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It also is concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[48] The path of reasoning by the Board in this case was clear, rational, and intelligible.

[49] In my view, it was not only reasonable but correct for the Board to:

(i) interpret s. 10 of the *LAPP Regulation* as being mandatory;

(ii) apply a contextual approach in interpreting the Agreement;

(iii) prefer an interpretation of the Agreement that complied with the *LAPP Regulation*;

(iv) hold that Article 24.01 of the Agreement, properly interpreted, adopted the eligibility rules of the *LAPP Regulation* rather than accept the interpretation of Article 24.01 advocated by SCF;

(v) find that Ms. Tobar met the eligibility criteria of being a person "employed on a full-time continuous basis" by SCF.

[50] The Board's conclusion that Ms. Tobar was entitled to participate in the LAPP between February 2007 and May 2009 not only falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law and, therefore, meets the reasonableness standard, it is correct.

V. Conclusion and Costs

[51] The application for judicial review is dismissed. Absent agreement, the parties may speak to costs.

Heard on the 9th day of March, 2011.
Dated at the City of Edmonton, Alberta this 21st day of April, 2011.

S.J. Greckol
J.C.Q.B.A.

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