

CITATION: Canadian Union of Postal Workers v. Canada Post Corporation, 2025 ONSC 2601
DIVISIONAL COURT FILE NO.: 2866/24
DATE: 20250513

**SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT**

RE: CANADIAN UNION OF POSTAL WORKERS, Applicant

AND:

CANADA POST CORPORATION, Respondent

BEFORE: M. Edwards, R.S.J, Ellies and Matheson JJ.

COUNSEL: *Jackie Esmonde and Christopher Perri*, for the Applicant

Richard J. Charney and Samantha Cass, for the Respondent

HEARD at Ottawa: April 30, 2025, by video-conference

ENDORSEMENT

[1] The Canadian Union of Postal Workers (the “Union”) seeks judicial review of the Final Award of Arbitrator Kenneth P. Swan dated February 19, 2024¹ (the “Award”). The Award arises from a Union grievance about the treatment of partial-day absences when calculating the required number of relief letter carrier positions under its collective agreement with Canada Post Corporation (“CPC”).

[2] The background is set out below, focusing on the issues raised on this application for judicial review. Those issues are as follows:

- (i) whether the Arbitrator’s decision that the collective agreement did not require rounding up of partial days was unreasonable; and,
- (ii) whether the Arbitrator unreasonably relied on the Union’s withdrawal or settlement of earlier grievances on the same subject.

¹ Amended award dated March 12, 2024 to correct minor typographical errors.

[3] Relief letter carriers cover for letter carriers who are absent, for example, on vacation. The collective agreement contains a process, using bar charts, to calculate the complement of relief letter carriers required for coverage. There is no express reference in the collective agreement regarding the accounting for partial-day absences when compiling the bar charts.

[4] There is a long history regarding the use of the bar charts, starting with paper charts followed by the implementation of software to produce the bar charts in 2002. The Union participated in the development of the software but maintained the right to pursue areas of disagreement in the grievance procedure and at arbitration. The software met most of the concerns of the parties but did not conform with the Union's position on the calculation of partial days.

[5] There is no issue that CPC recorded absences in .25-day increments and within those increments, rounded up. For example, a three-hour absence is recorded as a ½ day. The Union position sought a second step that was also rounded. Its position evolved over time, beginning with the position that each *individual* absence, partial or whole, should count as a full day. That position changed. By 2009, the Union submitted that the daily total each day should be rounded up for each of the hundreds of depots across Canada. For example, if there was a total of 3.25 absences on one day in one unit, it would be recorded as 4 as would any larger fraction. There would therefore be two steps, both rounding up.

[6] The use of the .25-day increments set by rounding up is not in dispute. The Union submits that there should be a further rounding up of the daily totals. CPC's position is reflected in the software, which, for the daily totals, rounds down, again regardless of the fraction.

[7] From 2003 to 2014, the Union filed a total of sixteen grievances on the issue of how to deal with partial days in the bar chart calculations. Most of those grievances were settled or withdrawn. Only four of the grievances proceeded to an arbitration award.

[8] The collective agreement provides for two types of arbitration procedure. The regular arbitration procedure is an informal arbitration process under the collective agreement that has a limited precedential effect. It is the default mechanism, subject to exceptions. The collective agreement also provides for a formal arbitration procedure, which does not have the same limited precedential effect. Clause 9.49 provides that the following types of grievances "shall be heard in the formal procedure": grievances that concerns the "unit as a whole or the Union as such", grievances "concerning employees in more than one area" and "policy grievances."

[9] As found in the Award, the partial-day issue falls within at least two of the exceptions to the use of the regular procedure. Under the collective agreement, they "shall" be heard in the formal procedure.

[10] The Union filed all the above grievances under the regular arbitration procedure. In three of the above grievances, three different arbitrators ruled that the grievance of this issue should be referred to the formal arbitration process. After each ruling was made, the Union withdrew that grievance. Despite these rulings, the Union continued to commence grievances on the partial-day issue under the regular procedure, including the grievance at issue here (the "Brandon Local grievance"). The Union filed this grievance in 2017, under the regular procedure.

[11] In the Brandon Local grievance, the CPC raised the grievance procedure again, as a preliminary issue. CPC submitted that the grievance should be referred to the formal process. Arbitrator Tom Joliffe agreed, as set out in his decision dated July 23, 2020. His referral of the grievance to the formal process is not challenged in this Court. After the grievance was referred to the formal process, the Union withdrew two more of the other grievances that were outstanding.

[12] Once the Brandon Local grievance was referred to the formal procedure, Arbitrator Swan was appointed to hear it. Arbitrator Swan had also decided an earlier seminal arbitration about the bar charts process, in 1995, but that arbitration did not address the partial-day issue.

Preliminary issue raised by the Union

[13] In the formal arbitration, a further preliminary issue was raised, this time by the Union. The Union submitted that there was a past practice on the partial-days issue in its favour. The Union proposed to provide evidence that it had succeeded on the four regular procedure grievances that had resulted in an award. CPC objected based on the collective agreement provisions about regular grievances. Clause 9.70 states that regular procedure decisions “shall not constitute a precedent and shall not be referred to in subsequent arbitrations.” In the alternative, CPC proposed to provide evidence that the Union had resisted bringing this issue to a formal arbitration through a pattern of withdrawals.

[14] The Arbitrator considered the preliminary issue as set out in detailed reasons for decision dated April 28, 2022. This preliminary decision is not challenged on this application for judicial review.

[15] The Arbitrator interpreted clause 9.70 in context, including clause 9.102 and 9.103, which provide that final arbitration awards in cases with substantially identical circumstances are binding on the parties. The Arbitrator held that a decision could not be both binding and beyond all future reference. After a lengthy consideration of interpretative principles and related decisions, the Arbitrator interpreted clause 9.70 to permit the Union to introduce regular arbitration decisions for the specific purpose of showing that the Union had not acquiesced to CPC’s calculation method, rather than for precedential effect.

[16] The Arbitrator then considered CPC’s position that, if the Union was permitted to adduce evidence regarding past regular arbitration decisions about the partial-days issue, CPC should be permitted to adduce evidence that the Union had withdrawn some of those grievances after rulings referring them to the formal procedure. CPC submitted that there was a pattern of withdrawals to avoid the formal procedure.

[17] The Arbitrator again interpreted the collective agreement. Clause 9.32 provided that a withdrawal “could not prejudice the position of the Union” on another similar grievance. The Arbitrator noted that the parties did not engage on this issue in detail, and the Union’s position was that such evidence may be admissible but there would be a question about the weight it should be given.

[18] The Arbitrator held that although the language differed between clauses 9.70 and 9.32, they had a similar effect of limiting the extent to which prior matters could be used in a grievance. He applied the principle that relevant evidence should not be excluded unless that was clearly required. The Arbitrator held that there was no restriction on referring to the fact that a grievance was withdrawn and the timing of the withdrawal, if relevant. The Arbitrator held that just as there are limits on how clause 9.70 excludes evidence, so too are there limits on how clause 9.32 does so. The Union was permitted to adduce evidence of grievances in the regular arbitration procedure and CPC was permitted to adduce evidence of the withdrawal of some of those grievances.

[19] As for the actual evidence, the Arbitrator concluded that the best way to assess whether a particular piece of evidence, while clearly relevant, is excluded by a provision of the collective agreement, is to test it against that provision in light of all the facts. He therefore decided to continue the hearing, hear the full evidence of both parties including the contested evidence, and assess its proper use after full argument on all of the issues.

[20] The above preliminary award, including its interpretation of clauses 9.70 and 9.32, was not challenged in this Court.

[21] The hearing then continued, with witnesses called by both sides, giving rise to the Award.

The Award

[22] There is no issue that the Arbitrator correctly characterized the dispute as focused on how CPC counted partial-day absences of letter carriers in the daily bar chart process for the purpose of determining the size of the relief carrier complement. The first step is not at issue between the parties – absences were recorded in increments of .25-day and for each absence, fractions were rounded up. However, the Union took the position that the daily totals should also be rounded up in the daily bar charts. CPC disagreed. CPC took the position that since that rounding issue was not addressed in the collective agreement, it fell within management rights and was properly rounded up, as had been done for decades.

[23] There is also no issue that the Arbitrator accurately summarized the background facts and prior rulings, identified the collective agreement clauses relevant to the preparation and use of the bar charts, and set out the applicable principles regarding the interpretation of a collective agreement.

[24] The grievance was dismissed. The Arbitrator found that the Union had not shown that CPC's calculation method was a breach of the collective agreement. The Award is supported by lengthy reasons for decision. Very briefly, the Arbitrator reasoned as follows:

- (i) The Arbitrator applied the well-accepted principles of collective agreement interpretation to clause 52.04, relied on by the Union. That clause sets out how the relief letter carrier complement is calculated, including the process for preparing the bar charts. However, it is silent on the subject of partial days.

Clause 52.04(a) of the collective agreement provides that if the bar charts showed that additional letter carriers would have been required more than 65% of the preceding twelve-month period, additional position(s) would be created. The Union relied on the words of clause 52.04(b)(i), which provided that: “For each working day in the twelve (12) month period, the bar charts will indicate the relief complement required for coverage (emphasis added).” CPC took the position that the issue was not addressed in the collective agreement, it fell within CPC’s managerial rights.

The Arbitrator found that the language in the collective agreement was apparently not chosen with the issue of partial-day absences in mind.

- (ii) The Arbitrator considered the text of the collective agreement and the role of the surrounding context as set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633.

The Arbitrator concluded that the context, including the lengthy history of the collective agreement wording that long-predated this dispute, offered very little to assist in the interpretation of the words used.

- (iii) The Arbitrator then considered the correct use of extrinsic evidence including the use of past practice as an interpretative tool. Since he found that the context did not lead to clear preponderance in favour of either party, he would consider the extrinsic evidence, which included the evidence from both sides about the prior arbitrations. He found that the evidence about the prior arbitrations included conduct that favoured each side’s position. The Arbitrator concluded that the extrinsic evidence about past practice did not assist in resolving the issue.
- (iv) The Arbitrator then considered CPC’s submission that the Union had avoided the formal arbitration process, preventing the partial-days issue from reaching a national resolution of the interpretation issues. The Arbitrator referred to the evidence of the Union witness that the Union did not want to jeopardize the gains it had made in the regular process by proceeding to a formal arbitration.

The Arbitrator held that at some point, long before the Brandon Local grievance, it was reasonable for CPC to conclude that the Union did not want to enforce its interpretation in a way that was conclusive and binding, to permit the parties to order their future conduct. After that point, it was unfair and contrary to the best principles of labour relations to allow the Union to re-open the issue and only proceed to a final resolution when compelled to do so.

- (v) In summary, the Arbitrator concluded that the partial-day issue was not addressed in the words of the collective agreement, even considering context and extrinsic evidence. Further, the Union’s evolving position and reluctance to bring the matter to a final conclusion reduced the persuasive value of its position.

- (vi) The Arbitrator denied the grievance and declared that the CPC approach to partial-day absences was not a breach of the collective agreement.

[25] The Union then sought judicial review.

Standard of Review

[26] There is no issue that the standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653. The standard of reasonableness is meant to ensure that courts intervene only when truly necessary – it finds its starting point in judicial restraint yet remains a robust form of review: *Vavilov*, at para.13.

[27] The Union bears the onus to show that the Award is unreasonable: *Vavilov*, at para. 291. It has not done so.

Whether the decision not to require rounding up was reasonable

[28] The Union submits, as it did on the arbitration, that the words of clause 52.04(b)(i) determine the partial-days issue even though partial days are not mentioned there or elsewhere. The Union submits that by saying that for each working day in the twelve month period, the bar charts will indicate the relief complement “required for coverage”, rounding up is mandated and serves the purpose of having enough relief letter carriers.

[29] This interpretive argument was fully addressed in the lengthy reasons for decision. The Union relies on isolated phrases such as the Arbitrator’s comment that the Union approach “does have some logical underpinning”. However, the Arbitrator made this comment in contrast to the Union’s earlier approach, which the Arbitrator said had “no logical underpinning”. The Union also seeks to contrast the first phrase, above, with the phrases that CPC relied on its long-standing adoption of its approach rather than asserting a logical premise. Again, this is selective.

[30] This is not the proper approach. As set out in *Vavilov*, at para. 102, a reasonableness review is not a “line-by-line treasure hunt for error”. All of the reasons for decision must be considered to determine whether there is a rational chain of analysis that is justified in light of the factual and legal constraints on the decision-maker: *Vavilov*, at paras. 102-104.

[31] A review of the Arbitrator’s full analysis shows that the Arbitrator applied the correct legal principles, considered the words of the collective agreement, the surrounding context and, within its limited role, the extrinsic evidence.

[32] The Arbitrator held that the “two fundamental interpretations advanced by the parties have no real logical foundation” and that even the “somewhat” more logical modified position of the Union still lacked “any real insight” into how to deal with efficiencies. The Arbitrator found that the language chosen by the parties to express their bargain did not come to grips with the subtleties that arose for partial-day absences.

[33] Before this Court, the Union argues that the Arbitrator failed in his duty to interpret the collective agreement. That is not so. In his conclusion, the Arbitrator noted that a party filing a grievance has to make out its case and convince the arbitrator that the interpretation which it advances is the correct one. The Arbitrator declared that CPC's approach to partial-day absences "did not constitute a breach of the collective agreement", obviously rejecting the Union's proposed interpretation of clause 52.04.

[34] The Arbitrator discussed the Union's changing position over the years. The Arbitrator discussed and rejected the Union's current proposed interpretation of clause 52.04(b)(i). The Arbitrator found that the Union's position would result in inefficiencies and the overstaffing of relief letter carriers.

[35] Consistent with CPC's position, it was therefore a matter within its managerial rights and its past practice over decades. As put in *Canadian Union of Public Employees, Local 5852 v. Scarborough Health Network*, 2022 ONSC 604 (Div. Ct.), at para. 68, any limitation on the employer's right to manage its operations must exist in clear language under the collective agreement (or through a legislative restriction). Here, there was no such limitation.

[36] The above issues do not render the Award unreasonable. However, before reaching a conclusion on reasonableness, we will address the other issue raised by the Union.

Whether the use of the prior arbitration evidence was reasonable

[37] This issue returns to the now-unchallenged ruling in the preliminary award. In that award, the Arbitrator interpreted clause 9.70 to permit the Union to rely on past arbitration results to a limited degree. Similarly, he interpreted clause 9.32 to permit CPC to rely on the withdrawal of prior grievances. As set out in the Award, after finding that there was no preponderance in favour of either party's interpretation, the Arbitrator determined that he would consider the extrinsic evidence that was the subject of the preliminary award.

[38] The Union submits that the Arbitrator erred by using the prior grievance withdrawals and settlements against it, despite the "without prejudice" nature of those steps under clause 9.32. The Union further submits that the Arbitrator should not have relied on the prior settlements since CPC had agreed to them.

[39] We are not persuaded that the Arbitrator's use of the extrinsic evidence rendered the Award unreasonable.

[40] The Arbitrator considered the extrinsic evidence, including the four regular-procedure grievances relied on by the Union. Those grievances had been decided by the same arbitrator, in the Union's favour, and the Union was permitted to rely on them. The Arbitrator also noted that there were three grievances that were withdrawn after being referred to the formal process, that there was one grievance outstanding, and that there were settlements where the grievances were withdrawn on a without prejudice basis. For the three grievances that had been withdrawn after the Brandon Local grievance was referred to the formal procedure, the Arbitrator noted that they were not in the same category as the other withdrawals.

[41] The Arbitrator then said the question was, “what to do with this information, subject always to the limitations on the use of extrinsic evidence, and this particular kind of evidence which is also constrained by the collective agreement. Does it, taken as a whole, or considered item by item, affect the outcome of this arbitration?”

[42] The Arbitrator applied the appropriate legal principles and the interpretation of clause 9.32 as set out in his preliminary award. He considered whether the extrinsic evidence showed conduct that was unambiguously based on one meaning. He found that that sort of conduct did exist, but for both sides. The Arbitrator therefore concluded that the past practice evidence did not assist.

[43] The Arbitrator also considered CPC’s argument about the extrinsic evidence. In keeping with the interpretation of clause 9.32, the Arbitrator decided that the pattern of withdrawals could be considered. He found that given the Union’s pattern of withdrawals, it was reasonable for CPC to conclude, long before the Brandon Local arbitration, that the Union did not want to enforce its interpretation. This was supported by the Union witness’s evidence. The Arbitrator indicated that it would be inequitable, and potentially undermine the grievance process, to allow the present grievance twenty years after CPC had set out its approach and the Union had contested it.

[44] In addition to relying on clause 9.32, discussed above, the Union raises another issue. The Union submits that the use of the extrinsic evidence in favour of CPC was unreasonable because the Arbitrator considered the unfairness of the Union conduct without specifying which equitable doctrine he was relying on. This misstates the reasons. The Arbitrator said that none of the doctrines, such as estoppel, laches and abuse of process, strictly applied. He found that the Union’s evolving position and obvious reluctance to bring the matter to a final conclusion significantly reduced the persuasive value of the Union’s position on the interpretation of the collective agreement. Again, the focus was on the interpretation of the collective agreement.

[45] Further, labour arbitrators are not legally bound to apply equitable principles in the same manner as courts: *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at para. 5. Arbitrators have a broad mandate in adapting the legal principles they find relevant to the grievances they are deciding. They must do so “reasonably, in a manner that is consistent with the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievance”: *Nor-Man*, at paras. 5-6. The Arbitrator did so.

[46] In summary, the Union has not shown that the Award is unreasonable. The Arbitrator’s decision is internally coherent, showing a rationale chain of analysis that is justified in light of the legal and factual constraints. The Arbitrator considered the relevant collective agreement text, the history of that text in collective bargaining, and the interpretative principles including the relevant labour relations context. He held that the collective agreement did not address the partial-days issue. He found that the Union’s position on the interpretation of clause 52.04(b)(i) would create inefficiencies and overstaffing. He found that the extrinsic evidence relied on by the Union was inconclusive and the pattern of withdrawals did not support the Union’s position. The Arbitrator reasonably denied the grievance.

[47] These findings are due significant deference, especially in this case, where the Arbitrator was deciding an issue – the partial-day rounding issue – that was not expressly addressed in the collective agreement.

[48] This application is dismissed with costs to CPC fixed at the agreed-upon amount of \$10,000, all inclusive.

M. Edwards R.S.J.

Ellies J.

Matheson J.

Date: May 13, 2025