CV 05934

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF an appeal from the arbitration Award by Arbitrator, John U. Bayly, Q.C., dated May 12, 1994

BETWEEN:

THE GOVERNMENT OF THE NORTHWEST TERRITORIES
as represented by the Minister of Personnel

Applicant

- and -

THE UNION OF NORTHERN WORKERS
and JOHN U. BAYLY, Q.C.

Respondents

REASONS FOR JUDGMENT

1 In this proceeding the applicant seeks judicial review of an arbitrator's decision to assume jurisdiction over the matter in dispute, i.e. his preliminary ruling that the matter was arbitrable within the provisions of the collective agreement between the parties.

2 The aggrieved employee was hired by the applicant in November 1988 as a cook at the Stanton Yellowknife Hospital. In the written offer of employment accepted by him, items (2) and (6) stated:

> "2. POSITION: Cook
> 95-4098
> Indeterminate

...

6. SALARY: $28,388.00 per annum
(Pay Level 16, Step 1)."

3 Article 24.01 of the collective agreement states:

> "24.01 Employees are entitled to be paid for services rendered for the classification and position to which they are appointed at the pay rates specified in the Appendices attached."

4 Appendix C to the collective agreement sets out (a) a classification table of employee positions into categories, groups and sub-groups; and (b) pay schedules for each.

5 Employee positions are divided into six broad categories, as follows:

AS Administrative Services
GL General Labour
HC Health Care
PD Program Delivery
TK Technical
TR Trades

(emphasis added)

6 Within the category HC - Health Care, there are seven groups, as follows:

CN Community Nursing
HN Hospital Nursing
HS Hospital Support Services
NS Nursing Support
SP Specialist Services
TE Technical Services
OP Opthalmic Medical Assistance

(emphasis added)

7 Within the category TR - Trades, group GT - General Trades, Appendix C lists 14 separate trades, including "Commercial Cook".

8 The record indicates that the arbitrator had before him documentary evidence that employee position #95-4098 (Cook) at the Stanton Yellowknife Hospital had been classified by the employer as HC/HS/IV, i.e. Heath Care/Hospital Support Services/Level IV. The record shows that this classification had been in place for years before the date of the grievor's hire, at the time of hire, and thereafter.

9 Appendix C of the collective agreement sets forth the negotiated pay levels for the period in question, i.e. April 1/88 - Mar 31/89. For the classification assigned to position #95-4098 (Cook), i.e. HC/HS/IV, Pay Level 16, Step 1, the annual pay is $28,388.00. For any position classified within the TR - Trades category as Commercial Cook, the annual pay for a journeyman cook is at Pay Level 19, Step 6, and is $39,892.00.

10 It may be that the employer's classification was incorrect, and that position #95-4098 at the Stanton Yellowknife Hospital should have been classified as being within category TR - Trades. However, that is not the issue on this judicial review. Nor, with respect, was it an issue for the arbitrator to decide.

11 Within a few months of his hire, the grievor complained to his supervisor and, later, to the Union, about his pay level. The Union took up the matter on his behalf pursuant to the grievance provisions of the collective agreement. At the second level of the grievance process, and thereafter, the Union sought to have the grievor paid as a

journeyman Commercial Cook in the category TR - Trades rather than in the category HC - Health Care.

12 The collective agreement between the parties acknowledges that classification of employee positions is the prerogative of the employer, subject to the employee's right of appeal pursuant to Article 36.03 of the collective agreement:

> 36.03 Where an employee alleges that he has been improperly classified with respect to his position, he may appeal to the Minister of Personnel and the following provisions shall apply:
>
> (1) (a) The Minister of Personnel shall refer the appeal to a classification appeal board.
>
> (b) The classification appeal board shall consist of the Deputy Minister of Personnel, the Head of the employing department, or their delegates and the employee's Shop Steward, and the Executive Secretary for the Union, or their delegates.
>
> (c) The classification appeal board may sit in Yellowknife or at some other place in Canada which might seem appropriate to the board under the circumstances.
>
> (d) The classification appeal board may determine that the employee's classification is proper having regard to the classification specifications for his position and his statement of duties, or, the board may decide that the employee has been improperly classified in his position.
>
> (e) The board shall make its report to the Minister of Personnel who will confirm the decision of the board and notify the employee in writing within fifteen (15) days of the receipt of the board's report.

(2) (a) Should the classification appeal board be unable to reach a decision or should the employee wish to pursue his appeal to a higher level, the Minister of Personnel shall refer the appeal to a classification review board.

(b) The classification review board shall consist of a representative of the Employer, a representative of the Union and an independent chairman.

(c) The chairman of the classification review board shall be chosen by the appointed members and where they fail to agree on the appointment of a chairman, the appointment shall be made by the Chief Justice of the Court of Appeal of the Northwest Territories, upon the request of either party.

(d) The classification review board may sit in Yellowknife or at some other place in Canada which might seem appropriate to the board under the circumstances.

(e) The classification review board may determine that the employee's classification is proper having regard to the classification specifications for his position and his statement of duties, or, the board may decide that the employee has been improperly classified in his position.

(f) The board shall make its report to the Minister of personnel who may confirm the decision of the board and notify the employee and the Union in writing within fifteen (15) days of the receipt by him of the decision of the board or make such other decision as to him seems fair and reasonable.

(g) The reply of the Minister of Personnel shall be final and binding upon the employee and the Union until such time as that employee has been promoted, transferred or provided with a new statement of duties by the Employer.

13 The collective agreement also provides that differences between the parties relating to the application of the collective agreement can be submitted to an arbitrator:

> 37.20 Where a difference arises between the parties relating to the interpretation, application or administration of this Agreement including any question as to whether a matter is arbitrable, or where an allegation is made that a term or condition of this Agreement has been violated, either of the parties may, after exhausting the grievance procedure in this Article, notify the other party in writing within twenty-one (21) days of the receipt of the reply at the Final Level, of his desire to submit the difference or allegation to arbitration under section 44 of the Public Service Act.
>
> ...
>
> 37.23 The arbitrator shall not have the authority to alter or amend any of the provisions of this Agreement, or to substitute any new provisions in lieu thereof, or to render any decision contrary to the terms and provisions of this Agreement, or to increase or decrease wages.

14 Before me on the hearing of the within application, both parties agreed that the result of the above-excerpted provisions of the collective agreement is that classification is **not** an arbitrable issue.

15 The arbitrator in his preliminary ruling determined that the within grievance was not a classification issue and was therefore a matter properly dealt with in arbitration pursuant to Article 37.20 of the collective agreement.

16 With respect, the arbitrator erred in his characterization of the dispute

between the parties. In my view his determination of this dispute as being anything other than a classification issue was patently unreasonable.

17 The arbitrator focuses on Article 24.01 (cited earlier in these reasons) of the collective agreement and the grievor's right to be paid for services rendered as a journeyman cook, and ignores two salient facts that are evident on the record. These are: (1) the grievor's position had already been classified, and (2) the grievor was being paid for services rendered for the classification and position to which he had been appointed at the pay rate specified in the appendix to the collective agreement.

18 The arbitrator's ruling is framed as if there had been no classification of the grievor's position. This oversight flaws the reasoning which leads to an assumption of jurisdiction by the arbitrator.

19 Further, the arbitrator interprets Article 24.01:

> 24.01 Employees are entitled to be paid for services rendered for the classification and position to which they are appointed at the pay rates specified in the Appendices attached.

as follows: "The employee is entitled to be paid for the type of services being performed in the position to which he is appointed at the pay rate specified in the appendices for that type of services". This interpretation completely omits one important word in Article 24.01 - "Classification". Also, this interpretation, incorrectly in my respectful view, uses the words "for services rendered" in the sense "for the type of services performed" rather

than in the sense "for actual hours worked".

20 In the result, the arbitrator wrongly categorized the grievance before him as an issue of pay entitlement under Article 24.01 rather than as a classification issue. Manifestly, it is a classification issue.

21 A classification issue is *ultra vires* the arbitration process.

22 The parties have agreed in their collective agreement that classification issues are not grievable or arbitrable under Article 37 but rather are to be grieved through the special appeal process established in Article 36. The grievor is not left without a remedy - his remedy is in Article 36.

Certiorari vs. Statutory Appeal

23 The within application for judicial review is before the Court by way of a motion for an order in the nature of *certiorari* quashing the decisions of the arbitrator on April 26, 1994 (preliminary ruling) and May 12, 1994 (award). The motion was filed on August 31, 1994. The arbitrator was served with Notice of the Motion pursuant to the Rules of Court and subsequently, on November 21, 1994, the arbitrator delivered to the Clerk of the Court the papers, documents, exhibits, etc. constituting the record of the proceedings before him, in accordance with Rule 651. The Motion was heard in Chambers on December 21, 1994, following the filing of written submissions by both parties.

24 During oral argument on December 21, 1994, the respondent Union raised

for the first time an objection to these *certiorari* proceedings on the basis that the employer ought to have brought the matter before the Court, if at all, pursuant to its statutory right of appeal or review under the *Arbitration Act*, R.S.N.W.T. 1988, ch. A-5. As the applicant's counsel was not on notice that such an objection would be raised, I directed both counsel to file written submissions on the point, and reserved decision on the main application. These further written submissions have now been received.

25 The parties agree that certain provisions of the *Arbitration Act* are invoked via Article 37.20 and Article 37.22(2) of the collective agreement and s.43 of the *Public Service Act*, R.S.N.W.T. 1988, ch. P-16:

> Article 37.20
>
> > Where a difference arises between the parties relating to the interpretation, application or administration of this Agreement including any question as to whether a matter is arbitrable, or where an allegation is made that a term or condition of this Agreement has been violated, either of the parties may, after exhausting the grievance procedure in this Article, notify the other party in writing within twenty-one (21 days of the receipt of the reply at the Final Level, of his desire to submit the difference or allegation to arbitration under section 44 [now section 43] of the Public Service Act.
>
> Article 37.22(2)
>
> > The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee affected by it.
>
> *Public Service Act*, s.43
>
> > Where a collective agreement fails to provide for the determination of disputes arising out of the collective agreement during the term of the agreement without

> stoppage of work, those disputes shall be determined by means of arbitration pursuant to the *Arbitration Act*.

26 Relevant provisions of the *Arbitration Act* are as follows:

> s.26. Subject to sections 27 and 28, an award made by an arbitrator or by a majority of arbitrators or by an umpire is final and binding on all the parties to the reference and the persons claiming under them.
>
> s. 27.(1) Where it is agreed by the terms of a submission that there may be an appeal from the award, the reference shall be conducted and an appeal lies to a judge within the time stated in the submission or, if no time is stated, within six weeks after the delivery of the award to the appellant.
>
> ...
>
> s.28.(1) Whether or not a submission provides for an appeal from an award, a party to a submission or a person claiming under that party may apply to a judge to set aside an award on the grounds that
>
> (a) an arbitrator or umpire has misconducted himself or herself, or
>
> (b) an arbitration or an award has been improperly procured,
>
> and the judge may, in the discretion of the judge, dismiss the application or set aside the award.
>
> (2) On an application under subsection (1), a party may by notice require any other party to produce, and the party so required shall produce, on the hearing of the application, any original book, paper or document in his or her possession that has been used as an exhibit or given in evidence on the reference and that has not been filed with the deposition supporting the application.
>
> 29. Unless by leave of a judge, application to set aside an award, other than by way of appeal, shall not be made after six weeks from the delivery of the award to the applicant.

27 It is clear from Article 37.22(2) of the collective agreement that the applicant

does not have a right to appeal the arbitrator's award pursuant to s.27 of the *Arbitration Act*. However, the respondent Union submits that the applicant does have a right of review pursuant to s.28 of the *Act* and should have pursued that statutory remedy rather than asking the Court to exercise its discretion to grant one of the prerogative remedies, i.e. *certiorari*. The cases of *Baldwin & Francis Ltd. v. Patents Appeal Tribunal* [1959] 2 All E.R. 433 (H.L.), *Re Wilfong, Cathcart v. Lowery* (1962) 32 D.L.R. (2d) 477 (Sask. C.A.), *Chad Investments Ltd.* (1971) 20 D.L.R. (3d) 627 (Alta. S.C., App.Div.), *North American Montessori Academy Ltd. v. Development Appeal Bd. of Edmonton* (1977) 7 A.R. 39 (Alta. Sup. Ct., App.Div.), and *Harelkin v. University of Regina* (1979) 26 N.R. 367 (S.C.C.) are cited on behalf of the respondent Union as authority for the proposition that, absent special circumstances, the Court should not grant an order of *certiorari* where the aggrieved party has an effective right of appeal pursuant to a statute.

28 (As an aside, I note beneath the surface of the parties' positions in this proceeding both an irony and a telling snapshot of the "legalistic" state of the law today. The irony is that whereas the employer's original complaint is that the employee should have taken <u>his</u> complaint along route A (Article 36) and not route B (Article 37), the Union's response (on behalf of the employee) is that the employer's complaint about the wrong route is <u>itself</u> being taken along the wrong route - route X (*certiorari*) as opposed to route Y (statutory review). This picture reveals that the law perhaps does pay as much homage to procedure as to substance.)

29 In any event, taking into consideration all of the circumstances, I am not satisfied that this is a case to dismiss an otherwise meritorious application for *certiorari*

because of the existence of a right of review under s.28 of the *Arbitration Act*.

30 Firstly, it is not necessarily clear that the jurisdictional issue raised by the applicant herein comes within "misconduct" as contemplated by s.28. I note that the expanded definition given to "misconduct" in s.28 of the *Arbitration Act* by my brother Vertes J in *Union of Northern Workers v. Northwest Territories Power Corporation* and *Government of the Northwest* Territories (CV 05481, November 15, 1994) was not available to the applicant when it launched these *certiorari* proceedings in August 1994. The statutory remedy mentioned may not be adequate or effective for the applicant's purposes, as opposed to those statutory remedies available in, for example, *Re Wilfong, Chad Investments* and *North American Montessori, supra*. There has been much litigation and debate as to whether the scope of judicial review is the same via these two routes - see *R.O.M. Construction Ltd. v. Electrical Power Equipment Ltd.* (1981) 121 D.L.R. (3d) 753 (Alta. C.A.), *Suncor Inc. v. McMurray Independent Oil Workers* [1983] 1 W.W.R. 604 (Alta. C.A.), *Shalansky v. Board of Governors of Regina Pasqua Hospital* (1983) 145 D.L.R. (3d) 413 (S.C.C.), and Jones de Villars, Principles of Administrative Law, pp. 308-309.

31 Secondly, assuming for the moment that the applicant's jurisdictional issue does indeed come within the ambit of "misconduct by the arbitrator", it is still open to the applicant under the *Act* to seek leave of the Court to extend the six-week time period for applying to set aside the arbitrator's award (see s.29). To now give effect to the respondent Union's objection, to require the applicant to seek leave to present a s.28 review, and to possibly entertain a s.28 review on the identical grounds already put forward in these *certiorari* proceedings, given the untimely nature of the objection, is, in

my respectful view, to give undue homage at the altar of technicalities. This is not a situation, as in *Baffin Plumbing & Heating Ltd. v. Labor Standards Board and Labour Standards Officer* (S.C.N.W.T., CV 04869, July 26, 1994) where the applicant before the Court has used *certiorari* proceedings as a supplement to a statutory appeal but rather a situation where the applicant has reasonably chosen what the applicant believes to be the more certain or appropriate remedy of the two. The lateness of the respondent's objection in my view contributes to the presence of "special circumstances" here to justify the Court in allowing the application for *certiorari* to proceed notwithstanding the existence of a possible statutory remedy.

Conclusion

32 An order in the nature of *certiorari* will issue quashing the proceedings before the arbitrator and the award resulting therefrom.

J.E. Richard
J.S.C.

Yellowknife, Northwest Territories
February 24, 1995

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