CV 05860

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF an arbitral award of Arbitrator Bill Hibbard, dated May 12, 1995, denying a grievance of Grievor Joseph Andrew;

AND IN THE MATTER OF a collective agreement between the Public Service Alliance of Canada and the Baker Lake Housing Association for the period April 1, 1993, through to March 31, 1996;

BETWEEN:

THE PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

- and -

THE BAKER LAKE HOUSING ASSOCIATION

Respondent

Application to quash arbitrator's award. Application dismissed.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on January 26, 1996

Reasons filed: January 30, 1996

Counsel for the Applicant: Austin F. Marshall

Counsel for the Respondent: Glenn D. Tait

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REASONS FOR JUDGMENT

1 This is an application for judicial review of an arbitration award.

2 The applicant union is the collective bargaining agent for the respondent's employees. Mr. Joseph Andrew was a member of the bargaining unit. In August of 1993, Andrew was dismissed from his employment. The reasons for his dismissal were set out in a letter to him. These included past disciplinary problems as well as problems noted in an evaluation report prepared by someone from outside the respondent association. Andrew, with the aid of the union, grieved his dismissal pursuant to the provisions of the collective agreement in force at the time. The grievance was eventually denied by the arbitrator who found that the dismissal was justified.

3 The applicant now seeks to quash the arbitrator's award. It alleges that the arbitrator's interpretation of the collective agreement was a patently unreasonable one. This is not a challenge to the facts as found by the arbitrator since it is acknowledged that a court has no power to review findings of fact. This is a challenge to the arbitrator's conclusion as to what procedural steps are mandated by the collective agreement in the case of dismissals.

4 The collective agreement sets out a general provision for the resolution of disputes and grievances in Article 34:

> 34.01 (1) The Housing Association and the Union recognize that grievances may arise in each of the following circumstances:
>
> (a) by the interpretation or application of:
>
> (i) a provision of a regulation, direction or other instrument made or issued by the Housing Association dealing with terms or conditions of employment; or
>
> (ii) a provision of this Collective Agreement or Arbitral Award; and
>
> (b) disciplinary action resulting in demotion, suspension, or a financial penalty;
>
> (c) dismissal from the Housing Association, and
>
> (d) letters of discipline placed on personnel file.
>
> (2) The procedure for final resolution of the grievances listed in section (1) above is arbitration.
>
> . . .
>
> 34.05 A grievance shall be processed by recourse to the following steps:
>
> (a) First Level (Housing Association Secretary/Manager)
>
> (b) Second Level (Housing Association Board of Directors)
>
> (c) Final Level (Arbitration)

5 Article 34 also contains a clause addressing dismissal specifically:

> 34.11 (1) No employee shall be dismissed without first being given notice in writing together with the reasons therefore. When the Employer dismisses an employee the grievance procedures shall apply except that the grievance may be presented at the Final Level.
>
> (2) An appeal to the Housing Association against a decision to dismiss the employee may be filed within thirty (30) calendar days after the employee receives his notice of dismissal.

6 The agreement contains a further Article dealing generally with discipline:

> 51.01 When an employee is to be disciplined, the Employer shall notify the employee at a meeting and shall inform the employee that he has the right to have a shop steward in attendance. The reasons for the discipline shall be provided to the employee in sufficient detail that the employee may defend himself against it.
>
> 51.02 The Employer shall notify the appropriate Union Representative when discipline occurs.
>
> 51.03 In the event of a suspension without pay of a duration of thirty (30) days or longer or a termination, the following procedures shall be followed:
>
> (a) The Labour/Management Committee shall meet to review the disciplinary action and shall attempt to resolve the matter within four (4) days of the disciplinary action.
>
> (b) Failing a suitable resolution through the Labour/Management Committee, in addition to the normal grievance and arbitration procedure in Article 34, the employee will, at his or her option, be entitled to a "provisional arbitration" to be held within one week of the meeting of the Labour/Management Committee, or a later date mutually agreed upon.

7 The applicant argued, at both the arbitration hearing and the hearing of this application, that Article 34.11(1), dealing with dismissal, must be read in conjunction with the requirements contained in Article 51, dealing with discipline generally. Article 51.01 requires that, before an employee is disciplined, the employer notify the employee of the reasons therefor and give the employee an opportunity to respond at a meeting. Only

after such a meeting is held, it is submitted, can the employer dismiss by providing the written notice required by Article 34.11(1). The applicant says that dismissal is a form of discipline, indeed the ultimate form of discipline. Hence it would be absurd, and thus a patently unreasonable interpretation, to require a meeting prior to the imposition of lesser forms of discipline but not prior to the imposition of the most extreme form, that being dismissal.

8 In this case there was no meeting with the employee prior to his dismissal. The position of the respondent is that the agreement draws a distinction between dismissal and other forms of discipline and the specific provisions of Article 34.11(1) override the general provisions of Article 52.01. Therefore there is no requirement for a meeting prior to dismissal.

9 The arbitrator agreed with the respondent. He wrote:

> Article 51.01 must be read within the context of the complete Collective Agreement. Article 34.05 describes the grievance procedure to be followed. Article 34.11 states:
>
> > (1) No employee should be dismissed without first being given notice in writing together with the reasons therefore. When the employer dismisses an employee, the grievance procedures shall apply except that the grievance may be presented at the Final Level.
>
> The article focuses on the dismissal of an employee and the requirement that notice be given in writing. The provision also stipulates that when the employer dismisses an employee, the grievance procedures found in the Collective Agreement shall apply. The one exception is that the grievance may be presented at the Final level. There is no reference in that article to Article 51.01. It is clear from Article 34.11 that the grievance procedures being referred to are found in Article 34.05. The Second Level was presented to the Housing Association Board of Directors, and was addressed to the Chairperson of that Association. Article 34.11 does not require as a pre condition for dismissal, a meeting with the grievor to discuss the reasons for the employers decision. The discipline contemplated in Article 51.01 cannot include discharge because the

> Collective Agreement specifically provides how discharge cases are to be handled and what the employer must do in such cases. Notice was given in writing by the employer specifying the reasons for the dismissal. In my opinion, the employer has followed precise what it was required to do, and has met its obligations to the grievor under the Collective Agreement in regards to the notice of dismissal.

10 The applicant raised a further ground for review although little emphasis was placed upon it. The applicant submitted that use of the evaluation report prepared prior to the dismissal was a violation of the articles in the collective agreement dealing with performance appraisals. The arbitrator made a finding of fact that the report was not a performance appraisal as contemplated by the agreement. This finding of fact is a complete answer to this ground and I find no merit in it. The sole issue, therefore, is the arbitrator's conclusion that Article 34.11 overrides, and relieves the employer from, the requirements of Article 51.01.

11 The parties are agreed that the standard of review is the "patently unreasonable" test. The arbitrator was asked to make a decision within his jurisdiction. His decision is protected by a broad privative clause found in s.58 of the Canada Labour Code:

> 58(1) Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed in any court.
>
> (2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an arbitrator or arbitration board in any of his or its proceedings under this Part.

12 In this type of case the powers of a court on review are extremely limited. This was explained by LaForest J. in *C.A.I.M.A.W.* v. *Paccar of Canada Limited*, [1989] 2 S.C.R. 983 (at pages 1003 - 1004):

> Where, as here, an administrative tribunal is protected by a privative clause, this Court has indicated that it will only review the decision of the Board if that Board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function; see *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*., [1979] 2 S.C.R. 227. The tribunal has the right to make errors, even serious ones, provided it does not act in a manner "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p.237). The test for review is a "severe test"; see *Blanchard v. Control Data Canada Ltd.,* [1984] 2 S.C.R. 476, at p.493. This restricted scope of review requires the courts to adopt a posture of deference to the decisions of the tribunal. Curial deference is more than just a fiction courts resort to when they are in agreement with the decisions of the tribunal. Mere disagreement with the result arrived at by the tribunal does not make that result "patently unreasonable". The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it.

13 As noted in a later case, it is "not enough that the decision of the Board [or an arbitrator] is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational": *Canada* v. *P.S.A.C.*, [1993] 1 S.C.R. 941 (per Cory J. at page 964).

14 Legislation has limited the ability of the court to intervene. The parties themselves have agreed to resolve all disputes by arbitration. I must therefore accord deference to the opinions of the arbitrator who, after all, is a specialist in this field. So, even if I disagree with the arbitrator, that does not necessarily mean that his decision is patently unreasonable.

15 The limited role of the court on review was very clearly illustrated in the recent case of *Saskatoon Police Service* v. *Grismer*, [1995] 10 W.W.R. 766 (Sask. C.A.). In that case the court heard an appeal from a chambers judge's refusal to quash a decision of the

Saskatchewan Police Commission. The decision involved the interpretation of a highly ambiguous legislative provision. The court did not necessarily agree with the Commission's decision but refused to label it as patently unreasonable. Gerwing J.A. wrote (at page 768):

> On reviewing the reasons of the Board accordingly we turn our mind to the patently unreasonable test. The interpretation of s.53(1)(a)(ii) chosen by the Commission is in our view not the only one, or indeed the most preferable one. It is not one which any of us in fact, had we been sitting at first instance, would have accepted. However, it is clear from an analysis of the section that the chosen meaning of this inherently ambiguous section is a possible one. Thus, since the interpretation is possible, albeit in our view not the preferable interpretation, we must accept it as being not patently unreasonable.

16 The applicant submits that it is patently unreasonable to interpret the agreement so as to draw a distinction between the procedural requirements for discipline generally and those for dismissal specifically. It is argued that they can be read in harmony and thereby provide the widest possible protection for employees. Applicant's counsel points out that it is trite law that the provisions of a collective agreement should be interpreted so as to give them the fullest effect possible. Applicant's counsel also points to the reference to "termination" in Article 51.03: "In the event of a suspension without pay of a duration of thirty (30) days or longer or a termination, the following procedures..." He says this is an indication that dismissal cases were meant to come within the scope of Article 51 and therefore a meeting was mandatory prior to the employee's dismissal.

17 While I may think that a meeting prior to dismissal may be the fair thing to do, and while it may seem anomalous that a meeting would be mandatory for lesser forms of discipline but not for dismissal, my views are not the guiding ones. I have to be satisfied

that there is no reasonable or rational basis for the arbitrator's views before I can intervene.

18 As submitted by respondent's counsel, the agreement delineates the different forms of discipline in Article 34.01(1). Disciplinary action resulting in demotion, suspension, or a financial penalty are mentioned in subclause (b), while dismissal is mentioned in subclause (c), and letters of discipline, presumably reprimands, are mentioned in subclause (d), of Article 34.01(1). Respondent's counsel argues that this reveals a clear intention to distinguish between dismissal specifically and discipline generally with the specific procedural requirements of Article 34.11(1) taking precedence over the general requirement for a meeting contained in Article 51.01. He relies on general rules of interpretation to the effect that every word used is intended to have some meaning, that they were not intended to conflict, and that specific provisions prevail over general ones.

19 In my opinion the arbitrator's interpretation of these provisions is one that the agreement can reasonably bear. The specific reference to dismissals in Article 34.11 could be said to set that procedure apart from Article 51.01. The differentiation between different types of discipline and dismissal in Article 34.01(1) supports the view that the terms "discipline" and "dismissal" are meant to convey different concepts. I note that Article 51.03 uses the term "termination", not "dismissal". To me that suggests that the intent of the agreement was not to include dismissal in that part. It may be explained by saying that "dismissal" is a deliberate, premeditated decision of the employer while "termination", in the context of Article 51, is not a predetermined step but one arising out of the meeting held to discuss some potential disciplinary action. That is one possible

interpretation. But, it is not my responsibility to explain the intent behind different parts of the agreement. It is enough to say that these are possible and rational interpretations.

20 In my opinion the arbitrator's decision is one founded on a rational interpretation of the agreement. It is not patently unreasonable. Accordingly, the application is dismissed.

21 Costs may be spoken to if necessary.

J. Z. Vertes

J.S.C.

Dated at Yellowknife, Northwest Territories
this 30th day of January, 1996

Counsel for the Applicant: Austin F. Marshall

Counsel for the Respondent: Glenn D. Tait

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