CV 05873

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

UNION OF NORTHERN WORKERS and RHONDA CLAES

Applicants

- and -

COMMISSIONER OF THE NORTHWEST TERRITORIES and AL SCHREINER, in his capacity as Chief Safety Officer

Respondents

Application for an interlocutory injunction. Dismissed.

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

Heard at Yellowknife, Northwest Territories
on August 22, 1995

Reasons filed: August 29, 1995

Counsel for the Applicants:	Austin F. Marshall
Counsel for the Respondent (Commissioner):	Donald M. Cooper, Q.C.
Counsel for the Respondent (Schreiner):	Garth E. Malakoe

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REASONS FOR JUDGMENT

1 This is an application for an interlocutory injunction restraining the respondent, Commissioner of the Northwest Territories (as representing the government of the Territories), from transferring the applicant, Rhonda Claes, or taking steps to dismiss her from her position in the public service. For the reasons that follow, I deny the application. The substance of my decision to do so is my conclusion that exclusive jurisdiction to deal with the issues raised by this application resides in the grievance and arbitration process established under the collective agreement between the government and its employees.

Facts:

2 The applicant Claes is employed as a community social worker. Her position is classified as "CSSW IV". Since April 19, 1994, she has worked in Sanikiluaq, an Inuit community in the eastern Arctic. She is not from that community and there is no evidence before me as to the circumstances surrounding her assignment to that community. The applicant, Union of Northern Workers, is the exclusive bargaining agent for Territorial public servants and Claes is a member of the union.

3 On May 6, 1995, Claes was threatened by one of her clients. The matter was reported to the police. The threat was taken seriously and the client was charged. There were concerns for Claes' safety so on May 13 she left Sanikiluaq. She was on medical leave until July 5 and since then has been assigned to temporary duties at the Iqaluit office of the Department of Health and Social Services (the "department").

4 On or about June 9th, the union contacted the occupational health and safety officer in Iqaluit with a formal complaint on behalf of Claes of dangerous working conditions in Sanikiluaq. Under the *Safety Act*, R.S.N.W.T. 1988, c.S-1, as well as under the collective bargaining agreement, an employee may refuse to work in "dangerous" situations, as that term is used in the legislation and the agreement. The safety officer responded that the office premises in Sanikiluaq had been previously inspected and were not considered to be dangerous to employees' health and safety. The safety officer considered the threat of violence against Claes to be a matter for the police. The Union demanded further investigation. On June 16, 1995, the Chief Safety Officer appointed

under the *Safety Act*, the respondent Schreiner, replied that the provisions of the *Safety Act* do not apply to Claes' circumstances and, in his opinion, the issue should be addressed under the collective agreement. On June 28th the applicants commenced these proceedings as an appeal of Schreiner's refusal to exercise jurisdiction in this matter.

5 In the meantime the Union, on behalf of Claes, filed a grievance under the collective agreement:

> **The Union of Northern Workers, on behalf of Rhonda Claes, herewith files a grievance directly at second level, under the authority of Article 37 of the Collective Agreement.**
>
> **The Union contends that the Employer has failed in it's 'duty to accommodate' the grievor, by discrimination and harassment. The Union further contends that the employer has failed to provide a safe workplace or alternate position within the Government network of departments.**
>
> **In redress, the Union requests that the grievor be made whole, that she be reimbursed for all her sick credits used since leaving Sanikiluaq, that the Employer provides accommodations for the grievor, until such time as the grievor has taken up a new position within the Government, and that all reference to this dispute be removed from all files.**

6 I was told that the grievance has been referred to the third level and the Union has now requested that the matter be put to arbitration.

7 On July 25, 1995, Claes was informed by the department's deputy minister that she was assigned to the community social worker's position in Arctic Bay, another eastern Arctic community. This position is classified as a "CSSW III" position but she was assured that the transfer was not a demotion and that she would maintain her "CSSW IV" salary and classification during her posting in Arctic Bay. She was given

various deadlines to report for duty in Arctic Bay. She, with the support of her Union, refused to do so for reasons which I will discuss shortly. On August 14, 1995, Claes received a letter from the department's acting deputy minister in which she was told that if she did not report to Arctic Bay by August 18th she would be deemed to have abandoned her position and her employment would be terminated. Hence this application to restrain the government by means of an injunction. The government undertook to take no action with respect to Claes' employment until my decision on this application.

8 Since the hearing of this application a further affidavit was filed by the applicants. This affidavit, by Dave Talbot, a regional vice-president of the Union, appears to address the sequence of events leading to the appeal of the Chief Safety Officer's refusal to conduct an investigation under the Safety Act. I realize that the respondents have had no opportunity to address this affidavit but, having regard to my decision, I do not think they are prejudiced if I refer to one item contained in it. This item is a copy of a lengthy letter written by Claes to her supervisor on May 18, 1995. In it she outlined the threat made by the client and numerous other complaints concerning the working and living conditions in Sanikiluaq. The letter concludes:

> **There are several issues that I require be address [sic] and resolved separately: (1) the immediate threat to my safety posed by a dangerous client; (2) the unacceptable workload faced by the social workers in Sanikiluaq; (3) health and safety issues represented by the intolerable environment of working and living in Sanikiluaq; and (4) the current state of my health, caused by working in Sanikiluaq, that makes return to a small, isolated community an unreasonable request. I am requesting that I be reassigned to an equivalent position in a major community.**

I quote this simply because it reveals the variety of concerns raised by Claes. The personal safety concern caused by the threat has not been the sole concern about a return to Sanikiluaq.

<u>Applicants' Submissions:</u>

Applicant's counsel based his submissions on two points.

First, Mr. Marshall submitted that the transfer of Claes to Arctic Bay is causally connected to her refusal to work in what was described as the dangerous situation in Sanikiluaq. Since the government has failed to address the safety issue, he argued, Claes is entitled to stand-by until they do and does not have to accept re-assignment. Even though the right to refuse work in a dangerous situation is spelled out in the collective agreement, the legislative mandate set out in the *Safety Act* must be complied with prior to imposing any requirement on Claes to return to work.

12 Mr. Marshall submitted that an arbitrator cannot address the question of the Chief Safety Officer's jurisdiction under that Act. So the issue of whether a threat of violence is within the ambit of the *Safety Act* cannot be addressed as part of the applicant's grievance. That would require the arbitrator to interpret an external statute. The issue as to whether the Chief Safety Officer was correct in his refusal to exercise jurisdiction can only be determined, it is argued, by this court on the appeal (or perhaps, more appropriately, on judicial review for an order in the nature of *mandamus*).

13 The second point raised by the applicants is one going to the fundamental nature of the employment relationship. Mr. Marshall submitted that the employer cannot unilaterally transfer an employee from one place to another place without the employee's consent. He said that the place of work is an inherent component of the employee's "position". He did not refer me to any specific provisions in either the *Public Service Act*, R.S.N.W.T. 1988, c.P-16, or the collective bargaining agreement, nor did he refer me to any case law, in support of this proposition. He did, however, tell me in effect that by a close analysis of the Act and the agreement, and by a consideration of the use of the term "position" in those sources, I too will come to the same conclusion.

14 The applicants' position is that an injunction is warranted because, by not investigating the safety issue raised by the employee and by the unilateral attempt to transfer the employee, the employer has committed violations of both the *Safety Act* and the *Public Service Act*. Until the safety issues are adequately addressed, it is submitted, the employer should be restrained by this court from proceeding with termination procedures. Mr. Marshall argued that only the court can provide this temporary relief since there is no authority given to arbitrators to issue injunctions.

Respondents' Submissions:

15 The respondent employer submitted that the entire matter comes squarely within the collective bargaining regime in place for the public service. As such this court should decline jurisdiction to deal with this matter. Mr. Cooper acknowledged that there is no power in an arbitrator to issue injunctive relief but said that, even though the court still retains that power, it is one that should be exercised only when there is an apprehended

violation of a statute or the collective agreement. It was argued that nothing has been put forward to establish such a violation.

16 The employer chose not to make submissions on the question of whether an employee can be unilaterally transferred to another location. The respondents were given very short notice that this argument would be advanced but Mr. Cooper declined an invitation for an adjournment so as to consider this question further. His submission was that this issue, as well, comes within the employment relationship and is clearly an arbitrable matter. It is not an issue for this court to decide.

17 As his final point, Mr. Cooper argued that, even if the court has jurisdiction, I should decline to grant an injunction since the applicants have failed to meet the test for such relief. He submitted that, even if Sanikiluaq posed a danger, there was no evidence that Arctic Bay would do so. He argued that the basis for Claes' refusal to go there was speculative at best. Furthermore, he submitted that Claes would not suffer irreparable harm if an injunction were not granted since, through the arbitration process, Claes could be reinstated with back pay (something this court cannot do) should an arbitrator conclude that the employer was wrong. Finally, it was submitted that the public interest must allow the employer to address the needs of government programmes with a fair degree of discretion. There is a social worker position open in Arctic Bay; the community needs a social worker; therefore, the public interest in assigning Claes to Arctic Bay should outweigh her private interest in being relocated to a larger centre.

18 The respondent Schreiner took no position on this application. His counsel merely pointed out that he was never asked nor did he refuse to carry out a safety investigation in Arctic Bay.

Analysis:

19 I have already given my opinion that the grievance-arbitration process under the collective agreement has exclusive jurisdiction in this matter. Therefore, it is unnecessary for me to review in detail the test for interlocutory injunctions. I will, however, say that Mr. Cooper's point regarding absence of irreparable harm is particularly pertinent to a dispute arising out of an employment context where the employee has the right to grieve a dismissal or other employer discipline. The relief that can be provided by an arbitrator is usually far more extensive and varied than a court can provide.

20 On June 29, 1995, the Supreme Court of Canada released its judgments in Weber v. Ontario Hydro, [1995] S.C.J. No.59. There were two judgments delivered in that case, a majority one by McLachlin J. and a minority one by Iacobucci J., but on the jurisdictional issue essential to the case before me the two sides agreed.

21 The Supreme Court of Canada in Weber set forth an "exclusive jurisdiction" model for the resolution of disputes that have their essential foundation in the collective agreement. If a dispute arises out of the agreement, and there is a mandatory arbitration process in place, then the courts should defer to the jurisdiction of the arbitration process. McLachlin J. explained the model as follows:

> **The final alternative is to accept that if the difference between the parties arises from the collective agreement, the claimant must proceed by arbitration and the courts have no power to entertain an action in respect of that dispute. There is no overlapping jurisdiction.**
>
> **On this approach, the task of the judge or arbitrator determining the appropriate forum for the proceedings centres on whether the dispute or difference between the parties arises out of the collective agreement. Two elements must be considered: the dispute and the ambit of the collective agreement.**
>
> **In considering the dispute, the decision-maker must attempt to define its "essential character", to use the phrase of La Forest J.A. in Energy & Chemical Workers Union, Local 691 v. Irving Oil Ltd. (1983), 148 D.L.R. (3d) 298 (N.B.C.A.). The fact that the parties are employer and employee may not be determinative. Similarly, the place of the conduct giving rise to the dispute may not be conclusive; matters arising from the collective agreement may occur off the workplace and conversely, not everything that happens on the workplace may arise from the collective agreement: Energy & Chemical Workers Union, supra, per La Forest J.A. Sometimes the time when the claim originated may be important, as in Wainwright v. Vancouver Shipyards Co. (1987), 38 D.L.R. (4th) 760 (B.C.C.A.), where it was held that the court had jurisdiction over contracts pre-dating the collective agreement. See also Johnson v. Dresser Industries Canada Ltd. (1990), 75 O.R. (2d) 609 (C.A.). In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement or it did not. Some cases, however, may be less than obvious. The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.**

22 The Supreme Court recognized that there are times when a remedy is required that the arbitrator is not empowered to grant. An injunction is a case in point. In such circumstances the residual power of the courts to grant such relief can be invoked. But, as noted in the earlier case of St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers' Union, [1986] 1 S.C.R. 704, such power should be exercised only to prevent immediate harm arising out of a clear violation of a statute or agreement and where no alternative remedy exists.

23 In the Northwest Territories the *Public Service Act* makes the collective agreement binding on the government, the union, and the employees who are union members. It also provides, in s.43, for the resolution of disputes by arbitration.

24 The collective agreement between the government and the Union provides for the resolution of disputes by grievance and by arbitration:

> 37.01 (1) The Employer 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 an Act, or a regulation, direction or other instrument made or issued by the Employer 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 Public Service; and
>
> (d) letters of discipline placed on personnel file.
>
> (2) The procedure for the final resolution of the grievances listed in paragraph (a) of section (1) above is as follows:
>
> (a) Where the grievance is one which arises in circumstances outlined in sub-paragraph (i) of paragraph(a) or in paragraph (d) the final level of resolution is to the Minister of Personnel.
>
> (b) Where the grievance is one which arises out of the interpretation or application of the Collective Agreement the final level of resolution is to arbitration;
>
> (c) Where the grievance arises as a result of disciplinary action resulting in demotion, suspension, or a financial penalty or dismissal from the Public Service, the final level of resolution is to arbitration.
>
> . . .
>
> 37.19 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 and the Final Level, of his/her desire to submit the difference or allegation to arbitration under Section 43 of the Public Service Act.
>
> . . .
>
> 37.21 (1) The arbitrator has all of the powers granted to arbitrators under Section 12 of the Arbitration Act in addition to any powers which are contained in this Agreement. **An arbitrator in a discipline case has the power to rescind, alter or amend the disciplinary decision including the ability to reinstate the grievor with full or partial compensation for lost wages, or the ability to award compensation in discipline or other alleged violations of the Collective Agreement.** (emphasis in original)
>
> (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 every employee affected by it.
>
> . . .
>
> 37.25 Where an employee files a grievance against his/her dismissal from the Public Service, the provisions of Clause 37.19 apply.
>
> 37.26 In addition to the powers granted to arbitrators under Section 12 of the Arbitration Act the arbitrator may determine that the employee has been dismissed for other than proper cause and he/she may:
>
> (a) direct the Employer to reinstate the employee and pay to the employee a sum equal to his/her wages lost by reason of his/her dismissal, or such less sum as in the opinion of the arbitrator is fair and reasonable; or
>
> (b) make such order as he/she considers fair and reasonable having regard to the terms of this Agreement.

25 The scheme established by the statute and the agreement reveals a clear legislative intent to oust this court's jurisdiction in the resolution of disputes arising out of the collective agreement context. A similar conclusion was reached by my colleague de Weerdt J. in Kuich v. The Commissioner of the Northwest Territories et al (N.W.T.S.C. No. CV 04931; May 7, 1994).

26 The question therefore is whether the two points raised by the applicants — the refusal by the Chief Safety Officer to exercise jurisdiction to investigate and the attempted unilateral transfer of Claes to Arctic Bay — are related to a dispute arising from the interpretation, application, administration or violation of the collective agreement.

(1) The Safety Issue:

27 The issue here is not whether the applicant's job in Sanikiluaq was a dangerous situation or there existed an unusual danger; the issue is whether the Chief Safety Officer was correct in his decision that the matter did not come within the ambit of the *Safety Act*. I have no doubt that the applicant Claes had a reasonable fear for her personal safety as a result of the threat made by the client in Sanikiluaq. I also have no doubt that she had concerns about other issues: an excessive workload, inadequate support services, poor housing and office conditions, etc. Whether these same concerns would apply with equal force in Arctic Bay is not before me in the evidence.

28 One of the recurring points made in the applicants' material, and one made by Mr. Marshall at the hearing, is that there is a presumed prospect of problems because the applicant Claes, an aboriginal northerner but non-Inuit, is working in an Inuit community. While I hesitate to dignify such a presumption with further comment, I will say that there is no evidence to support any such conclusion. I suspect that, unfortunately, the incidence of social workers being threatened by disgruntled or deranged clients is probably quite high in every community, whether northern or southern, aboriginal or not. But again no evidence on this problem has been presented.

29 The issue of safety in the workplace comes under both statute and the collective agreement. The *Safety Act* has general application to all workplaces, government and private, whether unionized or not. The Act provides in s.13 a right to the employee to refuse work:

> **13. (1) In this section, "unusual danger" means, in relation to any occupation,**
>
> **(a) a danger that does not normally exist in that occupation; or**
>
> **(b) a danger under which a person engaged in that occupation would not normally carry out his or her work.**
>
> **(2) A worker may refuse to do any work where the worker has reason to believe that**
>
> **(a) there exists an unusual danger to the health or safety of the worker;**
>
> **(b) the carrying out of the work is likely to cause to exist an unusual danger to the health or safety of the worker or of any other person; or**
>
> **(c) the operation of any tool, appliance, machine, device or thing is likely to cause to exist an unusual danger to the health or safety of the worker or of any other person.**

30 The Act provides for inspections by safety officers and by the Chief Safety Officer. It also provides for an appeal to this court from decisions of the Chief Safety Officer.

31 The collective agreement also deals with safety and health issues in Article 40:

> **40.01 All standards established under the Safety Act and Regulations thereunder shall constitute minimum acceptable practice. The Employer shall continue to make all reasonable provisions for the occupational safety and health of employees, including the appointment of safety officers, who shall retain their existing duties and powers. The Employer will entertain suggestions on the subject from the Union and the Employer and the Union undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.**

. . .

40.10 Right to Refuse Dangerous Work

An employee shall have the right to refuse to work in situations which can reasonably be considered dangerous.

(a) "danger" means any hazard or condition that could reasonably be expected to cause injury or illness to an employee or other persons exposed thereto before the hazard or condition can be corrected.

(b) An employee may refuse to do any particular act or series of acts at work which he/she has reasonable grounds to believe are dangerous to his/her health or safety or the health and safety of any other employee at the place of employment until sufficient steps have been taken to satisfy him/her otherwise or until the Chief Safety Officer or his/her representative has investigated the matter and advised him/her otherwise.

(c) The Employer shall not assign another employee to do the work assignment until a Union member and an Employer member of the Safety Committee have investigated the situation and deemed it to be safe.

32 The agreement also contemplates the filing of grievances on safety and health matters:

> **37.13 The Union shall have the right to initiate and present a grievance on matters relating to health and safety to any level of management specified in the grievance procedure on behalf of one or more members of the Union.**

as well as over the application or interpretation of the agreement:

> **37.16 The Union shall have the right to initiate and present a grievance to any level of management specified in the grievance procedure related to the application or interpretation of this Agreement on behalf of one or more members of the Union.**

33 It seems to me that there is a complementary system set up as between the statute and the agreement. The standards of the *Safety Act* are applied as a minimum acceptable level and the authority of the Chief Safety Officer is recognized. But the provisions of the *Safety Act* are secondary to the specific provisions of the agreement

since the agreement recognizes them to be minimum standards only. It therefore seems to me that the applicant Claes' refusal to work in Sanikiluaq on the ground that it is a dangerous situation is first and foremost an issue arising from the terms of the collective agreement. The refusal, if any, of the employer to investigate the work place from a "safety" perspective is a question regarding the interpretation of the agreement. Hence these are arbitrable matters.

34 The applicants' counsel is correct in his submission that an arbitrator cannot decide the question of the Chief Safety Officer's jurisdiction under the *Safety Act*. But the arbitrator can decide the extent of the employer's obligation under Article 40 of the collective agreement. And, in doing so, the arbitrator can interpret and apply the provisions of the *Safety Act*. Ever since McLeod et al v. Egan (1974), 46 D.L.R. (3d) 150 (S.C.C.), it has been recognized that arbitrators have a duty to construe and apply public statutes that may affect a grievance.

35 It seems to me that an arbitrator could be just as well placed as this court to determine whether threats of violence, such as that encountered by the employee in this case, come within the ambit of health and safety regulations. An arbitrator would be in even a better position to consider that question in the circumstance of the employee's particular type and place of work. An arbitrator could give remedial directions. All a court can likely do on a review of the Chief Safety Officer's decision in this case is say whether he was right or wrong and, if wrong, send the matter back to him to do what he should have done in the first place. These points reinforce my conclusion that this dispute is in essence an arbitrable matter.

36 As an aside, and while it is not up to me to decide the subject-matter of the *Safety Act* appeal (if it does go ahead), I note that some jurisdictions have specifically amended their occupational health and safety legislation to include violence and harassment in the workplace as health and safety issues as opposed to being simply criminal or social matters. The CCH Canadian Master Labour Guide (2nd ed., 1995), at pages 945-946, discusses the legislative changes recently implemented in Saskatchewan and British Columbia. This explicit recognition in such amended legislation may be highly suggestive that current legislation does not include these concepts.

(2) The Transfer Issue:

37 The question to answer here is whether the applicants are correct in saying that the employer cannot transfer an employee from one location to another without the employee's consent. If they are correct then an injunction should issue to prevent a clear violation of the employee's rights until the matter can be resolved by arbitration. If I cannot say that they raise a *prima facie* case, then that does not mean that they are wrong; that merely means that, having regard to the exclusive jurisdiction model discussed in Weber, I should defer on this question to the arbitration process. That is because it seems clear to me that any dispute over an employee's refusal to obey an assignment, or the employer deeming such refusal as abandonment and thus grounds for dismissal, by their very nature arise out of the collective agreement context.

38 Applicants' counsel submitted that an employee's "position" contained, as an essential component, the place of work. Therefore the employer cannot designate a new

place without in effect altering the "position", something that can only be done under the strict terms of the *Public Service Act* and collective agreement.

39 Neither the Act nor the agreement provide a definition for the term "position". Neither one of them address the question of place of work or transfer from one place to another. The term "transfer" as used in the agreement means the appointment of an employee to "a new position" that is not a promotion or demotion. But there is no reference to "position" being in any way related to "place of work". The lack of reference to a "transfer" as relating to "place of work" is not necessarily surprising since, in the collective agreement context, transfers are usually referrable to transfers from job to job or in or out of the bargaining unit. For those types of transfers there are usually strict procedures set out in an agreement.

40 The *Public Service Act*, in sections 12 through 14, outlines the requirement for the constitution of departments within the government and the organization of departments into jobs. The jobs are classified into positions. Rates of pay are then set for each classification and grade. If a deputy minister wants to add positions to the department, the request for any new position must outline duties, responsibilities and qualifications for the position. There is no mention of place of work.

41 Some provisions of the collective agreement however do seem to at least contemplate employees moving from one place to another. Article 43 provides for payment of removal expenses to the "place of duty" (a term also not defined) on initial appointment and subsequent moves. Article 41 provides for the payment of settlement

allowances to every employee who "is assigned to a position that is located in a community" listed in a schedule to the agreement. This suggests to me a differentiation between "position" and the "location" of a position.

42 In my opinion, the proposition advanced by the applicants is far from being clear. On the contrary I would say that the assignment of employees to different locations, so long as it does not entail a demotion, change of job or pay, would be an aspect of the right of management to organize its work force. This would of course be dependant on what specific commitments were made at the time of hiring, or what conditions are contained in the employee's job description, but there is no evidence of any of this before me.

43 There is also no evidence before me that the "CSSW IV" designation applies only to positions in Sanikiluaq (although it does not apply to Arctic Bay). In any event, applicants' counsel did not seriously contend that the relocation to Arctic Bay would be a demotion or change in job classification having regard to the commitment made by the department to maintain Claes' classification status and pay level.

44 The collective agreement expressly recognizes the employer's right to manage and organize the work force:

> **7.01 Except to the extent provided herein, this Agreement in no way restricts the Employer in the management and direction of the Public Service.**

45 An employer's management rights have traditionally contained the presumptive privilege of making changes in the organization of the work force, including transfers from

job to job, so long as they are made in good faith for *bona fide* organizational purposes and are not contrary to the terms of any statute or agreement. Transfers from one work place to another have also been traditionally considered to be within the management rights prerogative. See, generally, E. E. Palmer, Collective Agreement Arbitration in Canada (2nd ed., 1983), at pages 469-487 and 589-595; and, J. Finkelman & S. B. Goldberg, Collective Bargaining in the Public Sector (1983), at pages 181-182 and 308-309. It has also been held that the power to challenge a decision of management must be found in some provision of the collective agreement: Re Metropolitan Toronto Board of Commissioners of Police et al (1981), 33 O.R. (2d) 476 (C.A.), leave to appeal to S.C.C. dismissed.

46 An analogy can be drawn to private constructive dismissal cases in non-unionized settings. Courts have held that employers are permitted flexibility in deciding the location of the job. Generally speaking, where a transfer to a new location is a lateral move, that is where there is no loss of salary or status, and there is no contractual provision prohibiting relocation, then the transfer is not considered to be cause for the employee to refuse the move and claim constructive dismissal: Reber v. Lloyd's Bank (1985), 18 D.L.R. (4th) 122 (B.C.C.A); Smith v. Viking Helicopters Ltd. (1989), 68 O.R. (2d) 228 (C.A.).

47 There are not many labour cases that directly address this question of relocation of the workplace. The most common type of dispute found in arbitration cases is not over relocation *per se* but over how a refusal to relocate is to be treated. In Re The Crown in Right of Ontario and O.P.S.E.U. (1982), 3 L.A.C. (3d) 385, a decision of the

Ontario Crown Employees Grievance Settlement Board, the issue was whether such refusal was to be considered abandonment or the direction to relocate was to be considered a lay-off. The Ontario government closed a programme headquarters in Toronto and relocated it to Kingston. The Toronto employees were told to relocate in Kingston or else be deemed to have abandoned their positions. The Board held that the closure of the Toronto office constituted the abolition of those positions. Hence those employees who refused to relocate were to be considered as having been laid off. The consequences of abandonment as opposed to lay-off were of course much different. But, the decision was clearly based on the specific provisions of the collective agreement. The agreement expressly provided that jobs were to be classified by position and a geographic location. Therefore the positions had a geographical constraint. This was reinforced by a provision that an employee subject to lay-off could refuse a reassignment to someplace beyond a specified distance. The Board recognized the employer's right to make changes in the organization but such changes had to be in accordance with the terms negotiated in the agreement.

48 In this case there is no evidence of any specific commitment by the employer to Claes respecting relocation. There is no express requirement in the collective agreement for the employee's consent to a relocation. Indeed, there is no job security generally provided in the agreement. There are provisions for lay-offs due to redundancy, technological change, and contracting out of work. So one cannot say that any employee has generally a vested right to a particular job and even less so to a particular job in a particular place.

49 Having reviewed in some detail both the *Public Service Act* and the collective agreement, I cannot say that there is an obligation to obtain an employee's agreement to a transfer to a new location (a transfer that involves merely relocation without any change to job type or pay). That is not to say that such an obligation does not exist but merely to say that I fail to see any violation of the statute or the agreement so as to warrant issuance of an injunction. This question is clearly one that falls within the ambit of the collective agreement and should be addressed through the arbitration process.

50 The proposed transfer to Arctic Bay raises a number of other potential issues which may or may not be of significance. Is the proposed transfer an implicit change in classification notwithstanding the employer's assurances? Is it a disguised form of discipline connected to the complaint under the Safety Act? Is the safety issue relevant at all anymore since the employer is not insisting on Claes' return to Sanikiluaq? Finally, is the transfer in reality a "direct appointment" under the *Public Service Act* and, if so, is it even grievable? All of these issues are directly related to the collective agreement and therefore best addressed in arbitration.

Conclusion:

51 In my opinion these proceedings reveal the merits of the exclusive jurisdiction model approved in Weber.

52 The applicants have raised a number of issues: the scope of the employee's right to refuse work believed to be dangerous and indeed the criteria of a dangerous workplace; the right of the employee, if any, to refuse relocation to another work site; the obligations

of the employer to accommodate this employee's particular difficulties. Some of these issues may be amenable to litigation but, since all of them are related to the employment context, all of them can be made the subject-matter of grievances or references to arbitration. One arbitrator could conceivably address all issues. This has the obvious benefit of placing all issues into a factual context, not to mention the benefit of the expertise in labour issues provided by an arbitrator who works with these issues on a regular basis. The arbitration process provides one forum, less legalistic and conceivably more expeditious than a court, as opposed to the proliferation of court process evident in this case. In my view the arbitration process set out in the collective agreement — a process agreed to by both the employer and the Union on behalf of all employees — is an adequate alternative remedy to any relief this court could provide in this case.

53 For the foregoing reasons, the application for an injunction is dismissed. Costs may be spoken to if necessary.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 29th day of August, 1995

Counsel for the Applicants: Austin F. Marshall

Counsel for the Respondent (Commissioner): Donald M. Cooper, Q.C.

Counsel for the Respondent (Schreiner): Garth E. Malakoe

CV 05873

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

UNION OF NORTHERN WORKERS and RHONDA CLAES

Applicants

- and -

COMMISSIONER OF THE NORTHWEST TERRITORIES and AL SCHREINER, in his capacity as Chief Safety Officer

Respondents

Reasons for Judgment of the Honourable Mr. Justice J. Z. Vertes

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