Date: 1997 08 29
Docket: CV 06986

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER of an Application, pursuant to Section 28 of the ***Arbitration Act***, R.S.N.W.T. 1988, c.A-5, as amended, to set aside the Arbitration Award of Alan V.M. Beattie, Q.C., rendered February 28, 1997, in respect of the grievances of Dan O'Connor

BETWEEN:

UNION OF NORTHERN WORKERS

Appellant

- and -

GOVERNMENT OF THE NORTHWEST TERRITORIES

Respondent

Application to set aside an arbitrator's decision to impose a lesser penalty, and not re-instatement, where the arbitrator found that the employer did not have just cause for dismissal. Application denied.

Heard at Yellowknife on July 22, 1997

Reasons filed August 29, 1997

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Appellant: Andrew J. Raven

Counsel for the Respondent: Glenn Tait

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REASONS FOR JUDGMENT

[1] This is an application to set aside a grievance arbitration award made on February 28, 1997 pursuant to a collective agreement between the Union of Northern Workers and the Government of the Northwest Territories and also pursuant to the ***Arbitration Act***, R.S.N.W.T. 1988, ch.A-5. In this case the employee was dismissed for cause, on grounds of incompetence. He sought reinstatement through the grievance and arbitration provisions of the collective agreement. The grievance arbitrator found that the employer did not have just cause for dismissal, but was "almost" in that position. Instead of ordering reinstatement, the grievance arbitrator substituted a lesser penalty; i.e., an award of damages in the amount of $10,000 to the employee. The sole issue on this application is whether the grievance arbitrator misconducted himself or acted beyond his jurisdiction as an arbitrator in substituting this lesser penalty for an order of reinstatement. The union seeks to set aside the arbitration award on this ground.

[2] The collective agreement between the parties provided that the procedure for final resolution of any grievance arising from disciplinary action taken by the employer against an employee was arbitration. It also expressly provided that the arbitrator's decision was final and binding.

[3] Excerpts from the collective agreement are as follows:

> 31.21(a) 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.
>
> (b) 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.
>
> (c) The award of the arbitrator shall be signed by him/her and copies thereof shall be transmitted to the parties to the dispute.
>
> . . .
>
> 31.26 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 the wages lost by reason of the 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.

[4] The arbitrator in the present case relied upon this latter provision as authority for him to make the award he did.

[5] The ambit of review by this Court of a "final and binding" decision of an arbitrator is limited. This is clear from provisions of the ***Arbitration Act***:

> 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.
>
> 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.

(2) The evidence of the witnesses examined on the reference shall be taken down in writing and shall, at the request of either party, be transmitted by the arbitrator or the umpire, as the case may be, together with the exhibits, to the judge.

(3) Where the award of an arbitrator or an umpire is based wholly or partly on

(a) his or her physical examination of property, or
(b) special knowledge or skill possessed by him or her,

the arbitrator or umpire shall transmit to the judge a written statement of that physical examination, special knowledge or skill that will enable the judge to form an opinion of the weight that should be attached to the physical examination performed by the arbitrator or umpire or to the special knowledge or skill of the arbitrator or umpire in reaching the award.

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.

[6] In the present case, there is no suggestion that the arbitrator's award was improperly procured so the sole ground of review is "misconduct" by the arbitrator. An arbitrator clearly misconducts himself or herself when he or she acts in excess of his or her jurisdiction. See *U.N.W. v N.W.T.P.C and GNWT* [1994] N.W.T.J. No.59.

[7] The record placed before the Court indicates that the arbitrator heard evidence and the parties' submissions over four days at a hearing, and issued detailed reasons for his decision. The evidence covered the entire 3 ½ years of the grievor's employment history

with the employer, including the circumstances of each of a) the various "unsatisfactory" performance appraisals by the employer, b) two letters of reprimand or warning issued by the employer, c) three suspensions for misconduct, and d) the employer's termination of the grievor's employment. There were five separate grievances before the arbitrator for decision, including the one which related to termination of employment.

[8] Noteworthy among the arbitrator's findings or conclusions are the following:

(1) Some of the evidence was unsatisfactory and incomplete.
(2) Among approximately thirty alleged incidents in the performance appraisals were many well-founded charges of incompetence but also a number of allegations that were unfair or uncorroborated.
(3) The grievor was far from a model employee and was the author of much of his own misfortune.
(4) There was no basis for the grievor's belief that his supervisor was out to get him.
(5) The grievor had an attitude problem throughout his employment and at the arbitration hearing. He would not accept responsibility for his own faults or shortcomings, but blamed others instead. He is unlikely to change in that regard.
(6) The grievor knew he was facing the probability of dismissal.
(7) There was "almost" enough evidence to warrant the dismissal, on a balance of probabilities.
(8) A satisfactory employment relationship cannot be re-established between the employer and the employee, in the circumstances.

[9] All of these are findings or conclusions which were open to the arbitrator to make and are within his jurisdiction.

[10] It is also open to the arbitrator, and within his purview, to interpret the collective agreement, in particular article 31.26.

[11] In the arbitrator's reasons for decision, after dealing with the other four grievances, he turned to the grievance against dismissal, and stated:

> In my judgment, in all the circumstances of this case, just cause for termination has not been established on a balance of probabilities, although the Employer was not far from proving just cause. On the other hand, given the grievor's extremely outspoken and strong feelings about his perceived wrongful treatment at the hands of the Employer, his disdain

> for Mr. Crook (even if he is, as was stated, no longer with the Employer), and given the grievor's inability to accept much fault for much of what occurred, I do not believe it would be appropriate to reinstate him. Given his attitude I cannot imagine that a satisfactory working relationship could be re-established.
> . . .
>
> I believe that under the foregoing clause [31.26(b)], as well as the ***Arbitration Act***, I have the authority to substitute for the dismissals such lesser penalty as I consider just and reasonable in all the circumstances.
> . . .
>
> I consider damages in the amount of $10,000 (without interest) to be fair and reasonable, and I order the Employer to pay those damages to the grievor, subject to the Employer's obligation to comply with statutory requirements such as Employment Insurance. I also direct that the letter of dismissal be removed from the grievor's personnel file and be placed by a notation that the grievor's employment ended effective August 5, 1994.

[12] In my view the arbitrator places a reasonable and sensible interpretation on article 31.26. To deny that such as an interpretation is open is to deny any meaning to paragraph (b). To suggest that, once finding that there was no just cause for dismissal, the arbitrator was compelled to order reinstatement under paragraph (a) is to render paragraph (b) without purpose. The parties could not have intended that paragraph (b) have no meaning or purpose.

[13] There clearly exists a rational basis for the arbitrator's interpretation of article 31.26 of the collective agreement. I cannot see that it is open to this Court to interfere.

[14] As stated earlier in these Reasons, this Court's scope of review is limited.

[15] The arbitrator's interpretation of the terms of the collective agreement (including article 31.26) can only be set aside by this Court if it is patently unreasonable. *C.U.P.E. v New Brunswick Liquor Corporation* [1979] 2 S.C.R. 277; *United Nurses of Alberta v Misericordia Hospital* [1983] 6 W.W.R.1 (Alta.C.A.). In this case, I find that the arbitrator's interpretation of his remedial powers under article 31.26 is a reasonable one.

[16] The issue of whether a grievance arbitrator, on a grievance against dismissal, can substitute a lesser penalty that the arbitrator considers fair and reasonable in the circumstances arose in a case in Alberta a number of years ago, and was eventually the subject of a decision in the Court of Appeal there in *A.U.P.E. v University Hospitals Board* (1991) 82 D.L.R.(4th) 264. Although in that case it was a provision of the

governing statute (***Public Service Employee Relations Act***, R.S.A. 1980, ch.P-33) which contained the arbitrator's remedial powers, the wording of the statutory provision was not dissimilar to the wording of article 31.26 of the collective agreement in the present case. The Court of Appeal ruled that it was open to the arbitrator to impose the sanction it did; i.e., a lesser penalty instead of reinstatement.

[17] More recently, in *United Steelworkers of America v Liquid Carbonic Inc*. (1996) 29 O.R.(3d) 468, a case with factual circumstances very similar to the present one, the Divisional Court in Ontario ruled that compensation in lieu of reinstatement is a lesser penalty which an arbitrator has the power to substitute for dismissal. Again, the wording of both the collective agreement and the governing statute in *Liquid Carbonic* are, in essence, indistinguishable from the wording of article 31.26 in the present case.

[18] In am fortified in my decision not to interfere with the arbitrator's interpretation by the reasoning in *A.U.P.E.* and *Liquid Carbonic*, and I prefer these decisions over earlier, contrary, decisions of other courts in *Simmons v Government of Manitoba* (1984) 28 Man.R.(2d) 94 (Man.C.A.); *Hotel Employees Union v Shermith Investment Ltd.* (1988) 85 N.S.R.(2d) 348 (N.S.S.C.); and *International Woodworkers of America v Industrial Mill Installations Ltd.* (1971) 22 D.L.R.(3d) 416 (B.C.C.A.).

[19] It was further submitted by the union's counsel that even if article 31.26 permitted the arbitrator to consider a damages award in lieu of reinstatement, such a remedy can only be granted in exceptional circumstances where it is clearly established that the employment relationship has been irreparably damaged and the grieving employee cannot be rehabilitated. There is support for this proposition in reported cases, including *Liquid Carbonic* and the trial decision in *A.U.P.E.*

[20] Again, however, it is for the arbitrator to determine whether such exceptional circumstances existed in the present case, and not this Court. The record clearly indicates that the arbitrator was aware of the existing arbitral jurisprudence on this point, including cases referred to herein.

[21] In my view, a Court should be slow to interfere with an arbitrator's considered decision on the appropriate remedy where the arbitrator has determined that some measure of discipline or sanction is justified. This was clearly stated by the Supreme Court of Canada in *Huestis v New Brunswick Electric Power Commission* (1979) 98 D.L.R.(3d) 622 at p.631:

> There is very good policy reason for judicial restraint in fettering adjudicators in the exercise of remedial powers. The whole purpose in establishing a system of grievance adjudication under the Act is to secure prompt, final and binding settlement of disputes arising out of interpretation or application of the collective agreement, or disciplinary action taken by the employer, all to the end that industrial peace may be maintained.

[22] The arbitrator in the present case found that there was just cause for discipline (though not outright dismissal) and he fashioned a remedy which he believed was appropriate, fair and reasonable. In doing so, he did not venture outside his jurisdiction or otherwise misconduct himself.

[23] For these reasons, the application to set aside the arbitrator's decision is dismissed, with costs.

J.E. Richard,
J.S.C.

Dated at Yellowknife, Northwest Territories
this 29th day of August 1997

Counsel for the Appellant: Andrew J. Raven
Counsel for the Respondent: Glenn Tait

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JUSTICE J. E. RICHARD**