Date: 1997 08 29
Docket: CV 06622

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

IN THE MATTER of the ***Arbitration Act***, R.S.N.W.T. 1988, c.A-5, as am.,

AND IN THE MATTER of an Application to set aside the Arbitration Award of Nancy Morrison, Q.C. dated July 26, 1996

BETWEEN:

**THE GOVERNMENT OF THE NORTHWEST TERRITORIES**

Appellant

- and -

**THE UNION OF NORTHERN WORKERS**

Respondent

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Application to set aside an arbitrator's award of compensatory damages. Application denied.

Heard at Yellowknife on July 23, 1997

Reasons filed: August 29, 1997

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

Counsel for the Appellant: Karan M. Shaner
Counsel for the Respondent: Andrew J. Raven

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**REASONS FOR JUDGMENT**

[1] This is an application by the employer to set aside a grievance arbitration award made 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. The employer, over a period of years commencing as early as 1989, had purported to exclude certain employee positions from the bargaining unit to which the collective agreement applied. The union grieved not only the exclusions themselves but also the manner in which the employer had done so, alleging that the employer acted in clear violation of the collective agreement. The numerous grievances, relating to hundreds of excluded positions, were referred to an arbitrator for decision. The parties had agreed in the collective agreement that an arbitrator's decision is final and binding.

[2] The arbitrator held numerous hearings over a two-year period and dealt with 500-700 “exclusions”. Each employee position was assessed separately. Some exclusions were upheld; however, many were reversed and those positions ordered to be returned to the bargaining unit. In the final part of the arbitrator's decision, she made an award of compensatory damages against the employer, ordering the employer to pay to the union, with respect to certain employee positions returned to the bargaining unit, an amount equal to the union dues that would have been received by the union, retroactive to the date of the exclusion. The employer seeks to set aside this aspect of the arbitration award.

[3] The ambit of review by this Court of a “final and binding” decision of an arbitrator is limited. This is clear from the 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.

[4] 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 G.N.W.T.* [1994] N.W.T.J. No.59.

[5] In order to determine whether the arbitrator in the present case misconducted herself, I refer firstly to those provisions of the collective agreement relating to excluded positions:

> Article 2.01. For the purpose of this Agreement:
> . . .
>
> (o) "Employee" means a member of the Bargaining Unit and includes:
>
> (i) . . .
> (ii) . . .
> (iii) . . .
> (iv) . . .
>
> But does not include any person who:
>
> (v) is employed in a position confidential to the Commissioner, the Deputy Commissioner, the Executive Council or a Minister, Deputy Minister, or Chief Executive Officer of any Government Department or Agency;
>
> (vi) is employed as a Legal Officer;

(vii) who has executive duties and responsibilities in relation to the development and administration of Government programs;

(viii) whose duties include those of a personnel administrator or who has duties that cause him/her to be directly involved in the process of collective bargaining on behalf of the Employer;

(ix) who is required by reason of his/her duties and responsibilities to deal formally on behalf of the Employer with a grievance presented in accordance with the grievance process provided for by this Agreement;

(x) who is employed in a position confidential to any person described in subparagraph (vi), (vii), (viii) and (ix);

(xi) who is not otherwise described in subparagraph (vii), (viii), (ix) or (x) but who, in the opinion of an arbitrator, should not be included in the Bargaining Unit by reason of his/her duties and responsibilities to the Employer.

. . .

## ARTICLE 14
## INFORMATION

14.01 The Employer agrees to continue the past practice of providing the Union on a monthly basis, with information concerning the identification of each member in the Bargaining Unit. This information shall include, but not be limited to, the name, location, job classification, and social insurance number of all employees in the Bargaining Unit.

. . .

14.05 The Employer shall provide the Union with a monthly report of all positions excluded from the Bargaining Unit. This report shall include position number, position title, settlement code, and name of incumbent. In addition, the Employer shall provide the Union with a monthly report of all positions that were excluded from or included in the Bargaining Unit during that month. This report shall include position number, position title, position description, and, in the case of exclusion, the criteria.

14.06 Positions shall only be excluded from the Bargaining Unit on the basis of the criteria specified in Article 2.01 Clause (o) and interpreted in the document entitled

> "Exclusion from the Bargaining Unit U.N.W." in a Memorandum of Understanding dated January 13, 1978.

[6] The Memorandum of Understanding dated January 13, 1978 is attached as an appendix to the collective agreement. It contains the parties' agreement on the criteria to be used in interpreting and applying the managerial, confidential and other categories of exclusion listed in Article 2.01(o).

[7] One of the introductory paragraphs of the Memorandum states:

> The Government of the Northwest Territories has the right to exclude any position which adequately conforms to the criteria. Conversely the Union has the right to oppose a Government decision if it is their opinion that the criteria has not been interpreted or applied correctly. When the Union does not agree with a Government decision, the matter is presented to arbitration.

[8] In the Memorandum, the parties further agreed that each time the employer made a decision to exclude a position, it would provide to the union in writing accurate details justifying the exclusion. These details were to include the approved job description, the organization chart indicating the reporting relationship of the position, and an identification of the specific agreed criteria the employer was relying upon for exclusion.

[9] The immense subject matter of the exclusions came to the arbitrator via two routes. Firstly, the parties had stipulated (in the Memorandum of Understanding) that where there was merely a disagreement between the parties in a specific case about the application or interpretation of the agreed criteria, the final decision would be made by an arbitrator. No "grievance" need be filed.

[10] Secondly, the union had complained that the employer was repeatedly in breach of article 14.05 and article 14.06, and the union eventually filed a series of grievances with respect to those alleged breaches. These grievances were referred to arbitrator Morrison for determination. In essence, these grievances were that the employer:

(a) was not providing the monthly reports required by article 14.05.
(b) was regularly excluding positions without regard to article 14.06 requirements (i.e., the fact of exclusion was itself grieved).
(c) was failing to comply with the provisions of the Memorandum of Understanding with respect to providing to the union the required documents in justification of each exclusion.

[11] The record filed in this Court indicates that it was consistent breaches of the collective agreement as described in categories (b) and (c) above that led the arbitrator to award compensatory damages in favour of the union.

[12] For purposes of the subject matter of the compensatory damages award under attack in this application, I summarize findings or conclusions of the arbitrator which appear in the record:

(1) There were many instances where the employer excluded an employee position and did not notify the union.
(2) There were many instances where the employer did not provide a job description, organization chart and/or rationale for exclusion under specific criteria, even when requested by the union.
(3) There were many instances where the union, and indeed the arbitrator, were frustrated by inability to assess the justification for the exclusion (eventually determined to be improper) due to the lack of information from the employer.
(4) There were many delays in obtaining the arbitrator's final determination on specific (improper) exclusions which delays were directly attributable to the lack of information from the employer.
(5) The union suffered a financial loss which was self-evident -- the union dues which were not paid by an employee improperly excluded from the bargaining unit.
(6) The financial loss suffered by the union was certain and calculable and not speculative.
(7) The financial loss suffered by the union, calculated from the date of the improper exclusion, was not too remote, and it was foreseeable by the employer.
(8) The union had put the employer on notice, as early as May 1989, that it would be seeking compensatory damages equivalent to lost union dues as part of redress in the grievance process against breaches of article 14.05, article 14.06 and the Memorandum of Understanding.

[1] One sole example gleaned from the record helps to illuminate the picture which must have been seen by the arbitrator as she considered whether to make an award of compensatory damages. Position X was excluded from the bargaining unit by the employer in 1989, without notification to the union. The union grieved the exclusion in

May 1991. The union did not receive a job description until November 1993. Before the arbitrator in February 1995, the employer agreed that this position should be returned to the bargaining unit. One can readily see a clear breach of article 14.05, article 14.06 and the Memorandum of Understanding and that to order the return of the position to the bargaining unit is only partial redress. The union has sustained a financial loss to its treasury which loss flows directly from the breaches of the collective agreement.

[13] The arbitrator's award of compensatory damages equivalent to, or measured by, lost union dues was restricted by her to those cases where the employer had failed to provide the required notice and detailed documentation to the union within 30 days of the exclusion, and where the arbitrator had ultimately ruled that that exclusion did not satisfy the agreed criteria for exclusion.

[14] The findings and conclusions of the arbitrator summarized above were available to the arbitrator on the evidence before her. They were determinations made within the exercise of her mandate. In deciding to make an award of compensatory damages in favour of the union as part of redress, she acted within her jurisdiction as grievance arbitrator. An arbitrator has a broad range of remedial powers, including making an award of compensatory damages. *Imbleau v Polymer Corporation Ltd.* [1962] S.C.R. 338; *Huestis v New Brunswick Electric Power Commission* [1979] 2 S.C.R. 768. The form of redress here cannot be said to be unreasonable. A similar award in similar circumstances by an arbitration board in *A.U.P.E. v Alberta* (1991) 113 A.R.65 (Alta.Q.B.) was held by Miller, A.C.J. to be "entirely reasonable".

[15] I see no error of law or excess of jurisdiction in the arbitrator's decision. I see no misconduct. Nothing was decided by the arbitrator which was not within her jurisdiction to decide. No decision made within her jurisdiction was patently unreasonable. Accordingly, it is not for this Court to intervene on judicial review.

[16] With respect, the allegations of misconduct contained in the Notice of Appeal and the appellant employer's filed brief are without foundation. It is specious to assert that there was error in finding a breach of the collective agreement, in the face of what is contained repeatedly in the record. The appellant suggests that the arbitrator in effect awarded punitive damages; however, the record indicates the contrary. The arbitrator expressly rejected the union's specific request for exemplary or punitive damages. Damages were awarded on the basis of compensating the union for actual loss. Accordingly, there is no "windfall" to either the union or the affected employee, as submitted by the appellant employer.

[17] For the foregoing reasons, the application is dismissed, with costs.

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

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

Counsel for the Appellant: Karan M. Shaner
Counsel for the Respondent: Andrew J. Raven

CV 06622

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