Date: 1998 10 08
Docket: CV 07805

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

UNION OF NORTHERN WORKERS

Applicant

- and -

GOVERNMENT OF THE NORTHWEST TERRITORIES
and THE HONOURABLE JOHN TODD, MINISTER RESPONSIBLE
FOR THE FINANCIAL MANAGEMENT BOARD SECRETARIAT

Respondents

Application by union for a declaration that employer is engaged in bad faith bargaining. Application dismissed.

Heard at Yellowknife, NT, on September 21, 1998

Reasons for Judgment filed: October 8, 1998

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

Counsel for the Applicant: Andrew J. Raven

Counsel for the Respondents: Peter A. Gall and Lindsay M. Lyster

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REASONS FOR JUDGMENT

[1] The parties to this litigation are currently engaged in collective bargaining with a view to entering into a collective agreement under the *Public Service Act*, R.S.N.W.T. 1988, ch.P-16, as amended. On this application the union seeks a declaration that the employer is bargaining in bad faith.

[2] These parties have negotiated a series of successive collective agreements over the past three decades respecting the terms and conditions of employment of certain government employees. The collective bargaining regime is set forth in the *Public Service Act*. Although this regime is unlike that contained in labour relations legislation of other Canadian jurisdictions, it has withstood constitutional challenge. See *Professional Institute of the Public Service of Canada v. Commissioner of the Northwest Territories* [1990] 5 W.W.R. 385 (S.C.C.).

[3] In 1996 the legislature made substantive changes to the collective bargaining regime in the *Public Service Act*. See *Northwest Territories Teachers' Association v. Commissioner of the Northwest Territories* [1997] N.W.T.R. 348. Prior to the 1996 amendments, when the government (as employer) and the union failed to enter into a collective agreement notwithstanding the good faith bargaining process, the parties were

compelled to submit unresolved issues to arbitration, without work stoppage, and the arbitrator's award was deemed to be part of the collective agreement.

[4] With the 1996 amendments the parties are no longer compelled to submit unresolved issues to compulsory and binding arbitration but rather the parties are to have recourse to the services of a mediator. If there is no early resolution *via* mediation, the responsible Minister (i.e., the Minister of Finance and Chairman of the Financial Management Board) is authorized to unilaterally set the terms and conditions of employment and the employees, with some exceptions, can exercise a (new) right to strike.

[5] The salient features of the collective bargaining regime under the *Public Service Act*, as amended, therefore, are:

1. In an early section of the Act (s.3) the Minister is charged with the management and direction of the public service of the territorial government.

2. In those sections of the Act dealing with the collective bargaining process (ss.41-48), it is the Minister who is authorized to represent the employer, e.g., bargain with the union, sign the collective agreement, etc.

3. Either the Minister or the union can require the other party to commence collective bargaining with a view to arriving at a collective agreement (s.41.01(1)).

4. When such notice has been given, each of the Minister and the union are required to bargain in good faith (s.41.01(2)).

5. When the parties are unable to reach agreement on any term or condition of employment notwithstanding their good faith bargaining, either party can give notice to the other that it wishes to submit their differences to a mediator (s.4.1).
6. Where the parties cannot agree as to who should be the mediator, either party can request the Supreme Court to appoint a mediator (s.41.1(4)).

7. When the mediator provides his/her recommendations to the parties, the parties are free to accept or reject the recommendations (s.41.3).

8. Twenty-one days after the appointment of a mediator, if no collective agreement is in effect, the employees (with some exceptions) can participate in a legal strike upon 48 hours' notice to the Minister (s.42(2)).

9. Twenty-one days after the appointment of a mediator, if no collective agreement is in effect, the Minister may unilaterally change any term or condition of employment (i.e. any term or condition that is normally within a collective agreement (s.41.04)).

[6] The current collective bargaining process has "stalled" at steps 4 and 5 above, and this has led to the within application, and a related application, in this Court.

Complaint to Canadian Human Rights Commission

[7] There is a complicating circumstance (in one sense related to the current collective bargaining process and in another sense unrelated) which is at the heart of the dispute which has led to these Court applications. That circumstance is the existence of a pending complaint that is before a federal tribunal established pursuant to the *Canadian Human Rights Act* R.S.C. 1985, ch.H-6. That complaint was filed on behalf of certain female employees of the territorial government by the Public Service Alliance of Canada (PSAC). PSAC is the parent organization of the applicant in the within proceedings, Union of Northern Workers (UNW).

[8] PSAC presented its complaint to the Canadian Human Rights Commission in 1989. In its complaint PSAC alleged that the territorial government was acting in a discriminatory manner and in violation of the *Canadian Human Rights Act* with respect to the classification and pay of employees in female-dominated occupational groups in the public service of the territorial government. This complaint has been referred to in the within application as the "pay equity complaint".

[9] The record indicates that the pay equity complaint has had a tortured history in the federal forum to date and is now at the first steps of the next phase, itself complex, difficult and time-consuming.

[10] In the early years of the complaint a joint equal pay study was conducted by PSAC and GNWT. There then followed some settlement discussions but those were quickly aborted. The Canadian Human Rights Commission completed its investigation and directed that the complaint be referred to conciliation. Nothing was accomplished

in conciliation. GNWT challenged the jurisdiction of the Canadian Human Rights Commission to deal with the complaint, and that challenge was heard successively in the Federal Court Trial Division, Federal Court of Appeal and Supreme Court of Canada. The end result of all of that was that the jurisdiction of the Canadian Human Rights Commission to deal with the pay equity complaint was affirmed.

[11] In May 1997 the Canadian Human Rights Commission referred the pay equity complaint to a tribunal for hearing and determination. A panel of three tribunal members has been appointed to preside at a hearing. No hearing has yet been held. The tribunal has been attempting to schedule a pre-hearing meeting and as at the date of hearing the within application that pre-hearing meeting had not yet taken place. The hearing itself is expected to be very complex and time-consuming. Although there is yet no adjudication of the complaint of discriminatory classification and pay practices on the ground of gender, counsel advised me that the potential damages, covering hundreds of employees of the territorial government, past and present, in the time period 1988 to the present, could total millions and millions of dollars.

[12] At the risk of understating the case, this long-outstanding pay equity complaint hovers inertly over the current collective bargaining between the territorial government and UNW.

Status of Current Collective Bargaining

[13] The latest collective agreement between the territorial government and UNW expired on March 31, 1998. The commencement of the current collective bargaining round was initiated on October 15, 1997 when the Minister gave to the union the statutory "notice to bargain" as provided in s.41.01 of the Act.

> 41.01(1) The Minister or an employees' association on behalf of the members of a bargaining unit may, by written notice, require the other party to commence bargaining collectively with a view to the conclusion, renewal or revision of a collective agreement.
>
> (2) Where notice to bargain collectively has been given, the employees' association and the Minister's representatives shall, forthwith but in any case within 60 days after the notice has been given or within such further time as the parties may agree, meet and commence to bargain collectively in good faith.

[14] On February 2-3, 1998 the parties exchanged their respective opening proposals.

[15] One of the differences, *inter alia*, between the parties' proposals is that the territorial government included in its proposal a mechanism to settle the pay equity complaint (i.e., for those persons on whose behalf the pay equity complaint was filed and who were also UNW members) at the same time as reaching a new collective agreement, whereas the union's proposal deals only with collective agreement matters and not with the pay equity complaint. In short, it is this difference that has stalled the bargaining process.

[16] For its part, the government is of the view that because of the sheer magnitude of the potential settlement costs of the pay equity complaint, it needs to know what this figure is before it can reasonably commit to detailed terms and conditions of a new collective agreement, e.g., increased rates of pay for all employees. As the government's counsel put it, the two are necessarily and integrally connected. The employer also says that any past discriminatory practices should be fixed now by the parties rather than blindly perpetuating or exacerbating such discriminatory practices in a present or future agreement between the same parties. This government position is clear and easily understood.

[17] Equally clear and understandable is the union's position. The union's position is that the pay equity complaint is before a Human Rights Tribunal for determination and that is where it should remain. If settlement discussions are to take place with respect to the pay equity complaint, those discussions should be separate and apart from the bargaining process towards a new collective agreement. The union's view is that it should not be in a situation of having to "bargain" or "trade away" damages suffered by employees because of past discriminatory practices of the employer, in exchange for future pay rates and other employee benefits. The union also points out that the Canadian Human Rights Commission would have to be party to any settlement of the pay equity complaint.

[18] This difference between the parties (as to whether the pay equity complaint should be discussed at the bargaining table) remained outstanding through bargaining sessions which occurred in the first week of March 1998 and the first week of May 1998. The government wants to discuss settlement of the pay equity complaint, the union does not want to discuss it at the collective bargaining table.

[19] In correspondence between the parties and in submissions to the Court during the hearing of this application and a related application, the government acknowledges that it cannot bring the collective bargaining process to an impasse over a final settlement of

the pay equity complaint, nor can it hold up a collective agreement if the pay equity complaint is the only outstanding issue. Yet it wishes the opportunity to at least discuss such a settlement, to have the union at least consider its proposal for settlement, in conjunction with resolving what the union says are discriminatory classifications and rates of pay in the present collective agreement. The government wishes to discuss a resolution of the pay equity complaint, with or without the assistance of a mediator, and to have the union at least listen to its proposed resolution. The government realizes that, in the end, the union can succeed in having the pay equity complaint unresolved at the collective bargaining table and that it (the government) cannot impose any settlement of the pay equity complaint on the union or its members.

[20] From my review of the material counsel have placed before the Court, it appears that each of the parties genuinely and subjectively wishes to achieve the conclusion of a collective agreement, without resorting to economic sanctions permitted by the Act. In an exchange of correspondence, each party is "posturing" in purporting to set preconditions to the resumption of talks at the bargaining table. (I reiterate -- each party -- the one no more so than the other.) Such posturing is not, in my view, fatal to the collective bargaining process; also it is not an indication of the presence of bad faith or the absence of good faith by either party. It may be hard bargaining but it is nonetheless *bona fide* bargaining.

[21] On the evidence presented on this application, the respondents are in fact seeking a collective agreement with the applicant. That is uncontradicted. The respondents are fulfilling their statutory obligation in s.41.01(2) to bargain in good faith.

[22] On the present application the union, with respect, overstates the case when it submits that the government's proposal is illegal. To successfully resolve a human rights complaint, to the satisfaction of the complainants, the employer and the human rights commission, outside of the adjudicative tribunal process, cannot be said to be illegal, or contrary to public policy or to human rights legislation. Indeed, the *Canadian Human Rights Act*, at s.48, contemplates such an eventuality.

[23] As stated in *Carpenters and Employer Bargaining Agency* [1978] 2 C.L.R.B.R. 501, *Graphic Arts Union and Toronto Star* [1979] 3 Can.L.R.B.R. 306, and *Radio Shack* [1985] O.L.R.B. 1789, it is not illegal to raise outstanding complaints at the bargaining table or to seek a resolution short of litigation. It is often sensible to do so. However, such an issue cannot force bargaining to an impasse.

[24] A proposed discussion of resolution of the pay equity complaint is not an "illegal proposal" or "illegal demand" as those terms are discussed in *CALPA and Eastern Provincial Airways Ltd. (1983) 5 C.L.R.B.R. (N.S.)* 368, *Vancouver Symphony Society and I.A.T.S.E. Local 118* (1993) 17 C.L.R.B.R. 161, and *Northwood Pulp and Timber Limited* (1994) B.C.L.R.B. No. B271/94. At most, it comes within the second category of proposals referenced at p.172 of the *Vancouver Symphony* decision, i.e., proposals which may be tabled and negotiated but which cannot be pressed to impasse.

[25] The instant case is distinguishable from *Les Élevateurs de Sorel Limitée* (1985) C.L.L.C. 16032 and *Inuvik Housing Authority* (1987) C.L.R.B.D. No. 645 cited on behalf of the applicant. In the present case the parties are at the negotiating stage for a collective agreement. The employer, as I understand it, is not demanding a bald or outright withdrawal of the human rights complaint but rather is seeking a discussion of a resolution of that complaint to the satisfaction of all parties, at the same time as discussions on a prospective gender-neutral job evaluation system and fair wage scales for the term of the next collective agreement. On this application the applicant does not point to any particular offensive detail of the government's proposed resolution but rather to the mere notion of discussing resolution of the complaint. A point of impasse has not been reached. In *Les Élevateurs* and *Inuvik Housing* the parties had reached agreement in principle on the terms of a collective agreement and the one party, through the provision of a return-to-work protocol ending the strike, was improperly insisting on the bald withdrawal of outstanding unfair labour practice complaints without consideration of the merit of those complaints.

[26] Similarly, in *Iberia Airlines of Spain* (1990) C.L.R.B.D. No.796, the employer refused to continue collective bargaining if the union did not withdraw an outstanding complaint that was before the Labour Relations Board, thereby bringing the collective bargaining process to an impasse. It was held that the employer's position constituted bad faith bargaining. The *Iberia* facts are not present here.

[27] In the face of a long-outstanding allegation to a national body that the employer/employee relationship that has existed heretofore contains a bias or is skewered on account of gender, it is obviously incumbent on both parties to negotiate a collective agreement that includes, prospectively, a gender-neutral job evaluation system and gender-neutral wage scales. On this, the parties seem to be in agreement. Whether such an agreed/negotiated gender neutral system is <u>also</u> used as a basis for a negotiated resolution of the historical pay equity complaint is for the parties (and the Human Rights Commission) to decide. It is not for the government to decide unilaterally.

[28] The government, in its exchange of correspondence with the union, which correspondence was placed before the Court on this application, and in its counsel's submissions on the application, clearly acknowledges that it cannot impose a settlement of the pay equity complaint as part of the present collective bargaining process or otherwise. It recognizes that its proposal for a "global" settlement of past, present and future pay equity issues may well be to no avail; it merely seeks to have it considered by the other party.

[29] To repeat, an impasse has not been reached. The government in its exchange of correspondence with the union has indicated a willingness to consider changes to its so-called "final offer" of May 8, 1998 and to review its position in the mediation stage. The government has acknowledged that it cannot bring collective bargaining to an impasse over resolution of the pay equity complaint. It acknowledges that at the end of the day, if good faith bargaining fails to achieve a resolution of the pay equity complaint, that complaint must be left to adjudication by the Human Rights Tribunal.

[30] In these circumstances, I am satisfied that the government is bargaining *bona fide* towards the achievement of a new negotiated collective agreement (as is the union). I am not satisfied that it has been shown that the government is acting contrary to its statutory obligations under s.41.01 of the Act. The collective bargaining process prescribed by the Act ought to be allowed to continue. The parties ought to return immediately to the bargaining table.

[31] For these reasons, the within application is dismissed.

[32] Costs may be spoken to by way of written submissions to me within 30 days of the date these Reasons are filed.

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

Dated at Yellowknife, NT, this
8th day of October 1998

Counsel for the Applicant: Andrew J. Raven
Counsel for the Respondents: Peter A. Gall and Lindsay M. Lyster

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