GNWT v. Union of Northern Workers, 2000 NWTSC 31

Date: 2000 04 26
Docket: CV 08706

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 amended;

AND IN THE MATTER of an Application to set aside the Arbitration Award of Alan Beattie Q.C. dated February 9, 2000.

BETWEEN:

THE GOVERNMENT OF THE NORTHWEST TERRITORIES

Appellant

- and -

THE UNION OF NORTHERN WORKERS

Respondent

Application to set aside an arbitration award as being made without jurisdiction. Dismissed.

Heard at Yellowknife, NT, on April 20, 2000

Reasons filed: April 26, 2000

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

Counsel for the Appellant: Lucy K. Austin
Counsel for the Respondent: Paul N.K. Smith

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 amended;

AND IN THE MATTER of an Application to set aside the Arbitration Award of Alan Beattie Q.C. dated February 9, 2000.

BETWEEN:

THE GOVERNMENT OF THE NORTHWEST TERRITORIES

Appellant

- and -

THE UNION OF NORTHERN WORKERS

Respondent

REASONS FOR JUDGMENT

[1] The Government of the Northwest Territories and the Union of Northern Workers are parties to a collective agreement governing employment in the territorial public service. In these proceedings, the Government (herein referred to as "the employer") seeks to set aside an arbitration award made under that agreement as being made without jurisdiction. For the reasons that follow, the employer's application is dismissed.

The Arbitrator's Award

[2] On November 12, 1997, a grievance was filed by Mr. Martin van Rooy ("the grievor") respecting a notice of lay-off. The grievor had been employed in the government's Department of Safety and Public Services, Mine Safety Division, as a mechanical/electrical engineer since 1992. In 1996, the division was transferred to the control of the Workers' Compensation Board. Soon thereafter an organizational review was conducted resulting in a proposal to contract out the mechanical engineering

functions. A lay-off notice, indicating that his position would be eliminated, was issued to the grievor on October 31, 1997.

[3] The grievance was based, first, on an alleged contravention of Article 33.01(a)(i) of the agreement (this requires that where two employees of equal merit face being laid off, seniority will be the deciding factor) and, second, on an allegation that the lay-off was not genuine, but instead a disguised disciplinary termination of employment. At the arbitration hearing, the grievor abandoned his allegation of this being a disguised disciplinary dismissal although it was argued that he had been effectively dismissed due to the employer's failure to follow the terms of the agreement relating to lay-offs, specifically the obligation to offer a reasonable job offer.

[4] The agreement provides, in Articles 32 and 33, various rights and obligations in case of lay-off. Article 32 sets out a laid-off employee's entitlement to severance pay and various available options (such as retraining and education assistance). Article 33 deals primarily with the employer's obligation to make reasonable job offers and the employee's entitlement to priority status to available positions. Article 33.02 sets out the specific obligations of the employer. These include the obligation to "make every attempt to provide a reasonable job offer" to the laid-off employee (Article 33.02(d)).

[5] The grievance went before Arbitrator A.V.M. Beattie who heard three days of evidence and submissions. He concluded that the employer was in direct breach of its obligations under Article 33.02(d) in that "no offer of <u>any</u> position was made by the employer" (emphasis is by the arbitrator in his award). The arbitrator found, as facts, that the grievor was qualified for a number of lower-level positions within the division and, had he been offered one of those positions, he would have accepted it. This would have entitled the grievor to receive his previous salary for a period of one year (as per Article 33.02(f) of the agreement). These facts are not in issue on this application.

[6] The arbitrator was evidently perturbed about the treatment accorded the grievor. He described the grievor as being treated by his employer in a "cavalier and seemingly uncaring manner"; also "biased and discriminatory". The arbitrator wrote:

> The Collective Agreement regime, designed to provide some protection for laid off employees or those identified for layoff, has many safeguards for the employees, which

> safeguards were to all intents and purposes ignored by the Employer. The grievor was left in the position of having to make the best he could out of a closed-door situation. He was, effectively, constructively dismissed because the Employer was not prepared to accommodate the rights accorded to him by the Collective Agreement.

The reference above to the grievor being "constructively dismissed" became one of the focal points of the employer's argument on this application.

[7] In fashioning his award, the arbitrator identified his mandate as being "to identify breaches of the collective agreement and to determine how to achieve appropriate redress for the breaches". He went on to state:

> I agree with Counsel for the Union that the Employer acted in an unfair and unreasonable manner. I am very conscious of the admonition that arbitrators must not assume a managerial function and make appointments which should be within the domain of management. However, it is clear that the grievor must be redressed for the injustices, and breaches of the Collective Agreement provisions, which he has endured and which are tantamount to a constructive dismissal.

[8] The specific award was set out as follows:

> I will retain jurisdiction but I believe that it is incumbent upon me to give some specific direction to the parties. I will leave it to the discretion of the Employer to decide upon the position to be offered to the greivor, but I direct that an appropriate position for which the grievor is qualified be offered within one month from the date of this Award. In deciding upon the position the Employer must act reasonably and fairly. Once the position is offered, and if it is accepted by the grievor, the Union and the Employer should endeavour to agree upon the damages to which the grievor is entitled, taking into account the grievor's duty to mitigate. (I assume that the calculation would be based on his salary deemed to have continued for one year following the date of layoff at the former level and thereafter at the level of his new position, less the separation package he was paid and less what he has received or reasonably should have received in mitigating his damages.)

[9] Both parties characterized the award as calling for the reinstatement of the grievor. With respect, I do not view it that way at all. The award simply requires the employer to do that which Article 33.02(d) requires the employer to do, make a reasonable job offer to the grievor. If it is accepted, the matter is resolved save for the calculation of damages. If it is not accepted, the matter goes back to the arbitrator. The issue, however, is whether the arbitrator had the jurisdiction to do this.

Jurisdiction:

[10] This proceeding is labelled as an "appeal" but it is in reality an application for judicial review for jurisdictional error. There is no issue with the applicability of the *Arbitration Act*, R.S.N.W.T. 1988, c.A-5, to this proceeding. Section 28(1)(a) of that Act provides that an award may be set aside due to "misconduct" by the arbitrator. The term "misconduct", in this context, refers to acting in excess of jurisdiction: *Union of Northern Workers v. Northwest Territories Power Corp.*, [1994] N.W.T.J. No.59 (S.C.).

[11] It is almost trite to repeat the numerous dicta regarding curial deference to the decisions of labour tribunals and arbitrators in the collective bargaining arena. It is a specialized field demanding a prompt and efficient decision-making process. A useful summary of the relevant approach was given by Cory J. in *Toronto (City) Board of Education v. O.S.S.T.F., District 15* (1997), 144 D.L.R.(4th) 385 (S.C.C.), at pages 397-398:

> There are a great many reasons why curial defence must be observed in such decisions. The field of labour relations is sensitive and volatile. It is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding.
>
> In particular, it has been held that the whole purpose of a system of grievance arbitration is to secure prompt, final and binding settlement of disputes arising out of the interpretation or application of collective agreements and the disciplinary actions taken by an employer. This is a basic requirement for peace in industrial relations which is important to the parties and to society as a whole. ...
>
> It was for these reasons that PSAC No.2 stressed that decisions of labour relations tribunals acting within their jurisdiction can only be set aside if they are patently unreasonable. That is very properly an extremely high standard, and there must not be any retreat from this position. Anything else would give rise to the endless protraction of labour disputes resulting in unrest and discontent. Indeed the principle of judicial deference is no more than the recognition by the courts that legislators have determined that members of an arbitration board with their experience and expert knowledge should be those who resolve labour disputes arising under a collective agreement.

[12] Counsel for the employer took no issue with the appropriateness of the "patently unreasonable" test on a general basis. She emphasized, however, that her argument was limited to the sole question of whether the arbitrator had jurisdiction to order the remedy set out in his award. That question of jurisdiction is one that must be assessed on the basis of correctness: see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (at para.28). Counsel conceded that if the award was made within jurisdiction then the employer has no argument it can make as to the "reasonableness" of the particular remedy. This accords with the wide deference shown by courts to the remedial powers exercised by labour tribunals and arbitrators acting within their jurisdiction: see *Royal Oak Mines Inc. v. Canada Labour Relations Board*, [1996] 1 S.C.R. 369 (at para.58).

[13] The jurisdictional question requires a detailed examination of the applicable legislation and the collective agreement. Section 26 of the *Arbitration Act* provides that an award by an arbitrator shall be final and binding. The collective agreement (in Article 37.01) sets out that in grievances arising out of the interpretation or application of a provision of the agreement, disciplinary action, or dismissal, the final level of resolution is arbitration. Thus a great deal of responsibility is reposed in the arbitrator in terms of deciding whether something is within his or her jurisdiction and, if it is, how best to address it. This is also reflected in Article 37.19 which sets out the general right to submit a matter 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 at the Final Level, of his/her desire to submit the difference or allegation to arbitration under the Public Service Act.

[14] The powers and limitations of the arbitrator are set out in the following articles:

> 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.

(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 any employee affected by it.

(3) The award of the arbitrator shall be signed by him/her and copies thereof shall be transmitted to the parties to the dispute.

37.22 The arbitrator shall not have the authority to alter or amend any of the provisions of this Agreement, or to substitute any new provisions in lieu thereof, or to render any decision contrary to the terms and provisions of this Agreement, or to increase or decrease wages.

. . .

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 i 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.

[15] The employer's counsel argued that the arbitrator found that the grievor had been constructively dismissed. As such, it was submitted, the arbitrator failed to distinguish between a dismissal and a lay-off and, so, in purporting to reinstate the grievor, the arbitrator exceeded his jurisdiction by giving a remedy that was only available in a dismissal or disciplinary grievance. The grievor had withdrawn the allegation of the lay-off being a disguised disciplinary action so the arbitrator could not import dismissal remedies to a lay-off grievance. It was counsel's submission that the only remedy available in this case was compensation. She referred in particular to the reference to "the ability to award compensation in discipline or other alleged violations" as set out in Article 37.21(1) above.

[16] Counsel for the respondent union, on the other hand, argued that reinstatement was available pursuant to Article 37.26 because dismissal was the practical result in this case. The employer failed to fulfill its obligations and thus the grievor's employment ended. This, in counsel's submission, amounted to dismissal. Further, it was argued that if the arbitrator could not give this remedy then the employer's obligations in lay-off situations would be meaningless because they would be unenforceable (except at the risk of paying compensation). There would be no way for an aggrieved employee to maintain his or her employment.

[17] In my respectful opinion, both counsel have mischaracterized what was done in this case. As I stated above, I do not view the remedy given here as reinstatement. It is merely a direction to the employer to make a reasonable job offer. It may or may not be accepted. If it is accepted that may be, in effect, a reinstatement but, in my opinion, that is the result only if the offer is accepted. It is not *the* award since it is contingent on acceptance.

[18] I also do not view this case as a dismissal case. Thus I need not rule on the arguments made by employer's counsel as to the inappropriateness of importing common law concepts, such as constructive dismissal, into the collective bargaining forum. In my opinion, the arbitrator's references to the grievor being "in effect" constructively dismissed and the employer's conduct being "tantamount" to a constructive dismissal are merely descriptive of how the arbitrator viewed the entire situation placed before him. I do not read them as conclusions of law, merely a characterization of the practical effect of the employer's actions (or lack thereof) on the grievor.

[19] Can it be, as argued by the employer's counsel, that compensation is the only available remedy? I think not. If one were to follow that argument to its logical conclusion, then compensation would be the only available remedy for any breach of the agreement that does not entail discipline or dismissal (and these are distinct terms in the labour relations context). Every collective agreement contains numerous provisions not dealing with discipline or dismissal matters which could be breached. Compensation would not be the only, or the most effective, or, indeed, a rational remedy for all of them.

[20] What are the jurisdictional boundaries imposed on the arbitrator with respect to remedies? While the articles set out above are not necessarily written as clearly as one would like, I suggest that the boundaries are discernible.

[21] In my opinion, one starts with the first sentence of Article 37.21(1): "The arbitrator has all the powers granted to arbitrators under s.12 of the *Arbitration Act* in addition to any powers which are contained in this Agreement." The powers in s.12 of the *Arbitration Act* relate to procedural matters and are not pertinent for purposes of this discussion.

[22] The next question is: What powers are contained in the agreement? In my view, one has to look next at Article 37.21(2): "The arbitrator shall hear and determine the difference or allegation and shall issue a decision...". This is the mandate given to an arbitrator to decide grievances. How he or she decides depends on the nature of the grievance. In this context the term "decision" must necessarily refer to both the dispute and the remedy devised by the arbitrator. This decision is "final and binding upon the parties". This is an indicator that the arbitrator's decision must be accorded deference.

[23] Next, one turns to the second sentence in Article 37.21(1). In a discipline case, the arbitrator may rescind, alter or amend the disciplinary decision. This includes the ability to reinstate the grievor with compensation. And, since the reference to compensation has been made, the agreement makes clear that the arbitrator has the ability to award compensation in discipline cases and for other violations of the agreement. I do not read this as a limitation on the arbitrator's power to issue a decision. I read this as simply clarification of the arbitrator's power to award compensation (something that was a highly contentious point in the early days of grievance arbitration in Canada until resolved in *Imbleau v. Polymer Corporation Ltd.*, [1962] S.C.R. 338). I do not interpret this as meaning that compensation is the only remedy for other violations of the agreement.

[24] Then one turns to Article 37.26 regarding dismissal cases specifically. I agree with the employer's counsel when she argued that "dismissal" must not be used as an alternative to "lay-off" as descriptive terms of what happened here. The term "dismissal" is specifically interpreted (in Article 2.01(l) of the agreement) as a rejection on probation or a dismissal within the terms of the *Public Service Act*, R.S.N.W.T. 1988, c.P-16. That Act also draws distinctions as between lay-offs, discipline (suspension and demotion), and dismissal. Therefore I do not agree with the union's counsel in his argument as to the applicability of Article 37.26 to this case.

[25] In my opinion, the arbitrator was within his jurisdiction to order the remedy he did in this case. He did not, in the words of Article 37.22, alter or amend any provision in the agreement, or render any decision contrary to the terms of the agreement. He directed the employer to do what the agreement requires it to do: provide a reasonable job offer. The arbitrator had already concluded as a fact that this is what the employer failed to do.

[26] In *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269, the Supreme Court established a test to ascertain if a particular remedy is within the jurisdiction granted to a tribunal by its enabling statute. It held that there must be a relation between the breach, its consequences, and the remedy. There the court was considering a broad remedial provision in the Canada Labour Code. The same remedial provision was again considered in the *Royal Oak Mines* case (noted previously). That case appears to extend the same analytical paradigm to questions of jurisdiction generally when dealing with remedial powers. It was the model relied on, for example, in the subsequent cases of *C.U.P.E., Local 301 v. Montreal*, [1997] 1 S.C.R. 793, and *Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union*, [1998] 1 S.C.R. 1079, neither of which involved the Canada Labour Code.

[27] The legal test was elucidated in the *Royal Oak* case as being if a tribunal "imposes a remedy which is not rationally connected to the breach and its consequences or is inconsistent with the policy objectives of the statute then it will be exceeding its jurisdiction" (at para.56). But, once it is found that the tribunal does have a remedial jurisdiction, and once it has found a contravention, then the form of the appropriate order also fell within its jurisdiction. This is consistent with the need for arbitrators to be vested with the power to fashion effective context-specific remedies.

[28] In the present case, the broad jurisdictional mandate given to arbitrators is that contained in Article 37.21(2): the arbitrator shall hear the grievance and issue a decision. That decision by necessity must include a remedy. In a specific personal grievance, as opposed to one on a question of policy, there is no point to a decision in favour of the grievor if there is no remedy. The remedial mandate is also very broad. Specific remedial powers are set out with respect to dismissal and discipline grievances. The agreement also provides that compensation can be awarded. But it would be an illogical and impractical fettering of an arbitrator's expertise and experience to limit the remedial power to compensation in all but dismissal and discipline grievances. If there was such a limitation, then there may be no truly effective or rational remedy for certain types of breaches. As noted by Cory J. in the *Royal Oak* case (at para.58):

> In my view remedies are a matter which fall directly within the specialized competence of labour boards. It is this aspect perhaps more than any other function which requires the board to call upon its expert knowledge and wide experience to fashion an appropriate remedy. No other body will have the requisite skill and experience in labour relations to construct a fair and workable solution which will enable the parties to arrive at a final resolution of their dispute. Imposing remedies comprises a significant portion of the Board's duties.

[29] Cory J. was referring to the Canada Labour Relations Board in this extract but, in my opinion, his comments are apposite to all tribunals and arbitrators appointed to make final and binding decisions resolving grievances in the labour relations context. In the present case the arbitrator fashioned a practical solution so as to put the grievor in the position he should have been in if the employer had complied with its obligations under the agreement. In my opinion the arbitrator was within his jurisdiction to award this particular remedy. It is rationally connected to the breach of the agreement and its consequences, and it is consistent with the objectives of the collective agreement to maintain an effective and mutually beneficial relationship between the employer and its employees (as per Article 1). This conclusion is amply supported by the comments of Dickson J. (as he then was), on behalf of the court, in *Heustis v. New Brunswick Power Commission* (1979), 98 D.L.R. (3d) 622 (S.C.C.), at page 631:

> There is a 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.

[30] To summarize this case, the grievor was laid off. This was an exercise of management's authority to organize the workplace. But, the employer had certain obligations. The arbitrator found that the employer breached those obligations. In my opinion, it was open to the arbitrator to fashion a remedy that would give a meaningful and rational result. As I said above, in my view the arbitrator directed the employer to correct the breach by doing what should have been done in the first place. This, based upon my review of the agreement, is clearly within the arbitrator's jurisdiction.

[31] The employer's counsel made submissions as to the impossibility of carrying out the award now. The issue before me, however, is not the difficulty the employer may face in carrying it out but the jurisdiction of the arbitrator to make it. Any problems encountered in fulfilling the arbitrator's directions should be taken back before the arbitrator (since he retained jurisdiction).

Conclusion:

[32] The application to set aside the award of arbitrator Beattie is dismissed. Ordinarily costs would follow the event. If counsel cannot agree they may make written submissions to me within 30 days of this judgment. The stay of the award, ordered by Schuler J. on March 9, 2000, is dissolved.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT, this
26th day of April 2000

Counsel for the Appellant: Lucy K. Austin
Counsel for the Respondent: Paul N.K. Smith

CV 08706

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 amended;

AND IN THE MATTER of an Application to set aside the Arbitration Award of Alan Beattie Q.C. dated February 9, 2000.

BETWEEN:

THE GOVERNMENT OF THE NORTHWEST TERRITORIES

Appellant

- and -

THE UNION OF NORTHERN WORKERS

Respondent

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