Govt. of the NWT v. Union of Northern Workers, 2001 NWTSC 27

Date: 2001 03 16
Docket: S-0001-CV20000000134

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

Applicant

-and-

THE UNION OF NORTHERN WORKERS

Respondent

Application for judicial review of arbitrator's award. Dismissed

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

Heard at Yellowknife, Northwest Territories
on March 7, 2001.

Reasons Filed: March 16, 2001

Counsel for the Applicant (G.N.W.T.): Lucy K. Austin
Counsel for the Respondent (U.N.W.): Paul N.K. Smith

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REASONS FOR JUDGMENT

[1] The Government of the Northwest Territories seeks judicial review of an arbitrator's award regarding a grievance brought by the respondent Union. The Government and Union are parties to a collective bargaining agreement respecting persons employed in the public service of the Territories. The agreement is negotiated pursuant to the authority of the *Public Service Act*, R.S.N.W.T. 1988, c.P-16 (as amended).

[2] The grievance alleged a breach by the Government of Article 14.01 of the agreement:

> 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 evaluation, and social insurance number of all employees in the Bargaining Unit.

[3] This provision has been included for many years in previous versions of the agreement. In the last year, however, the Government ceased to provide the social insurance numbers of employees in the bargaining unit. The Government's position is that they are prohibited by law, specifically by certain provisions of both the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1, and the *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c.20, from releasing the social insurance numbers.

[4] Before I turn to the arbitrator's decision, I want to comment on the purpose of this information clause in the agreement. It seems to me that the legitimate objectives of this clause in the agreement cannot now be disclaimed by the Government (and indeed counsel did not try to do so). After all, the Government willingly agreed to its inclusion in the agreement and complied with it for several years. Why it now considers itself precluded by law from providing this information, as opposed to realising it several years ago, is not explained in the record. In any event, the arbitrator outlined in his award the purpose of this clause and specifically the importance to the union of receiving the social insurance numbers (at p.5):

> Mr. Bayer's evidence is that social insurance numbers are important to the Union. They provide a means of identification of employees; they form the basis of the Union's database; they permit the Union to track such things as changes of name and employees who are working in more than one part of Government. Mr. Bayer testified that since employees, even if they change their name, only have one social insurance number, many problems are eliminated. The social insurance number also permits the Union to police the Collective Agreement and ensure that the Employer is remitting dues properly.
>
> The Union Security provisions of the Collective Agreement contain the Rand Formula. That is, employees are not required to acquire membership in the Union but must pay Union dues. The vast majority of the bargaining unit are members of the Union. When they become members they provide their social insurance numbers to the Union. Mr. Bayer said that is a requirement of Union membership. A small minority only pays the equivalent of dues. If the Employer does not provide these social insurance numbers, the Union has no enforceable method of obtaining them.

[5] With respect to the federal *Income Tax Act*, the government points to two provisions that make it an offence to disclose the social insurance number of an employee. First, there is s.237(2)(b) which prohibits an employer from communicating the number, without the written consent of the person, unless it is required or

authorized under the Act. Second, there is s.239(2.3) which also prohibits communication of the number:

> (2.3) Every person to whom the Social Insurance Number of an individual or to whom the business number of a taxpayer or partnership has been provided under this Act or a regulation, and every officer, employee and agent of such a person, who without written consent of the individual, taxpayer or partnership, as the case may be, knowingly uses, communicates or allows to be communicated the number (otherwise than as required or authorized by law, in the course of duties in connection with the administration or enforcement of this Act or for a purpose for which it was provided by the individual, taxpayer or partnership, as the case may be) is guilty of an offence and liable on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months or to both.

[6] As noted by the arbitrator, there are three exceptions contained within this provision. It is not an offence if (a) the communication is required or authorized by law, or (b) communication takes place in the course of duties in connection with the administration or enforcement of the Act, or (3) if communication is for a purpose for which the number was provided by the individual concerned.

[7] In dealing with this specific issue, the arbitrator held that the communication of the social insurance number is required by law. He relied specifically on s.41(6) of the *Public Service Act*:

> (6) A collective agreement made between the Minister and an employees' association is binding on the Government of the Northwest Territories, the employees' association and the members of the bargaining unit to which the collective agreement applies.

[8] The arbitrator interpreted this provision to mean that the Government, because it included Article 14.01 in the agreement, is "required by law" to provide the social insurance number. His reasons are found at p.8 of the award:

> This provision, together with Article 14.01, means that the Government is required by law to provide the social insurance number. That is to say, the Government's failure to provide it is a breach of Article 14.01 of the Collective Agreement. A breach of the Collective Agreement is a breach of the *Public Service Act*. The Government may communicate the social insurance numbers because it is required by law to do so. That is not a breach of Section 239(2.3) of the *Income Tax Act*.

[9] With respect to the territorial *Access to Information and Protection of Privacy Act*, the Government points to the fact that a social insurance number is "personal information" under that Act and, as such, it cannot be disclosed unless authorized by the Act. On this point, the arbitrator found that disclosure is authorized by subsections 48(p) and (u) of the Act. Those subsections permit disclosure:

> (p) for the purpose of complying with a law of the Territories or Canada or with a treaty, written agreement or arrangement made under a law of the Territories or Canada;
>
> ...
>
> (u) for any purpose in accordance with any Act that authorizes or requires the disclosure;

The arbitrator held that both subsections permit disclosure since the communication is for the purpose of complying with Article 14.01 of the agreement and s.41(6) of the *Public Service Act* requires compliance with the agreement.

[10] The Government's position on this application is that the arbitrator has in effect elevated the terms of the agreement to the status of "law". In counsel's submission, there is no legislative intent that the agreement itself become law. An agreement, notwithstanding that it becomes binding by virtue of law, is not itself law unless the legislature specifically says it is so. And, even if it were law, it cannot override the *Income Tax Act* since all territorial legislation is subject to all federal legislation by virtue of s.16 of the *Northwest Territories Act*, R.S.C. 1985, c. N-27.

[11] Much of the argument before me centred on the appropriate standard of review. That issue requires a consideration of the four factors outlined in *Pushpanathan* v. *Canada*, [1998] 1 S.C.R. 982: (1) the presence or absence of a privative clause; (2) the expertise of the tribunal (and I use the term "tribunal" as including a single arbitrator as in this case); (3) the purpose of the governing legislation as a whole and the provisions creating the tribunal and its role; and (4) the nature of the problem (whether it is a question of law, mixed law and fact, or fact). A reviewing court will use these four factors to determine the appropriate standard for assessing the impugned decision on a spectrum ranging from correctness to reasonableness s*impliciter* to patent unreasonableness. This spectrum involves an interplay of these

factors (although it was noted in *Pushpanathan* that the most important factor is the expertise of the tribunal) to determine the degree of deference to be accorded to the tribunal's decision.

[12] The standard of "correctness" means that there is no deference shown by the reviewing court. The question is whether the decision is right or wrong. The standard of "patent unreasonableness" demands a high degree of deference. The question then is not whether the tribunal's decision is wrong, but whether there is any rational basis for it. The standard of reasonableness *simpliciter* is somewhere in between these two. The difference between it and patent unreasonableness lies in the immediacy or obviousness of the defect: as per *Canada v. Southam Inc.*, [1997] 1 S.C.R. 748 (at paras. 56-57). If the defect is apparent on the face of the tribunal's decision, then it is patently unreasonable. But, if it takes some significant searching or testing to find the defect then the decision is unreasonable but not patently so. It should also be noted that *Pushpanathan* anticipates that different decisions of the same tribunal may be subject to different standards of review.

[13] In the field of labour relations, it has been generally held that the four factors noted above point to a high level of curial deference, and the application of the patently unreasonable standard, to decisions of labour arbitrators interpreting the provisions of a collective agreement: see *Toronto Board of Education* v. *O.S.S.T.F.*, [1997] 1 S.C.R. 487. Here the collective agreement, article 37.21, and the *Arbitration Act*, s.26, both provide that an arbitrator's decision is "final and binding". The task of interpreting collective agreements is squarely within the expertise of a labour arbitrator. The purpose and nature of grievance arbitration in promoting the efficient management of conflict between employers and employees depends upon the prompt and binding determination of disputes by expert arbitrators with minimal interference by the courts. Grievances typically give rise to questions of fact or, at best, questions of mixed fact and law. Thus all four factors generally point to the patently unreasonable test.

[14] Here, however, the arbitrator was dealing with a question that is closer to, if in fact not totally, a question of law. Generally speaking, the more the decision is one strictly of law, particularly one of general application and involving the interpretation of a general public statute external to the arbitrator's core expertise, then the standard tends to be less deferential and closer to the standard of correctness: see *Pushpanathan* (at para. 37). There may nevertheless be a degree of deference

accorded to even pure questions of law but that depends on the expertise of the tribunal relative to the specific issue to be decided.

[15] In my opinion, there is much to be said in favour of the application of a reasonableness *simpliciter* standard to the arbitrator's decision in this case. This was the position advocated by the applicant's counsel. But I need not be definitive on that point and nothing I say here should detract from what I outlined just now as the usual approach to the review of decisions by labour arbitrators. The reason for that is that I think the arbitrator's decision was correct, albeit in part for the wrong reasons, and if it meets that test then it obviously meets any other test one wishes to apply.

[16] The fact that I think the arbitrator was correct in the result should in most circumstances be sufficient to dispose of this application. It is often said, at least on appeals in ordinary civil litigation, that an appeal is from an order or judgment, not from the reasons: see, for example, *Hamilton Brothers Corp. v. Royal Trust Corp.* (1991), 117 A.R. 314 (C.A.). On a judicial review application however, the reasons may be more of a concern if one has to assess the reasonableness of a decision. It is also true, and again speaking in purely general terms and in the context of ordinary litigation, that an adjudication under appeal may be affirmed on a ground not articulated or different from the reasons of the original tribunal. An appellate court may affirm the decision on any valid ground: *Re Thatcher and Merchant* (1983), 1 D.L.R. (4th) 763 (Sask. C.A.). In this case, counsel for the government expressed grave concerns over the potential implications of the arbitrator's finding that the *Income Tax Act* prohibition did not apply because the agreement itself has the status of "law" by virtue of s.41(6) of the *Public Service Act*. I can appreciate those concerns and it is here where I think the arbitrator was in error in his reasoning even though he came to the correct result in the end.

[17] In my opinion, it would take explicit statutory language for some external document to be regarded as law. Examples can be found in both federal and territorial legislation. One is the *Canada-United Kingdom Civil and Commercial Judgments Conventions Act*, R.S.C. 1985, c. C-30. That statute provides, in s.2, that the Convention, itself being an agreement, is approved and "declared to have the force of law in Canada". It goes on to provide that the provisions of the Act and the Convention prevail over any other law if there is any inconsistency. Another example is the *Intercountry Adoption (Hague Convention) Act*, S.N.W.T. 1998, c.19. That Act provides, in s.3, that when the Convention comes into force "its provisions are

law in the Territories". It also provides that the Convention prevails in case of any conflict with Territorial law.

[18] These examples clearly show the type of specific statutory language required to elevate an external agreement to the status of "law". Contrasted to these examples is s.41(6) of the *Public Service Act* which merely affirms that a collective agreement is binding on the Government. There may be a number of reasons for having such a "binding" provision in the statute (and I note that both the *Canada Labour Code*, in s.56, and the federal *Public Service Staff Relations Act*, in s.59, have similar provisions). But whatever its purpose the effect is clearly not to elevate the agreement itself to the status and force of law.

[19] Such an interpretation would also contradict some other obvious provisions of both the agreement and the *Public Service Act*. Article 5.01 of the agreement provides that nothing in the agreement shall be construed so as to require the employer to do or refrain from doing anything contrary to any Act of the Territories; Article 5.02 states that in the event that any law renders null and void any provision of the agreement then the remaining provisions shall remain in effect. All of this suggests a superiority of laws over the agreement. It accords with the accepted principle that, where the provisions of a collective agreement are clearly contrary to a statue, the arbitrator is to treat that portion of the agreement as null and void: see Brown & Beatty, *Canadian Labour Arbitration* (at para. 2:2100).

[20] The *Public Service Act* provides, in s.44, that no collective agreement shall provide for the alteration or elimination of any existing term or condition of employment if such would require the enactment or amendment of any existing legislation. This too contradicts the notion that s.41(6) of the Act has the effect of giving the agreement the force of law.

[21] So, for these reasons, I respectfully conclude that the arbitrator was wrong in his reasons dealing with the impact of the *Income Tax Act* prohibition. I nevertheless think he came to the correct conclusion because, in my opinion, the communication of social insurance numbers is authorized by reason of the third exemption in s.239(2.3) of that Act: "for a purpose for which it was provided by the individual."

[22] The employee provides his or her social insurance number to the employer for purpose of employment. The employee must be a member of the union, or at least

subject to the terms of any collective agreement so long as he or she is a member of the bargaining unit, also for purpose of employment. One is inseparable from the other. A purpose of providing one's social insurance number is to comply with employment requirements, as is compliance with the terms of the agreement. Section 41(6) of the *Public Service Act* also makes the agreement binding on the members of the bargaining unit. Therefore, in my opinion, the employer's communication of the employee's social insurance number to the employee's bargaining agent, the Union, is implicitly a purpose for which the employee provided it to the employer. Thus the *Income Tax Act* does not prohibit compliance with the Government's obligation pursuant to Article 14.02 of the agreement.

[23] With respect to any obstacle presented by the *Access to Information and Protection of Privacy Act*, again I think the arbitrator came to the correct conclusion (although I do not agree completely with his reasons). In my opinion, there can be no dispute that disclosure is permitted by virtue of s.48(p) of the Act: "for the purpose of complying with ... a written agreement ... made under a law of the Territories". I do not necessarily agree that s.48(u) permits disclosure since that refers to "any Act that authorizes or requires disclosure". The conclusion with respect to this subsection is premised on the earlier conclusion that the agreement constitutes law, a conclusion with which I disagree.

[24] There is further support, however, as submitted by respondent's counsel, for holding that the privacy legislation is no impediment to disclosure of social insurance numbers. Section 48(a) of the Act permits disclosure "for the purpose for which the information was collected or compiled or for a use consistent with that purpose". This is somewhat similar to the exemption discussed above in relation to the *Income Tax Act.*

[25] A number of decisions by labour tribunals of various jurisdictions have addressed the effect, if any, of privacy legislation on information requirements imposed by collective agreements on employers. Many of them were reviewed by the federal Public Service Staff Relations Board in 1996 in the case of *Public Service Alliance of Canada* v. *Treasury Board* (files 161-2-791 & 169-2-584). The entitlement of the union, as the exclusive bargaining agent for all employees in the bargaining unit, to employee information was recognized in all cases. It is an aspect of the union's obligation to fairly represent all members of the bargaining unit. It necessarily follows that it has both the right and the need to obtain employee

information. These cases consistently held, as noted by the Board in the *Public Service Alliance* matter, that it was not a violation of privacy legislation to provide such information to the union as this was a use which was consistent with the purpose for which the information had been obtained or collected. This same reasoning was applied with equal force to the requirement to provide social insurance numbers: see *Société canadienne des postes et Syndicat canadien des postiers*, [1995] D.A.T.C. no. 53. I agree with this analysis.

[26] For all of these reasons, I find that the arbitrator came to the correct result even though I do not agree with all of his reasoning. Therefore the application for judicial review is dismissed. The earlier order staying the arbitrator's award is set aside.

[27] Counsel may make arrangements for written submissions if they are unable to agree on the question of costs.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 16th day of March, 2001.

Counsel for the Applicant (G.N.W.T.): Lucy K. Austin
Counsel for the Respondent (U.N.W.): Paul N.K. Smith