Lebelle v. Y.P.D.D.E.A., 2001 NWTSC 87

Date: 2001 12 10
Docket: S-1-CV2001-000288

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

DENISE LEBELLE

Applicant

- and -

YELLOWKNIFE PUBLIC DENOMINATIONAL
DISTRICT EDUCATION AUTHORITY

Respondent

REASONS FOR JUDGMENT

[1] The issue in this case is whether the *Education Act*, S.N.W.T. 1995, c.28, provides an absolute right to arbitration to a teacher whose contract of employment has been terminated.

[2] The applicant was hired as a teacher by the respondent education authority in August, 1999. Her employment was governed by the *Education Act* and subject to a collective bargaining agreement between the employer authority and the Northwest Territories Teachers' Association ("NWTTA"). The NWTTA is the sole bargaining agent for teachers and membership in the NWTTA is a condition of employment for all teachers. The applicant was a member of the NWTTA.

[3] The Act and the agreement differentiate between two types of teachers. There are teachers who have been employed for less than two consecutive years (referred to in the agreement as "non-tenured" teachers); and there are those who have been employed for two or more consecutive years (referred to as "tenured" teachers). The distinction is important because of the contractual rights enjoyed by teachers.

[4] The Act, in s.53(1), provides that a contract of employment of a teacher continues in force from school year to school year. It may be terminated in one of four ways: (1)

by mutual consent; (2) by dismissal for cause; (3) by dismissal for incompetence; or (4) at the end of a school year. The Act further provides, in s.54, that a teacher may be dismissed at any time for cause or incompetence. But, a tenured teacher, that is one who has been employed for two or more years, may only be dismissed for cause or incompetence. A non-tenured teacher, on the other hand, may have his or her contract of employment terminated at the end of the school year (provided that the employer gives the requisite written notice).

[5] The distinction between tenured and non-tenured teachers is also carried forward to the collective bargaining agreement. The agreement establishes, in Article 21, a grievance and arbitration process for the resolution of any differences between a teacher and the employer. There is a first step involving a grievance being filed in writing with the employer. If there is no resolution then the grievance may be taken to a second step involving a referral to a grievance committee composed of two representatives of the employer and two representatives of the NWTTA. If the dispute is not resolved at that stage then either party may take the dispute to a formal hearing before a three-person arbitration board. The decision at that stage is termed as "binding".

[6] There are, however, two significant points to note. First, clause 21.01.3 provides that if the grievance committee reaches a unanimous decision then that decision shall be "final and binding". I interpret that as meaning that there is no recourse to the arbitration board. Second, if a tenured teacher's contract is terminated for any reason, any appeal of the termination goes directly to the arbitration board bypassing the first two stages of the grievance procedure. This is found in clause 19.05 of the agreement which refers to the termination of a teacher's employment "beyond the second consecutive year of employment".

[7] The applicant in this case was a non-tenured teacher. She was in the first year of employment with this employer. During the school year she received a good appraisal. On March 31, 2000, however, the applicant received a letter notifying her that her contract of employment will not be renewed for the upcoming school year. The reason given was uncertainty as to the next school year budget and the number of staff that will be required. There is no real dispute in this case that the employer was acting within its prerogative in not renewing the applicant's contract. It seems to be an accepted method by which the employer can manage its professional forces in the face of uncertainty over future resources and requirements. This letter of March 31 was apparently viewed as a formality and the applicant expected to be hired back.

[8] Some five weeks later, in early May, the applicant met with the principal of the school where she was teaching. She asserts that the principal told her that her contract would not be renewed due to problems with her work. On May 17, 2000, she filed a grievance. Her grievance referred to "the matter of my termination". It alleged contraventions by the employer of clause 2.04 of the collective agreement (a failure to exercise management rights in a fair and reasonable manner) and clause 19.01(iii) (requiring at least two written evaluations by the school administration and one written evaluation by the education authority's Superintendent). The applicant sought to have the termination of her contract revoked and to have a teaching position made available to her.

[9] The grievance was rejected at the first stage by the Superintendent of Education citing compliance with the requirements of the Act and the agreement in respect of the termination of the applicant's contract. The NWTTA, on behalf of the applicant, then took the grievance to the next step by requesting that the matter be considered by a grievance committee. The committee unanimously dismissed the grievance. The committee decision noted three points of interest:

(a) that the process for termination was followed;
(b) that the applicant had a number of opportunities to apply for vacant positions; and,
(c) that competence was not a factor in the grievance.

[10] The grievance committee issued its decision on June 8, 2000. The school year ended on June 28. The applicant's record of employment indicated "shortage of work" as the reason for termination. The applicant subsequently obtained a teaching position in Alberta for the 2000/2001 school year but at an annual salary approximately $20,000.00 less than what she would have been earning if rehired by the respondent. In May, 2001, some eleven months after the decision of the grievance committee, she instructed counsel to have this dispute submitted to arbitration. Her counsel wrote to the respondent's lawyer identifying the issues as (i) whether the employer had grounds to dismiss the applicant, and (ii) whether the notice of termination complied with the statutory notice requirements. When the respondent refused to submit to arbitration the applicant commenced these proceedings.

[11] The Originating Notice was filed on behalf of the applicant on August 15, 2001. It does not seek judicial review of the grievance committee decision. It seeks an order submitting "the issue of the dismissal" of the applicant to arbitration. For the first time in any of the documentation I have seen there is the allegation that the termination of the

applicant's contract of employment was a disguised dismissal for cause. Counsel did not place before me any of the submissions made to the grievance committee so it is impossible for me to determine if disguised dismissal was argued in that forum. The applicant relies on s.57 of the *Education Act* and says that it gives her an unqualified right to arbitration:

> 57. Where a dispute arises concerning the dismissal from a contract of employment between a teacher and the education body employing the teacher, the dispute may be determined by means of arbitration under the *Arbitration Act*.

[12] The applicant submits, in essence, that the clear intent of s.57 is to submit all disputes concerning dismissal of a teacher to arbitration. This applies equally to tenured and non-tenured teachers with the only exception being the proviso in the agreement that tenured teachers can bypass the grievance steps and go directly to arbitration. The respondent answers, however, that it had the right to terminate the applicant's contract at the end of the school year and therefore there is no need, indeed there is no basis, for an inquiry into questions of cause for dismissal. Further, the respondent argues that the collective agreement draws a valid distinction between tenured and non-tenured teachers in the extent of their procedural rights and, in any event, s.57 of the Act is a permissive provision, not a mandatory one.

[13] Counsel made numerous submissions on points that were non-essential to the main point in this case, that being, in my opinion, the interpretation of s.57 of the Act. This is not a judicial review application so the correctness or reasonableness (patent or otherwise) of the grievance committee's decision is not for me to say. Also, this is not a wrongful dismissal claim. This is simply a matter of statutory interpretation.

[14] It is banal to repeat the principle that a collective agreement cannot override or contradict a statutory provision. But that does not mean that a statute and collective agreement should not be read together so as to ascertain the true intent of the comprehensive scheme they are meant to reflect. In this case, when one does read them together and not as isolated instruments, one discerns very quickly that s.57 was not intended to give the absolute right to arbitration that the applicant seeks to maintain.

[15] First, I wish to address respondent's submission that s.57 of the *Education Act* is not a mandatory provision.

[16] Respondent's counsel cited s.28(2) of the *Interpretation Act*, R.S.N.W.T. 1988, c.I-8, as the guiding rule: "The expression 'shall' is to be construed as imperative and the

expression ‘may’ as permissive.” Notwithstanding what should be a straightforward application of this rule, case law reveals that the true meaning may differ if the context of a particular statute requires some other construction.

[17] In ordinary usage, “may” is permissive and “must” is imperative. “May” is usually employed to imply permissive, optional or discretionary action as opposed to mandatory action. In some cases, however, it has been held that “may” has a compulsory force. This is the case where there is something in the context or subject-matter of the statute to clearly indicate that “may” is being used in an imperative sense. This is most commonly found when “may” is used to confer jurisdiction on a court or tribunal. Then it will be considered imperative if there can be no justification for failing to exercise that jurisdiction. But it is a matter of statutory interpretation. One must try to determine the intention of the legislature by looking at the subject-matter of the statute and considering the relation of the provision to the whole of the statute: see Côté, *The Interpretation of Legislation in Canada* (1984), at 177-181; Pigeon, *Drafting and Interpreting Legislation*, at 35-39; *Maxwell on the Interpretation of Statutes* (12th ed., 1985), at 314-315; Bennion, *Statutory Interpretation* (1984), at 27; *The Dictionary of Canadian Law* (2nd ed., 1995), at 727; *Stroud’s Judicial Dictionary* (5th ed., 1986), at 1567.

[18] An example of when “may” connotes both an option and a mandatory jurisdictional component was supplied by the applicant’s counsel in this case. He referred me to the previous *Education Act*, R.S.N.W.T. 1988, c.E-I, replaced by the current statute in 1995. That previous act contained a provision for appeals of dismissals to a board of reference:

> 122. (1) A teacher who is dismissed for cause or for incompetence may in the prescribed manner and within the prescribed time appeal the dismissal to a board of reference.

This provision gave an option to the teacher who is dismissed (“may... appeal”) but necessarily it also requires the board of reference to act if there is an appeal.

[19] The current Act, and s.57 in particular, does not direct that any particular party act in a certain way. It merely says that a dispute concerning the dismissal of a teacher “may be determined” by arbitration. It does not say that the teacher may take the dispute to arbitration. It simply provides one mechanism as an available option for resolution of such a dispute. And whether that is the only option is for the parties (the employer and the employees as represented by their bargaining agent) to decide through the collective bargaining process.

[20] In this case the parties agreed on a number of items to govern the resolution of disputes concerning termination or dismissal. First, they agreed on a three-stage procedure involving a grievance to the employer, a grievance to a committee composed of equal representation from the employer and the union, and finally a submission to an arbitration board. Second, they agreed on a distinction between tenured and non-tenured teachers. In respect of a dispute over the dismissal of a tenured teacher, it goes directly to arbitration; in respect of non-tenured teachers, it goes first through the grievance steps. Third, they agreed that if the decision of a grievance committee is unanimous, then that decision is final and there is no further recourse to the arbitration board. This applies, however, only to non-tenured teachers. This is the process adopted by the parties. In my opinion, it is fair and it accords with the statutory scheme.

[21] I say it is fair because the grievance procedure itself allows for the review of the dispute by a committee that reflects equally the interests of the employer and employees; the affected employee is able to make representations to it and apparently is entitled to be represented (as the applicant was by the union in this case); and there are no restraints on the committee's power to resolve the dispute.

[22] I say it fits with the statutory scheme because the *Education Act* also draws distinctions between tenured and non-tenured teachers and treats them differently with respect to contract rights.

[23] Earlier I made reference to the four ways in which a teacher's contract of employment may be terminated and the distinctions drawn between tenured and non-tenured teachers in the statute. These are found in certain subsections of sections 53 and 54 of the Act:

> 53.(1) Subject to section 54, a contract of employment of a teacher continues in force from school year to school year and may, by notice in writing, be terminated by mutual consent, by dismissal for cause, by dismissal for incompetence, or at the end of a school year.
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> . . .
>
> 54.(1) A teacher may be dismissed for cause or for incompetence at any time in accordance with the regulations.

> (2) Where a teacher has been employed as a teacher for less than two consecutive years, the employer of the teacher may terminate the contract of the teacher at the end of a school year by giving notice in writing as required by subsection 53(2).
>
> (3) Where a teacher has been employed as a teacher by one employer for two or more consecutive years, that employer shall not terminate the contract of that teacher except for cause or for incompetence.
>
> (4) Notwithstanding any contract of employment or provision of this Act, where the number of teachers required in an education district is decreased, the employer of a teacher may terminate the contract of the teacher at the end of a school year by giving notice sent by registered mail at least 45 days before the day set as the closing day of the school in which the teacher is employed.
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> (5) Where a teacher is dismissed or his or her contract is terminated, the employer shall give the teacher written reasons for the dismissal or termination.

[24] As noted previously, the employer may terminate the contract of a non-tenured teacher (such as the applicant) at the end of the school year. There is no need to show cause or incompetence. Also, a tenured teacher's contract may be terminated only for cause or incompetence. And, finally, the Act uses the word "dismissal" to refer only to those situations where a contract is terminated for cause or incompetence. This can be found in s.53(1) in the distinct references to "dismissal for cause" and "dismissal for incompetence" and in s.54(1) which refers to "dismissal for cause or for incompetence". In all other cases the references are to "termination" of the contract. And, s.54(5) clearly notes the distinction between a teacher being "dismissed" and a teacher whose "contract is terminated".

[25] This leads me to conclude that the object of s. 57 of the Act, if it is arguably to secure a right to arbitration, is confined to those teachers who are "dismissed" for cause or incompetence. The section specifically refers to disputes concerning the "dismissal" from a contract of employment. This can only refer, if one were to maintain consistency, to dismissals for cause or incompetence and, since those are the only grounds upon which tenured teachers may be dismissed, it applies primarily to tenured teachers. This interpretation accords with the collective agreement since a tenured teacher has the right to go straight to arbitration if that teacher is dismissed or the contract terminated.

[26] All this does not mean, of course, that a non-tenured teacher could not be dismissed for cause or incompetence. But that is not the case here. The employer

exercised its prerogative to terminate the applicant's contract at the end of the school year. The grievance committee held unanimously that the employer followed the necessary process. And, also of course, I am not being asked to review the decision of the committee. Indeed, in many aspects, this application is nothing more than a collateral attack on the committee's decision seeking to argue issues that may or may not have been put before the committee.

[27] This non-mandatory construction of s.57 of the *Education Act* also accords, in my opinion, with the prevailing pattern of collective bargaining legislation. For example, s.43 of the *Public Service Act*, R.S.N.W.T. 1988, c.P-16, provides as follows:

> 43. Where a collective agreement fails to provide for the determination of disputes arising out of the collective agreement during the term of the agreement without stoppage of work, those disputes shall be determined by means of arbitration pursuant to the *Arbitration Act*.

In this example there is a direction that arbitration shall be used to resolve disputes but only where there is no dispute resolution process in the collective agreement. Here there is one (one that includes a grievance procedure for all teachers and a compulsory arbitration procedure for tenured teachers).

[28] A more pertinent example is provided by s.57(1) of the *Canada Labour Code*, R.S.C. 1985, c.L-2:

> 57.(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.

This provision requires a dispute resolution process to be included in every collective agreement, but that process could be by arbitration or some other procedure.

[29] As an aside, I think an argument could be made that s.57 of the *Canada Labour Code*, being in Part I of the Code dealing with industrial relations, applies in the Northwest Territories in this situation. First, all laws of the Northwest Territories are subject to the Acts of Parliament by virtue of s.16 of the *Northwest Territories Act*, R.S.C. 1985, c.N-27. Second, the definition of a "work, undertaking or business outside of the exclusive legislative authority of the legislatures of the provinces", found in s.2(1)

of the Code, has been held to be broad enough to include employer-employee relations in the Northwest Territories, at least in the purview of collective bargaining legislation such as Part I of the Code: *Canada Labour Relations Board* v. *City of Yellowknife* (1977), 76 D.L.R.(3d) 85 (S.C.C.). And, third, teachers employed by a district education authority, such as the respondent, do not seem to be included as "public servants" within the territorial *Public Service Act* (a factor of some significance since the *City of Yellowknife* case expressly declined to consider the status of "government" employees).

[30] However one views this side issue, there is some case law on s.57 of the *Canada Labour Code* that is relevant to the discussion as to the scope of s.57 of the *Education Act*. In *Re Canadian Air Line Employees' Association and Eastern Provincial Airways (1963) Ltd.* (1982), 140 D.L.R. (3d) 369 (Nfld. C.A.), leave to appeal to S.C.C. refused (1983), 40 N.R. 625, the issue was whether s.57 of the Labour Code (then known as s.155) conferred a substantive right on a probationary employee to grieve termination of employment when the collective agreement barred such an employee from the grievance procedure. The court held that s.57 only guarantees that all collective agreements under the Code shall contain some form of dispute resolution procedure. It does not guarantee individual employees' rights of access to that procedure, nor does it confer substantive rights upon employees in addition to their rights under a collective agreement. Therefore, a probationary employee who is denied the right to grieve pursuant to the collective agreement cannot invoke s.57 as an alternative procedural remedy. The judgment (per Morgan J.A.) states (at 371-372):

> In my opinion, art. 16.01 of the collective agreement does not contravene s.155 of the Canada Labour Code. That section is only applicable when a collective agreement does not contain a provision for final settlement of differences by arbitration or otherwise. This is not the situation here. In this case, a permanent employee, if disciplined or discharged, is given the express right by art. 16 to invoke the grievance procedure and, after presenting his grievance up to the final level, may invoke the arbitration procedure provided by art.17. The arbitrator can then review the matter and determine whether there was just cause for discipline or discharge. However, under the agreement the company retains the sole right to dispense with the services of a probationary employee and it may do so without cause. Article 16.01, then, merely confirms the finality of the company's decision with respect to probationary employees.
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> Section 155 of the Canada Labour Code does not purport to confer substantive rights upon employees in addition to their rights as defined in the collective agreement and, even if an arbitrator were entitled, under the provisions of that section, to review the company's decision to terminate the services of a probationary employee, he is still bound to determine the matter in accordance with the provisions of the collective agreement.

[31] Neither counsel referred to the *Eastern Airways* case (although respondent's counsel did draw my attention to s.57(1) of the *Labour Code*) but, in a similar manner, in this case the *Education Act* and the collective agreement both differentiate between tenured and non-tenured teachers with different substantive and procedural considerations applying to each. The employer has by statute the right to terminate a non-tenured teacher's contract at the end of the school year. This is not a "dismissal" since the employer need not show cause or incompetence. The collective agreement provides a grievance procedure for non-tenured teachers but precludes recourse to arbitration if the grievance committee's decision is unanimous. That is what happened here. And, to paraphrase the *Eastern Airways* case, s.57 of the *Education Act*, written as it is in non-mandatory language, does not purport to confer substantive rights upon the applicant in addition to her rights as set out in the collective agreement.

[32] Applicant's counsel urged strongly that if there is a question about how to characterize a termination, such as a disguised dismissal for cause, then an arbitrator has jurisdiction to make the initial inquiry as to whether the termination is arbitrable or not. Counsel relied on the case of *Jacmain v. Attorney-General of Canada*, [1978] 2 S.C.R. 15, as support for this proposition. That case centred on the question of whether an arbitrator had jurisdiction to review a probationary employee's rejection when the statute limits the arbitrator to inquiries into disciplinary action. The employer had the right to terminate a probationary employee for any reason. The majority in *Jacmain* held that the employee's right to arbitration, dependant as it was on disciplinary action, was not triggered since the employer's exercise of its right to terminate was taken in good faith. And the arbitrator was not authorized to act in the absence of disciplinary action.

[33] In my opinion *Jacmain* is not applicable to this case. If it stands for anything then it is, as submitted by respondent's counsel, that where an employer acts within its prerogative then there is no need to inquire into questions of cause or incompetence.

[34] In this case the employer acted within its right to terminate the applicant's contract. The applicant grieved that decision. The grievance committee found that the employer complied with the necessary process. The applicant chose not to seek judicial review of that decision but instead seeks to submit the issue of what she now labels as a "dismissal" to arbitration relying on s.57 of the *Education Act*. I have already held that s.57 is not a mandatory provision purporting to confer a substantive right. In my opinion, there is no requirement to put anything to arbitration because the issue has been comprehensively dealt with by the dispute resolution procedure in the collective agreement. To submit the

matter now to arbitration would be to countenance an end run around the very process adopted by the parties to the collective agreement to resolve employment related disputes.

[35] For these reasons, the application is dismissed. Costs may be spoken to if the parties are unable to agree.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 10th day of December, 2001.

Counsel for the Applicant: Austin F. Marshall
Counsel for the Respondent: Arthur von Kursell