Hiltz v. *The Commissioner of the NWT et al*, 2003 NWTSC 48

Date: 2003 08 21
Docket: S-1-CV-6018

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JEFF HILTZ

Plaintiff

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES
and JOHN POLLARD, in his capacity as Minister Responsible
for the *Public Service Act*

Defendants

Application to determine a preliminary point of law.

Heard at Yellowknife, NT, on July 16, 2003

Reasons filed: August 21, 2003

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

Counsel for the Plaintiff: David Yazbeck

Counsel for the Defendants: Sheldon Toner

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REASONS FOR JUDGMENT

[1] The parties have brought an application to determine what they describe as a "preliminary point of law". This "point" really involves two issues: (1) the inter-relationship between the statutory regime and the collective bargaining agreement governing the public service of the Northwest Territories; and, (2) this court's jurisdiction to entertain the claim advanced by the plaintiff in these proceedings. The parties say that the resolution of these issues will have general application to the government and its employees.

Summary of Facts:

[2] The Plaintiff is a qualified community health nurse. He became an employee of the Government of the Northwest Territories (as represented in this action by the defendant Commissioner of the Northwest Territories) in 1991. As an employee, he was a member of the Union of Northern Workers and thereby covered under the provisions of a collective bargaining agreement. The terms and conditions of his employment were governed by that agreement and the *Public Service Act*, R.S.N.W.T. 1988, c.P-16 (as amended).

[3] In 1993, the plaintiff was working as a nurse at the Stanton Yellowknife Hospital. In July of that year, he and his wife, a teacher also employed by the government, planned a move to another community where his wife was to take up new teaching duties as of September 1st. The plaintiff applied for leave without pay, effective September 1, 1993, pursuant to Article 21.06 of the collective agreement. That entitles an employee, whose spouse's position is relocated, to leave without pay for a period of one year. If the employee, such as the plaintiff here, does not obtain another position with the government within the one year period then that person shall, according to Article 21.06, cease to be an employee at the end of the period. The plaintiff was granted leave and this was eventually confirmed in writing by the Minister of Personnel:

> This letter will confirm that you will be on "Leave Without Pay for Relocation of Spouse" as per Article 21.06, from September 1, 1993 to August 31, 1994. This request is approved with the understanding that should you not find alternative employment, the Government of the Northwest Territories has no employment obligation to you.

[4] The plaintiff alleges that during his period of leave he applied for numerous positions, for which he was qualified, but was unsuccessful in obtaining one. He complained to his union and they launched, in January of 1994, a grievance under the agreement claiming that the employer failed to make reasonable efforts to place the plaintiff in a position and, more significantly, that the plaintiff had priority status to any available positions. A second grievance was launched shortly thereafter alleging specifically that the employer discriminated against the plaintiff by systematically excluding him from available positions due to the plaintiff's union activism in the past.

[5] The point about "priority status" was a reference to s.37 of the *Public Service Act* which, in brief summary, provides that when an employee is granted a leave of absence for a period in excess of two months, and whose position is filled by another person, that employee is entitled to be appointed, without competition, to another position for which the employee is qualified. In this case, the employer had appointed someone else to the plaintiff's former position at the Stanton Yellowknife Hospital.

[6] The grievances eventually went before an arbitrator who, on August 12, 1994, issued an award dismissing the grievances. On the issue of priority to job positions, the arbitrator held that no such right exists under Article 21.06 of the collective agreement. If there was any entitlement under s.37 of the Act, then that was something beyond the arbitrator's jurisdiction and he declined to deal with that question. On the claim of

discrimination, the arbitrator held that the evidence failed to establish the allegation. Neither party sought judicial review of this award.

[7] The plaintiff eventually moved from the Northwest Territories and obtained a job elsewhere. Then, on September 19, 1995, the plaintiff commenced this action alleging a breach of s.37 of the Act and discrimination on the part of the employer. He sought a declaration as to his entitlement to priority status pursuant to the Act, a mandatory injunction requiring the defendants to appoint him to a position for which he is qualified, and damages for lost income and other expenses. The defendants filed a Statement of Defence in which they state that s.37 does not apply to the plaintiff, since his leave was granted pursuant to Article 26.01 of the collective agreement, and that the claim respecting discrimination had already been adjudicated and thus subject to the doctrine of issue estoppel. On August 1, 1996, a consent order was issued whereby the allegations respecting discrimination were struck out. Subsequently, the parties filed amended pleadings. Of note, the defendants amended their defence to include a pleading to the effect that the grievance procedure set out in the collective bargaining agreement was the final resolution process for this claim.

[8] Examinations for discovery of a representative of the defendants were conducted in 1999 and 2000. Not much else seems to have happened in this litigation with the exception of this application.

Issues:

[9] The order of August 1, 1996, also contained a provision that serves as the basis for this application. This was a clause allowing the parties "to set down for determination as a preliminary point of law the issue of the applicability of section 37 of the *Public Service Act* to the plaintiff's claim, including all necessary questions related thereto, so as to determine the claim for declaratory relief". A further clause, however, provided that "if the parties seek to determine such preliminary issues, they should prepare a proposed order setting forth the specific issues addressed, or seek directions".

[10] In due course, this application was set down to be argued in May of 1998. It was adjourned *sine die* at the request of the plaintiff. It was subsequently set down and argued before me (some seven years after the order had been issued). What was never done, however, is what was anticipated by the second pertinent clause in the original order: the preparation of an order setting forth the specific issues or questions to be addressed. Nevertheless, counsel were agreed that the two issues for determination are as follows:

1. Does s.37 of the *Public Service Act* apply to the plaintiff's claim?

[11] The defendants assert that the priority entitlement provided by s.37(3) of the Act has been supplanted, or at least modified, by the specific provision in Article 21.06 of the collective agreement. The plaintiff submits that such an interpretation would mean that the agreement is in conflict with the statute and, in such a case, the statute must prevail. But, in any case, so the plaintiff claims, the two provisions can co-exist and the employee is entitled to the benefit of both.

2. Does this court have jurisdiction to entertain this claim?

[12] The defendants here rely on the exclusive jurisdiction model articulated by the Supreme Court of Canada over the past decade and assert that since there is a grievance procedure set out, in both the Regulations made pursuant to the statute and in the agreement, then that procedure is to be preferred. Thus the court should decline jurisdiction. The plaintiff argues, however, that the grievance procedure is not the only, or even the preferred, option since the issue of any entitlement pursuant to s.37 is not one that arises out of the agreement and therefore is beyond the jurisdiction of the arbitrator. The grievance procedure that is available is simply one through successive levels of management. Therefore, because there is no opportunity for independent adjudication, and because the procedure is permissive only, not mandatory, the court maintains a residual jurisdiction to entertain the case.

[13] There is no lack of irony in the defendants' submission on this second question. Before the arbitrator, the employer took the position that only the court had jurisdiction to deal with any claim under s.37 of the Act. Here, they assert the opposite. The employer says that the court has no jurisdiction and must defer to the grievance process. The effect of this would be to leave the plaintiff with no recourse. An arbitrator said he should go to court. If I say he must use the grievance process, then he is profoundly out of time (under both the Regulations and the agreement). Plus, he is no longer an "employee" so his status to bring a grievance is questionable. Here, the plaintiff did what the arbitrator said he should do, that is, go to court.

[14] One may well ask why the defendants should even be heard on this issue. But, a litigant is entitled to change its position. I do not fault defendants' counsel for this about-face. He was not present at the arbitration hearing. Indeed, I commend counsel for his forthrightness in addressing this point head-on and in addressing the predictably sceptical queries from the bench. In any event, the jurisdictional question is one that has much

exercised courts throughout Canada in employer-employee disputes in a collective bargaining context.

[15] To fully appreciate the issues, it is necessary to review in detail many of the provisions of the pertinent legislation and agreement.

Statute & Collective Agreement Provisions:

[16] The *Public Service Act* regulates the employment of all persons employed in the public service of the Northwest Territories, unionized and non-unionized. With respect to the unionized workforce, the statute contemplates that the terms and conditions of employment will be negotiated and set out in a collective bargaining agreement. Section 41(6) of the Act makes any collective agreement binding on the employer, the employees' union, and the members of the bargaining unit to which the agreement applies. There is no dispute that the plaintiff was part of the bargaining unit to which the agreement applied at the material times.

[17] The Act requires that an agreement provide for the determination of disputes, failing which they will be determined by arbitration:

> 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*.

[18] The Act further provides for the effective supremacy of the legislation:

> 44. No collective agreement shall provide, directly or indirectly, for the alteration or elimination of any existing term or condition of employment, the alteration or elimination of which or the establishment of which, as the case may be, would require or have the effect of requiring the enactment or amendment of any legislation by the Legislature except for the purpose of appropriations.

[19] The supremacy of the Act, and legislation generally, is also recognized in Article 5 of the collective agreement:

STATE SECURITY

5.01 Nothing in this Agreement shall be construed to require the Employer to do or refrain from doing anything contrary to any Act of the Northwest Territories.

FUTURE LEGISLATION

5.02 In the event that any law passed by Parliament or the Northwest Territories Legislative Assembly renders null and void or alters any provision of this Agreement, the remaining provisions of the Agreement shall remain in effect for the term of the Agreement. When this occurs the Collective Agreement shall be re-opened upon the request of either party and negotiations shall commence with a view to finding an appropriate substitute for the annulled or altered provision.

CONFLICT OF PROVISIONS

5.03 Where there is any conflict between the provisions of this Agreement and any regulation, direction or other instrument dealing with terms and conditions of employment issued by the Employer, the provisions of this Agreement shall prevail.

The references in Article 5.03 to "any regulation, direction or other instrument" do not include a statute such as the *Public Service Act*: see *Northwest Territories (Minister of Personnel)* v. *U.N.W.*, [1989] N.W.T.J. No. 95 (S.C.).

[20] The statutory provision in contention is s.37 of the Act dealing with a "leave of absence":

37.(1) Where an employee has been granted leave of absence for a period in excess of two months, the Minister may appoint another person to that employee's position and, in that event, the employee ceases to be the incumbent of that position but, during the remaining period for which the employee was granted leave of absence, the employee shall, subject to this section, be deemed to be the incumbent of an equivalent position on the establishment.

(2) An employee who by subsection (1) is deemed to be the incumbent of an equivalent position is not entitled to any remuneration in

> respect of that position unless the employee was, in accordance with the regulations, granted leave of absence with pay.
>
> (3) Where an employee is on leave of absence and another person is appointed to his or her position under subsection (1), the Minister shall, during or after the expiration of leave, appoint the employee without competition to another position in the public service for which the employee is qualified.

[21] The term "leave of absence" is not defined in the Act but it is in the collective agreement, in Article 2.01(v), as "absence from duty with the employer's permission". The reference to "permission" is interesting because it suggests a certain degree of discretion on the part of the employer. This is reinforced by reference to s.39 of the *Public Service Regulations*, made pursuant to the Act, which provides that "a Deputy Minister may grant leave of absence without pay for a period of up to six months, but additional leave of absence without pay may be granted only with the approval of the Minister". The use of the word "may" also connotes a discretionary power.

[22] A leave of absence without pay is not the only reference to leave in the Regulations. Under the general heading of "Leaves of Absence", there are sections dealing with vacation leave, sick leave, special leave, court leave, and retiring leave. All of these are arguably absence from duty by permission. All of these provisions have certain aspects by which an employee becomes *entitled* to a certain amount of leave with pay. Some other types of leave also mentioned in the Regulations, such as education leave and travel leave, are discretionary.

[23] The leave provision of the collective agreement that is in contention is Article 21.06, entitled "Leave Without Pay for Relocation of Spouse":

> 21.06 Leave Without Pay for Relocation of Spouse
>
> (a) The Employer shall grant leave without pay for a period of 1 year, at the request in writing of an employee whose spouse's position is permanently relocated or who accepts an appointment to another position outside the employee's headquarters area. If the employee does not obtain another position within the one year period, the employee shall cease to be an employee at the end of approved period leave without pay.

> (b) Leave without pay granted under this Clause shall be deducted from the calculation of "continuous employment" for the purpose of calculating severance pay and vacation leave for the employee involved, except where the period of such leave is less than three (3) months. Time spent on such leave which is for a period of more than three (3) months shall not be counted for pay increment purposes.

[24] It will be readily noted that the major distinction between the "leave of absence" pursuant to s.37 and the "leave without pay for relocation of spouse" in this Article is that, in the former, the employee is entitled to priority status with respect to any position for which he or she is qualified, indeed the employee never stops being an employee, while, in the latter case, the employee ceases to be an employee at the end of the leave of absence and there is no reference to any obligation on the part of the employer to appoint him or her to any position.

[25] Again, however, this is not the only type of "leave" referred to in the agreement. There is vacation leave, termination leave, special leave, casual leave, sick leave, court leave, injury on duty leave, maternity leave, adoption leave and emergency leave. There are also provisions for leave of absence for employees elected as union officers. Some are with pay, some without; some have benefits receivable from elsewhere; some are discretionary while some are entitlements. They may or may not track other provisions dealing with the same subject. For example, the provisions dealing with court leave are slightly different as between those in the agreement and those in the Regulations. This, of course, is no concern since the provision in the agreement would cover the unionized workforce while the Regulation would cover non-unionized workers. It would be a different question if the conflict were with the statute.

[26] The Regulations also provide for a grievance procedure respecting complaints about any matter respecting the Act or the Regulations. It provides for a progressive series of grievances submitted to higher levels of management with the Minister having the final decision:

> 41. Subject to sections 29 and 33 of the Act, any employee who has a complaint about a matter in respect of this Act or the regulations may have that complaint dealt with in accordance with the grievance procedure set out in sections 44, 45 and 46, provided that a reasonable attempt is first made to resolve the complaint with the immediate supervisor of the employee.

. . .

44. (1) An employee who has a complaint about a matter in respect of the Act or these regulations may submit a written grievance describing the nature of the complaint to a person designated by the Minister within 10 days of the employee becoming aware of the circumstances giving rise to the complaint.

(2) The person designated under subsection (1) shall hear the grievance, decide on it and send a written copy of the decision to the employee within 14 days of his or her receipt of the grievance.

45.(1) If the employee is not satisfied with the decision made under subsection 44(2) or if the complaint is not capable or being resolved under section 44, the employee may submit the written grievance to the Deputy Minister or, where there is no Deputy Minister, to a person designated by the Minister within 10 days of the employee receiving the decision or becoming aware of the circumstances giving rise to the complaint, as the case may be.

(2) The Deputy Minister or person designated under subsection (1), as the case may be, shall hear the grievance, decide on it and send a written copy of the decision to the employee within 14 days of his or her receipt of the grievance.

46.(1) If the employee is not satisfied with the decision made under section 45 or if the complaint is not capable of being resolved under section 44 or 45, the employee may submit the written grievance to the Minister within 10 days of the employee receiving the decision or becoming aware of the circumstances giving rise to the complaint, as the case may be.

(2) The Minister shall hear the grievance, decide on it and send a written copy of the decision to the employee within 30 days of his or her receipt of the grievance.

(3) The decision of the Minister is final and binding.

[27] The collective agreement also contains provisions dealing with the resolution of disputes. It contains a grievance procedure which by and large mirrors that found in the Regulations. But it also contains the availability of arbitration before an independent adjudicator. These are found in Article 37, the relevant sections of which are the following:

ADJUSTMENT OF DISPUTES

37.01 (1) The Employer and the Union recognize that grievances may arise in each of the following circumstances:

(a) by the interpretation or application of:

(i) a provision of an Act, or a regulation, direction or other instrument made or issed by the Employer dealing with terms or conditions of employment; or

(ii) a provision of this Collective Agreement or Arbitral Award; and

(b) disciplinary action resulting in demotion, suspension, or a financial penalty;

(c) dismissal from the Public Service; and

(d) letters of discipline placed on personnel file.

(2) The procedure for the final resolution of the grievances listed in paragraph (a) of section (1) above is as follows:

(a) Where the grievance is one which arises in circumstances outlined in sub-paragraph (I) of paragraph (a) or in paragraph (d) the final level of resolution is to the Minister of Personnel.

(b) Where the grievance is one which arises out of the interpretation or application of the Collective Agreement the final level of resolution is to arbitration.

© Where the grievance arises as a result of disciplinary action resulting in demotion, suspension, or a financial penalty or dismissal from the Public Service, the final level of resolution is to arbitration.

. . .

37.05 Except as otherwise provided in this Agreement a grievance shall be processed by recourse to the following steps:

(a) First Level (first level of management)

(b) Second Level (second level of management)

© Final Level (Minister of Personnel)

. . .

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 Section 43 of the *Public Service Act.*

. . .

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.

[28] As is apparent, the arbitration process is available only for disputes relating to the interpretation, application or administration of the agreement as well as any question as to whether a matter is arbitrable. Any grievance arising due to the interpretation or application of a provision of an Act (including presumably the *Public Service Act*) is restricted to the grievance procedure through the ascending levels of management with the final level of resolution being the Minister of Personnel. And this is what the arbitrator was confronted with in this case.

[29] The arbitrator declined to take jurisdiction to deal with the grievance relating to s.37 of the *Public Service Act*. He noted that his jurisdiction as arbitrator did not extend beyond the agreement. In this (at least on this isolated question) he was undoubtedly right. And, since the arbitrator had the jurisdiction to decide whether a matter is arbitrable, his decision on this point deserves considerable deference. But it creates difficulties. And it highlights what, in my opinion, is a fundamental problem in this jurisdiction.

[30] The state of labour relations law in Canada has undergone significant evolution in the past decade or so. Many jurisdictions have recognized this by amending their labour relations statutes. For example, in order to overcome what was perceived to be undue limitations on the powers of arbitrators, and in order to give effect to the exclusive jurisdiction model of grievance arbitration delineated by the Supreme Court of Canada, many jurisdictions have enacted legislation expressly conferring on arbitrators the power to "interpret and apply human rights and other employment-related statutes... despite any conflict between those statutes and the terms of the collective agreement". This wording is taken from the Ontario *Labour Relations Act* but similar provisions now exist in Nova Scotia, British Columbia, and under the *Canada Labour Code*: see Brown & Beatty, *Canadian Labour Arbitration* (3rd ed., looseleaf service), at para. 2:2100. Such enactments, in my opinion, enable arbitrators to deal fully with the issues before them, especially in situations such as the present one where the employment relationship is governed by both a collective agreement and a statute (and the statute is not incorporated into the agreement). In having arbitrators interpret and apply all employment related statutes, the parties are able to avoid multiple proceedings, with the potential for inconsistent decisions, and the attendant cost and delay.

[31] In this jurisdiction, there is no comprehensive labour relations legislation. Most unionized workplaces come under the *Canada Labour Code*. The public service of the Territories, however, is governed by a statute, the *Public Service Act*, which has been subjected to piecemeal amendment over the years but in many respects is still the same as it was several decades ago. For example, the sections on leave of absence (now s.37) and compulsory arbitration (now s.43) can be found, in exactly the same terms, in the *Public Service Ordinance* of 1974. In fact, the two sections can be traced back to legislative amendments in 1965 and 1969 (respectively), an era before there was even a fully elected legislature for the Territories. It just seems to me that a review of this legislation may be overdue so as to examine whether it still satisfies the needs of the employer and the employees in this new millennium.

Applicability of Section 37 to this Claim:

[32] The issue here is whether the collective agreement conflicts with the statute or can the two be harmonized so as to give effect to both. As Messrs. Brown & Beatty write (*supra* at para. 2.2140):

> Where the provisions of a collective agreement are clearly contrary to a statute, the traditional response is to treat that portion of the agreement as null and void. Of course, if the provisions of the collective agreement are not inconsistent with the statute but rather impose a different type of obligation, then the collective agreement must prevail.

Generally speaking, however, there is a presumption that the parties did not intend to negotiate something that was contrary to law. And, it can also be presumed that the parties are aware of any pertinent law, such as s.37 of the Act, when they negotiate an agreement.

[33] The issue relates to the fact that the plaintiff took a one-year leave of absence, pursuant to Article 26.01 of the agreement, which on its face does not provide for priority status in hiring, i.e., the right to be appointed to a position for which he is qualified without competition. Section 37(3) of the statute does provide for such a right. The defendants claim that the plaintiff's entitlement is to be determined by the agreement. The plaintiff claims that he is, or was, entitled to the right conveyed by s.37(3); that the employer breached its obligations under that section; and, that he has suffered damage as a result of that.

[34] The defendants' position on this issue consists of two parts. First, they submit that Article 26.01 of the agreement deals with a specific circumstance, leave of absence due to the relocation of a spouse, that can be harmonized with the general provision found in s.37 of the Act. Second, nothing in the Act precludes the parties from contracting specific rights and obligations, or limitations on same, that do not explicitly or implicitly amend the statute. In this case, Article 26.01 deals with a specific situation affecting unionized workers, while s.37 of the Act is still operative with respect to general leaves of absence and with respect to the non-unionized workforce.

[35] The plaintiff's basic position is that the collective agreement cannot supercede or supplant the provisions of the *Public Service Act*. If there is a conflict between the two then the statute must prevail. Analogizing to the situation with employment standards legislation, the plaintiff submits that the Act sets out minimum standards that cannot be

waived or otherwise contracted out of unless the agreement provides for a superior standard. And, by suggesting that the entitlement provided in s.37(3) does not apply to a member of the bargaining unit who takes a leave of absence, the defendants are in effect amending the statute by limiting its general applicability.

[36] I agree generally with defendants' counsel when he argues that, if one can, one must try to harmonize the collective agreement with the statute. There is authority for the proposition that the existing legislation must be read in such a way as to harmonize with the collective agreement, unless the operation of the latter is clearly excluded: *Durham Regional Police Association* v. *Durham Regional Board of Commissioners of Police*, [1982] 2 S.C.R. 709; *B.C.G.E.U.* v. *British Columbia* (1987), 12 B.C.L.R. (2d) 97 (C.A.). The question then is whether there is any inconsistency or incompatibility between the statute and the agreement, or can the two operate together and be effective.

[37] Also, on a general point, I am not necessarily convinced by the plaintiff's argument that the parties cannot contract out of the provisions of the Act. I do not find the analogy to employment standards legislation to be an apt one. If one examines the cases dealing with employment standards legislation specifically — and here I refer to ones such as *McLeod* v. *Egan*, [1975] 1 S.C.R. 517, and *Machtinger* v. *HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 — the point that stands out is that the legislation in question expressly provided that no one could contract out of its provisions unless the contract provides for benefits that are more favourable to an employee than those contained in the statute. In the collective bargaining context, these saving provisions have been held to preserve the rights under employment standards legislation but at the same time to extend to an employee any additional benefits or rights given under a collective agreement: *Blair* v. *Alberta* (1995), 125 D.L.R. (4th) 732 (Alta. C.A.). There is no such express prohibition in the *Public Services Act*.

[38] I am also not necessarily convinced that the parties cannot contract out of the Act on public policy grounds. I recognize that parties are not competent to contract out of the provisions of statutes enunciating fundamental public policy. This principle has been expressed most clearly in cases dealing with human rights legislation: see, for example, *Ontario Human Rights Commission* v. *Borough of Etobicoke*, [1982] 1 S.C.R. 202.

[39] While I imagine it can be said that the *Public Service Act* is an expression of "public policy", in the sense that any act of the legislature is an expression of "public policy", it is not, in my opinion, in the same category as human rights legislation or even general employment statutes that apply to all workers in all types of workplaces. The Act is a statute that governs the relationship between one specific employer, the government,

and those members of the public who are employed by it. Therefore, I fail to see, as a matter of principle, why the only employer governed by this statute and an association representing its employees could not contract out of its provisions (provided there was no statutory prohibition against it and provided that the parties explicitly acknowledged what they were doing).

[40] I need not be definitive on this point because here there is a statutory provision that applies should the parties wish to contract any terms or conditions of employment. Section 44 of the Act stipulates that no collective agreement shall, directly or indirectly, alter or eliminate any existing term or condition of employment if it would require or have the effect of requiring the enactment or amendment of any legislation (including undoubtedly amendment of the *Public Service Act* itself). Section 37 of the Act comes within the series of sections that have the general heading of "Terms and Conditions of Employment". So, in my opinion, the real question is not whether the parties can contract out of the statute; it is whether the parties have agreed to something that in effect amends the Act.

[41] What is the same and what is different between s.37 and Article 26.01? They both address leave of absence. Article 26.01 specifies leave without pay; s.37 presumes leave without pay "unless the employee was, in accordance with the regulations, granted leave of absence with pay". Leave of absence is generally discretionary, pursuant to the Regulations, but s.37 merely refers to "where an employee has been granted leave of absence". Article 26.01 makes leave an entitlement if requested. This is a specific benefit that the employer has agreed to. In other words, the employer has bound itself to limit its discretion in this situation. Since it does not impact the Act, but merely circumscribes the general discretion stipulated in the Regulations, then s.44 does not come into play. Leave of absence under the statute could be for any reason; Article 26.01 specifies a reason. Section 37 applies if the leave of absence is for more than two months; Article 26.01 provides for leave for a period of one year. None of these seemingly similar or seemingly different terms come within the purview of the s.44 proscription.

[42] The only apparent difference is with respect to priority status. Section 37(3) provides, in effect, that if an employee's position is filled by someone else while the employee is on leave, then, since the employee is considered to be the incumbent of an equivalent position, the employee is entitled to be appointed without competition to another position for which he or she is qualified. This entitlement applies during or after the expiration of the leave of absence. Why after? Because the employee is still an employee. There may not be a position available, or one for which the employee is

qualified, at the expiration of the leave. So the entitlement continues so long as the employee remains an employee.

[43] Article 26.01 makes no reference to priority status for appointment. It is silent on that point. It makes no reference at all to s.37 of the Act. All it says is that if the employee does not obtain another "position" within the one year leave period, the employee ceases to be an employee.

[44] It seems to me that the reference to obtaining another "position" can only mean a position within the public service. If it is meant to be any job whatsoever, what would be the point of going on leave? One may as well quit since after the leave period one ceases to be an employee in any event. So, if it does refer to a "position" within the public service, why would the general entitlement provided by s.37(3) not apply? Again, and not to be too tedious about this, what would be the point of taking leave if one did not maintain a certain status or priority for appointment to positions in the public service for which one were qualified? If not, if the employee is in the same position as anyone else applying on job competitions, why not just quit completely?

[45] I think the answer is that the parties did not contract out of the entitlement in s.37(3) nor did they implicitly amend it. The parties simply agreed to put a limit on it. That limit is one year. After that, the individual ceases to be an employee. It is that fact that terminates the entitlement to priority status.

[46] To interpret Article 26.01 as negating the entitlement contained in s.37(3) would, in my opinion, have the effect of amending the statue. That subsection applies to all employees. It is not subject to any qualification.

[47] In my opinion, the two provisions can be harmonized and they can operate effectively and rationally. If an employee takes leave pursuant to Article 26.01, then during that period he or she is entitled to be appointed without competition to another available position in the public service for which he or she is qualified. At the end of the one year period of leave, if the employee has not obtained another position, the employee ceases to be an employee. The entitlement then ends. Article 26.01 deals with a right to a leave of absence in a specific circumstance; s.37(3) deals with the employee's entitlement during that leave. This essentially, as I understood it, was the argument of the plaintiff and I accept it.

[48] For these reasons, my conclusion on this issue is that s.37(3) does apply to the plaintiff's claim.

The Court's Jurisdiction to Entertain the Claim:

[49] As noted previously, this issue brings into consideration the exclusive jurisdiction model elucidated by the Supreme Court of Canada in *Weber* v. *Ontario Hydro*, [1995] 2 S.C.R. 929, and other cases. Where a difference between the parties to a collective agreement arises from the interpretation, application, administration or violation of the agreement, the dispute must proceed through arbitration. The essential point to determine is whether the dispute, no matter how the parties may characterize it, arises expressly or inferentially out of the agreement. If it does then the courts must defer to the arbitration process. The same reasoning applies as between some statutory tribunal and the arbitration process: see *Regina Police Association* v. *Regina*, [2000] 1 S.C.R. 360. An important point, however, is that neither the existence of an employment relationship nor the fact that the dispute arose in the employment context are determinative of the issue. And no case has gone so far as to state that rights created by a statute that affect employment must necessarily be dealt with in an arbitration or grievance process outside of the courts.

[50] The question is one of determining legislative intent. Recourse to the courts may be excluded by express statutory language or by necessary implication. This was most recently articulated by Binnie J. on behalf of the Supreme Court of Canada in *Goudie* v. *Ottawa*, [2003] S.C.J. No. 12 (at paras. 22-23):

> The principle that disputes arising under a collective agreement should be resolved by labour arbitrators, not courts, is based on legislative intent. In *St. Anne Nackawic Pulp & Paper Co.* v. *Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, Estey J. laid down the general principle at pp. 718-719:
>
> > The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.
>
> Subsequent cases have confirmed that if the dispute between the parties in its "essential character" arises from the interpretation, application, administration or violation of the collective agreement, it is to be determined by an arbitrator appointed in accordance with the collective agreement, and not by the courts.

Binnie J. also went on to say that none of the leading cases deny access to the courts by plaintiffs who allege a cause of action outside the collective agreement.

[51] In this case the defendants do not say that arbitration is the exclusive forum for resolving the plaintiff's claim. Everyone seems to agree that, since this dispute arises under s.37(3) the Act, the arbitrator under the collective agreement had no jurisdiction to deal with it. The defendants submit, however, that the grievance procedures under the collective agreement and the *Public Service Regulations* oust the jurisdiction of this court.

[52] The grievance process in the agreement and under the Regulations mirror each other. The agreement contemplates the possibility of a grievance arising out of the interpretation or application of legislation and provides that, in those circumstances, the final level of resolution is the Minister of Personnel. The Regulations also provide a process whereby an employee who has a complaint about a matter with respect to the Act or the Regulations can have the complaint dealt with through succeeding levels. Again, the final level of resolution is the Minister. While the agreement does not say so, the Regulations provide that the Minister's decision is "final and binding". This type of provision has been traditionally interpreted to mean that no appeal lies to the court from the decision (although judicial review is still available).

[53] The plaintiff submits that there is no explicit or implicit intention to be found in either the Act or the Regulations to oust the jurisdiction of the court. The arbitrator has already declined jurisdiction to deal with the plaintiff's claim under s.37(3) of the Act so it must follow that the process under the collective agreement cannot provide the plaintiff with a remedy. So, if there is a procedure to which the plaintiff must submit, it can only be the grievance process under the Regulations.

[54] The plaintiff's counsel, during oral argument, also made passing references to the doctrine of issue estoppel. It seems to me that an argument could be made that the arbitrator's decision that he lacked jurisdiction to deal with the claim under s.37(3) Act, and that any remedy for a breach of that section must be sought from the courts, is *res judicata*. After all, it was a final decision concerning the same issue between the same parties. And, furthermore, it was the argument of the employer that the arbitrator accepted on this point. So, it is at least arguable that the necessary preconditions of issue estoppel are met. And those preconditions can apply to decisions of an arbitrator or statutory tribunal: see *Danyluk* v. *Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460. Even if the *res judicata* doctrine did not apply, it could be argued that what the defendants are doing is relitigating a decided issue (one that they won the first time).

Such attempt at relitigation has frequently been halted by the court invoking its power to prevent an abuse of process: see, for example, *Stevenson* v. *Bomac Construction*, [1986] 5 W.W.R. 21 (Sask. C.A.). The plaintiff's counsel did not press this point so I need not deal with it further.

[55] A review of sections 41 and 44 to 46 of the Regulations (set out above) shows, first, that the process is not mandatory. Section 41 states that the employee "may have" a complaint dealt with according to the grievance procedure. This is a permissive and empowering use of the word "may", not a mandatory one. Second, there is no recourse to independent third-party adjudication. The final level of decision-making is the Minister, someone who, as expressed by plaintiff's counsel, can hardly be expected to be totally unbiased and objective. Nor is the Minister necessarily someone with the specialized qualifications of, say, an arbitrator. Third, the "final and binding" clause is not as strongly worded as most privative clauses protecting the decisions of specialized tribunals.

[56] These observations are similar to ones made in a number of decisions that have rejected statutory grievance procedures as the exclusive avenue of redress for complaints brought under a statute. The primary problems were the fact that the process was optional and the lack of independent adjudication. In such circumstances the courts held that there was no legislative intent to oust the jurisdiction of the court: *Danilov* v. *Canada*, [1999] O.J. No. 3735 (C.A.), leave to appeal to S.C.C. refused [2001] 1 S.C.R. vi; *Pleau* v. *Canada*, [1999] N.S.J. No. 448 (C.A.); *Phillips* v. *Harrison*, [2000] M.J. No. 606 (C.A.); *Burgess* v. *Ontario*, (2001), 55 O.R. (3d) 507 (C.A.); *Bell* v. *Canada*, [2002] N.J. No. 27 (C.A.); *Guenette* v. *Canada*, [2002] 60 O.R. (3d) 601 (C.A.); *Yearwood* v. *Canada*, [2002] B.C.J. No. 1603 (C.A.); *Olsen* v. *Canada*, [2003] B.C.J. No. 794 (C.A.).

[57] The reasoning in these cases was, admittedly, subjected to some critical analysis by the Federal Court of Appeal in *Vaughan* v. *Canada*, [2003] 224 D.L.R. (4^{th}) 640 (application for leave to appeal to S.C.C. pending). In that case, a federal government employee alleged that his employer had negligently failed to take the steps necessary to enable him to receive certain early retirement benefits available to him under a statute and regulations. He launched an action in the Federal Court. The defendant moved to strike the claim on the ground that the dispute was subject to the grievance procedure set out in the federal *Public Service Staff Relations Act* (this procedure was the one under consideration in most of the cases referred to in the previous paragraph). The claim was struck and the employee's appeals were dismissed.

[58] The two judgments written in the *Vaughan* case (by Sexton J.A. and by Evans J.A.) focussed on the point concerning a lack of independent adjudication in the statutory grievance process available in that case. They noted that the Supreme Court in *Weber* did not single out the availability of an independent adjudicator as an important consideration. The important task is to examine the legislation to determine the legislature's intention. As Sexton J.A. put it (at para. 17):

> Examination of the legislation itself, along with the nature of the dispute itself are the determining factors. Thus, the choice in the PSSRA not to have independent adjudicators as part of the statutory scheme must be respected.

[59] Whatever may be the benefits or drawbacks of the federal scheme, what all this tells me is simply that there is a clearly-defined division of opinion between the Federal Court and several provincial appellate courts as to the scope of the federal legislation. It is not for me to resolve that division. I will, however, say that while the Supreme Court in *Weber*, it is accurate to say, did not place an emphasis on the availability of independent adjudication, the whole premise of *Weber* was the appropriateness of arbitration as an alternative to the court. Arbitration implies independent adjudication. The Court in *Weber* did not consider the appropriateness of some non-independent process because it was not a consideration in its elaboration of the exclusive jurisdiction model. I do not say that the availability of independent adjudication is essential in every case; merely that it is an important factor when considering whether a legislature meant to oust the court's jurisdiction.

[60] In this case, the essential nature of the plaintiff's complaint is a violation of the statute and not a dispute arising out of the collective agreement. While it arose in an employment context, the issue involves an alleged breach by the employer of a statutory obligation. The plaintiff claims that he suffered damage as a result of the breach. He is no longer an employee so his remedy may be limited to damages. The grievance resolution process provided by the Regulations is neither mandatory nor subject to independent adjudication. The decision of the employer is final. It is the same under the grievance procedure set out in the agreement. It amounts to no more, as put by Cromwell J.A. in the *Pleau* case, than the raising of a complaint to the employer. I discern no legislative intent to oust the court's jurisdiction so as to make such a claim subject to the exclusive jurisdiction of the grievance process.

[61] For these reasons, I conclude that this court does have jurisdiction to entertain the plaintiff's claim.

Conclusion:

[62] The plaintiff seeks costs. I see no reason why costs should not follow the event. The plaintiff was successful on both issues. He will have his costs, based on Column 3 of the tariff, subject to any previous order respecting costs for any step relating to this application.

J.Z. Vertes
J.S.C.

Dated this 21st day of August, 2003.

Counsel for the Plaintiff: David Yazbeck

Counsel for the Defendants: Sheldon Toner

S-1-CV 6018

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

JEFF HILTZ

Plaintiff

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES and JOHN POLLARD, in his capacity as Minister Responsible for the *Public Service Act*

Defendants

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