Date: 2011 06 09
Docket: S-1-CV-2010000181

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

Applicant

- and -

UNION OF NORTHERN WORKERS
PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Application for judicial review under Part 44 of the Rules of Court

Heard at Yellowknife, NT, on May 31, 2011

Reasons filed: June 9, 2011

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

Counsel for the Applicant: Erin Delaney

Counsel for the Respondent: Austin Marshall

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REASONS FOR JUDGMENT

[1] This is an application for judicial review under Part 44 of the Rules of Court. The Applicant employer seeks an order setting aside the decision of an arbitrator on a jurisdictional issue.

[2] The parties to this proceeding are parties to a collective agreement dated August 2, 2005. One of the government's employees (the grievor) was terminated from her employment in 2007 on account of excessive absenteeism. With the assistance of the union, the grievor filed a grievance under the provisions of the collective agreement on June 2, 2007, complaining that "the Employer has terminated the member without just cause." The parties were unable to resolve the dispute under the grievance procedure set out in the collective agreement, and the grievance was referred to arbitration, again under the provisions of the collective agreement.

[3] Prior to the arbitration hearing, in June 2010, the union raised with the employer for the first time, a possible breach by the employer of a provision of the

collective agreement regarding the presence of a union representative at the time that the grievor was terminated in May 2007. The union stated its intention to make this allegation, i.e., breach of contractual due process, at the arbitration hearing. The employer took the position that at the arbitration hearing the parties were restricted to the issues raised in the grievance document and during the grievance procedure and that the Arbitrator had no jurisdiction to consider this new allegation.

[4] The parties sought a ruling from the Arbitrator on this jurisdictional issue, in advance of the hearing on the merits of the grievance. The Arbitrator issued his decision on October 17, 2010. He ruled that the union was entitled to present evidence and arguments on the new allegation at the arbitration hearing considering the merits of the grievance. It is this preliminary jurisdictional ruling on which the employer seeks judicial review on this application.

[5] As the issue before this Court is purely one of the Arbitrator's jurisdiction, the standard of review by this Court is correctness. *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[6] The parties provided the Arbitrator with an Agreed Statement of Facts for purposes of the hearing of the preliminary jurisdictional question. For purposes of these Reasons, I summarize the agreed facts as follows:

a) On April 3, 2007, the grievor's supervisor hand-delivered to the grievor a Recommendation of Termination for Innocent Absenteeism dated April 2, 2007, signed by the Deputy Minister (exhibit #1 before the Arbitrator). In that letter the Deputy Minister advised the grievor that her supervisor had recommended to the Deputy Minister that the grievor's employment be terminated due to high levels of absenteeism. The letter detailed the rate of absenteeism over several years, reviewed physician reports, reviewed the employer's steps to accommodate the grievor, etc. The Deputy Minister invited the grievor to make a response or submission to him, prior to any determination being made on the recommendation to terminate her employment. The Deputy Minister also suggested to the

grievor that she might wish to consult with the union for assistance in making a submission.

b) On April 12, 2007 a union representative, on behalf of the grievor, requested an extension of time to provide a reply to the Deputy Minister's letter, and an extension was granted to April 30, 2007.

c) On April 19, 2007, the grievor submitted her written reply to the Deputy Minister (exhibit #3 before the Arbitrator). In that letter, inter alia, she acknowledged the accommodation measures of the employer, she explained that some of her absences were not related to her illness/disability, she advised that she was obtaining an updated prognosis from her physician and she asked her employer to allow her to continue as an employee, and to prove that she could be an asset as an employee.

d) On April 27, 2007, the union provided to the employer an updated medical prognosis, on behalf of the grievor.

e) On May 22, 2007, the grievor's supervisor hand-delivered to the grievor a Letter of Termination for Innocent Absenteeism dated May 22, 2007 signed by the Deputy Minister (exhibit #5 before the Arbitrator). In that letter, the Deputy Minister reviewed all of the information that now had been provided to him regarding the recommendation to terminate employment. In the end, the Deputy Minister, for reasons stated in that letter, decided to accept the recommendation.

f) On June 2, 2007 the union presented a grievance on behalf of the grievor (Grievance #07-E-00433; exhibit #6 before the Arbitrator). On the pre-printed grievance form, under "Nature of Grievance" is entered the words "Innocent Absenteeism", and under "Details" is entered "The Employer has terminated the member without just cause."

g) The parties dealt with Grievance #07-E-0433 under the grievance procedure in the collective agreement. On June 29, 2007 the employer denied the grievance at the final level.

h) On July 13, 2007 the union referred Grievance #07-E-0433 to arbitration (exhibit #8 before the Arbitrator).

i) On March 31, 2008 the grievor filed a complaint with the NWT Human Rights Commission alleging that the employer refused to continue to employ her, discriminated and harassed her on the basis of her disability, family status and sex. The union provided legal counsel to the grievor to assist her with her human rights complaint. The hearing of the human rights complaint commenced on May 24-29, 2010 and was then adjourned to later in 2010.

j) On June 8, 2010 the grievor's legal counsel acting for her before the Human Rights Tribunal, sent an e-mail to the employer's legal counsel (exhibit #9 before the Arbitrator), and raised for the first time a possible breach of Article 37.07(d) of the collective agreement with regards to the delivery of the Letter of Termination on May 22, 2007 (see subparagraph (e) above). Article 37.07(d) of the collective agreement states:

> 37.07 (d) "Where an employee is required to attend a meeting with the Employer or a representative of the Employer to deal with matters that may give rise to the suspension or discharge of an employee, that employee shall be advised 24 hours in advance of the meeting of his/her right to have a representative of the union at the meeting. At the employee's request, the meeting will be postponed for a maximum of there (3) working days."

k) On August 18, 2010 the union confirmed to the employer that it intended on advancing, in the arbitration of Grievance #07-E-0433, the issue of whether the interaction between the grievor and her supervisor on May 22, 2007 constituted a meeting under Article 37.07(d) and, if so, whether a breach of the collective agreement occurred that would result in the nullification of the termination for innocent absenteeism. The employer responded that it would be objecting to the Arbitrator's jurisdiction to hear this newly-raised issue on the arbitration of Grievance #07-E-0433

l) It is common ground that this issue (union representation under Article 37.07(d)) had not been expressly identified in the grievance documents and had not previously been discussed by the parties during the grievance procedure before Grievance #07-E-0433 was referred to arbitration.

[7] Article 37 of the collective agreement between these parties sets out a regime for the resolution of disputes. Article 37 describes different categories of grievances, establishes a first level and a final level as steps in the processing of grievances, sets timelines for the presentation of grievances, sets timelines for the employer to reply to grievances at each of the levels, provides for the participation of the union in the processing of an employee's grievance, etc. Where the difference that has arisen between the parties has not been resolved to the satisfaction of a party at the final level of the grievance process, that party can refer the unresolved dispute to arbitration, pursuant to Article 37.19:

> 37.19 Where a difference arises between the parties relating to the interpretation, application or administration of this Agreement including any question as to whether a matter is arbitrable or where an allegation is made that a term or condition of this Agreement has been violated, either of the parties may, *after exhausting the grievance procedure in this Article,* notify the other party in writing within twenty-one (21) days of the receipt of the reply at the Final Level, of his/her desire to submit the difference or allegation to arbitration under the Public Service Act. (emphasis added)

[8] Article 37.19 applies to Grievance #07-E-0433 presented by the grievor on June 2, 2007 against her dismissal, by virtue of Article 37.25

> 37.25 "Where an employee files a grievance against his/her dismissal from the Public Service, the provisions of Clause 37.19 apply."

[9] Grievance #07-E-0433 is a grievance against "dismissal without just cause", and is characterized as such in all of the successive documentation between the parties, from the recommendation for termination, the employee's response, the letter of termination, the formal grievance presented by the union on the grievor's

behalf, the final grievance response, to the referral to arbitration. The case before the Arbitrator could also be called a "discipline case", an expression used in Article 37.21 of the collective agreement.

[10] In the context of the dispute resolution regime negotiated by the parties in the collective agreement, there is a marked difference between an allegation of "dismissal without just cause" and an allegation of "dismissal without due process". The parties have taken Grievance #07-E-0433, a grievance against dismissal without just cause, through the grievance procedure, i.e., have "exhausted" the grievance procedure, and that grievance is now properly before the Arbitrator.

[11] The complaint that on May 22, 2007 the employer may have breached this employee's union representation rights under Article 37.07(d), first raised in the e-mail of June 8, 2010, is an allegation of "dismissal without due process". That dispute has not been taken by the parties though the grievance procedure agreed to by the parties, and is accordingly, in my respectful view, not properly before the Arbitrator. The Arbitrator has no jurisdiction under Article 37.19 on the "union representation" issue, as the grievance procedure has not been exhausted on that issue.

[12] This is not to say that a grievance based on "dismissal without just cause" and a grievance based on "dismissal without due process" cannot be heard at the same time. It is simply that it was not done in this case.

[13] In his written decision of October 17, 2010 the Arbitrator reviewed the case law provided by the parties, from which he gleaned the following principles, at page 13 of his decision:

> "1. Grievance documents should be interpreted liberally unencumbered by excessive technicality
> 2. The parties are permitted to raise new arguments in arbitration that have not previously been disclosed in the grievance procedure.
> 3. At arbitration, the parties are not allowed to:
> _ Alter the substance of the grievance;
> _ Introduce an issue not raised, even inherently, in the original grievance;
> _ Make new claim; or

- Introduce a new different issue not raised in the grievance."

[14] The Arbitrator then refers to the allegation of a breach of contractual due process, first raised in the e-mail of June 8, 2010, as merely an "additional argument", and therein, in my respectful view, he erred.

[15] The Arbitrator expressly dismissed the notion that it is important, in the context of a collective agreement, that the parties have an opportunity to discuss any dispute during the course of the grievance procedure prior to advancing the dispute to arbitration. On the contrary, I find that the parties have themselves agreed that the grievance procedure must be exhausted before a matter goes to arbitration, and for good reason. In ignoring the contractual requirements that a grievance must proceed firstly through the grievance procedure before proceeding to arbitration, the Arbitrator erred in assuming jurisdiction.

[16] The union submits on this application that the "union representation" issue is inherent in the grievance against dismissal without just cause. I disagree. A breach of an employee's union representation rights under Article 37.07(d) is a substantive matter, a separate, stand-alone issue.

[17] It cannot be said that a breach of Article 37.07(d) union representation rights goes to the essential character or constitution of a grievance against dismissal without just cause, i.e. it is not inherent in such a grievance.

[18] In holding that the union is "free to advance new arguments in support of its original grievance", the Arbitrator stated that "from the outset the union has alleged that the grievor has been *unjustly terminated*" (emphasis added). With respect, this is a mis-statement of the evidence that was before the Arbitrator. In Grievance #07-E-0433 the allegation was that the grievor was terminated *without just cause.*

[19] I find that the present case is on all fours with the case before the Federal Court of Appeal in *Shneidman v. Canada (Attorney General)*, 2007 FCA 192, and I find the reasoning of the Court in that case quite persuasive. The fact that *Shneidman* dealt with a grievance and arbitration regime under a federal statute, i.e. *Public Service Staff Relations Act*, does not, in itself, distinguish the judicial reasoning set out therein from the present case before this Court.

[20] In *Shneidman*, the employee was terminated for cause. The employee filed a grievance alleging that the termination was without just cause. Her grievance was denied at the final level of the internal grievance process. She then referred her grievance to arbitration. One week before the arbitration hearing, she raised a preliminary objection, alleging that her union representation rights had been violated. The arbitrator ruled that she had jurisdiction to consider this preliminary objection. On judicial review, the Court held that the arbitrator had incorrectly taken jurisdiction over the preliminary objection.

[21] Sexton, J.A. stated, at paragraph 26:

> "[26] To refer a complaint to adjudication, the grievor must have given her employer notice of the specific nature of her complaints throughout the internal grievance procedure... only those grievances that have been presented to and dealt with by all internal levels of the grievance process may subsequently be referred to adjudication.

and at paragraphs 27-28

> "[27] Where the grievance on its face is sufficiently detailed, the employer will have notice of the nature of the employee's grievance at all levels. However, where, as here, it is not clear on the face of the grievance what grounds of unlawfulness will be relied upon by the employee, the employee must provide further specification at each stage of the internal grievance process as to the exact nature of her complaint if she intends to refer the matter to adjudication.
>
> [28] Both parties benefit from this notice requirement. The employer must understand the nature of the allegations to be able to adequately respond to them. The employee likewise benefits from the notice requirement because it allows her to understand the reasons why the employer has rejected her grievance."

[22] In my view the internal grievance procedure that the employer and the union have agreed to in the collective agreement must be allowed to work as intended. The newly-raised issue of a breach of union representation rights in May 2007 ought to have been addressed by the timely presentation of such a grievance in the internal grievance procedure (and perhaps resolved by the parties) rather than presenting the grievance, for the first time, directly to the Arbitrator. Under the terms of the collective agreement between the parties, the Arbitrator simply does

not have jurisdiction to deal with the newly-raised issue of a breach of Article 37.07(d).

Premature application for judicial review?

[23] In its brief filed in advance of the hearing of this application the union submits that the employer's application for judicial review of the Arbitrator's decision of October 17, 2010 on the jurisdictional issue is premature, and ought to await the completion of the arbitration hearing and the Arbitrator's final award, when all possible grounds for judicial review can be dealt with in one hearing. The union relies upon a 1988 decision of the Ontario Divisional Court in *University of Toronto v. C.U.E.W.*, 65 O.R. (2d) 268 in this regard.

[24] Notwithstanding *University of Toronto,* the decision to decline to hear an application for judicial review of an interim or interlocutory award is discretionary. In all of the circumstances of this case, it is my determination that I ought to consider and adjudicate upon the merits of the employer's application for judicial review at this time. These circumstances include:

a) the issue of this application being "premature" ought to have been raised earlier in these proceedings, i.e. as soon as the employer's application for judicial review was filed in this Court, rather than waiting to insert it in the pre-hearing brief six months later, and eleven days before the hearing of the substantive application on its merits. This reviewing Court now has before it full and comprehensive submissions of both parties, both in written briefs and in oral argument, as to the substance of the employer's application. The citing of the principle "labour relations delayed is labour relations denied" from the *University of Toronto* decision in this context is not particularly *apropos* the instant case inasmuch as the parties, after six months, have now brought the employer's application before the Court with full argument for adjudication and yet the Court is being asked to postpone that adjudication

b) the *University of Toronto* decision stresses the importance of the reviewing court having a full factual context. That full

> factual context exists in the record before this Court, i.e., to enable this Court to adjudicate upon the employer's application. The newly-raised issue of union representation rights is a discrete issue, and its factual context is not intertwined with the factual context of the dismissal with/without just cause.

c) the question raised by the employer's application is not moot or hypothetical, as in *University of Toronto.*

[25] For these reasons I have found that the within application is not premature in the sense contemplated by *University of Toronto,* and I have adjudicated as set forth earlier in these Reasons.

Stay of Proceedings

[26] At the time that the employer filed its within application under Part 44 for judicial review of the Arbitrator's ruling on the jurisdictional issue, the employer filed a separate application seeking a stay of the Arbitrator's interim award/decision of October 17, 2010 until such time as its application for judicial review was determined. Initially it was contemplated that the stay application would be heard prior to the main application; however counsel eventually set both applications down to be heard in Special Chambers on the same date (first, May 3, later re-scheduled to May 31). As the main application is now determined, the stay application is moot, and accordingly is considered withdrawn.

[27] For the foregoing reasons, I grant the employer's application. The award of the Arbitrator dated October 17, 2010 is hereby set aside.

J.E. RICHARD
J.S.C.

Dated this 9th day of June 2011.

Counsel for the Respondent:	Austin Marshall
Counsel for the Applicant:	Erin Delaney

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