SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v. Lapierre,* 2014 YKSC 42

Date: 20140728
S.C. No. 13-AP006
Registry: Whitehorse

Between:

GOVERNMENT OF YUKON

Petitioner

And

RENE LAPIERRE

YUKON TEACHERS' ASSOCIATION

Respondents

Before: Mr. Justice G.C. Hawco

Appearances:

Stephanie Schorr — Counsel for the Petitioner
Jocelyn Barrett — Counsel for the Respondents

REASONSFORJUDGMENT

Introduction

[1] Mr Lapierre was employed by the Government of Yukon through La Commission Scolaire Francophone du Yukon No. 23 ("CSFY") as a teacher to teach at Ecole Emilie- Tremblay ("EET") in Whitehorse. He was initially hired as a "temporary" full-time teacher for the school year commencing January 5, 2007 and ending June 25, 2008. He was hired again for the school year September 2, 2008 to June 25, 2009, again from August 25, 2009 to June 25, 2010, and once again from August 25, 2010 to June 22, 2011.

[2] On May 10, 2010, Mr Lapierre submitted a grievance (367-YG-17) alleging that as of the beginning of 2009-201O school year, his third consecutive temporary position, he was a permanent employee.

[3] This grievance was filed ten months late under the *Education Labour Relations Act* ("the Act"), but the Government of Yukon did not raise this as a defense during the grievance proceedings.

[4] The relevant sections of the Act are sections 106 and 109. Section 106 states:

> Probation for school personnel
>
> 106(1) A person employed pursuant to this Act is on probation for two years from the date of commencement of employment.
>
> At any time during the probationary period, the superintendent may terminate the employee's contract of employment on giving 30 days prior written notice specifying the reasons for the termination to the employee.
>
> The probationary period for an employee may be extended for a period of one year by agreement of the bargaining agent, the employee, and the superintendent.
>
> Any employee who is terminated during a probationary period by a superintendent shall have the right to appeal the decision to the deputy minister and not pursuant to section 63 of this Act.
>
> An employee who is on probation shall be evaluated during the first year of probation and shall be evaluated in the second year of probation on or before March 31 of that year.
>
> When the probationary period is extended for a period of one year, the employee who is on probation shall be evaluated in the third year of probation on or before March 31 of that year.
>
> When no notice of termination is given during the probationary period, the contract of employment of the employee shall continue until and unless terminated in accordance with this Act.

> (8) When an employee has been employed on a temporary basis in one teaching position for an entire school year and is on probation for the next school year, the temporary employment period shall be counted in the calculation of the probationary period.

[5] Section 109 provides:

> Temporary employment
>
> 109(1) An employee may be employed on a temporary basis during part or all of a school year as may be agreed to by the employee and the superintendent and the employment may be reviewed for part or all of the next school year.
>
> Despite subsection (1), the period of employment for an employee who is employed on a temporary basis may be renewed for more than 2 consecutive school years by the deputy minister in exceptional circumstances.
>
> Any employee who is employed on a temporary basis shall be evaluated at least once in each school year by either the principal or the superintendent.

[6] On May 20, 2010, the deputy minister of Education wrote to Mr Lapierre stating that pursuant to section 109(2) of the Act, Mr Lapierre was employed as a temporary employee for a third consecutive school year in circumstances which she deemed exceptional, namely, the fact that the circumstances were to facilitate the conclusion of an Agreement between the Minister of Education and the President of CFSY enabling a three-year pilot project to offer the Fine Arts and Sports/Nature Programs at EET.

[7] ln August of 2010, Mr Lapierre was offered another temporary position for 2010- 2011 because the Supreme Court of Yukon had ordered the Government of Yukon to fund certain teaching positions as EET on an interim basis.

[8] On April 4, 2011, the Government of Yukon delivered a letter terminating Mr Lapierre's employment effective immediately with 15 days' pay in lieu of notice pursuant to the Temporary Teaching Regulation, 2001/123. This termination was grieved by Mr Lapierre (367-YG-18).

[9] On March 2, 2012, the employer offered an appointment to Mr Lapierre as a temporary teacher for the period of March 19, 2012 to June 15, 2012 at Ecole Whitehorse Elementary School.

[10] The grievances proceeded and on July 10, 2013, a decision was given by the Adjudicator, Mr Steven B. Katkin, whereby he allowed Mr Lapierre's grievances and ordered him to be reinstated.

[11] That decision has been appealed. That is the matter before me. On May 26, 2014, I heard argument, having received briefs from counsel beforehand.

Issues

[12] The two issues before me are firstly, what is the appropriate standard of review.

[13] The second issue is, depending upon the standard of review, albeit either correctness or reasonableness, can or should the decision of the Adjudicator be set aside.

Decision

[14] In my view, the standard of review is one of reasonableness. I am further of the view that the decision of the Adjudicator was reasonable and that the decision ought not be set aside.

Reasoning

Standard of Review

[15] This appeal is pursuant to section 95 of the Act which states:

> Appeal to Supreme Court
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> 95(1) The Supreme Court has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before an adjudicator, upon the ground that the adjudicator
>
> failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> erred in law in making its decision or order, whether or not the error appears on the face of the record; or
>
> based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[16] As the employer argued, this section specifically states the standard appeal grounds: a breach of natural justice principles; a jurisdictional error(s); an error(s) in law which does not have to appear on the face of the record; and "palpable and overriding" error in fact or misapprehension of the evidence.

[17] The employer has argued that in arriving at his decision, Mr Katkin interpreted section 106 and section 109. In doing so, his decision is reviewable and may be overturned if he erred in his interpretation. The standard of review is, the employer argues, one of correctness. No deference ought to be given and it matters not that the decision may be "reasonable". The issue is merely whether it is correct.

[18] The Respondents have argued that even if the arbitrator did interpret the

statute, the standard of review is one of reasonableness, not correctness.

[19] The Supreme Court of Canada has made a number of pronouncements with respect to judicial reviews and appeals of this nature. Their most recent decision is *Canadian National Railway Company v Attorney General of Canada,* 2014 SCC 40. The issue in that decision appears to have been related to an agreement made between Peace River Coal Inc. and the CNR. The Canadian Industrial Transportation Association, one of the respondents, had sought to have the Governor in Council vary a decision of the Canadian Transportation Agency which related to a tariff established under the agreement. The issue before the Supreme Court was whether the standard of review by the Governor in Council, which had rescinded the decision of the Canadian Transportation Agency, was correctness or reasonableness.

[19] The Supreme Court found that the pivotal decision of the Supreme Court in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 applied to administrative decision-makers generally and not just to administrative tribunals and therefore applied to adjudicative decisions of the Governor in Council made under section 40 of the Transportation Act and that the applicable standard of review was reasonableness. At para 55, the Court stated:

> It is now well established that deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity (Dunsmuir, at para. 54; Smith v. Alliance Pipeline Ltd., 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28; Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 sec 61, [2011] 3 S.C.R. 654, at para. 30). In such cases, there is a presumption of deferential review, unless the question at issue falls into one of the categories to which the correctness standard applies: constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside of the adjudicator's expertise,

> questions regarding the jurisdictional lines between two or more competing specialized tribunals, and the exceptional category of true questions of jurisdiction (Dunsmuir, at paras. 58-61, and Alberta Teachers' Association, at para. 30, citing Canada (Canadian Human Rights Commission), at para. 18, and Dunsmuir, at paras. 58-61).

[20] I have been advised by both counsel that Mr Katkin is indeed an experienced adjudicator/arbitrator. He had a "particular familiarity" with the Act in question. He appears to have gone through the evidence with a great deal of care, beginning with the Agreed Statement of Facts and continuing with the evidence of Mr Lapierre himself, the president of the Yukon Teachers' Association, Ms Katherine Mackwood, Ms Taillefer, the executive director of CSFY, Mr Marc Chamagne, and Mr Pierre Picard.

[21] He then went through the arguments of both parties. Following this, he gave his reasons for reaching his conclusions.

[22] I refer to these particular statements by Mr. Katkin:

> [238] In my view, that date [September 5, 2007] also serves as recognition by the employer of the griever's date of commencement of employment within the meaning of subsection 106(1) of the ELRA....
>
> [239] Third, the employer's argument does not support the object of the ELRA, namely, labour relations and employment relationships. If the employer's argument were followed to its logical conclusion, employees employed on consecutive term contracts of one school year each for more than two years would be in a continual state of probation throughout the period of their employment. Indeed, the employer argued that the grievor remained on probation during his fourth term contract.
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> [242] It is a well-known labour relations principle that employees who have not completed their probationary periods generally do not enjoy the same level of employment security as those who have. However, if correct, the employer's argument would have the effect that temporary employees employed on successive term contracts would often terminate

be denied the right of availing themselves of the grievance procedure or of referring a grievance to adjudication under the ELRA, as each contract year would be considered a separate probationary period. In my view, the denial of such fundamental rights is contrary to the intent of section 106 and moreover, is inconsistent with the object of the ELRA....

[243] Therefore, I conclude that, under section 106 of the ELRA, in view of the absence of an agreement to extend his probationary period, the grievor was on probation for two years from the date of commencement of his employment, September 5, 2007. Accordingly, the grievor was on probation for the 2007-2008 and 2008-2009 school years, and the evidence showed that his evaluations were satisfactory for each of those years. As his employment was not terminate during the probationary period, the grievor's employment status must now be determined.

[255] Therefore, I conclude that the normal and ordinary meaning of the language of subsection-s 109 (1) and (2) of the ELRA clearly indicates that, absent exceptional circumstances deemed by the deputy minister, an employee under the ELRA may not be employed on a temporary basis for more than two consecutive years.

[256] The grievor successfully completed the two-year probationary period, during which he was employed on a temporary basis. Based on the above, I find that, upon the completion of his second year of temporary employment, barring the existence of "exceptional circumstances" as determined by the deputy minister, the griever was no longer employed on a temporary basis, but had acquired the status of a permanent full-time employee with all the rights that flow therefrom, including the layoff provisions under the collective agreement.

[264] Subsection 109(2) of the ELRA states that the employee's period of temporary employment "may be renewed ... by the deputy minister in exceptional circumstances." In my view, the normal and ordinary meaning of this language presupposes that the exceptional circumstances must exist contemporaneously with the renewal of the temporary contact. Otherwise, there would be no legally valid basis for the deputy minister to exercise his or her discretion to extend an employee's temporary employment status for a third consecutive school year.

[265] It would be illogical to construe subsection 109(2) of the ELRA to mean that the deputy minister may exercise his or her discretion at any time after the renewal of an employee's third consecutive school year of temporary employment. Such a construction would mean that the

> deputy minister could with impunity prolong an employee's temporary status indefinitely by claiming the existence of exceptional circumstances during the employee's term of employment. This would make it all too easy for the employer to subvert the intention of the legislation and justify its decision after the fact. In so doing, the employer would evade the obligations it may have towards employees who have completed the initial two-year period of temporary employment under subsection 109(1). Moreover, the effect of such action would interfere with an employee's expectation and right to end their temporary employment status after two consecutive school years. That cannot be the intent of subsection 109(2).

[23] Mr Katkin gave his decision on July 10, 2013. On February 11, 2014, the Court of Appeal of Yukon gave a decision in *La Commission Scolaire Francophone du Yukon No. 23 v Procureure generale du Territoire du Yukon,* 2014 YKCA 4. That case was a section 23 Charter challenge with a number of issues which are not relevant to the issue before me or which was before Mr Katkin, however, it did involve a consideration of same section 109 with which Mr Katkin and this court is concerned. At para 210 of their decision, the Court of Appeal said this:

> The scheme of the statute is clear. Teachers and other ordinary employees may be employed on a "term" or "temporary" basis, but only for a limited time. Unless there are "exceptional circumstances" they must become permanent employees after two consecutive years. Because the statute deals with term employee exhaustively in s. 109, it is apparent that s. 106(7) cannot be read as dealing with anything other than permanent employment.

[24] Obviously, this was dicta and is not binding. But it is undoubtedly persuasive. It is supportive, in my respectful view of the reasoning of Mr Kalkin.

[25] In the end result, I am quite satisfied that Mr Katkin's decision was not only not a "palpable and overriding error", but was reasonable, in looking at all of the circumstances. He considered that it was simply inappropriate, and unfair, to

attempt to invoke "exceptional circumstances" long after they could have, or ought to have, if they existed, than provided.

[26] I recognize that because section 106 and section 109 have not been interpreted judicially (at least section 106), this may cause some concerns, but that is something which may be remedied. Under the present legislation, the griever was entitled to his remedies. The appeal is dismissed, with costs.

HAWCOJ.