COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***PSAC v. Government of Yukon***,
2004 YKCA 0007

Date: 20040506
Docket: CA03-YU502

Between:

**Public Service Alliance of Canada,
Yukon Employees Union and David Knight**

Appellants
(Petitioners)

And

Government of Yukon and Michael Bartsch

Respondents
(Respondents)

Before: The Honourable Madam Justice Southin
The Honourable Mr. Justice Braidwood
The Honourable Mr. Justice Oppal

G.R. Thompson	Counsel for the Appellants
P. Gawn	Counsel for the Respondent Government of Yukon
Place and Date of Hearing:	Vancouver, British Columbia March 31, 2004
Place and Date of Judgment:	Vancouver, British Columbia May 6, 2004

Written Reasons by:
The Honourable Mr. Justice Braidwood

Concurred in by:
The Honourable Madam Justice Southin
The Honourable Mr. Justice Oppal

Reasons for Judgment of the Honourable Mr. Justice Braidwood:

[1] This appeal concerns the jurisdiction of an arbitrator arising out of a labour dispute.

[2] The learned arbitrator ordered that a competition be held for a certain public service position. That decision was appealed to the Supreme Court where the learned judge held that the arbitrator did not have jurisdiction to order that a competition be held. The learned judge ordered a re-hearing on a limited basis: 5 Admin. L.R. (4th) 207, 2003 YKSC 38.

[3] The appellants are the Yukon Employees Union (“YEU”), which is part of the Public Service Alliance of Canada (“PSAC”) and carries out certain services on behalf of PSAC members in the Yukon, and Mr. Knight, a member of PSAC and YEU.

[4] The respondents are Mr. Bartsch, who is an employee of the Government and currently occupies the position of Manager, Material Management in the Department of Infrastructure (the “Position”), and the Government of the Yukon.

[5] Labour relations between the Government, PSAC, and YEU are governed in whole or in part by a collective agreement, which was effective during the period in question.

[6] On 25 March 2002 the Corporate Human Resources Services Branch of the Public Service Commission posted a notice of proposed appointment without competition for the Position. Mr. Knight had been acting in the Position for six months on an interim basis. The person proposed for the appointment was Mr. Bartsch. The Public Service Commission assessed Mr. Bartsch's qualifications and concluded he was suitable for the position.

[7] On 28 March 2002 Mr. Knight appealed the appointment without competition. What I have numbered below as clause 5 of Article 47.01 of the collective agreement provides in part:

> . . . No appointment will be made from the competition which gave rise to the appeal until such time as the arbitrator's decision is rendered and complied with.

[8] On 12 April 2002 the Acting Deputy Minister of the Department of Infrastructure issued a Notice of Lay-off to Mr. Bartsch and, on the same day, the Director of Corporate Human Affairs Services issued an appointment to Mr. Bartsch for the Position effective 15 April 2002.

[9] A letter constituting the Notice of lay-off read in part:

> . . . Your lay-off is necessary because of changes in the organization for the department and the abolition of your position.

> Pursuant to Section 181(1) of the Act, you are hereby given three months' written notice of lay-off. . . .

[10] As mentioned, the letter of 12 April 2002 appointed Mr. Bartsch to the Position. It also confirmed that the Position is identified as a bargaining unit position and that the terms and conditions of employment are laid out in the PSAC collective agreement.

[11] On the same day, Mr. Bartsch accepted the position.

[12] To justify Mr. Bartsch's appointment in the face of Article 47.01, which was triggered by Mr. Knight's notice to arbitrate, filed 28 March 2002, the Government relies on s. 152 of the ***Public Service Act***, R.S.Y. 2002, c. 183 (formerly s. 172 of the ***Public Service Commission Act***, R.S.Y. 1986, c. 141), which reads as follows:

> **152** Despite anything in this Act, the public service commissioner may, without competition, appoint a lay-off to any position in the public service for which the lay-off is qualified and which has the same or lower maximum rate of pay as the position held by the lay-off at the time they were laid off.

There is a strong suggestion of high-handedness in the sudden use of s. 152 in the face of pending arbitration proceedings.

[13] The Government made the following submission to the arbitrator:

> Circumvention of the Collective Agreement – The employer did choose to use the lay-off provisions of the *PSA* in order to appoint Mr. Bartsch to the Manager, Material Management position. We did this because we felt his employment status was in jeopardy otherwise. As evidenced by our presence here today, it was not the employer's express intention to circumvent article 47 of the collective agreement. However, it is the employer's view that the *PSA* gives a higher priority to the employment rights of laid off employees than to the promotional rights of other employees. [Second emphasis added.]
>
> Conclusion – This case has revealed a less than perfect synchronization of the legislation and the collective agreement. More specifically, there appears to be some ambiguity with regard to the rights of a laid off employee to appointment to a vacant position and the rights of a bargaining unit member to a promotional opportunity. Clearly the *PSA* and Article 47 need to be reconciled in order to resolve the matter at hand.
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> It is the employer's view that the intent of the legislation was to provide laid-off employees with priority for appointment to vacant positions over all others. This intent is set out in sections 172 and 174 of the *PSA*, which begin with the phrase '*Notwithstanding anything in this Act*' and in section 95 of the *PSA* which begins with the phrase '*subject to section 10*'. Furthermore, the definition of 'lay-off' in the *PSA* does not distinguish between an employee who is in the bargaining unit or one that is not. The employer believes it has correctly interpreted and applied the lay-off provisions of the *PSA* in this case and moreover, that it has appropriately determined that Mr. Knight's rights to a promotional opportunity are not paramount over those of a laid off employee to appoint to a vacant position. [Emphasis in original.]

[14] It is necessary to set out various clauses of Article 47.01 of the collective agreement. I have numbered the clauses in Article 47.01 for ease of reference:

47.01[1] Length of satisfactory service with the Employer will be considered in the determination of the successful candidate.

[2] There shall be no conflict of interest between members of the selection panel and applicants for the competition. Any person sitting as a member of a selection panel must be approved by the Public Service Commission. At a minimum, the Chairperson of the selection panel must have taken and successfully completed the selection skills course conducted by the Public Service Commission.

[3] Any bargaining unit candidate who is unsuccessful on the competition and who believes that his/her qualifications were not properly assessed may appeal provided the appeal is brought forward by the Union.

[4] The appeal must be presented to the Director, Corporate Human Resource Services within five (5) working days of the date that the candidates were advised that the decision would be made, or when those who were not interviewed were advised they were unsuccessful.

[5] The appeal will proceed immediately to expedited arbitration. The arbitrator will be selected in rotation from a list of Yukon-based arbitrators acceptable to both the Union and the Employer. No appointment will be made from the competition which gave rise to the appeal until such time as the arbitrator's decision is rendered and complied with.

[6] The arbitrator will render his/her written reasoned decision within five (5) days of the end of the appeal period. The decision will be final and binding. A copy of the decision will

be forwarded to the appellant, Union and the Employer.

[7] The arbitrator shall have jurisdiction to decide whether the Employer has properly assessed the appellant's qualifications and whether the Employer has properly conducted the competition to assess fairly the relative merits of the appellant vis-à-vis those of the successful candidate. If he/she determines that it was not, then the arbitrator may direct that any portion of or the entire competition be redone. Subject to Article 47.02, the arbitrator shall also have jurisdiction to determine whether the statement of qualifications utilized in the selection process was reasonable in relation to the nature of the position involved in the competition.

[8] The arbitrator will not have the authority to appoint any person to a position in the public service.

[9] The Employer will cover the cost of the salary/wages for the appellant. All other costs of presenting the appellant's case to the arbitrator will be borne by the Union. The Employer and the Union will share equally the cost of any arbitration hearing or other process including, but not limited to, the arbitrator's fees, the arbitrator's travel costs, and the cost of facilities associated with a hearing.

[10] This appeal process will not apply to any appointment of target-group members made under the auspices of the Employment Equity Program.

[11] When the Public Service Commission makes an appointment without competition and an employee feels his or her promotional opportunities have been prejudicially affected he or she may with the consent of the Union file an appeal with the Director, Corporate Human Resource Services. Such an appeal will be referred directly to expedited arbitration as described

> in this Article. The jurisdiction of the arbitrator will be the same as for competition.

[15] It will be noted that clause 7 of Article 47.01 refers to the jurisdiction of the arbitrator to decide whether the employer has properly assessed the appellant's qualifications and whether the competition was fairly conducted. The remedy relates to the arbitrator's ability to direct that any portion of or the entire competition be redone.

[16] The respondents' argument is that, since no competition took place or needed to take place, clause 7 of Article 47.01 does not apply.

[17] The issue is clear: What does clause 11 of Article 47.01 mean? This clause directly refers to an appointment without competition and concludes: "The jurisdiction of the arbitrator will be the same as for competition."

[18] The arbitrator found as follows:

> . . . Under the terms of Article 47, no appointment should have been made until an arbitrator's decision had been rendered and complied with (Exhibit 4). In this case, even though appealed, the Employer did not conduct a competition or other process to assess fairly the relative merits of the appellant vis-à-vis the appointee (successful candidate).
>
> **Decision:**
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> Without setting a precedent for future staffing actions and because of the circumstances unique to

> this situation, the Employer is directed to conduct interviews to determine the relative merits of the appellant vis-à-vis those of Mr. Bartsch. This can be done through a competition restricted to the two candidates (given no other employees appealed the appointment without competition) up to a full competition.

[19] The Government appealed this determination to the Supreme Court of the Yukon. The learned judge characterized the problem as a question of legal interpretation and applied the correctness standard of review. This aspect of the learned judge's reasoning is not in question. He wrote in part:

> [48] If one applies a literal interpretation to the words "the jurisdiction of the arbitrator will be the same as for competition," the award of the arbitrator can be understood, in that she took it to mean that she could determine "whether the employer has properly conducted the competition to assess fairly the relative merits of the applicant vis-à-vis those of the successful candidates." However, those words apply to the situation where the PSC has decided to conduct a competition for a position.
>
> [49] In my view, Article 47.01 cannot be interpreted to permit the arbitrator to order competitions. The wording "the same as for competition" must be interpreted to apply to the situation of an appointment without competition. Thus, the arbitrator can review the discretion exercised by the PSC to exempt an appointment from competition.
>
> [50] To put this in the context of rules of statutory interpretation, it would be an absurd or inconsistent result to apply remedies appropriate for a competition to the assessment of an appointment without competition. The substantive role of the arbitrator is one of assessment of the PSC decision to appoint Michael Bartsch without competition.

> [51] In conclusion, I am of the view that the arbitrator exceeded her jurisdiction in ordering a competition. Her only jurisdiction was:
>
> 1. to determine that the appointment of Michael Bartsch was "in the best interests of the public service";
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> 2. to determine that the statement of qualifications for the position was reasonable; and
>
> 3. to determine whether the government had fairly and properly determined that Michael Bartsch was "a suitable qualified person".
>
> [52] I therefore set aside the award of the arbitrator and direct that the appeal be re-heard with the jurisdiction of the arbitrator as set out above. The application of the union and David Knight to compel the government to comply with the award is dismissed.

[20] With the greatest of deference to the learned chambers judge, I must disagree with his interpretation of Article 47.01.

[21] The parties to the collective agreement have agreed that an appointment under s. 152, namely, an appointment without competition, is subject to review by arbitration.

[22] Article 47.01 specifically refers to an appointment made without competition and the right of an employee who feels that his or her promotional opportunities have been prejudicially affected to appeal and have an expedited arbitration. As noted above, the arbitrator’s jurisdiction in

such circumstances is the same as in an appeal arising from a competition appointment.

[23] Without discussing the full scope of that jurisdiction, but only at this point stating that it exists, clause 5 of Article 47.01 is triggered once an appeal is launched. To repeat, this clause reads in part:

> . . . No appointment will be made from the competition which gave rise to the appeal until such time as the arbitrator's decision is rendered and complied with.

[24] The words in clause 5 do refer to an appointment from a competition; however, as mentioned, the last sentence of clause 11 of Article 47.01 states that the jurisdiction of the arbitrator in an appointment without competition "will be the same as for competition".

[25] In reading s. 152 of the ***Public Service Act***, together with the terms of the collective agreement, it is clear that the parties agreed that the arbitrator had jurisdiction under clause 11 of Article 47.01 to hear a grievance covered by the collective agreement. That being so, the general provisions of Article 47.01 apply and, pursuant to clause 5, no appointment should have been made by the Government under s. 152 until the arbitrator's decision was rendered. This must

be the result if clause 11 of Article 47.10 is to be given sensible meaning. Further, when clause 11 is read in conjunction with clause 7, an arbitrator having assumed jurisdiction pursuant to clause 11 may order that the competition take place.

[26] It is not a question of determining whether or not the provision of the ***Public Service Act***, being a statute, over-rides the collective agreement. Rather, the question is whether the parties, by agreeing to the terms of their collective agreement, have agreed that s. 152 will be governed by Article 47.01 of their agreement. In my view, they have.

[27] Although s. 152 is available to the Government in some circumstances, in my opinion it is not appropriate here. Because of the terms of Article 47.01, the Government cannot have the benefit of s. 152 once an employee has launched an appeal. In the instant case, the arbitrator had jurisdiction: to find that it was inappropriate to appoint Mr. Bartsch pursuant to s. 152 after Mr. Knight filed his appeal but before a decision in his appeal had been rendered; to proceed with the arbitration as it was originally constituted; and to direct that a competition should be held.

[28] Accordingly, I am of the opinion that the decision of the learned judge below should be set aside and the decision of the arbitrator should be upheld and I would order accordingly.

"The Honourable Mr. Justice Braidwood"

I AGREE:

"The Honourable Madam Justice Southin"

I AGREE:

"The Honourable Mr. Justice Oppal"