IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Public Service Alliance of Canada, et al.* v. *Government of Yukon, et al.*, 2003 YKSC 38

Date: 20030714
Docket: S.C. 02-A0120
Registry: Whitehorse

Between:

**PUBLIC SERVICE ALLIANCE OF CANADA,
YUKON EMPLOYEES UNION and DAVID KNIGHT**

Petitioners

And:

**GOVERNMENT OF YUKON
and MICHAEL BARTSCH**

Respondents

Appearances:

Glen R. Thompson	Counsel for the Petitioners
Penelope Gawn	Counsel for the Respondent, Government of Yukon
R. Grant Macdonald, Q.C.	Counsel for the Respondent, Michael Bartsch

Before: Mr. Justice Veale

REASONS FOR JUDGMENT

Introduction

[1] The Yukon Employees Union (the union) and David Knight seek an order directing the Government of Yukon (the government) to implement the award of a competition appeal arbitrator (the arbitrator) dated May 9, 2002 (the award). The award required the

government to proceed to a full competition between David Knight and Michael Bartsch for the position of Manager, Materiel Management, in the Department of Infrastructure (the position). The government raises several issues, including whether the arbitrator exceeded her jurisdiction and whether the collective agreement can take precedence over the statutory right of the government to give priority in re-hiring a laid off employee.

[2] Although the government and the Public Service Commission (PSC) are separate entities, I will use the term “government” to include the PSC and employer.

[3] I have concluded that the award of the arbitrator exceeded her jurisdiction. However, I am sending it back for re-hearing with directions on the appropriate jurisdiction. I am also of the view that the government breached Article 47.01 of the collective agreement.

The Facts

[4] Labour relations between the government and the union are governed by a collective agreement, effective January 1, 2000 to December 31, 2002.

[5] The government embarked on a process called “Renewal” in 2001 and 2002. As a result, certain employees were laid off and the government was to try to find alternate positions for the laid off employees.

[6] David Knight was acting in the position for six months when the government posted a Notice of Proposed Appointment Without Competition dated March 25, 2002. The person proposed for the appointment was Michael Bartsch.

[7] Michael Bartsch was assessed by the government as having the aptitude to be successful in the position. However, the PSC assessment of Michael Bartsch determined that he had:

> "many but not all, of the qualifications for the position. The gaps are mainly in the areas of:
>
> - Knowledge of procurement and purchasing principles and practices;
> - Knowledge of asset control and disposal principles and practices;
> - Knowledge of inventory and warehousing principles and practices."

[8] David Knight filed an appeal on March 28, 2002, prior to the April 3, 2002 appeal expiry date.

[9] On April 12, 2002, the government issued a Notice of Lay-Off to Michael Bartsch and, on the same day, issued an appointment of Michael Bartsch to the position, effective April 15, 2002.

[10] David Knight's appeal was heard on May 6, 2002. The government and the union agreed that the arbitrator had jurisdiction to hear the appeal. All parties were represented at the arbitration, but it does not appear that lawyers participated. The arbitrator made her award on May 9, 2002. The award stated:

> … 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.

[11] The government indicated it would proceed with the interviews. Michael Bartsch, through counsel, advised that he would not be attending for an interview. He took the position that he had been offered and accepted the position.

[12] The government took the position that it was unable to implement the decision.

Issues

[13] The following issues will be considered:

1. Have the union and David Knight exhausted all their remedies?
2. Did the arbitrator exceed her jurisdiction?
3. Does the statutory right of the government to give priority to laid off employees take precedence over the appeal right of employees under the collective agreement?

ISSUE 1: HAVE THE UNION AND DAVID KNIGHT EXHAUSTED ALL THEIR REMEDIES?

[14] The government submits that David Knight has not exhausted his statutory remedy under s. 78(1) of the *Public Service Staff Relations Act*, RSY 1986, c. 142, which reads as follows:

> 78.(1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, and his grievance has not been dealt with to his satisfaction, he may, subject to subsection (2) refer the grievance to adjudication.

[15] Counsel for the government and the union agree that the arbitrator's decision is not an arbitral award and therefore the remedy provided in s. 15 of the *Public Service Act*, RSY 1986, c. 141 does not apply.

[16] In order to consider whether s. 78(1) applies to this competition appeal, it is necessary to set out certain parts of Article 47 of the collective agreement:

ARTICLE 47

COMPETITION APPEAL PROCESS

47.01 Vacancies in the bargaining unit for a regular indeterminate or regular term position above the entry level will be posted except for exemptions and lateral transfers within departments.

. . .

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.

. . .

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.

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.

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.

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.

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

. . .

> 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.

[17] I have not set out the earlier sections of the collective agreement dealing specifically with the processing of grievances. However, it is clear that s. 78(1) of the *Public Service Staff Relations Act* is in the section of the Act entitled “Adjudication of Grievances.” There is also a corresponding section of the collective agreement (Article 28), which covers “Processing of Grievances.”

[18] Article 47.01 is completely separate and distinct from the grievance procedure in the collective agreement. It covers appeals from competitions and appointments without competition. The word “grievance” does not appear in Article 47, and it provides a completely different procedure than that for grievances.

[19] Furthermore, Article 47.01 states that the decision of the arbitrator will be final and binding. While this may not be a full privative clause, in my view, it suggests that only a court can review the decision of the arbitrator. It would be pointless to set up an expedited arbitration process under Article 47.01 with final and binding decisions only to have those decisions enter the grievance procedure.

[20] The government relied upon *Vaughan* v. *Canada*, [2003] F.C.J. No. 241 (F.C.A.) to support its submission. In that case, a federal government employee commenced an action to claim early retirement incentive benefits before pursuing the statutory grievance procedure. The court found that ss. 91 and 92 of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 provided a comprehensive scheme for the

determination of workplace disputes. Hence, the court has only a residual jurisdiction for judicial review and has no jurisdiction to hear the claim until the grievance procedure is exhausted.

[21] In the case at bar, a comprehensive scheme for appeals from competition and appointments without competition is provided in Article 47.01 of the collective agreement. It has been engaged and finalized with the arbitrator's award.

[22] For the above reasons, I conclude that this court has jurisdiction to hear this application and that David Knight and the union have exhausted their remedies.

ISSUE 2: DID THE ARBITRATOR EXCEED HER JURISDICTION?

[23] Article 47.01 of the collective agreement provides that the jurisdiction of the arbitrator for an appeal of an appointment without competition "will be the same as for competition."

[24] The collective agreement sets out three areas of jurisdiction for the arbitrator in a competition appeal:

a) to decide whether the employer has properly assessed the appellant's qualifications;

b) to decide 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; and

c) 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.

Because no competition has taken place, counsel for the government submits that the jurisdiction of the arbitrator is even narrower. It is submitted that the arbitrator exceeded her jurisdiction by directing that a competition be held where none had taken place. Counsel submits there is no wording in Article 47.01 to empower the arbitrator to make the award she made.

[25] Counsel for the union and David Knight submit that the plain meaning of the words used in the collective agreement gives the arbitrator the jurisdiction to make the direction she made. Further, it is submitted that the arbitrator is entitled to tailor her award to fit the special circumstances of this case.

Standard of Review

[26] I must first determine the standard on which the arbitrator's decision should be reviewed. The four factors outlined in *Pushpanathan* v. *Canada*, [1998] 1 S.C.R. 982 must be considered:

1. the presence or absence of a privative clause;
2. the expertise of the tribunal;
3. the purpose of the governing legislation as a whole and the provisions creating the tribunal and its role; and
4. the nature of the problem, i.e. is it a question of fact, mixed fact and law, or law?

[27] In considering these factors, there are three standards that can be applied in judicial review. The "correctness" standard means that no deference is shown by the court to the arbitrator. The only question is whether it is right or wrong. The standard of

"patent unreasonableness" is at the other end of the spectrum. Under this standard, a high degree of deference is given to the arbitrator. The reasonableness standard is in between the above.

1. The Presence or Absence of a Privative Clause

[28] In this case, the collective agreement stated that the decision of the arbitrator is final and binding. There is also s. 86(1) of the *Public Service Staff Relations Act*, which states:

> **Review of orders**
>
> 86.(1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the board, an arbitrator or an adjudicator is final and shall not be questioned or reviewed in any court.
>
> (2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain the board, an arbitrator or an adjudicator in any of its or his proceedings.

[29] However, the reference to an arbitrator in s. 86(1) refers to an arbitrator, by definition, appointed under s. 54 of the *Public Service Staff Relations* Act. That is not the case here. The arbitrator in this appeal is appointed under Article 47.01 of the collective agreement. While the words "final and binding" mean no further grievance should be taken on the arbitrator's award, they do not amount to a statutory privative clause.

2. The Expertise of the Tribunal

[30] There is no doubt that the arbitrators have been selected by the union and government for their expertise in issues of competition and appointments without competition.

[31] However, the arbitrators do not have the expertise of a labour relations board. The written decision of the arbitrator did not contain any legal analysis or reference to case law. In this case in particular, issues of legal interpretation loom large because of the drafting of Article 47.01 and the relationship between the collective agreement, the *Public Service Act* and the *Public Service Staff Relations Act*.

3. The Purpose of the Tribunal and Its Role

[32] There is no specific legislation creating the role of arbitrator in this very specialized circumstance of assessing public service appointments with competition and appointments without competition. However, Article 47.01 of the collective agreement creates a complete code for the procedure on appeals. The general purpose is to provide a quick resolution by a person with expertise. Article 47.01 does just that. The appeal was filed on March 28, 2002; the appeal was heard on May 6, 2002, and the arbitrator's decision was made on May 9, 2002.

[33] The result is that this situation is unlike the usual labour relations board, where members may act on a full-time basis. Those boards are often authorized to make interpretations and they have, or develop, considerable expertise in that function.

[34] In this case, the single arbitrator is required to conduct an expedited arbitration and render a quick decision. There is no evidence before me that legal submissions on interpretation of her jurisdiction were made. While it is undoubtedly appropriate for the arbitrator to interpret Article 47.01, it is not a specific area of expertise of the arbitrator.

The substantive role of the arbitrator is to determine whether the employer properly assessed qualifications, not to interpret the collective agreement.

4. The Nature of the Problem

[35] As I have indicated, the nature of the problem is one of legal interpretation. This involves consideration of the plain meaning of the words used, as well as a purposive and contextual interpretation of Article 47.01. It involves considering the *Public Service Act* and the *Public Service Staff Relations Act* as the applicable statutes upon which Article 47.01 is premised.

[36] Although no party objected to the jurisdiction of the arbitrator to hear this appeal, the issue before me is whether an excess of jurisdiction occurred in the arbitrator's direction to interview and hold a competition between David Knight and Michael Bartsch.

[37] In *Canada (Attorney General)* v. *Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at para. 30, Cory J. quoted Beetz J. from a previous decision on when a jurisdictional error occurs:

> A jurisdictional error results generally in an excess of jurisdiction or a refusal to exercise jurisdiction, whether at the start of the hearing, during it, in the findings or in the order disposing of the matter. Such an error, even if committed in the best possible good faith, will result nonetheless in the decision containing it being set aside …"

[38] I am mindful of the general rule that the decision of a labour arbitration board in interpreting a collective agreement will only be set aside if it is one that is patently unreasonable (see *N.A.P.E.* v. *Newfoundland*, [1996] 2 S.C.R. 3). That decision is premised upon a board having expertise in interpreting collective agreements and being supported by a privative clause.

Standard of Review to be Applied

[39] However, in this case, the arbitrators' expertise was in the area of public service appointments by competition and without competition. Their appointment was not by statute and their decisions are not protected by a statutory privative clause. There was no specific reference to interpretation of collective agreements. Further, in my view, the interpretation of Article 47.01 and consideration of the *Public Service Act* and the *Public Service Staff Relations Act* are not within the arbitrator's core area of expertise (see *Trent University Faculty Association* v. *Trent University* (1997), 150 D.L.R. (4th) 1 (Ont. C.A.) at para. 22). In my view, the standard of correctness should be applied to this issue of jurisdiction and law (see *Nanaimo (City)* v. *Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342).

Analysis

[40] The difficulty facing the arbitrator was that Article 47.01 did not state precisely what her jurisdiction would be in the case of an appointment without competition. Her jurisdiction, if taken literally, was simply to be "the same as for competition." But that literal interpretation imported the remedies appropriate for a competition, which was precisely what the government was exercising its statutory discretion to avoid.

[41] The essence of the arbitrator's decision is the following:

> Grounds for Appeal: the appellant's promotional opportunities were prejudicially affected by the appointment without competition of Mr. Bartsch to the subject position.
>
> . . .

> 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).

[42] The arbitrator then ordered a competition between Michael Bartsch and David Knight. Her focus was not on the appointment without competition process, but rather the failure of the government to address the loss of promotional opportunity for Mr. Knight. However, the focus of the appeal should be an assessment of whether the government has fairly adhered to the appointment without competition process.

[43] The following sections of the *Public Service Act* must be considered:

> **Appointment and termination**
>
> 95. Subject to section 10, the commission has the exclusive right and authority to appoint persons in the public service and to recruit, certify and document all employees appointed to a position on the establishment of a department of the public service.
>
> . . .
>
> **Exemption from competition**
>
> 110. Where
>
> (a) a suitable person is available for appointment from a current list of eligible certified applicants for employment in the class in which the vacant position is included, or
>
> (b) it is in the best interest of the public service and the commission is satisfied that a suitable qualified person is available;
>
> the commission may exempt an appointment from competition.

[44] Section 110(a) of the *Public Service Act* refers to a suitable person being available from a current list of eligible certified applicants. There is no evidence before me that this was the case here.

[45] Section 110(b) of the *Public Service Act* has a two-fold requirement: it must be in the best interests of the public service and it must be a “suitable qualified person.” This section contemplates that the qualifications of the person to be appointed without competition be assessed as against the qualifications required for the position.

[46] Counsel for the union relied upon the case of *Canadian Union of Public Employees, Local 301* v. *Montreal (City)*, [1997] 1 S.C.R. 793 for the principle that the arbitrator could tailor her award according to the special circumstances of this appeal.

[47] However, in that case, the Quebec Labour Code authorized the Council of Essential Services to “make an order to ensure that a service to which the public is entitled is available, …”. The Council was given the further discretion to enjoin any person to do what is required or abstain from doing anything in contravention. This wording, which L’Heureux-Dubé J. described as much more flexible and broadly worded than the Canada Labour Code, must be contrasted to the jurisdiction of the arbitrators in the case at bar, which is very specific and narrow. In my view, the concept of the arbitrator fashioning the appropriate order for the special circumstances of the case does not apply, given the narrow jurisdiction of Article 47.01.

[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”;
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.

ISSUE 3: DOES THE STATUTORY RIGHT OF THE GOVERNMENT TO GIVE PRIORITY TO LAID OFF EMPLOYEES TAKE PRECEDENCE OVER THE APPEAL RIGHT OF EMPLOYEES UNDER THE COLLECTIVE AGREEMENT?

[53] This issue arises because the government, after unsuccessfully trying to settle the appeal, proceeded to lay off Michael Bartsch on April 12, 2002 and appoint him to the position, effective April 15, 2002. The arbitrator was correct in finding this to be in violation of the collective agreement. The government undoubtedly wished to enhance its legal position before the arbitrator. Article 47.01 clearly states that:

> 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.

[54] It is reasonable to interpret this wording as applying to the circumstance of an appointment without competition as well. The purpose of the prohibition not to make appointments during appeal is to prevent the government from making the appeal provision in Article 47.01 meaningless by making appointments that give the newly appointed employee contractual rights to the position. This is precisely what occurred with Michael Bartsch. Once he was appointed to the position, he simply ignored the arbitrator's decision because he had a binding contract of employment.

[55] The government submits that its action was appropriate as it was providing for a laid off employee whose rights should be greater than the promotional rights of the acting employee. The government further submits that its statutory rights take precedence over the collective agreement when the two are in conflict.

[56] Several sections of the *Public Service Act* and the *Public Service Staff Relations Act* are involved in this issue. Sections 171, 172 and 174 of the *Public Service Act* state as follows:

PART 10

LAY-OFFS

Recommendation to lay off

171. A deputy head may recommend to the commission that an employee be laid off whenever he deems it necessary because of

(a) a shortage of work,

(b) insufficient appropriated funds,

(c) the abolition of a position, or

(d) changes in the organization of the department.

Appointment of lay-off to other position

172. Notwithstanding anything in this Act, the public service commissioner may, without competition, appoint a lay-off to any position in the public service for which he is qualified and which has the same or lower maximum rate of pay as the position held by him at the time he was laid off.

. . .

Consideration for appointment

174. Notwithstanding anything in this Act, a lay-off shall be considered for appointment to a position for which he is qualified which has the same or lower maximum rate of pay as the position held by him at the time he was laid off, in priority to all other qualified candidates and in priority to all other employees who became lay-offs at an earlier time.

[57] The *Public Service Act* deals with the creation of a public service and appoints a public service commission and commissioner to appoint qualified persons to public service positions.

[58] In contrast, the *Public Service Staff Relations Act* covers the collective agreement entered into by government and the members of the public service. Section 48 states:

Binding effect of agreement

> 48. A collective agreement is, subject to and for the purposes of this Act, binding on the employer, on the bargaining agent that is a party thereto and its constituent elements, and on the employees in the bargaining unit in respect of which the bargaining agent has been certified, effective on and from the day on and from which it has effect pursuant to subsection 47(1).

[59] The precise issue to be determined is whether Article 47.01 of the collective agreement can prohibit appointments once an appeal is filed in the face of the right of the PSC to appoint a lay-off "in priority to all other qualified candidates."

[60] The arbitrator was alive to the issue of the apparent conflict, although she felt it was "unforeseen and unintended." She did not specifically decide whether the collective agreement prevailed over the *Public Service Act*. However, her decision implicitly upheld the collective agreement, in that she decided that David Knight's promotional opportunity should be competitive with the government's right to appoint lay-offs in priority to all other qualified candidates.

[61] The Supreme Court of Canada has dealt with the apparent conflict or incompatibility between a collective agreement and a labour statute. In *Durham Regional Police Assoc.* v. *Durham (Region) Police Commissioners*, [1982] 2 S.C.R. 709, the municipality had a legislative discretion to pay costs incurred by a member in a civil or criminal proceeding brought against the member. The collective agreement provided that the municipality "shall" reimburse the member where the member is subsequently acquitted of such charges. The court found no incompatibility, as the legislation still had room to operate, and each provision had its own area of operation. In order to override the collective agreement provision, the statute must prescribe exclusivity in its wording.

[62] The British Columbia Court of Appeal subsequently dealt with a similar issue in *B.C.G.E.U.* v. *British Columbia (Government Personnel Services Division) (B.C.C.A.)*, [1987] B.C.J. No. 391. In that case, the collective agreement prohibited the employer from contracting out work presently performed by employees which would result in laying off employees. The statute gave the employer the discretionary power to contract out to avoid unreasonable costs or delays. The British Columbia Court of Appeal followed the *Durham Regional Police Assoc.* v. *Durham (Region) Police Commissioners*, *supra*, case and decided that the statutory provision must be read in harmony with the collective agreement unless the operation of the collective agreement is clearly excluded. Specifically, the court decided that the exercise of the statutory contracting out provision must not result in the laying off of employees, as required in the collective agreement.

[63] The same reasoning applies to this case. The government has the power to appoint lay-offs in priority to other qualified candidates, but not after an appeal has been filed under Article 47.01 of the collective agreement. There is no statutory wording that says the right to appoint lay-offs is exclusive, so as to exclude the operation of Article 47.01 of the collective agreement.

[64] I conclude that Article 47.01 of the collective agreement and s. 174 of the *Public Service Act* should be interpreted to work in harmony. The government has breached Article 47.01 of the collective agreement in appointing Michael Bartsch to the position after the appeal was filed.

Conclusion

[65] I have found that the court can hear this application as there were no other remedies available to the union and David Knight. I have also found that the arbitrator exceeded her jurisdiction, and I have set out what I consider to be the appropriate jurisdiction for the arbitrator under Article 47.01 of the collective agreement. I have set aside the award of the arbitrator and ordered that the matter be sent back to the arbitrator (or such arbitrator as may be agreed upon) to exercise the appropriate jurisdiction in an appeal of an appointment without competition.

[66] As the results of this application are mixed, there will be no order for costs.

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VEALE J.