**SUPREME COURT OF YUKON**

Citation: *Yukon (Government of) v. Public Service Alliance of Canada*, 2014 YKSC 59

Date: 20141003
S.C. No.: 13-A0084
Registry: Whitehorse

BETWEEN:

GOVERNMENT OF YUKON

Petitioner

AND:

PUBLIC SERVICE ALLIANCE OF CANADA, YUKON EMPLOYEES' UNION
YUKON CLASSIFICATION APPEAL BOARD

Respondents

Before the Honourable Mr. Justice J. Groves

Appearances:

| | |
|---|---|
| Judith M. Hartling | Counsel for the Petitioner |
| Andrew Astritis | Counsel for the Respondent - Public Services Alliance of Canada |
| No appearance | For the Respondent - Yukon Employees' Union |
| No appearance | For the Respondent - Yukon Classification Appeal Board |

**REASONS FOR JUDGMENT**

[1] GROVES J. (Oral): This is an application for judicial review of a decision of the Classification Appeal Board, a decision rendered by the chairperson, Richard Coleman, sitting alone after hearing by way of materials, as opposed to an oral hearing, which decision is dated August 20, 2013.

[2] The application for judicial review is set out or is founded on three points. The applicant, Government of Yukon, raises as its first point that the Classification Appeal Board and the chairperson exceeded his jurisdiction by considering school

psychologists as a comparable when, by virtue of s. 5(3) of the *Public Service Regulations* (OIC 1987/075 under the *Public Service Act*, RSY 2002 c. 183), the Appeal Board is not entitled to consider any positions which are not official benchmark positions. I am advised, and it is not disputed, that school psychologists are, in fact, not benchmark positions.

[3] A second foundation for the application for judicial review is a claim by the Government of Yukon that the Classification Appeal Board and the chairperson exceeded their jurisdiction by disregarding the entirety of the classification "Education Consultants", specifically the exclusion criteria. Here, a direct reading of the exclusion criteria suggests that those in this group must have a teaching certificate, instructional diploma, or degree in education, none of which the successful party appears to have.

[4] The third basis for judicial review advanced by the Government of Yukon is that the chairperson and the Classification Appeal Board designation of these parties in the way in which they did is an unreasonable interpretation of the application of the plan.

[5] The group which had requested reclassification is a group of speech language consultants. They were classified in one group under the classification plan and they requested to be reclassified in the education group as education consultants.

[6] Turning to the issue of judicial review, the starting point for any judicial review is always the question: What is the standard of review? The law has developed in this area quickly in the past 10 years or so. And in general answer to this question, absent provincial or territorial legislation which sets a standard of review, has really boiled down to a question of whether the Court is to apply a correctness standard or a reasonableness standard.

[7] When applying the correctness standard, analysis begins with a view that the decision must be legally correct.

[8] That is, of course, a higher standard than the reasonableness standard, which means that the decision must be reasonable. In applying the reasonableness standard, there is a recognition that deference should be given by the courts to the tribunal with the expertise. The decision on a reasonableness standard is often one of whether the decision is within the realm of reasonable outcomes considering all of the circumstances, including how the decision was arrived at. As such, a reasonableness standard limits a court's jurisdiction to change or to return the decision for reconsideration to cases when the decision is not reasonable.

[9] The difficulty and error that courts often fall into in the reasonableness standard is confusing or not considering that a decision can be reasonable; in other words, reasonably applying the criteria set out in the legislative mandate, but not in the court's view correct. If the decision is reasonable -- in other words, if the tribunal reasonably applied the criteria set out in the legislative mandate -- then the courts are not entitled to act or interfere.

[10] I thank counsel for their submissions on this difficult point, and their submissions generally. I agree with counsel for the respondent, PSAC, the Public Service Alliance of Canada, that the test to be applied here is a test of reasonableness.

[11] A review of case authority starting with the seminal decision of *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, and then *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] SCC 61, and the decision of *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011

SCC 53 convinced me that the four areas of exception to judicial deference, the four areas in which the correctness standard is to be applied as set out in *Dunsmuir*, are narrowing as the law develops.

[12] Correctness is still the standard for constitutional matters and for matters in which there is competitive jurisdiction of tribunals. Correctness is narrowing when one looks at case law developed on the other articulated areas, areas as articulated in *Dunsmuir*, critical to the development of the law outside the expertise of the tribunal and true questions of jurisdiction.

[13] As such, for the application to succeed, I am satisfied that the applicant must show that this tribunal, in approaching its tasks and deciding the matter it did, in the way it did, acted unreasonably.

[14] The facts here are related to the classification in the Public Service of the Yukon of speech language consultants who work in schools in the Yukon. Prior to the impugned decision, these speech language consultants were classified in what is called the "Scientific and Technical Group". I will read, for the record, the definition as set out in the Job Evaluation Plan.

> Scientific and Technical Group
>
> (a) Inclusions
>
> The Scientific and Technical Group includes positions requiring the continuous exercise of a discipline normally acquired through formal post secondary education in the natural or physical sciences, including, but not limited to:

[15] And then it sets out a number of natural and physical sciences, including medicine and health, which is the classification for speech language consultants.

[16] Continuing on in the inclusion section:

> This group encompasses positions working at all levels within the disciplines from trainee and developmental through to supervisory.

[17] The next aspect to be considered under the scientific and technical group is the area of exclusions, (b):

> Positions excluded from this group are those in which:

[18] And there are three set out, but it is the third which is relevant to this matter, and it reads:

> - the major focus is education and inclusion is more appropriate in the Education Group

[19] The proposed classification by the speech language pathologists and the classification which the Classification Appeal Board directed is under the Education Group. The Education Group has three subgroups noted in the Job Evaluation Plan and it is the subgroup C, "Consultants", in which the chairman of the Classification Appeal Board determined it was appropriate for speech language consultants to be placed.

[20] The education group under "Inclusions" reads as follows:

> Inclusions
>
> The Education Group includes positions involved in developing and evaluating educational standards, programs and techniques and also in administering educational and professional support programs in the school and college systems. Also included are positions engaged in curriculum development and instruction.
>
> Positions generally require an undergraduate or graduate degree in Education, Psychology, or a related field, or a combination of discipline-related training and an Instructional Diploma or a Teaching Certificate.

[21] Under the subgroup "Consultants", the Job Evaluation Plan notes the following:

> Consultants (EC)
>
> This sub-group includes positions in the public school environment where the primary focus is the evaluation and promotion of teaching techniques, curriculum standards, and methods of instruction in specialized subject areas.

[22] And then in regard to the education group as a whole, the Job Evaluation Plan sets out a number of exclusions.

> Exclusions
>
> Excluded from this group are positions for which:
>
> - membership in the YTA is mandatory

[23] I am advised that YTA is the Yukon Teachers' Association.

[24] And secondly:

> - there is no essential requirement for a teaching certificate, instructional diploma or degree in Education

[25] Turning to the decision, after setting out correctly the issue and summarizing the parties' respective position, the decision goes through a page and a half of analysis before reaching a decision at the bottom of page 7. The analysis, respectfully, focuses on the term "Education". The analysis starts with the following sentence: "The Plan defines the issue as whether 'the major focus for the subject positions is education'".

[26] This analysis, with respect, is not complete.

[27] The plan says, in terms of exclusions from the scientific and technical group, "the major focus is education and inclusion is more appropriate in the Education Group". That requires, respectfully, a detailed analysis of inclusion and exclusion factors for both groups, and, specifically, inclusion and exclusion factors of the education group.

[28] This, in my view, was not undertaken by the tribunal. What the tribunal was faced with was two competing categories: "Scientific and Technical" and "Education". The enabling language of these criteria set out both indicia of inclusion and indicia of exclusion. In my view, this tribunal fell into error, made an unreasonable decision, by focussing primarily on a partial and only a partial phrase of exclusion criteria of the Scientific and Technical group and did not focus on the entirety of the definition set out in both groups, both as to inclusion and exclusion. The partial phrase "focus is education" is not the test. The test is "major focus is education and inclusion is more appropriate in the Education Group".

[29] There is no analysis in the reason, respectfully, of it being more appropriate in the Education Group. Any such analysis would have to deal in some way with the exclusion aspect of the Education Group, specifically an exclusion which makes it inappropriate to be a member of that group if one does not possess a teaching certificate or an instructional diploma or a degree in education.

[30] In one sense, the decision that had to be made was one group or another. Any decision as to either group is within, perhaps, the general parameters of a reasonable decision.

[31] Where this tribunal acted unreasonably, in my view, is its focus of analysis on one phrase of one criteria of exclusion in one group and virtually no analysis or assessment of the exclusion criteria set out in the other group in which it placed these individuals and exclusion analysis, which seems, on the face of it, to prohibit those individuals from being a member of that group.

[32] Any analysis must be reasonable. And to be reasonable, in my view, must

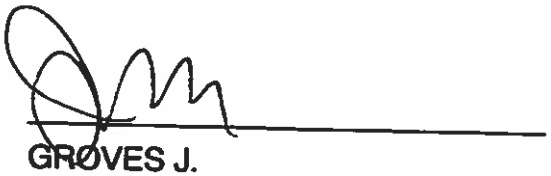
include a consideration of all indicia of inclusion and all indicia of exclusion. To focus on one partial aspect of one criterion as opposed to an analysis of all criteria is unreasonable.

[33] Counter to this, the Public Service Alliance of Canada advances the split decision of the Federal Court of Appeal in *Public Service Alliance of Canada v. Canadian Federal Pilots Assn.*, 2009 FCA 223. I am not convinced, having an opportunity to review that case, that the facts in that case and the underlying legislative scheme are sufficiently similar to have the majority decision in that case apply here. In any event, I prefer the analysis of Pelletier J.A. in his reasoned dissent.

[34] As for the first ground of this judicial review, I need not decide that issue. But I would say I agree with PSAC's position that it was the government's submissions to the tribunal that introduced consideration of an inappropriate benchmark. And it is not as a result, in my view, available to a party who has done so to argue error on the tribunal by following the path of error that, in this case, the government's submissions introduced into the process.

[35] That being said, I have concluded in regard to the second and third aspect of judicial relief sought that the Classification Appeal Board acted unreasonably in not considering all inclusive and all exclusive criteria in the competing classifications in considering and coming to its decision in August of 2013. The proper remedy is to send the matter back to a new adjudicator of the Classification Appeal Board with directions that that adjudicator consider all inclusive and exclusive criteria in a rehearing of the matter, and that the new adjudicator specifically not consider any positions which are not official benchmarks.

[36] Thank you.



GROVES J.