

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Association of Administrative and Professional Staff v. University of British Columbia*,
2008 BCCA 337

Date: 20080902
Docket: CA035173

Between:

The Association of Administrative and Professional Staff

Appellant
(Petitioner)

And

University of British Columbia

Respondent
(Respondent)

And

Public Sector Employers' Council

Respondent
(Respondent)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Low

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Place and Date of Hearing: Vancouver, British Columbia
March 12, 2008

Place and Date of Judgment: Vancouver, British Columbia
September 2, 2008

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Chief Justice Finch

The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] The Association of Administrative and Professional Staff appeals from the order of Madam Justice Ballance dismissing its application under the **Commercial Arbitration Act**, R.S.B.C. 1996, c. 55 for leave to appeal an arbitration award dated August 16, 2005. Her reasons for judgment are indexed as 2007 BCSC 766, 74 B.C.L.R. (4th) 71.

[2] The issue before the arbitrator was the applicability of a cap on severance pay set out in the **Public Sector Employers Act**, R.S.B.C. 1996, c. 384 and the *Employment Termination Standards Regulation* (B.C. Reg. 379/97), with respect to two employees who were terminated without cause. The two employees were, however, members of the Association of Administrative and Professional Staff, which had an agreement with the University of British Columbia covering terms and conditions of employment. That agreement provided for greater severance pay than was allowed under the **Public Sector Employers Act** and the *Regulation*.

[3] The Association is not certified under the **Labour Relations Code**, R.S.B.C. 1996, c. 244, and the administration of the agreement did not come under the **Code**. Adjudication of disputes was by arbitration under the **Commercial Arbitration Act**. However, the Association said its relationship with the University was a collective bargaining relationship, its agreement was equivalent to a collective agreement, and its members, including management, constituted a bargaining unit and were thereby protected from the capping provisions of the **Public Sector Employers Act** and the *Regulation*.

[4] The arbitrator, Mr. Lanyon, held that the agreement between the Association and the University is not equivalent to a collective agreement; that the relationship between them is not a collective bargaining relationship; and that the two employees were subject to the severance cap of the **Public Sector Employers Act** and the *Regulation*.

[5] The Association sought to appeal the decision of Mr. Lanyon under s. 31 of the **Commercial Arbitration Act**:

31(1) A party to an arbitration may appeal to the court on any question of law arising out of the award if

...

(b) the court grants leave to appeal.

(2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that

(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,

(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(c) the point of law is of general or public importance.

(3) If the court grants leave to appeal under this section, it may attach conditions to the order granting leave that it considers just.

[6] In its petition, the Association alleged that Mr. Lanyon erred in law:

- 1) in his interpretation of "bargaining unit" in the **Public Sector Employers Act**, specifically in finding that "bargaining unit" in

that **Act** has the same meaning as under the *Labour Relations Code*; and

- 2) in his interpretation of “bargaining unit” in the written agreements between the Association and the University, specifically, in deciding that the bargaining unit established under the agreements is not a bargaining unit recognized under the *Code*.

[7] The Association also contended that the arbitrator erred by finding as a fact that the Labour Relations Board of British Columbia does not allow the inclusion of managers in a bargaining unit when there was no evidence to that effect and in fact the finding is wrong.

[8] Madam Justice Ballance dismissed the appeal. In considering s. 31(2)(a) of the *Commercial Arbitration Act*, she found that the errors alleged in the interpretation of “bargaining unit” in the *Public Sector Employers Act* and the agreements were questions of law; that they had sufficient importance to the parties to fit the criteria for leave to appeal; and that the alleged errors are material as going to the heart of the decision and so satisfied the “miscarriage of justice” criteria. In considering s. 31(2)(c) she found that the point of law raised is of general and public importance. Madam Justice Ballance then turned her mind to the residual discretion she had to decline to grant leave to appeal, even where the criteria in ss. 31(2)(a) and (c) are met. She found that the appeal lacked sufficient substance to warrant the appeal proceeding, that is, that the Association had not established more than

an arguable point. She therefore declined to exercise her discretion to give leave to appeal.

[9] The issue for this Court is whether the judge misdirected herself or her decision is so clearly wrong as to amount to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367; *Jakobsen v. Wear Vision Capital Inc.*, 2004 BCCA 147 at para. 15. We will not interfere merely on the basis we would have reached a different decision: *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3.

[10] In *BCIT (Student Association) v. BCIT*, 2000 BCCA 496, 80 B.C.L.R. (3d) 266, this Court observed at para. 22 “that courts can lay down factors to be considered in the exercise of discretion, while they cannot lay down rigid rules”, citing *Ward v. James*, [1965] 1 All E.R. 563 at 571 (C.A.), and *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

[11] To determine the issue before us, we must first consider the task of the judge hearing the application for leave to appeal under s. 31 of the *Commercial Arbitration Act*.

[12] The criteria of s. 31 of that *Act* are somewhat different in British Columbia than in other provinces in expressly referring to miscarriage of justice and in according a wide degree of discretion to the court. In *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257, 62 D.L.R. (4th) 530 (C.A.) [cited to B.C.L.R.], Mr. Justice Lambert acknowledged that a judge has discretion to refuse leave to appeal through a judicial exercise of discretion even where one or more of the conditions in

s. 31(2) is, or are, met. In cases coming under s. 31(2)(a), Mr. Justice Lambert held that the residual discretion should be exercised only “[i]f the decision of the arbitrator ... is so obviously wrong that he cannot have reached his decision on a matter of substance by a considered decision-making process” (p. 267).

[13] This Court considered afresh the criteria for leave to appeal under s. 31 in ***BCIT (Student Association) v. BCIT***. The unanimous reasons for judgment of a five-judge division reviewed ***Domtar*** and varied the approach, holding first that the residual discretion under s. 31 should be exercised on a principled basis in relation to all three paragraphs, (a) through (c). The reasons then address the role the merits of the proposed appeal play in the exercise of discretion:

[29] ... In my view, the apparent merit or lack of merit of an appeal is part of the exercise of the residual discretion, and applies equally to all three subsections, (a) through (c). Just as an appeal woefully lacking in merit should not attract leave under (b) (of importance to a class of people including the applicant) or (c) (of general or public importance), so too it should not attract leave under (a). Consideration of the merits, for consistency in the section as a whole, should be made as part of the exercise of residual discretion.

[30] In considering the merits of an appeal or lack thereof, an appellant should establish more than an arguable point. The merits of the appeal, while not requiring that the award is obviously wrong or the decision is patently unreasonable, must have sufficient substance to warrant the appeal proceeding. And on this I would not expect the appeal itself to be argued on the leave application.

[31] I do not consider that the application of any formula will determine whether a chambers judge should exercise discretion and grant leave to appeal. The discretion is to be exercised judicially, that is, trial judges will take into consideration those matters with which they are well familiar. Those matters include the apparent merits of the appeal, the degree of significance of the issue to the parties, to third parties and to the community at large, the circumstances surrounding the dispute and adjudication including the urgency of a final answer,

other temporal considerations including the opportunity for either party to address the result through other avenues, the conduct of the parties, and the stage of the process at which the appealed decision was made (in my view, unlike the facts in "*The Nema*", interlocutory orders would rarely, if ever, pass the sieve of judicial discretion). Undoubtedly included in this assessment will be respect for the forum of arbitration, chosen by the parties as their means of resolving disputes, and recognition that arbitration is often intended to provide a speedy and final dispute mechanism, tailor made for the issues which may face the parties to the arbitration agreement.

[Emphasis added.]

[14] In reaching her conclusion, the judge found that the criteria in ss. 31(2)(a) and (c) were met. Addressing the exercise of her discretion, she said:

[53] The Association alleges that the arbitrator effectively rewrote the *PSEA* by incorporating into it, terms and definitions found in the *LRC*. It is critical also that the arbitrator concluded that the phrase "bargaining unit" in the *PSEA* had the same meaning as in the *LRC*, because the *LRC* in fact contains no definition of a "bargaining unit". The terms defined under the *LRC* are "unit" and "appropriate bargaining unit". Along the same lines, the Association points to the lack of precision of the arbitrator in referring to the phrase "bargaining unit" as having a "normative statutory meaning" because it is not statutorily defined. It asserts that this is of significance because bargaining units may exist outside the structure of the *LRC*. The Association's criticisms and challenges to the arbitrator's reasoning and the Decision itself taken together are insufficient to establish that it has more than an arguable point on the merits of the appeal. I do not share the view that Arbitrator Lanyon effectively rewrote the *PSEA* by incorporating concepts found in the *LRC*. I find that to be a rather simplistic characterization of the Decision and blind to the fullness of the arbitrator's analysis. The arbitrator's interpretative findings were based on and consistent with his factual findings regarding the intention of the legislature and how the *PSEA* and the *PSEA* Regulation ought to apply. He interpreted the *PSEA* using principles of statutory interpretation in a manner consistent with the existing statutory scheme of labour law established under the *LRC*.

...

[55] The merits of the appeal do not have sufficient substance to warrant the appeal proceeding: the Association has not satisfied me that it has more than an arguable point. I decline to exercise my discretion to grant leave. The Association's application for leave to appeal is dismissed.

[15] On this appeal, the Association says that the judge erred in law in concluding that the Association had not established that its proposition that the arbitrator had misinterpreted s. 14.1 of the *Public Sector Employers Act* was more than an arguable point. There is sufficient merit to justify the giving of leave to appeal, says the Association, in its contention that the arbitrator erred in law in failing to give an interpretation to the legislation that: (a) recognizes a common law right to bargain collectively; and (b) protects the bargain freely negotiated between the Association and the University which bestows greater rights on these two employees than is provided by the legislation in issue. In support, the Association points to the recent decision of the Supreme Court of Canada in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27, a decision, it says, that changed the labour law landscape and demonstrates that its submission has merit.

[16] The Association says as well that she erred in taking into account the arbitrator's expertise and qualifications, in failing to give weight to errors in the arbitrator's findings of fact, and in failing to find inconsistency in the arbitrator's conclusions that the *Public Sector Employers Act* incorporated the *Code* to some degree, but that there was no collective bargaining relationship and a collective agreement in existence.

[17] The Association's pre-eminent submission is that the judge was wrong in law to view so low the potential for success in the appeal. To consider this submission, something more must be said about the arbitration decision.

[18] The agreement between the parties was two part: the framework agreement and an agreement dealing with specific terms. For the purpose of this case, they may be referred to generically as the agreement.

[19] The arbitration focused upon the definition of employee in the *Public Sector Employers Act* and in the agreement between the parties, and considered the interaction of this language with that found in the *Labour Relations Code*.

[20] The two employees did not fit within the definition of employee in s. 1 of the *Labour Relations Code* because they each "performed the functions of a manager" and thus they were excluded by paragraph (a) of that definition. The *Labour Relations Code* provides:

(1) In this Code:

...

"**employee**" means a person employed by an employer, and includes a dependent contractor, but does not include a person who, in the board's opinion,

(a) performs the functions of a manager or superintendent, ...

...

"**unit**" means an employee or a group of employees, and the expression "**appropriate for collective bargaining**" or "**appropriate bargaining unit**", with reference to a unit, means a unit determined by the board to be appropriate for collective bargaining, whether it is an

employer unit, craft unit, technical unit, plant unit or another unit, and whether or not the employees in it are employed by one or more employers.

[21] Part 3.1 of the *Public Sector Employers Act*, Exempt Employee Compensation, contains the provision capping severance pay. Section 14.1 of that Part defines employee:

4.1 In this Part:

...

"**employee**" means a public sector employee who is excluded from membership in a bargaining unit.

[22] Section 14.4 of the *Public Sector Employers Act* provides that the employment termination standards set out in the *Regulation* are deemed to be included in all applicable contracts of employment (to which the *Act* applies) in force or renewed on or after the effective date of the *Regulation*. That is, the severance cap in the *Regulation* was, by s. 14.4, deemed to be included in the agreement between the parties. On its face, Part 3.1 interferes with the agreement made between the Association and the University.

[23] The agreement between the Association and the University includes a provision that describes these employees as members of the bargaining unit:

4.0 Scope of Bargaining Unit and Exclusions

Association Group Membership

[The Association] represents all management and professional employees, except for the following excluded positions: