

Jan 18/94

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#92-697

IN THE MATTER of expedited arbitrations pursuant to s. 37.27 of the Collective Agreement between the Union of Northern Workers and the Minister Responsible for the Financial Management Board for the Government of the Northwest Territories made September 6th, 1989 for the period April 1st, 1989 to March 31st, 1992.

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES  
(Employer)

- and -

THE UNION OF NORTHERN WORKERS  
(Union)  
In the matter of a Union Policy Grievance with respect to rates of pay for OPHTHALMIC TECHNICIANS

APPEARANCES:

FOR THE EMPLOYER:

MS. SYLVIA HAENER

FOR THE UNION:

MR. CHRIS DANN

AWARD

The parties acknowledged that the grievance was properly before me.  
The Employer however has raised a preliminary matter.

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JURISDICTION

With respect to the preliminary matter, it is important for me to have the background and by agreement, the parties have provided me with an Agreed Statement of Facts which says:

1. In September 1990 the Employer, Stanton Yellowknife Hospital, "unclassified" four Ophthalmic Technician positions and unilaterally assigned a higher rate of pay to address the recruiting difficulties they were experiencing.
2. The Union's position is that the Employer has violated Article 36.01 of the Collective Agreement because they did not negotiate rates of pay for the revised classification standard.
3. The Employer's position is that the decision to unclassify four Ophthalmic Technician positions was based on established practice in response to a short term recruiting problem. This decision did not change the classification standard so there is no need to negotiate a new rate of pay for all Ophthalmic Technician positions. The classification appeal process is the appropriate method for resolving this issue.

The grievance has been brought and proceeded with pursuant to Article 36.03 of the Collective Agreement. This clause, which is part of the article on classification, provides in pertinent part:

"Where an employee alleges that he/she has been improperly classified with respect to his/her position, he/she may appeal to the Minister of Personnel and the following provisions shall apply:

- (1)(a) The Minister of Personnel shall refer the appeal to a Classification Appeal Board
- (d) The Classification Appeal Board may determine that the employee's classification is proper having regard to the classification specifications for his/her position and his/her Statement of Duties or the Board, may decide that the employee has been improperly classified in his/her position.

The Employer asserts that section 36.03 envisages that an Employee would trigger the section. As the four employees who have received a level of pay greater than that which they would receive in their classification, they are obviously not grieving their overpayment. No grievance has been filed by or on behalf of the other Ophthalmic Technicians who are not paid beyond the level of their classifications, presumably because they have no grounds to complain under the Collective Agreement.

In addition, the Employer says that the Union has a remedy under clause 36.01. That clause says:

"During the term of this agreement, if a new or revised classification standard is implemented by the Employer, the Employer shall before applying the new or revised classification standard, negotiate with the Union the rates of pay and the rules affecting the pay of employees for the classification affected. If the parties fail to reach agreement within sixty (60) days from the date on which the Employer submits the new or revised standard to the Union, the Employer may apply the new rates of pay and the Union may refer the matter to arbitration. The arbitrator's decision will be retroactive to the date of application of the new rates."

Mr. Dann, for the Union, points out that although this section outlines a negotiations process, that no negotiations took place nor are any possible since clause 36.01 is only applicable during the term of this agreement. The agreement has expired.

Quite apart from the fact that there were no negotiations which appears to be a prerequisite to a matter under this clause being a proper subject for arbitration, the expiry of the agreement makes it impossible to employ that clause.

Mr. Dann agreed with Ms. Haener that clause 36.03 is an employee triggered clause.

During the course of the preliminary objection, Ms. Haener for the Employer submitted that the Employer has admitted and accepted that it has made an error. It has admitted that in paying four Ophthalmic Technicians more than the pay set out in the pay scale, that it has exceeded the amounts of remuneration set out in the Collective Agreement. Since Pay Level 22, which is the applicable level, is a negotiated level, she submits that I would have to re-write the Collective Agreement in order to award the other Ophthalmic Technicians the same as those who have been paid more than the limits in the classification. I agree I would have to do that. I accept that I have no jurisdiction to rewrite the agreement.

Ms. Haener submitted further that in order to protect the pay levels of the four Ophthalmic Technicians, the Employer has availed itself of clause 24.08 to protect those pay levels for those particular employees.

What the Employer is essentially arguing is that because there is no award I can give in favour of any of the Employees, either those who are not paid in excess of Pay Level 22 or with respect to those who were, that I am without jurisdiction. Mr. Dann argues for the Union that I can make a declaratory award and that I have jurisdiction to do so. In his argument, he has referred me to section 41 of the Public Service Act which deals specifically with the binding effect of Collective Agreements and that contrary to what Minister Stephen Kakfwi found at the third level of grievance, there is a requirement to negotiate a new rate of pay for all Ophthalmic Technicians if the Employer wishes to pay some of the Employees in that category at a higher rate.

I find that I do have jurisdiction to deal with this matter on arbitration although I accept as both parties have submitted, that I do not have the authority to re-write the Collective Agreement and I can therefore not provide any satisfaction to the Ophthalmic Technicians who are paid at the Pay Level 22 rates. Furthermore, I cannot and am not being asked to make any award which would affect the pay levels of the four Ophthalmic Technicians paid more than is prescribed in the Collective Agreement for the work they are doing.

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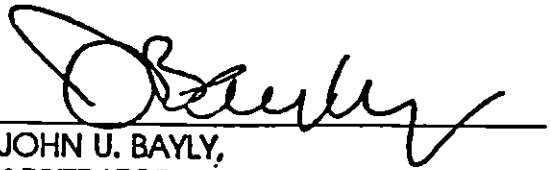
AWARD

Based on the agreed facts as they were provided to me, and set out prior to my dealing with the issue of my own jurisdiction, and having found that I have jurisdiction, I make the following declaratory award:

1. I find that the Collective Agreement is binding on both the Employer and the Employees.
2. I find that the Employer does not have unilateral power to increase rates of pay.
3. I find that clause 1.01 sets out the purposes of the Collective Agreement which are, among other things, to maintain harmonious and mutually beneficial relationships between the Employer and Employees during the term of the agreement.
4. I find that there are provisions in the Collective Agreement providing for re-negotiation.
5. I find that little could more seriously affect the harmonious relationships between the Employer and the Employees than to prefer, for whatever reason, some Employees or recruits in a pay classification over others doing the same or similar work.
6. I accept that the Employer admits it has made a mistake. I agree that it has done so.
7. I find that the Employer has sought at least to protect the Employees who were paid more than the amount required and negotiated for those in their classification and that it has done so pursuant to clause 24.08 of the Collective Agreement in order to keep its bargain with them. To a limited extent, I cautiously applaud that.
8. I find that there is unfortunately nothing I can do to re-dress the disharmony visited on the other Ophthalmic Technicians within the same class as those receiving the extra pay without re-writing the Collective Agreement. Without

re-writing the Collective Agreement, I cannot raise their pay levels. I cannot nor should I contemplate lowering the pay of the four technicians being paid outside and beyond the classification limits. I can only accept and trust that the Employer will follow through with the assurances given to me at this arbitration and will observe the provisions of successor Collective Agreements in similar situations in the future.

Heard at the City of Yellowknife in the Northwest Territories this 18<sup>th</sup> day of January, 1994.

  
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JOHN U. BAYLY,  
ARBITRATOR