Citation: *Jones v. Yukon (Highways and Public Works)*, 2020 YKSM 1

Date: 20200508
Docket: 18-S0069
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Chief Judge Chisholm

OLIVER JONES

Plaintiff

v.

GOVERNMENT OF YUKON
(HIGHWAYS AND PUBLIC WORKS)

Defendant

Appearances:
Oliver Jones — Appearing on his own behalf
Rachel Gutman — Counsel for the Defendant

RULING ON APPLICATION

Introduction

[1] The Defendant, Government of Yukon ("Yukon"), applies to strike the Plaintiff's Claim on the basis that it discloses no reasonable cause of action. The Application is made pursuant to s. 46(4)(a) of the *Small Claims Court Regulations* (OIC 1995/152, as amended by 2011/04) (the "*Regulations*").

Background

[2] The facts for the purposes of this Application are as set out in the Plaintiff's Claim. The parties also filed affidavit evidence and made extensive submissions. The

Plaintiff, ("Mr. Jones"), worked as a policy analyst for Yukon between July 2011 and January 2018. He resigned from his position with Yukon effective January 12, 2018. Upon the termination of his employment, Yukon did not pay him monies owed in lieu of outstanding vacation leave credits.

[3] Specifically, as of his termination date, Mr. Jones had 98.5 hours of vacation leave credits, but did not receive a payout of these credits as part of his final payment. Additionally, Yukon recovered further monies from Mr. Jones equaling an amount equivalent to 114 hours of vacation leave credits. Mr. Jones admits in his pleadings that Yukon erroneously credited him with unearned vacation leave in both 2013 and 2014.

[4] When Mr. Jones learned of the adjustments that Yukon had unilaterally made to his termination package, he was no longer employed with Yukon and no longer had access to the leave management system. He communicated with government personnel for a period of time to better understand the unanticipated changes to his termination package and to attempt to resolve the matter. Approximately 10 months after learning of this situation, he filed a Claim in this Court.

[5] Mr. Jones' Claim alleges that Yukon has been unjustly enriched by its actions. He seeks $11,488.26 and costs from Yukon.

[6] After oral and written arguments on this Application, Yukon advised the Court by way of a letter, on which Mr. Jones was copied, that it would be making a payment to Mr. Jones in the amount of $1,835.39.

Issue

[7] The issue to be determined in this Application is whether this Court has jurisdiction over the matters raised by Mr. Jones in his Claim, or whether his recourse is solely through the collective agreement grievance process.

Positions of the Parties

[8] Yukon submits that Mr. Jones' employment was subject to a Collective Agreement and that his dispute must be brought by way of a grievance through his bargaining agent. It argues that the grievance process is the appropriate avenue, as the essential character of this dispute is Yukon's ability to withhold and recover leave, which entails an interpretation and application of articles of the Collective Agreement.

[9] Yukon submits that as the subject matter of the Claim arises from the Collective Agreement, this Court has no jurisdiction to hear this matter.

[10] Mr. Jones submits that, despite parts of his initial pleadings, the provisions of the Collective Agreement are inapplicable to this fact situation, as his employment had ended at the time Yukon unilaterally adjusted his leave credits to his financial detriment. This is a matter that should be dealt with under the common law, as Yukon has been unjustly enriched by its actions.

[11] In any event, Mr. Jones contends that Yukon has invalidated any grievance process, as he made attempts to resolve the matter directly with Yukon soon after learning of Yukon's actions in regards to his vacation leave, and without the assistance of his Union, which he believed he could no longer access as an ex-employee.

[12] Additionally, Mr. Jones argues that if the Court accedes to Yukon's Application to strike, he would have no other legal avenue to address his dispute with Yukon. This is so because the Union has refused, on two occasions, to represent him in this matter because it states that he was not within the requisite grievance timelines.

Analysis

[13] Section 46(4)(a) of the *Regulations* reads:

> (4) The court may strike out or amend a pleading, or anything in a pleading, on the grounds that
>
> (a) it discloses no reasonable cause of action or defence
>
> …
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, or may impose such terms as are just.

[14] A defendant's application to strike a claim will only be successful if it is "plain and obvious" that the claim discloses no reasonable cause of action (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at para. 18; and *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 17).

[15] The Court in *Imperial Tobacco* held that, assuming the facts pleaded to be true, it must be obvious that "the claim has no reasonable prospect of success".

Should the Claim be struck for lack of jurisdiction?

[16] The Supreme Court of Canada has held that mandatory arbitration clauses in collective agreements deprive courts of their concurrent jurisdiction in disputes that expressly or inferentially arise out of those agreements, subject to residual discretion.

Labour relations legislation "generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement", (*Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at para. 67).

[17] As outlined by the Supreme Court of Yukon in *Kornelsen v. Yukon*, 2019 YKSC 69, ("*Kornelsen No. 1*"), the decision in *Weber* has been further considered and extended in the last 25 years:

> [47] In *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, the Supreme Court of Canada extended the approach adopted in *Weber* to statutory dispute resolution mechanisms in employment matters. In coming to that determination, Bastarache J. stated:
>
> > [26] …the rationale for adopting the exclusive jurisdiction model was to ensure that the legislative scheme in issue was not frustrated by the conferral of jurisdiction upon an adjudicative body that was not intended by the legislature. …
>
> [48] More recently, in *Beaulieu v. University of Alberta (Governors)*, 2014 ABCA 137 ("*Beaulieu*"), at para. 36, the Alberta Court of Appeal reiterated that: "Where labour legislation and a collective agreement establish a dispute resolution procedure, that procedure must be followed and should not be duplicated or undermined by concurrent court action: *Weber* at para 58; *Young Estate* at para 29. …"

[18] In *Weber*, at para. 43, the Court reiterated the principle that "…the analysis of whether a matter falls within the exclusive arbitration clause must proceed on the basis of the facts surrounding the dispute between the parties, not on the basis of the legal issues which may be framed". The question to be resolved is whether the conflict is one which materialized under the collective agreement.

[19] I note that the Collective Agreement in force at the relevant time of this dispute is part of a comprehensive statutory scheme, which also includes the Yukon *Public*

Service Labour Relations Act, R.S.Y. 2002 c.185, ("Yukon *PSLRA*"). As a result of the legislative and collective agreement framework, a robust dispute resolution procedure exists in which employees and/or the Union, on behalf of an employee, may employ the grievance process (ss. 77 and 78 of the Yukon *PSLRA* and Article 28 of the Collective Agreement).

[20] In making a determination as to the appropriate forum, *Weber* held that a judge or arbitrator must consider both the nature of the dispute and the scope of the collective agreement (paras. 50-54).

[21] The decision in *Kornelsen No. 1* outlines the process, as follows:

> [51] …
>
> a. what is the nature or "essential character" of the dispute; and
>
> b. does the "essential character" of the dispute fall within the scope of the collective agreement (*Weber*, at para. 51), or more specifically in this case, the scope of the combined application of the territorial legislation and the collective agreement.
>
> [52] Therefore, the question at the core of the inquiry in this case is whether the essential character of the dispute arises from the interpretation, application or violation of the combined application of the collective agreement and labour legislation.
>
> [53] If the essential character of the dispute falls within the ambit of the exclusive dispute resolution procedures set out in the legislation and collective agreement, then the arbitrator has exclusive jurisdiction over the matter unless the court is of the opinion that this is one of those exceptional cases where it is called upon to exercise its inherent jurisdiction in granting remedies not available to the arbitrator (*Beaulieu*, para. 21).

[22] In the matter before me, the dispute between the parties is whether Yukon properly applied the terms of the Collective Agreement in calculating monies owing to Mr. Jones upon his resignation. It is not, as submitted by Mr. Jones, a matter arising outside "the temporal boundaries of the employment contract" (as considered in *Goudie v. Ottawa (City)*, 2003 SCC 14).

[23] Mr. Jones expressly acknowledges such in his Claim in which he submits that Yukon unreasonably failed to pay him for his services, specifically:

> 1. Upon my resignation from the Government of Yukon, [Yukon failed] to pay me cash for vacation leave credits outstanding according to 23.06(1) (Appendix A) of the Collective Agreement between Government of Yukon and the Public Service Alliance of Canada…
>
> …
>
> 3. [Yukon misapplied] the Collective Agreement in an attempt to recover monies they inaccurately believed I owed to them.
>
> 4. [Yukon unfairly withheld and so failed] to pay me all the money owed to me upon my resignation from the Public Service according to sections 19.05 (Appendix B), and 25.04(2) (Appendix C) of the Collective Agreement.

[24] Therefore, the essential character of this dispute clearly arises within the scope of the Collective Agreement.

[25] However, Mr. Jones contends that since he was no longer an employee of Yukon when it calculated his termination benefits, the Collective Agreement no longer applied to him.

[26] The definition of "employee" is found at section 1(1) of the Yukon *PSLRA,* and reads:

> …
>
> "employee" means a person employed in the public service other than
>
> …
>
> and for the purpose of this definition, a person does not cease to be employed in the public service only because of their ceasing to work as a result of a lawful strike or only because of their discharge contrary to this or any other Act;

[27] Section 77 of the Yukon *PSLRA* sets out the right of an employee to present a grievance concerning the interpretation or application of a provision of a collective agreement or with respect to any matter affecting the terms and conditions of employment. That grievance may be pursued through to adjudication and any decision resulting from such adjudication is deemed final pursuant to s. 86 of the Yukon *PSLRA*.

[28] Section 77(1) and (2) of the Yukon *PSLRA* read:

> 77(1) When any employee feels aggrieved
>
> (a) by the interpretation or application in respect of the employee of
>
> (i) a provision of an Act, or of a regulation, bylaw, direction, or other instrument made or issued by the employer, dealing with terms and conditions of employment, or
>
> (ii) a provision of a collective agreement or an arbitral award; or
>
> (b) as a result of any occurrence or matter affecting the employee's terms and conditions of employment, other than a provision described in subparagraph (a)(i) or (a)(ii)
>
> in respect of which no administrative procedure for redress is provided in or under an Act, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

> (2) An employee is not entitled to present any grievance relating to the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies, or any grievance relating to any action taken pursuant to an instruction, direction, or regulation given or made as described in section 100.

[29] In *The Queen v. Lavoie*, [1978] 1 F.C. 778 (C.A.), the Federal Court of Appeal considered the jurisdiction of the Public Service Staff Relations Board to grant an extension of time to a former employee of the Government of Canada to present a grievance with respect to a disciplinary dismissal. The Court held that s. 90(1) of the *Public Service Staff Relations Act,* R.S.C. 1970, c.P-35, (no longer in force), the language of which is almost identical to s. 77 of the Yukon *PSLRA*, "…must be read as including any person who feels…aggrieved as an 'employee'",(para. 10).

[30] The Federal Court has interpreted the *Lavoie* decision as "…[preserving] the right of former employees to grieve where the matter giving rise to the grievance arose during the course of the individual's employment, where the individual was 'aggrieved as an employee'", (*Salie v. Canada (Attorney Gerneral)*, 2013 FC 122, at para. 61).

[31] It should be pointed out that in *Salie*, the Court accepted jurisdiction over the application based on a finding that Mr. Salie had not been "aggrieved as an employee" when his former employer attempted to recover, approximately two years after he left his position, a mistaken double-payment of severance pay.

[32] In *Price v. Canada (Attorney General)*, 2016 FC 649, the plaintiff, a former federal public servant sought damages arising from his alleged mistreatment by senior managers in the Federal Public Service. After having engaged in the grievance

process, and despite his apparent success in having his performance rating changed, Mr. Price filed an application for judicial review of the decision allowing his grievance. The Attorney General applied to strike the plaintiff's statement of claim on grounds which included that it disclosed no reasonable cause of action.

[33] Fothergill J. held that the plaintiff's complaints in the application "were clearly rooted in his employment relationship with [his former employer]" (para. 29). Therefore, Mr. Price had been "aggrieved as an employee" and the only forum available to him for the relief he sought was the grievance process found in the federal *Public Service Labour Relations* legislation.

[34] More recently, in *Santawirya v. Deputy Head (Canada Border Services Agency)*, 2019 FCA 248, the Federal Court of Appeal stated, at para. 11:

> Section 208 provides that an "employee" can file a grievance under the PSLRA. The law is clear, however, that the scope of the term "employee" is broader than the definition set out in subsection 206(1) of the legislation, which confines "employee" to "a person employed in the public service of Canada." If the material facts giving rise to a grievance occurred while a person was an employee, that person is entitled to file a grievance, even if his or her employment has subsequently ended. There are many examples of the application of this principle in the case law, stretching back close to half a century (*The Queen v. Lavoie*, [1978] 1 F.C. 778 (C.A.) at p. 783, 18 N.R. 521; *Salie v. Canada (Attorney General)*, 2013 FC 122 at paras. 60-61, 225 A.C.W.S. (3d) 1001; *Price v. Canada (Attorney General)*, 2016 FC 649 at para. 24, 268 A.C.W.S. (3d) 866).

[35] As noted, the dispute before me arose soon after and as a result of Mr. Jones leaving his employ with Yukon. The nature of the dispute directly relates to this employment. Mr. Jones challenges Yukon's authority to unilaterally reduce his vacation leave credits years after they had been credited to his leave account, and to

concurrently reduce his termination benefits. These credits were allegedly earned while he was an employee of Yukon. For the purposes of his dispute with Yukon, Mr. Jones is an employee of Yukon, notwithstanding that he had recently left his employment when this matter occurred.

Has the grievance process been frustrated and rendered meaningless for the Plaintiff?

[36] Mr. Jones did make efforts to better understand and remedy this matter soon after he became aware of it. He appears to have received revised paperwork for his leave credits, dated January 29, 2018. On February 1, 2018, he wrote to a human resources employee, with whom he had been dealing with on another matter, about his outstanding leave balance having been turned into a substantial deficit, resulting in over $7,000 having been recouped by Yukon. He received a response from the human resources employee the following day indicating that he had been credited in the first few years of his employment with vacation leave to which he was not entitled.

[37] On February 10, 2018, Mr. Jones made an access to information request to Yukon with respect to all of his vacation transactions from July 1, 2012 to the date of his request. He alleges that he only received printed transaction records, but that a response to his request should have included “all communication records and decision records surrounding [his] vacation transactions…”.

[38] Mr. Jones subsequently made a comprehensive written complaint to Yukon on March 15, 2018 regarding this matter. Yukon did not provide a substantive response until May 28, 2018, in which it denied, amongst other things, having failed to apply the Collective Agreement.

[39] Mr. Jones asserts that this history, as summarized above, demonstrates his repeated attempts to engage Yukon in finding a fair resolution to this matter. He contends that these efforts constituted a grievance, despite the fact that his complaints were not in a form supplied by Yukon. He points out that Article 28.03 of the Collective Agreement states:

> A grievance of an employee or group of employees shall not be deemed to be invalid by reason only of the fact it is not in accordance with the form supplied by the Employer.

[40] Mr. Jones ultimately filed his Claim on December 4, 2018. Yukon filed a Reply on December 14, 2018, pleading that this Court does not have jurisdiction and that his dispute "must be brought by way of a grievance to his bargaining agent".

[41] Upon receiving Yukon's Reply, Mr. Jones contacted his Union, the Yukon Employees' Union ("YEU"). On December 18, 2018, YEU summarily rejected his request for assistance, indicating that he was out of time to file a grievance. Around the time of the hearing of Yukon's Application to strike, Mr. Jones again contacted YEU in writing, at the Court's urging, to determine if it would reconsider its position. It appears from the Collective Agreement that the timelines for filing a grievance may be waived by agreement of the parties. Again, YEU summarily rejected this request, referring again to the missed timelines. The replies from YEU reveal no attempts to analyze substantively the situation in which Mr. Jones found himself.

[42] It is not for me to determine whether the complaints of Mr. Jones are likely to succeed in any grievance process, nor how the time limits that apply to grievances should be interpreted. Nevertheless, I note that it appears that nobody put their mind to

the fact that Mr. Jones' actions, in informally challenging Yukon's calculations of his termination of employment benefits, may have engaged the Yukon *PSLRA* and the Collective Agreement. Mr. Jones viewed his status as an ex-employee of Yukon as preventing him from obtaining the assistance of his Union. Based on the record before the Court in this Application, the human resources' personnel with whom Mr. Jones corresponded do not appear to have considered his complaints to constitute a grievance. Finally, when asked to assist, the YEU appears to have taken a narrow view of the issue, focusing solely on the issue of time limits.

[43] I understand Mr. Jones' frustration with respect to the manner in which this matter has unfolded. However, there is nothing in the record before me to demonstrate that Yukon intentionally, or unintentionally for that matter, misled Mr. Jones when responding to his complaints. Yukon, of course, was not privy as to whether any contact between Mr. Jones and the YEU had transpired, and would have had no knowledge of the mistaken impression Mr. Jones harboured with respect to his status, as an ex-employee, with the YEU. Yukon's Reply to this action is that it is properly brought by way of grievance through the YEU. Yukon does not suggest that it would be unwilling to proceed through the grievance process, which is a reasonable position for it to take in all the circumstances.

[44] Mr. Jones' frustrations in this matter undoubtedly extend beyond his inability to achieve a mutually agreeable resolution with Yukon, and include the non-action of the YEU once he alerted them to his plight and how it had unfolded. However, even if Mr. Jones had included YEU as a party to this action, I would have concluded that in all the circumstances this would not be the proper forum to seek recourse.

[45] Recently, the Yukon Supreme Court has found that even where the duty of fair representation is not codified, "the existence in the Yukon *PSLRA* of an exclusive right of the Union to bargain and represent employees gives rise to a corresponding obligation to do so fairly, implicit in the statute" (*Kornelsen v. Yukon Employees Union*, 2020 YKSC 1 ("*Kornelsen No. 2*"), at para. 44). However, as set out in *Kornelsen No. 2*, at para. 56, all of the relevant considerations point to jurisdiction properly vesting in the Yukon Public Service Labour Relations Board.

[46] Considering the history of this dispute, it would seem both fair and reasonable, that if Mr. Jones were to bring a complaint under the Yukon *PSLRA* against the YEU, the Union would take no position on any limitations argument (see *Kornelsen* No. 2, at para. 60).

Conclusion

[47] As a result, Yukon's Application pursuant to s. 46(4)(a) of the *Small Claims Court Regulations* to strike Mr. Jones' Claim is granted, on the basis that the pleadings, if accepted as true, do not establish that this Court has jurisdiction.

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CHISHOLM C.J.T.C.