SUPREME COURT OF YUKON

Citation: *Jirousek v. Yukon (Government of)*, 2021 YKSC 19

Date: 20210323
S.C. No. 20-AP004
Registry: Whitehorse

BETWEEN:

ANN JIROUSEK

PETITIONER

AND

GOVERNMENT OF YUKON
and
IAN R. MACKENZIE

RESPONDENTS

Before Chief Justice S.M. Duncan

Appearances:

Luke S. Faught	Counsel for the Petitioner
I.H. Fraser	Counsel for the Respondent, Government of Yukon
Ian R. Mackenzie	No one appearing

RULING
(Preliminary Objection to Judicial Review)

Introduction

[1] This application for judicial review seeks to set aside an interlocutory decision of the adjudicator for want of jurisdiction because he was not appointed properly according to s. 65 of the *Education Labour Relations Act*, R.S.Y. 2002, c. 62 ("*ELRA*"). The respondent Government of Yukon ("Yukon") makes a preliminary argument that this matter should have been raised first before the adjudicator and not brought as an

application for judicial review to this Court. This ruling addresses this preliminary argument.

Facts

[2] The adjudicator, Ian R. Mackenzie, was appointed by the Yukon Teachers Labour Relations Board ("the Board"). He was assigned to adjudicate the grievance brought by the Yukon Teachers' Association ("YTA") of the termination for cause of the employment of Ms. Ann Jirousek by the Deputy Minister of Education.

[3] YTA and Ms. Jirousek provided to counsel for Yukon a report of an independent medical examination ("IME") performed on her that they intended to rely on at the hearing. Yukon made a preliminary application by written submissions to the adjudicator for an order for Ms. Jirousek to submit to a second IME. YTA opposed Yukon's application by way of written reply. The adjudicator decided in favour of Yukon and issued a production order with conditions for Ms. Jirousek to attend for a second IME, as well as his reasons for decision, in writing, on September 22, 2020.

[4] YTA seeks judicial review of the adjudicator's decision because they claim he acted without statutory authority. The Board appointed the adjudicator for a second term on June 1, 2020, without consulting with YTA. Section 65(1) of the *ELRA* states:

> The board shall appoint, **after consultation with the employer and the bargaining agent**, such persons, to be called adjudicators, as may be required to hear and adjudicate upon grievances referred to adjudication under this Act. (emphasis added)

Proper Petitioner

[5] The petition was brought in the name of Ann Jirousek, not YTA. Generally, a grievor does not have standing to bring an application for judicial review from the

decision of an adjudicator or arbitrator (see *Alford v. Government of Yukon*, 2006 YKCA 9, paras. 14-26, decided under the *Public Service Act*, R.S.Y. 2002, c. 183). Yukon objects to Ann Jirousek as petitioner because she lacks standing.

[6] Counsel for the petitioner agreed to substitute YTA for Ms. Jirousek. Yukon has consented. Thus, an order on consent will be issued to amend the petition to show YTA and not Ann Jirousek as the petitioner.

Preliminary Issue – Should this matter be decided by the Court or adjudicator?

[7] This petition raises the preliminary issue of whether this Court should exercise discretion to consider the application to set aside the adjudicator's decision to order a second IME, on the basis of his lack of jurisdiction, or whether this question should be decided by the adjudicator. It requires an assessment of whether adequate alternative remedies exist and have been exhausted; and whether the *ELRA* provisions about final orders and judicial review are sufficient to oust the application of the common law principles favouring deference by the court.

Positions of the Parties

a. Petitioner

[8] The issue on the underlying application for judicial review is whether the Board's failure to consult YTA under s. 65(1) of the *ELRA* before appointing the adjudicator for a second term means he is without jurisdiction or statutory authority to order Ms. Jirousek to submit to a second IME. Section 65(4) authorizes the powers of the adjudicator on condition they have been appointed pursuant to s. 65. The absence of consultation and resulting inappropriate appointment constituted a failure to observe a principle of natural

justice and/or an act beyond the adjudicator's jurisdiction (s. 95(1)(a) *ELRA*); and/or an error of law in making the order (s. 95(1)(b) *ELRA*).

[9] On the preliminary issue of whether or not the Court should decide this matter, the petitioner relies on ss. 94 and 95 of the *ELRA* to justify the Court application. Section 94 provides:

> … every order, award, direction, decision, declaration, or ruling of an adjudicator is final and shall not be questioned or reviewed in any court except in accordance with section 95 …

This is subject to s. 15.6, which is not relevant here. Section 95 sets out various grounds of judicial review, including those relied on in this case (see para. 8 above). Counsel for the petitioner argues that these clear statutory provisions make the common law principles on which Yukon relies inapplicable.

[10] Counsel says the petitioner could not have raised this issue earlier because they did not know until they received the September 22, 2020 written decision on September 25, 2020, who the adjudicator was. The petitioner says there was no positive obligation on them to ensure the assignment of a lawfully appointed adjudicator; instead, there is a presumption of regularity that applies to the Chair of the Board's exercise of discretion that the petitioner is entitled to rely on. There was no waiver or acquiescence because the petitioner took no fresh steps once they realized there was a jurisdictional issue, but instead brought this petition.

b. Respondent (Government of Yukon)

[11] Counsel for Yukon states judicial review is a discretionary remedy. The Court should not exercise its discretion to grant judicial review in this case because: i) questions of jurisdiction should be decided by the adjudicator, an adequate alternative

remedy that has not been exhausted here; and ii) YTA failed to object to the adjudicator's appointment before he issued his decision and order.

[12] The question of whether consultation was required under the statute in the circumstances is a question of mixed law and fact that the adjudicator is best placed and able to consider. Having the adjudicator decide the jurisdictional issue is consistent with the principles related to adequate alternative remedies set out in the common law and with principles of deference set out in the decision of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*"). The provisions in the *ELRA* do not oust the common law principles in the circumstances of this case.

[13] Counsel for Yukon says there is no evidence that no one at YTA knew about the adjudicator's appointment, or alternatively, that they were unable to ascertain his identity before the preliminary application. In other words, the adjudicator's identity was either in YTA's knowledge or constructive knowledge before he made his decision to order a second IME. YTA could and should have raised the jurisdictional objection before this decision. The fact that they did not do so constitutes waiver of any objection to the adjudicator's appointment or acquiescence to it. There was also no evidence that YTA would have objected to the adjudicator's appointment for a second term had they been consulted on it.

[14] Yukon clarified at the outset of the hearing that they intended to rely only on their preliminary argument that the Court should not hear this judicial review. Yukon made no argument on the merits of the underlying application for judicial review; that is, whether the adjudicator's appointment was valid under the statute. Counsel confirmed that if this matter were returned to be argued before the adjudicator, Yukon would not concede

that consultation was required before the adjudicator's second appointment. Their argument would include, among other things, examining the meaning of "consultation" or "consult" in the *ELRA,* where it appears five times.

Short Conclusion

[15] The question of whether the adjudicator was properly appointed under the statute should be sent to the adjudicator for determination. This is consistent with the Supreme Court of Canada jurisprudence stating the court should decline to grant relief in a judicial review where there is an adequate alternative remedy. Such a remedy can include recourse in the forum in which the litigation is occurring (*Strickland v. Canada (Attorney General),* 2015 SCC 37, at paras. 40-45) (*"Strickland"*). This is an attempt to judicially review the adjudicator's authority to make any decision. The adjudicator has not considered this issue. As a result, the wording in s. 65 of the *ELRA* does not preclude the adjudicator from deciding the jurisdictional issue.

Analysis

a. Judicial review not appropriate

[16] Judicial review is discretionary. Even if the petitioner has a case on the merits, the court can still exercise its discretion to refuse relief. The inquiry in this case involves a balancing of factors. The court must first determine whether there is an adequate alternative remedy. Then the court must still consider whether judicial review is appropriate based on relevant considerations, many of which are similar to the alternative remedy determination.

[17] The Supreme Court of Canada in *Strickland* set out a number of relevant considerations for the court in determining whether the alternative remedy in all the

circumstances is adequate to address the grievance. The categories of considerations are not closed.

[18] Some relevant considerations include: i) the convenience of the remedy; ii) the nature of the error alleged; iii) the existence of adequate recourse in the forum where the litigation is taking place; iv) the relative expertise of the alternative decision-maker; v) economic use of judicial resources; vi) cost (*Strickland*, para. 42).

[19] These considerations favour the adjudicator deciding the matter in this case, the alternative remedy.

[20] First, it is convenient for the adjudicator to make a decision about whether he has jurisdiction. If he decides he does not have jurisdiction, that will be the end of the matter, as a new adjudicator will be appointed. Yukon indicated at the hearing before me that they would not seek judicial review of that decision if it were made. If the adjudicator decides that he does have jurisdiction, then once a final decision on the grievance is made, YTA has another ground if they choose to judicially review it, this time based on a full record and reasons on the jurisdictional issue.

[21] Second, the nature of the error alleged is a jurisdictional one. A determination of whether there was an error of jurisdiction in this case requires both an interpretation of the statute and an inquiry into the factual circumstances. It is a question of mixed fact and law. A factual inquiry into the usual practice of consultation in this context, as well as into the specific occurrence in this case, is necessary. A legal interpretation of consultation in the statute and its application to the circumstances here is also necessary. These inquiries are more appropriately made by the adjudicator than the court.

[22] The law is clear that adjudicators or arbitrators are competent to decide questions about their own jurisdiction. The doctrine was summarized in *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, at para. 11:

> … The majority of the Court held that, when an arbitration clause exists, any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone. Where a question concerning jurisdiction of an arbitrator requires the admission and examination of factual proof normally courts must refer such questions to arbitration. **For questions of mixed law and fact, courts must also favour referral to arbitration, and the only exception occurs where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration** (emphasis added).

[23] In this case, the exception set out in *Rogers* does not apply.

[24] Third, adequate recourse may be obtained before the adjudicator. Full arguments about whether he was properly appointed according to the *ELRA* can be made before him. His decision will allow the grievance process to move forward. Courts have characterized reconsideration by the original decision-maker as an alternative administrative remedy (*Saskatoon (City) v. Walmart*, 2019 SKCA 3, at para. 42). YTA is not without recourse if they disagree with a decision that the adjudicator has jurisdiction, as this may still form a ground for judicial review at the conclusion of the hearing.

[25] Fourth, the adjudicator's expertise to decide this matter is greater than that of the Court. The issue requires an interpretation of the "home statute", the *ELRA*, with which he is more familiar than the Court, because he interprets and applies it regularly. To answer the jurisdictional question, an interpretation of consultation as it appears

throughout the *ELRA*, including in s. 65, is necessary. This matter also requires an inquiry into the process and past practice of consultation in the context of appointments of adjudicators by the Board under s. 65. Knowledge of and experience with this process and practice of consultation and appointments, as well as the facts in this case, are more accessible to the adjudicator, than to the Court.

[26] Fifth, a decision by the adjudicator, especially at a preliminary stage, saves judicial resources. The principle of deference by the courts has been promoted by the Supreme Court of Canada in many decisions and most recently in *Vavilov.* Deference is particularly warranted in the context of interlocutory decisions. "[J]udicial review of interlocutory decisions should only be undertaken in the most exceptional of circumstances" (*C.B. Powell v. Canada*, 2010 FCA 61 ("*Powell*"), at para. 33). If judicial review is sought, it is a more economical use of judicial resources to wait until a final decision of the matter is made.

[27] Finally, as a general rule, court applications are more costly because of filing fees, more formal process requirements, and stricter evidentiary requirements.

[28] The *Strickland* test can be summarized as follows: "is the alternative remedy adequate in all the circumstances to address the applicant's grievance" (*Strickland*, para. 42). In this case, for the reasons noted above, the adjudicator is an appropriate decision-maker on the jurisdictional issue. This is also in keeping with the general principle set out in *Powell:*

> … absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. … [O]nly when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. … (para. 31).

[29] The preliminary issue in this case also involves a determination by the Court of the suitability and appropriateness of judicial review. Factors similar to the adequate alternative remedy inquiry are considered. It is a balancing exercise that also takes into account the purposes and the policy considerations underpinning the legislative scheme in issue. Professor David Mullan (D.J. Mullan, "The Discretionary Nature of Judicial Review", in R.J. Sharpe and K. Roach, eds, *Taking Remedies Seriously: 2009* (Montréal: Canadian Institute for the Administration of Justice, 2010), at 447, as quoted in *Strickland*, at para. 44, described this balancing exercise as follows:

> … the courts focus on the question of whether the application for relief is appropriately respectful of the statutory framework within which that application is taken and the normal processes provided by that framework and the common law for challenging administrative action. Where the application is unnecessarily disruptive to normal processes … the courts will generally deny relief [p.447] (emphasis already added)

[30] In this case, YTA argues that ss. 94 and 95 of the *ELRA* make judicial review appropriate. YTA says the adjudicator's decision on the preliminary application clearly falls under s. 94 as an order that is final, and thus eligible to be judicially reviewed under s. 95 on the grounds of alleged absence of jurisdiction, among other grounds.

[31] The only challenge raised in this judicial review is a challenge to the ability of the adjudicator to make any decision because of his invalid appointment. It is not a challenge otherwise to the legal appropriateness of the adjudicator's preliminary production order. The objection to the validity of the adjudicator's appointment under the statute could have been made to him before he made any decision in this grievance. The adjudicator has had no opportunity to consider the jurisdictional question. There is no final decision on this issue to be reviewed by the Court, as contemplated in ss. 94

and 95 of the *ELRA*. Judicial review at this time is disruptive to the adjudication process and contrary to the common law principles.

[32] On balance, considering all of the factors raised in the common law and considering the statutory provisions and the context of this case, judicial review of the jurisdictional objection that the adjudicator was not properly appointed is not appropriate at this time.

b. Did YTA have knowledge or constructive knowledge of the adjudicator?

[33] Given my finding on the inappropriateness of judicial review, it is not necessary to rule on this issue. I will not address the presumption of regularity argument or whether YTA could or should have inquired in advance about the identity of the adjudicator. However, I will make one observation.

[34] There is a suggestion in Yukon's argument, without evidence, that there was a case management telephone conference call on July 30, 2020, with the adjudicator, counsel, the YTA, and the Registrar. If this is correct, then YTA knew at that time the identity of the adjudicator, before he made his decision on Yukon's preliminary application. There is no evidence from YTA on this particular point; however, the grievor's YTA representative swears he did not know the identity of the adjudicator until after receiving the September 22, 2020 decision. There is no evidence from YTA that no one else from YTA knew or could have known the identity of the adjudicator before the September preliminary application.

[35] If YTA did know the identity of the adjudicator before the preliminary application, then I agree with Yukon that YTA's failure to raise the jurisdictional objection before the adjudicator decided Yukon's preliminary application is fatal to the judicial review (*New*

Brunswick v. Dunsmuir, 2005 NBQB 270; aff'd on other grounds, 2008 SCC 9, at paras. 32-35; *Burns v. Hodgson*, [1945] O.R. 876).

[36] However, I have insufficient evidence before me to decide this issue.

Conclusion

[37] On consent, YTA will be substituted for Ann Jirousek as the petitioner.

[38] This application for judicial review is dismissed. There is an adequate alternative remedy to have the matter determined before the adjudicator. Judicial review is not appropriate in the circumstances for the reasons set out above.

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DUNCAN C.J.