SUPREME COURT OF YUKON

Citation: *Kornelsen v. Yukon*, 2019 YKSC 69

Date: 20191220
S.C. No. 17-A0067
Registry: Whitehorse

BETWEEN

JEANNIE KORNELSEN

PLAINTIFF

AND

GOVERNMENT OF THE YUKON TERRITORY

DEFENDANT

Before Madam Justice E.M. Campbell

Appearances:
Jeannie Kornelsen — Appearing on her own behalf
Karen Wenckebach — Counsel for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The plaintiff was a long-time employee of the Government of Yukon ("Yukon"). She was a member of a bargaining unit covered by a collective agreement. The plaintiff was dismissed in 2015. Following her dismissal, the plaintiff filed a claim against Yukon in this Court seeking damages for an employment related claim.

[2] Yukon brings this application to strike the plaintiff's amended statement of claim on the basis that the Supreme Court of Yukon lacks jurisdiction over the plaintiff's claim and, in the alternative, that the plaintiff's amended statement of claim is embarrassing.

BACKGROUND

[3] The plaintiff claims damages against Yukon for constructive dismissal, breach of employment contract, intentional infliction of emotional distress, and conspiracy to harm her. She also seeks punitive, aggravated and exemplary damages for the manner in which Yukon dealt with her. She alleges that she suffered mental distress because Yukon dismissed her in a way that was cruel and humiliating. She also alleges that Yukon dismissed her in a malicious way with the intent of causing her personal embarrassment and/or harm.

[4] The plaintiff's amended statement of claim contains the following factual allegations.

[5] The plaintiff was hired by Yukon as a permanent seasonal employee in 1998 and dismissed in 2015.

[6] She alleges that, in the summer of 2014, she disclosed to a co-worker and to her supervisor that she had recently been sexually assaulted by that co-worker's boyfriend. The plaintiff states that she did so because she knew she needed help and support, and she wanted to protect the co-worker. The plaintiff also knew she would need to take time off for counselling. Soon after, the plaintiff started feeling the effects of post-traumatic stress such as daily anxiety and fear at work. The plaintiff actively sought support through agencies and her employer, but, from the onset, Yukon did not support her. The plaintiff's co-worker and supervisor were not supportive of her either. Instead, her co-worker discounted her trauma and minimized the events. Also, unbeknownst to the plaintiff, her story and her trauma were shared with other co-workers and became a topic of gossip in the office.

[7] The plaintiff alleges that, from then on, she was harassed by her co-workers and supervisor, and mocked in public or on social media by other employees. She alleges her supervisors used excuses, such as that she was displaying inappropriate behaviour and being disrespectful to others, and that she was taking too much time off work, for disciplining her.

[8] The plaintiff states that she was penalized for being a whistleblower by disclosing the harassment she was subjected to in the workplace after disclosing her trauma.

[9] On November 17, 2014, the plaintiff received a letter of reprimand in relation to an argument she had with a co-worker at work in September 2014.

[10] During the winter of 2014 - 2015, the plaintiff actively, but unsuccessfully, sought a new position within government. On December 30, 2014, the plaintiff contacted the Respectful Workplace Office ("RWO") about her situation. A workplace circle was held in April 2015. According to the plaintiff, it did not solve but reinforced the issues she was facing in the workplace. The plaintiff continued to be in contact with the RWO throughout the summer of 2015.

[11] The plaintiff also sought assistance from her union, the Yukon Employee's Union ("YEU") to explore the possibility of a workplace accommodation or transfer. She had her first meeting with a YEU representative in February 2015. The representative explained to the plaintiff what her options were under the collective agreement. However, the plaintiff states that the YEU representative showed little empathy or interest in her situation.

[12] In March 2015, the YEU representative advised the plaintiff that requesting a workplace accommodation would be her best option. The plaintiff states that in support

of a workplace accommodation she provided all the medical information, including a document filled out by her doctor stating that she was suffering from acute stress disorder. However, according to the plaintiff, instead of representing her interest in securing a timely and suitable accommodation for her, YEU worked alongside Yukon against her interest. The plaintiff states that there was no real effort made to find an appropriate workplace accommodation for her, as YEU and Yukon discounted her trauma and the effects it had on her, as well as her experience in the tourism industry.

[13] The plaintiff alleges that in May 2015, by the end of her first assignment workplace accommodation, she received notice that she was no longer allowed to enter the premises of her place of work. The plaintiff's second workplace accommodation was an off-site assignment. The constraints related to that assignment triggered a recurring medical issue for which the plaintiff received treatment during a short visit at the hospital. According to the plaintiff, Yukon then used her medical issue as an excuse to prevent her from coming back to work and completing her second assignment.

[14] Around that time, the plaintiff faced an accusation of inappropriate behaviour from another employee, which the plaintiff says was false.

[15] The plaintiff states that the location of the third workplace accommodation Yukon proposed to her was unsuitable. She alleges there was anxiety and stress associated with that location due to a past work-related situation, which was known to some of her supervisors.

[16] At some point, the Yukon Disability Management Program became involved in the plaintiff's file. They suggested that the plaintiff consider her options, including short-term and long-term disability.

[17] The plaintiff states that during that time, Yukon required the plaintiff to attend a number of meetings with Human Resources and Disability Management to force her to accept the third workplace accommodation.

[18] In June 2015, Yukon required the plaintiff to update her medical information, which she did.

[19] The plaintiff alleges that on July 3, 2015, she attended the location of the proposed third workplace accommodation. However, the employees, whom she spoke to there, told her they did not know what type of work she was expected to perform at that location. The plaintiff submits that, as a result, she faced constructive dismissal, effective July 9, 2015.

[20] The plaintiff states that despite her constructive dismissal, Yukon continued to harass her with further medical information requests. She also states that she sent numerous emails seeking help from territorial public servants and elected officials to no avail.

[21] On July 31, 2015, the plaintiff received a “Letter of Expectations” from the Director of Tourism regarding respectful interactions with colleagues and directing her to stop contacting elected officials about her employment matter. The letter also reiterated that Yukon had found a suitable workplace accommodation for her, which, the plaintiff points out, she had not agreed to.

[22] The plaintiff states that Yukon continued to send harassing correspondence to her concerning the third workplace accommodation and requesting medical information from her.

[23] Yukon required the plaintiff to attend an Independent Medical Assessment in Vancouver, British Columbia, on September 4, 2015. However, the plaintiff missed her flight to Vancouver and tried unsuccessfully to reschedule the appointment.

[24] On September 4, 2015, the plaintiff alleges that she was summoned to a meeting where she was officially terminated for lack of communications skills and refusing to participate in the accommodation process.

ISSUES

[25] The main issue in this application is whether the labour dispute resolution process provided under the territorial legislation and the plaintiff's collective agreement ousts this Court's jurisdiction over the plaintiff's claim. The application also raises the issue of whether the plaintiff's amended statement of claim complies with the Supreme Court of Yukon's *Rules of Court*.

[26] The questions raised by this application are the following:

A. Should the plaintiff's amended statement of claim be struck on the basis that the Supreme Court of Yukon lacks jurisdiction over her claim?

(a) Is affidavit evidence admissible on this issue?

(b) Does the Supreme Court of Yukon have jurisdiction over the claim?

B. In the alternative, should the plaintiff's amended statement of claim be struck because it is embarrassing?

POSITIONS OF THE PARTIES

[27] As a preliminary issue, Yukon submits that, as an exception to Rule 20(29), this Court should admit the affidavit evidence it tenders in support of its application because it is necessary to determine the main jurisdictional issue. In addition, Yukon submits that the proposed affidavit evidence should be admitted because the allegations contained

in the amended statement of claim are unclear and difficult to follow. On the substantive issue regarding jurisdiction, Yukon submits that the plaintiff was one of its employees; that in the course of her employment she was represented by the YEU; and that she was therefore bound by the terms of the collective agreement as well as by the applicable territorial legislation in place at the relevant time.

[28] Yukon further submits that the essential character of the plaintiff's claim relates to her dismissal. According to Yukon, the territorial legislation, in conjunction with the plaintiff's collective agreement, provide for a complete, final, and binding dispute resolution process with respect to the dismissal of its employees. Under that process, labour adjudicators appointed under the *Public Service Labour Relations Act*, R.S.Y. 2002, c. 185 (as amended), have exclusive jurisdiction over the plaintiff's claim. Yukon further submits that this exclusive dispute resolution process ousts this Court's jurisdiction over the plaintiff's claim. Yukon further submits that, even if the plaintiff's bargaining unit, the YEU, refused to support and pursue the plaintiff's appeal against her dismissal under the administrative process in place, that refusal does not entitle the plaintiff to ignore this administrative process and file a claim against Yukon for wrongful and/or constructive dismissal before this Court.

[29] The plaintiff submits that her claim has merits and is within the purview of this Court. The plaintiff submits that she exhausted all avenues within and outside her collective agreement prior to filing her claim in this Court, and that she made every attempts to remedy her employment situation with Yukon but that she was unfairly turned away. The plaintiff also submits that the YEU did not fulfill its "duty to fair representation" to her and instead worked alongside Yukon to her detriment. The

plaintiff is of the view that there is nothing inherently wrong with the labour dispute process set out in the legislation and the collective agreement. However, the plaintiff submits that the process broke down in her case because Yukon and the YEU did not adhere to it. The plaintiff further submits that, contrary to what the defendant contends, the labour dispute resolution process agreed upon by Yukon and the YEU is not a true alternative to this proceeding as it is unfair, flawed, and "rigged". As a result, the plaintiff submits that this Court has jurisdiction over this matter.

ANALYSIS

A. Should the plaintiff's amended statement of claim be struck on the basis that the Supreme Court of Yukon lacks jurisdiction over her claim(s)?

(a) Is affidavit evidence admissible on this issue?

[30] Yukon brings this application to strike for lack of jurisdiction pursuant to Rule 20(26)(a) of the Supreme Court of Yukon's *Rules of Court*, which provides:

> **Rule 20 – Pleadings Generally**
>
> **Scandalous, frivolous or vexatious matters**
>
> (26) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) It discloses no reasonable claim or defence as the case may be,
>
> …

[31] As per subrule 20(29), no evidence is admissible on an application to strike under subrule 20(26)(a).

[32] According to the *Rules* and in principle, applications to strike proceed solely on the basis of the facts alleged in the relevant pleading, in this case, the plaintiff's

amended statement of claim. Those allegations are assumed to be true for the purpose of the application, unless they are patently ridiculous or incapable of proof (*Hunt v. Carey*, [1990] 2 S.C.R. 959, at p. 980; *Falloncrest Financial Corp. v. Ontario* (1995), 27 O.R. (3d) 1 (O.N.C.A.); *Clark v. Ontario (Attorney General),* 2019 ONCA 311).

[33] However, Canadian courts have recognized that, when a party challenges a court's jurisdiction to hear a claim through an application to strike, affidavit evidence may be admissible if the pleading at issue does not contain factual allegations addressing jurisdiction, or when the factual allegations are not sufficiently particularized to determine the jurisdictional issue (see *MIL Davie Inc. v. Hibernia Management and Development Co.,* [1998] F.C.J. No. 614 (F.C.A.), at para. 8; *Harris v. Canada (Attorney General)*, 2004 F.C.J. No. 1304, at para. 6; *Horseman v. Horse Lake First Nation*, 2005 ABCA 15, at para. 12; and *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85).

[34] While there does not appear to be Yukon caselaw on this particular issue, considering the body of jurisprudence, I see no good reason why this exception should not find application under our *Rules of Court*.

[35] I now turn to the admissibility of the proposed affidavit evidence in this particular case. Yukon requests that the affidavits of two labour relations advisors to the Public Commissioner's Office of Yukon and of a paralegal with the Department of Justice filed in support of its application be admitted: the Affidavit #1 of Mary Hartshorne dated November 2, 2017; the Affidavit #1 of Stephanie Schorr, dated August 17, 2018; and the Affidavit #1 of Darlene Romat, dated October 3, 2018.

[36] The affidavits of Mary Hartshorne and Stephanie Schorr contain specific information regarding the plaintiff's employment, including duration and termination. The Affidavit #1 of Mary Hartshorne refers to the steps taken by the plaintiff to challenge her dismissal. Finally, the three affidavits refer to the plaintiff's collective agreement, parts of which are attached as exhibits to the affidavits.

[37] The plaintiff opposes the admission of the proposed affidavit evidence as she is of the view that her amended statement of claim contains all the facts necessary to adjudicate the issue. In the alternative, the plaintiff submits that, if the affidavit evidence is admitted, some of the dates referred to in the affidavits are inaccurate and should be corrected.

[38] The plaintiff's amended statement of claim is 32 pages long. While it contains numerous emotional and argumentative statements, it also contains a number of factual allegations describing the nature and duration of the plaintiff's employment with Yukon, as well as her specific position and status as a territorial public servant. The amended statement of claim contains information acknowledging that the plaintiff was a member of a bargaining unit, that she was represented by the YEU, and subject to a collective agreement. The allegations of facts also address the alleged circumstances that gave rise to the plaintiff's claim.

[39] However, the amended statement of claim does not contain allegations referring to the specific provisions of the plaintiff's collective agreement. It does not refer to the specific terms of the plaintiff's letter of dismissal and the associated administrative appeal process in place; nor does it describe the steps taken by the plaintiff to challenge her dismissal prior to filing her claim with this Court. I am therefore of the view that the

plaintiff's amended statement of claim is not particularized enough to determine the jurisdictional issue. As a result, I am satisfied that the proposed affidavit evidence is necessary and admissible in this application.

(b) Does the Supreme Court of Yukon have jurisdiction over the plaintiff's claim?

[40] In addition to the facts contained in the amended statement of claim that I referred to at paras. 5 to 24 of this decision, I am of the view that the following facts deposed to in the affidavits filed by Yukon are relevant to determine the issue of jurisdiction.

[41] The plaintiff was a part-time seasonal employee of the Department of Tourism and Culture (working 70 hours bi-weekly).

[42] The plaintiff received a letter of dismissal signed by the Deputy Minister of Tourism and Culture, dated September 4, 2015. The letter first states Yukon's position that it "has made reasonable efforts to accommodate [the plaintiff] due to a medical condition, since March 2015." The letter then identifies the plaintiff's refusal to fully participate "in the accommodation process despite the employer's several unsuccessful attempts to clarify [her] limitations and restrictions" as the main reason for her dismissal. The letter of dismissal refers to a previous letter dated August 10, 2015, in which the plaintiff would have been warned that maintaining her employment was conditional on her active participation in the accommodation process, including providing the detailed medical information requested by her employer. The letter of dismissal states the employer's view that the plaintiff's "inappropriate, disrespectful and threatening communication to [her] supervisors, Disability Management Consultant, human resource staff and others, despite being given a letter of expectation in this regard, is

also concerning and unacceptable." Finally, the letter indicates that the plaintiff was dismissed pursuant to s. 121 of the *Public Service Act*, R.S.Y. 2002, c. 183 (as amended). The letter includes a specific reference to the plaintiff's right to appeal her dismissal by notice in writing to the deputy minister pursuant to s. 132 of the *Public Service Act*.

[43] The plaintiff appealed her dismissal to the deputy minister pursuant to s.132 of the *Public Service Act*. She declined YEU representation at that first stage of the appeal process. However, considering the plaintiff's submissions that she felt that an appeal proceeding before two individuals involved in her dismissal (the Deputy Minister of Tourism and Culture as well as the Director of Tourism) was evidence that the system was "rigged", it is nonetheless unclear whether she fully participated in that process.

[44] The plaintiff's appeal at the deputy minister's level resulted in a settlement agreement. The terms of that settlement agreement are not before this Court. The plaintiff recognizes the existence of a settlement agreement, but submits that it was reached under duress.

[45] Also, even if they are not contained in the plaintiff's amended statement of claim, I am prepared to consider the following allegations of facts that the plaintiff made in her submissions, for the purpose of this application, as the plaintiff is self-represented and to ensure a complete record:

1) the plaintiff tried to file grievances to challenge her dismissal and other events related to her dismissal. However, YEU refused to support her and to file them;

2) the YEU representatives, who accompanied her at meetings during the accommodation process, did not assist the plaintiff and would, on occasion, discipline the plaintiff during and after the meetings;

3) the plaintiff contacted the Human Rights Commission and the Office of the Yukon Information and Privacy Commissioner about her case. However, it is unclear what steps, if any, she took with those bodies prior to filing her claim with this Court.

ANALYSIS

Legal Principles

[46] In *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 ("*Weber*"), the Supreme Court of Canada stated that exclusive arbitration clauses provided in collective agreements oust the courts' jurisdiction over civil matters covered by those clauses, subject to residual discretion.

[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. …"

[49] One of the Supreme Court of Canada's underlying considerations for choosing the exclusive jurisdiction model in *Weber* came from the following statements of Estey J. in *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, at pp. 718-719:

> The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law. These considerations necessarily lead one to wonder whether the *Miramichi* case, *supra*, and cases like it, would survive an objection to the court's jurisdiction if decided today. The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks. (my emphasis)

And at page 721:

> What is left is an attitude of judicial deference to the arbitration process. This deference is present whether the board in question is a "statutory" or a private tribunal (on the distinction in the labour relations context, see *Roberval Express Ltée v. Transport Drivers, Warehousemen and General Workers Union, Local 106*, 1982 CanLII 34 (SCC), [1982] 2 S.C.R. 888, *Howe Sound Co. v. International Union of Mine, Mill and Smelter Workers (Canada), Local 663*, 1962 CanLII 37 (SCC), [1962] S.C.R. 318, affirming (1961), 1961 CanLII 311 (BC CA), 29 D.L.R. (2d) 76, *Re International Nickel Co. of Canada and Rivando*, 1956 CanLII 122 (ON CA), [1956] O.R. 379 (C.A.)) It is based on the idea that if the courts are available to the

> parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration, when adopted by the parties as was done here in the collective agreement, is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of a collective agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement. (my emphasis)

[50] The Supreme Court of Canada further stated in *Weber*, at para. 43, 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. …. Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it.

[51] The Supreme Court of Canada went on to set out the following two-part test to determine whether an arbitrator or the court has jurisdiction over a claim:

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).

[54] Even in cases where the language of the labour dispute resolution scheme has not been found to oust the courts' jurisdiction, the Supreme Court of Canada in *Vaughan v. Canada*, 2005 CSC 11 ("*Vaughan*"), at paras. 2, 17, 22, 25, and 39 stated that while the courts retain a residual discretion to deal with the labour dispute, the general rule of deference should prevail.

What is the nature or "essential character" of the dispute?

[55] As previously stated, the essential character of the dispute is determined on the basis of the facts surrounding the dispute, not on the basis of the legal issues framed by the parties to the dispute.

[56] As stated in *Beaulieu*, at para. 43: "While aspects of the alleged conduct may arguably extend beyond the ambit of the collective agreement, this does not alter the essential character of the dispute: *Kniss* at para. 24."

[57] The plaintiff's amended statement of claim describes the events that culminated in her dismissal. All her allegations relate to the circumstances surrounding the loss of her employment. This includes the allegations of harassment and wrongdoings, which the plaintiff relies on to support her claim that Yukon treated her unfairly in wrongfully or constructively dismissing her. In essence, the plaintiff is challenging the lawfulness of her dismissal before this Court and seeking damages as a result.

Does the "essential character" of the dispute fall within the scope of the territorial legislation and collective agreement at issue?

[58] Section 27.01 of the plaintiff's collective agreement provides that:

> The parties agree that the Employer has the right to discipline and discharge for just cause. Employees will be given, in writing, the reasons for any formal discipline.

[59] Part 8 of the *Public Service Act* specifically addresses the circumstances in which public servants may be suspended and/or dismissed. It provides for two levels of appeal in case of suspension and/or dismissal.

[60] Section 121 of the *Public Service Act* provides that a deputy head (deputy minister) has the power to suspend and dismiss an employee:

> 121 A deputy head may suspend or dismiss an employee
>
> (a) for misconduct, neglect of duties, or refusal or neglect to obey a lawful order;
>
> (b) if the employee is incapable of performing their duties;
>
> (c) if the employee is unsatisfactory in performing their duties; or
>
> (d) if the employee is charged with a criminal offence and the circumstances thereby created render it inadvisable for the employee to continue their duties.

[61] An employee may appeal their dismissal to the deputy minister. At that first level of appeal, the employee has a right to request a hearing and to make submissions to the deputy minister (ss.132 and 134). The deputy minister may then confirm, modify or revoke his or her earlier decision (s. 135). However, if the employee does not request a hearing within the specified time period (s. 133), the deputy minister's decision to suspend or dismiss the employee becomes final and binding.

[62] An employee, who is a member of a bargaining unit under the *Public Service Labour Relations Act*, has the right to appeal the deputy minister's decision under s. 135 to an adjudicator appointed pursuant to the *Public Service Labour Relations Act* (s. 136).

[63] Section 137 of the *Public Service Act* provides that the decision of the adjudicator, at the second level of appeal, is final and binding on the parties:

> 137 The decision of an adjudicator appointed pursuant to the *Public Service Labour Relations Act* is final and binding and on receipt of the decision of the adjudicator, the deputy head shall take any action necessary to implement the decision and so inform the public service commissioner. (my emphasis)

[64] The adjudicator has jurisdiction to hear the full merits of the appeal pursuant to s. 136 of the *Public Service Act* and has wide remedial authority. The arbitrator's jurisdiction is limited only in so far as they cannot make an order that requires the amendment of a collective agreement or an arbitral award (s. 81 of the *Public Service Labour Relations Act*).

[65] According to s. 79(1) of the *Public Service Labour Relations Act*, an appeal taken pursuant to s. 136 of the *Public Service Act* constitutes a grievance.

[66] Section 28.15 of the plaintiff's collective agreement provides that:

> (1) An employee must obtain the approval of the Alliance and be represented by the Alliance before a grievance can be referred to adjudication.
>
> (2) A grievance referred to adjudication can only be withdrawn by the employee with the prior approval of the Alliance.

[67] Section 48 of the *Public Service Labour Relations Act* provides that the employees represented by a union are bound by the terms of the collective agreement negotiated on their behalf by the union.

[68] In *Alford v. Yukon*, 2006 YKCA 9 ("*Alford*"), the Court of Appeal of Yukon stated that the combined application of a public servant's collective agreement, the *Public Service Act* and the *Public Labour Relations Act*, results in the union having exclusive authority to file and pursue an appeal of a suspension and/or dismissal before an arbitrator pursuant to s. 136 of the *Public Service Act*. Consequently, an employee, including the plaintiff, cannot file an appeal of a suspension and/or dismissal to an arbitrator pursuant to s. 136 without the concurrence of their union.

[69] The decision of the Court of Appeal in *Alford* stands for the proposition that the union has exclusive rights in relation to the advancement of issues to adjudication (arbitration) for all its members, including probationary employees, to the extent the scheme permits. According to the Court of Appeal, s. 136 of the *Public Service Act is* a complimentary provision, which does not detract from the otherwise exclusive authority possessed by a union by virtue of its certificate of bargaining authority (para. 20). As stated by the Supreme Court of Canada in *Vaughan*:

> [25] …The party to the collective agreement is the union, and the union may or may not decide to carry an employee's grievance forward based on many considerations, which will include, but are certainly not limited to, its merits.

[70] I am of the view that the final and binding two-level appeal procedure set out in Part 8 of the *Public Service Act*, the *Public Service Labour Relations Act* and the plaintiff's collective agreement constitutes an exclusive and complete code with respect to the resolution of disputes arising out of the suspension and/or dismissal of territorial

public servants. This includes claims of wrongful or constructive dismissal. This is also the conclusion that Gower J. reached in *Wood v. Yukon (Highways and Public Works)*, 2016 YKSC 68, at para. 23. (aff'd 2017 YKCA 4).

[71] As a result, the essential character of the plaintiff's claim, which I found to be for wrongful or constructive dismissal, falls squarely within the ambit of the exclusive, binding and final appeal/arbitration process set out in Part 8 of the *Public Service Act*, the *Public Labour Service Act* and the plaintiff's collective agreement.

[72] Considering the clear ruling of the Supreme Court of Canada in *Weber*, I am bound to find that the exclusive arbitration process related to the plaintiff's dismissal set out in the territorial legislation and the collective agreement ousts this Court's jurisdiction over the plaintiff's claim for damages for wrongful or constructive dismissal, unless I find that this is an appropriate case to exercise this Court's residual inherent jurisdiction.

The courts' residual discretion

[73] The courts' residual discretion to assume jurisdiction over a claim, which would otherwise fall within the ambit of an exclusive arbitration process, should only be exercised in cases where a "real deprivation of ultimate remedy" exists (*Weber,* at para. 57, citing *St. Anne Nackawic*, at p. 723).

[74] In *Beaulieu*, at para. 48, the Alberta Court of Appeal guarded against resorting to the court's inherent residual discretion in absence of exceptional circumstances. It also summarized the nature of the court's inquiry when determining whether to exercise its inherent residual jurisdiction.

> The court's residual inherent jurisdiction should only be used in exceptional cases, otherwise there is a risk that the

> exclusive jurisdiction model will be circumvented or undermined. The relevant inquiry is not whether the collective agreement's dispute resolution procedures offer the same remedies as a court but whether the court's failure to intervene will result in a "real deprivation of ultimate remedy": *Cherubini Metal Works Ltd v. Nova Scotia (Attorney General)*, 2007 NSCA 38, at para 69, citing *Weber* at para. 57. In other words, can the dispute resolution procedures provide the remedy required to resolve the dispute: *Bisaillon* at para. 42. (my emphasis)

[75] The question is whether the dispute resolution process provides an answer to the problem (*Beaulieu*, at para. 49, citing *Vaughan,* at para. 36). Where effective redress for a complaint cannot be obtained through the arbitration process, then a court may exercise its residual inherent jurisdiction.

[76] Courts should not resort to their inherent residual jurisdiction to hear a claim simply because one party is dissatisfied with the process and would prefer to proceed in court (*Beaulieu*, at para. 29).

[77] As stated in *Beaulieu*, at para. 49, even the: "Lack of recourse to an independent third-party adjudicator is not generally enough to invoke the court's residual inherent jurisdiction, so long as the collective agreement's dispute resolution procedures are capable of providing an effective remedy: *Vaughan v. Canada*, 2005 SCC 11, at paras. 22-26."

[78] However, in cases of institutional bias, where conflict has been found to exist between the interests of the employee and those of the institution (department) and its management, an internal grievance process that does not provide for independent third-party adjudication but makes management personnel the ultimate decision-makers, may not provide the employee effective redress (*Beaulieu*, at para. 51).

[79] The case of *Pleau (Litigation Guardian of) v. Canada (Attorney General)*, 1999 NSCA 159 ("*Pleau*"), is an example where the court found it necessary to exercise its residual inherent jurisdiction because, amongst other things, the dispute resolution scheme in place did not provide for independent third-party adjudication. In *Pleau*, the employee alleged that he had been subjected to harassment and defamation, amongst other things, as a result of "what he believed to be evidence of misconduct in the operation of a government facility" (*Vaughan,* at para. 19, citing *Pleau,* at p. 380). The court found that the grievance process agreed to by the parties or mandated by the legislation did not exclude recourse to other process; and the collective agreement did not explicitly or by inference govern the substance of the dispute. The court also found that the unavailability of independent arbitration did not provide an effective redress in that case (*Pleau*, at para. 96). Consequently, the court determined that it was appropriate to exercise its inherent residual jurisdiction.

[80] In the matter before me, the plaintiff submits that this Court should exercise its inherent residual jurisdiction over her claim because the dispute resolution procedure provided by the territorial legislation and the collective agreement prevents her from accessing and obtaining a fair and impartial hearing before an impartial arbitrator. She raises concerns about procedural fairness arising from her conflicts with management and YEU representatives, as well as the collusion she states existed between the YEU and Yukon in her case.

[81] In support of her position, the plaintiff states that she agreed to enter into a settlement agreement with Yukon because she believed that an appeal before the very individuals who were involved in her dismissal (the Deputy Minister of Tourism and

Culture as well as the Director of Tourism) had no chance of success. For her, it was evidence that the system was "rigged". Also, the plaintiff states that she was prevented from accessing the arbitration stage of the appeal process in place to challenge her dismissal because her bargaining unit was not supportive of her and refused to file a grievance on her behalf. According to the plaintiff, the YEU also refused to file her grievances in relation to a number of events that led to her dismissal. She states she felt she had no other option but to agree to settle her dispute with Yukon, which, she submits, amounts to duress.

[82] In the plaintiff's case, the question of access to an independent arbitrator arises because the plaintiff needed YEU's approval, which she states she could not obtain, to take her appeal to the arbitration level. However, this situation does not in itself justify exercising this Court's discretion to hear the plaintiff's claim against her employer. If it were the case, the Supreme Court of Yukon would simply become an alternative route to the otherwise exclusive scheme provided by the legislation and the collective agreement each time a union refuses to support an appeal of one its members with respect to their suspension and/or dismissal. This would circumvent the exclusive labour dispute resolution process set out in the legislation and the collective agreement. It would also fail to recognize the role that the union, as the exclusive bargaining agent for its members, plays in that process.

[83] This leads me to the plaintiff's submissions that the process is "rigged" and that she settled her appeal to the deputy minister under duress.

[84] According to the dispute resolution process in place, an employee is entitled, at the first level of appeal, to make representations and request that the deputy minister

reconsider his or her decision. If the deputy minister maintains the dismissal, the union, on behalf of the employee, may file an appeal before an independent arbitrator. The fact that the deputy minister, who signed the plaintiff's dismissal letter, is designated as the decision-maker at the first level of the appeal process is not, in itself, evidence that the process is "rigged".

[85] In this case, the plaintiff was not prevented from accessing the dispute resolution process in place. She filed an appeal of her dismissal pursuant to s. 132 of the *Public Service Act* to the deputy minister. She could have pursued her appeal but chose, instead, to settle her dispute prior to receiving a decision from him. The plaintiff submits that her appeal was bound to fail considering the way Yukon and the YEU had treated her, and that she had no choice but to settle. While I am prepared to accept, for the purpose of this application, that the plaintiff felt hard done and discouraged by the attitude of Yukon and the YEU towards her, I am unable to conclude, based on the allegations before me, that this automatically leads to the conclusion that the deputy minister would not have properly exercised his decision-making power.

[86] I also note that there are essentially no factual allegations before me that relate to the specific circumstances and discussions surrounding the settlement the plaintiff reached with Yukon. The plaintiff may be dissatisfied with the settlement agreement that was reached, which this Court is not privy to, however, this does not entitle her to turn to the courts to revisit the issue.

[87] Also, the fact that the YEU would not support her efforts to challenge her dismissal does not necessarily support the conclusion that the settlement was reached

under duress, even if one assumes that the YEU was not supportive of the plaintiff from the beginning.

[88] While I do have sympathy for the plaintiff, I do not see how her argument can succeed in the context of a civil claim against Yukon before this Court. The plaintiff's recourse against her employer in relation to her dismissal is clearly delineated. She must follow the appeal process provided in the legislation and her collective agreement, unless it is shown that it cannot provide a proper remedy to resolve the dispute.

[89] While a settlement agreement with Yukon may have been seen, by the plaintiff, to be the easiest route at the time, there was another course of action open to her, which was to pursue her appeal before the deputy minister and to challenge the YEU's decision not to take her case to arbitration, if necessary. If, as alleged by the plaintiff, her bargaining unit refused to support the appeal of her dismissal under the arbitration process in place and if her bargaining unit failed in their duty to represent her then her, recourse would be against the YEU. The proper forum for this recourse is not a matter for me to determine. It is also not for me to weigh in on its chances of success.

[90] I understand that the plaintiff also filed a claim against the YEU in this Court. I also understand that another judge of this Court is presently seized with an application to dismiss that claim based on lack of jurisdiction. I will, therefore, refrain from stating anything further in relation to any avenue or recourse that may be available to the plaintiff against the YEU.

[91] I am of the view, that there is no real deprivation of an ultimate remedy in this case, and that the exercise of this Court's residual inherent jurisdiction in the

circumstances of this case would undermine the effective operation of the dispute resolution process set out in the territorial legislation and the collective agreement.

CONCLUSION

[92] Consequently, I grant Yukon's application to strike the plaintiff's claim based on lack of jurisdiction.

[93] As I have granted Yukon's application to strike the plaintiff's amended statement of claim for lack of jurisdiction, I need not consider the alternative ground upon which Yukon seeks to have the plaintiff's claim struck.

[94] Yukon seeks costs of the application, in any event of the cause. Considering my decision, the parties may seek an appearance date before this Court to speak to the issue of costs, if necessary.

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CAMPBELL J.