IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Alford* v. *Government of Yukon*, et al., 2006 YKSC 31

Date: 20060428
Docket No.: S.C. No.: 05-A0042
Registry: Whitehorse

BETWEEN:

DOMINIC ALFORD

PETITIONER

AND:

GOVERNMENT OF YUKON, as represented by the Public Service Commission and VINCENT L. READY, Arbitrator

RESPONDENTS

Before: Mr. Justice L.F. Gower

Appearances:

Timothy S. Preston, Q.C.	For the Petitioner
Zeb Brown and Peter A. Csiszar	For the Respondent Government of Yukon, as represented by the Public Service Commission

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a petition for judicial review of a decision of arbitrator Vincent L. Ready, dated March 31, 2004 ("the award"), which was made in the following context.

[2] The petitioner was a probationary employee of the Government of Yukon ("the employer" and alternately "the Government"). On June 3, 2003, he was informed by a letter from the employer that his employment had been terminated in accordance with

what is now s. 104 of the *PSA*. The petitioner filed both a grievance and an appeal from that termination. He was then a member of the Public Service Alliance of Canada, which included the Yukon Employees' Union (collectively, "the Union"), and his employment was governed by a collective agreement, the Yukon *Public Service Act* ("*PSA*") and the Yukon *Public Service Staff Relations Act* ("*PSSRA*") (together "the legislation").[1]

[3] The reason for termination in the June 3rd letter was that the petitioner had engaged in misconduct with respect to computer use by accessing computer files containing sexually explicit material or nudity.

[4] At that time, the employer was conducting numerous investigations with respect to similar alleged computer misuse on approximately 96 other Government employees. The employer imposed discipline upon those employees in the form of written reprimands, suspensions and dismissals. In response to those disciplinary measures, the employees concerned filed approximately 150 grievances through the Union, all of which alleged that the discipline imposed was unjust or egregious and contrary to the terms of the collective agreement. Prior to hearing the merits of any of the grievances, a settlement was reached between the employer and the Union, wherein the disciplinary measures were reduced and the permanent employees who were dismissed were reinstated.

[5] The settlement of the disciplinary grievances for the other employees was part of an alternative dispute resolution ("ADR") process facilitated by arbitrator Ready, which resulted in a number of binding recommendations. One of those binding recommendations was that the following issue be referred to Mr. Ready for adjudication:

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[1] The relevant provisions of each are found in Appendix A

whether or not the petitioner, as a probationary employee, had access to adjudication under the provisions of the collective agreement, *PSA* and/or the *PSSRA*. The decision that the petitioner now seeks to review resulted from that adjudication ("the preliminary arbitration"). Arbitrator Ready found that the employer rejected the petitioner on probation for cause under s. 104 of the *PSA* and that the termination was not subject to appeal, nor was it open to review by an arbitrator, ". . . given the clear bar to adjudication and appeal contained in Sections 78(3) and 81(1)(b) of the *PSSRA*." Thus, he determined that he lacked jurisdiction to deal with the matter further.

[6] The Union represented the petitioner before arbitrator Ready, but not on this application for judicial review. Prior to hearing the petition, I dealt with a preliminary challenge by the employer to the petitioner's standing to bring the application without Union representation. In *Alford* v. *Government of Yukon*, 2005 YKSC 74, at para. 21, I held that the Union has the exclusive right to represent probationary employees who grieve their rejection for cause under s. 104 of the *PSA* whenever: (a) they wish to refer such a grievance to adjudication; or (b) the grievance involves the interpretation or application of a provision of the collective agreement relating to the employee, as was the case here. Thus, the petitioner has no standing to seek judicial review of arbitrator Ready's decision with respect to the petitioner's grievance.

[7] However, I also held that the Union does not have the exclusive right to represent a probationary employee appealing a "dismissal" for cause under s. 136 of the *PSA*. And, since the petitioner was purporting to argue that he was indeed pursuing an appeal under that section, then he has standing to challenge that aspect of arbitrator Ready's decision, without Union representation.

ISSUES

[8] The following issues arise on this application:

1. What is the standard of review?
2. Has the petitioner in fact made an appeal from the termination of his employment under s. 136 of the *PSA*?
3. If the petitioner has made an appeal under s. 136 of the *PSA*, does that section apply to a probationary employee who is "rejected for cause" under s. 104 of the *PSA*?
4. If the petitioner cannot appeal a rejection for cause under s. 104 of the *PSA* under s. 136, then how may he challenge whether the rejection for cause was done in good faith?
5. Did the arbitrator err by finding the petitioner was rejected "for cause" under s. 104 of the *PSA*?

ANALYSIS

1. What is the standard of review?

[9] It is agreed by the parties that in determining the appropriate standard of review of the preliminary arbitration, I should use the "pragmatic and functional approach" outlined by the Supreme Court of Canada in *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Voice Construction Ltd.* v. *Construction and General Workers' Union, Local 92*, [2004] 1 S.C.R. 609; and *Dr. Q.* v. *College of Physicians and Surgeons of British Columbia*, 2003 SCC 19. That approach leads to one of three standards of review, which constitute a spectrum of relative deference by the reviewing court: correctness, reasonableness *simpliciter*, and patent

unreasonableness. Those three standards respectively dictate whether the reviewing court should undertake an “exacting review”, “significant searching or testing”, or whether the decision should be left to the “near exclusive determination of the decision-maker”: *Dr. Q.*, cited above, at para. 22. In applying the pragmatic and functional approach, the Court must consider four contextual factors:

1. The presence or absence of any privative clause;
2. The expertise of the Court relative to that of the decision-maker below;
3. The purpose of the legislation in question; and
4. Whether the question decided by the decision-maker was a question of law, a question of fact or a question of mixed fact and law.

Privative Clause?

[10] The absence of a privative clause points toward a more searching standard of review: *Dr. Q.*, cited above, at para. 27.

[11] Here, I agree with the petitioner’s counsel that the arbitrator was not acting under any specific provision of the *PSA* or the *PSSRA* in deciding the award. Rather, his jurisdiction to undertake the preliminary arbitration was essentially bestowed upon him by the employer and the Union when they agreed to be bound by the arbitrator’s recommendations following the larger ADR process, which was engaged in to resolve the numerous grievances of the various employees involved. The employer’s counsel stressed in reply that the arbitrator had to be acting as an adjudicator under the legislation, because the petition itself states that the arbitrator “erred in declining jurisdiction”. Therefore, as I understood the argument, if the arbitrator had assumed jurisdiction, he would then have gone on to adjudicate either the petitioner’s grievance or

his appeal, or both, under the parameters of the legislation. However, with respect, that argument smacks of bootstrapping, and the employer could point to no particular legislative provision, or any provision of the collective agreement for that matter, which specifically authorized the preliminary arbitration. Indeed, the very reason for the preliminary arbitration was to determine if there could be an adjudication under the legislation. Therefore, I conclude that this was essentially an *ad hoc* consensual arbitration, which the petitioner is deemed to have consented to by virtue of his membership in the Union's bargaining unit and the Union's representation of him at that stage.

[12] As a result, the privative clauses relied upon by the employer, specifically ss. 78(3), 81(3)(b) and 86 of the *PSSRA*, have no application to the preliminary arbitration, since that took place outside the four corners of the legislation. This points towards the correctness standard of review.

Relative Expertise?

[13] Where the Court has superior expertise relative to the decision-maker below on the particular question being reviewed, this again points to a more exacting standard of review. The analysis under this heading has three dimensions:

1. The Court must characterize the expertise of the decision-maker in question;
2. It must consider its own expertise relative to that of the decision-maker; and
3. It must identify the nature of the specific issue before the decision-maker relative to this expertise: *Dr. Q.*, cited above, para. 28.

[14] Dealing with the last point first, the nature of the specific issue before arbitrator Ready was largely, if not entirely, a matter of statutory interpretation. He was tasked with

deciding a question of jurisdiction, specifically whether the petitioner, as a probationary employee, had “access to adjudication” under the *PSA* and the *PSSRA*, and statutory interpretation is “ultimately within the province of the judiciary”: *Monsanto Canada Inc.* v. *Ontario (Superintendent of Financial Services)*, 2004 SCC 54, at para. 10. In that same vein, this Court’s expertise on matters of statutory interpretation is presumably greater than that of the arbitrator. Finally, while the arbitrator is likely more expert than this Court in matters of labour relations and labour law generally, that expertise did not give him any advantage in deciding the particular question before him.

[15] In short, this Court is well suited to decide the issue and this also points toward the correctness standard.

Purpose of the Legislation?

[16] In general, increased deference will result where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies, whereas less deference results when it essentially seeks to resolve disputes or determine rights between two parties: *Dr. Q.*, cited above, paras. 30 and 32.

[17] The purpose of the *PSA* is to establish a public commission and to set out the framework or process for operating and regulating the civil service. It addresses classification of positions, pay and allowances, appointments, transfers, suspensions and dismissals, and layoffs. The *PSSRA* sets out a bargaining unit regime, including dispute resolution provisions, for arbitration, conciliation boards and adjudication. Together, the *Acts* reflect a legislative intent that questions concerning the interpretation and enforcement of the collective agreement and the legislation itself be resolved through an arbitration or adjudication process, where experienced decision-makers may

employ their specialized expertise. Here, even the employer's counsel concedes that the role of an arbitrator or adjudicator is generally to resolve a two-party dispute. While the legislation as a whole may also seek to balance the various interests of the employer, the Union and the employees, I am satisfied that its focus on dispute resolution tends toward an approximation of a conventional judicial paradigm involving a pure *lis inter partes*, determined largely by the facts before a given decision-maker: *Dr. Q.*, cited above, at para. 32. Accordingly, less deference by the reviewing court is required and, once again, this points toward the correctness standard.

The Nature of the Question?

[18] The petitioner's counsel submitted that the nature of the question before the arbitrator was purely a question of law. The employer's counsel characterized the request in the petition for an adjudication to determine whether the dismissal of the petitioner constituted a "disciplinary discharge" as a question of fact. However, that was not the question posed to arbitrator Ready, although a submission on those lines was made at the preliminary arbitration. Further, the employer's counsel referred to the petitioner's submission that he purports to appeal his termination under ss. 132 and 136 of the *PSA*. That, says the employer, is a question of mixed fact and law, as it requires an inquiry into the factual basis for the petitioner's termination, as well as an analysis of whether those sections even apply to these facts. In my view, whether ss. 132 and 136 apply to the petitioner's case is almost entirely a question of statutory interpretation and, to the extent that it involves a consideration of any factual underpinnings, the question may be viewed as one of mixed fact and law, but one which is more law-intensive: *Dr. Q.*, cited above, at para. 35. A question of pure law and a question of mixed fact and

law which is more law-intensive militate in favour of a more searching standard of review, particularly where the decision will be one of general importance or precedential value: *Dr. Q.*, cited above, at para. 34. Yet again, this points toward correctness.

[19] Having considered each of the four contextual factors within the functional and pragmatic approach, I find that little or no deference is called for and that the standard of review should be one of correctness.

2. Has the petitioner in fact made an appeal from the termination of his employment under s. 136 of the PSA?

[20] The petitioner's ability to pursue this application for judicial review is premised on the assumption that he is in fact pursuing an appeal under s. 136 of the *PSA*. However, in my decision on the preliminary issue of standing, I made no such factual determination, as the petitioner wished to present further argument on the point.

[21] Following receipt of the termination letter, the petitioner wrote to his supervising Deputy Minister on June 11, 2003 stating:

> "Re: Dominic Alford Dismissal, Effective June 3, 2003
>
> Please be advised that in accordance with Section 148 of the *Public Service Act*, I wish to appeal my dismissal as noted above.
>
> . . .
>
> I hereby request a hearing within 10 days as is the practice of the employer."

[22] In my preliminary decision, I indicated the petitioner was likely referring to s. 148 of the *Public Service Commission Act*, as s. 148 of the *PSA* is not applicable to appeals. The employer has since pointed out that s. 148 of the *Public Service Commission Act* has been amended and is now s. 132 of the *PSA*, which reads:

> "132. If, of their own motion, a deputy head [deputy minister] suspends or dismisses an employee, the employee may, by notice in writing within 10 working days from the date of receipt of the notification to the employee of the deputy head's decision, request a hearing by the deputy head."

Thus, I find that the petitioner's letter of June 11, 2003 requesting a "hearing within 10 days" must have been a notice of his intention to proceed under what is now s. 132 of the *PSA*.

[23] The petitioner later filed a grievance presentation form on July 2, 2003, in which he stated, under "Details of Grievance":

> "I grieve that by a letter dated June 20, 2003 issued from Staff Relations the employer is refusing to hear my dismissal appeal and further is discriminating against me. This contravenes articles 5:01, 5:02, 9:02 and 28:18. I also further grieve the employer has not acted in accordance with the *Public Service Act* Sections 117 and Sections 119 and 120 and is again discriminating against me. I also further state by refusing to allow my appeal to proceed is a further denial of Natural Justice. [all as written]."

Under the title "Corrective Action Requested," the petitioner included in the relief sought the following:

> ". . . 2. That I be allowed to exercise my rights to appeal my dismissal. . . . "

[24] From the "Details of the Grievance", the employer concludes that the petitioner's request for a hearing under s. 132 of the *PSA* must have been denied by his deputy minister in the letter of June 20, 2003 from "Staff Relations". The employer further says there is no evidence of any notice of appeal from the petitioner, or even an indication of his intention to appeal, under s. 136 of the *PSA*, the relevant parts of which state:

> "136(1) An employee may, within 10 working days of the receipt of the final decision of the deputy head, appeal the

> decision to an adjudicator appointed pursuant to the *Public Service and Staff Relations Act*.
>
> (2) An employee who appeals pursuant to subsection (1) shall notify the deputy head in writing.
>
> . . .”

[25] However, in its written submissions to arbitrator Ready, the Union confirmed that:

> “Pursuant to section 132 of the Act [the petitioner] requested a hearing by the deputy head.
>
> . . .
>
> The employer declined to grant a hearing. Its position appears to be that section 132 hearings are not available to employees rejected during their probationary period.
>
> The [Union], on behalf of [the petitioner] appealed this final decision to the Yukon Public Service Staff Relations Board, pursuant to section 136(1).”

[26] The employer maintains that the latter submission of the Union was nothing more than that – a submission – and cannot constitute evidence that the petitioner in fact launched an appeal under s. 136 of the *PSA*. Admittedly, there was no evidence before arbitrator Ready, and similarly none before me, that the petitioner notified his deputy minister “in writing” of his intention to appeal under s. 136. However, the employer replied in writing to the Union’s submissions above, and nowhere in that written reply, or elsewhere, did the employer question whether the petitioner had indeed launched an appeal under s. 136 of the *PSA*. Nor did arbitrator Ready refer to any issue being taken by the employer about whether the petitioner had in fact appealed under s. 136. And, as there was no oral hearing before the arbitrator, the complete record is before me.

[27] In all of the circumstances, taking into account the broad language used by the petitioner in his grievance and the particular assertion by the Union that it "on behalf of [the petitioner] appealed [the deputy minister's refusal to grant a hearing under s. 132] to the Yukon Public Service Staff Relations Board, pursuant to subsection 136(1)", I remain unpersuaded that the petitioner has not in fact commenced this appeal. At the very least, his grievance implies that it was his intention to pursue such an appeal, as that would have been the next procedural step to follow a refusal by his deputy minister to grant a hearing, as the petitioner requested, under s. 132 of the *PSA*. In any event, given that the employer did not raise this issue at all before arbitrator Ready, and only did so in the hearing before me on the petition, by reason of issue estoppel, I reject the employer's argument on the point.

3. If the petitioner has made an appeal under s. 136 of the PSA, does that section apply to a probationary employee who is "rejected for cause" under s. 104 of the PSA?

[28] Arbitrator Ready found that the avenue of appeal via s. 132 of the *PSA* was not available to an employee rejected on probation, and thus, implicitly, neither would an appeal under s. 136 (both sections are found in Part 8 of the *PSA*). Because of the central importance of this point to the petitioner's case, I will quote arbitrator Ready directly at pp. 22 and 23 of his decision on the preliminary arbitration, immediately after he sets out s. 132 of the *PSA*:

> "With respect, I disagree that this avenue of appeal is available to an employee rejected on probation. The language of the *Act* gives clear authority to the deputy head to reject a probationary employee "at any time during the probationary period" and that the effect of the rejection is that the employee "ceases to be an employee." Furthermore, the

> [petitioner] in this case [was] not suspended or dismissed, [he was] rejected on probation. As noted in *Penner*, [[1989] 3 F.C. 429], a deputy head has "the choice of either discharging or rejecting the employee" and he may "choose which one of those two powers he wants to use." "

[29] The petitioner's counsel says that arbitrator Ready erred in that conclusion. As I understood him, the submission is essentially this: at a minimum, a probationary employee rejected for cause under s. 104 of the *PSA* must have some way of challenging whether the rejection was validly "for cause" and whether the employer was acting in good faith in that regard, or rather, whether the employer was actually discharging the probationary employee for disciplinary reasons. If the latter proves to be the case, then, goes the argument, the employer's decision to reject for cause under s. 104 may be quashed or, at the very least, there should be a further adjudication to determine whether the disciplinary reasons are sufficient to justify the employee's discharge from employment. In short, the petitioner says that there must be some form of a preliminary hearing in which evidence is presented to an adjudicator in order to decide whether the rejection for cause was valid and done in good faith. It is access to that type of an adjudication which the petitioner was seeking before arbitrator Ready, either by way of a referral to adjudication or by way of an appeal under s. 136 of the *PSA*. However, based on my preliminary decision on standing, the petitioner is limited here to the question of whether s. 136 of the *PSA* provides access to that type of an adjudication. If it does, then the appeal hearing itself would determine whether the rejection was indeed for cause and done in good faith. There were a number of arguments raised in debating this proposition.

Does an employee rejected for cause cease to be an employee for appeal purposes?

[30] Here, the petitioner refutes the employer's argument, which reflects the award of arbitrator Ready, that the effect of being rejected for cause is that the probationary employee "ceases to be an employee" pursuant to s. 105 of the *PSA*, and therefore cannot have access to the appeal provisions in Part 8 of the *PSA*, which are only available to "employees". The petitioner's counsel pointed out that under s. 126 of the *PSA*, an employee who has been suspended under s. 124 and fails to appeal that suspension may be dismissed by the deputy minister. In that case, s. 126 states that such an employee "ceases to be an employee" with effect from the day on which the employee was suspended. Nevertheless, such a person still has a right to appeal that dismissal under s. 130(1) of the *PSA*, which states that:

> "An employee may, within 10 working days of the receipt of the decision of the deputy [minister] pursuant to s. 126, appeal the decision to an adjudicator appointed pursuant to the *Public Service Staff Relations Act*."

Thus, notwithstanding that s. 126 purports to say that such a person "ceases to be an employee", they are nevertheless referred to as "an employee" in s. 130(1) and given the right to appeal. Similarly, I find that notwithstanding s. 105 purports to say that a probationary employee rejected for cause under s. 104 of the *PSA* "ceases to be an employee", they may still be notionally considered to be "an employee" for the purposes of the appeal remedy under s. 136. However, that is not the end of the matter.

Is a probationary employee an employee under Part 8 of the *PSA*?

[31] The petitioner's second argument is that a probationary employee is nevertheless an "employee" under Part 8 of the *PSA* and therefore has all the rights of appeal under

that Part given to non-probationary employees. Part 8 of the *PSA* consists of ss. 121 through 143 and deals with the "suspension and dismissal" of employees and the right of such employees to appeal those decisions. Section 121 provides that a deputy minister may suspend or dismiss an employee for a variety of reasons, including:

- misconduct
- neglect of duties
- refusal or neglect to obey or follow orders
- if the employee is incapable of performing their duties
- if the employee's job performance is unsatisfactory
- if the employee is charged with a criminal offence and the circumstances make it inadvisable for the employee to continue their duties.

[32] In his written submissions, the employer's counsel argued that Part 8 would have no application to probationary employees. However, at the hearing of the petition, he correctly conceded that a probationary employee may be "suspended" within the period of probation, or indeed "dismissed" within that period, under Part 8, rather than being rejected for cause under s. 104 of the *PSA*. In either of those events, the probationary employee would have access to the appeal remedies within Part 8.

Is "rejection for cause" distinct from "dismissal for cause"?

[33] The employer's counsel submitted that a probationary employee who is rejected for cause under s. 104 would not have access to the appeal remedies in Part 8 of the *PSA*, because s. 104 is contained in a separate part of the *Act* – Part 6. Within Part 6 are

ss. 102 through 111, which are exclusively devoted to issues regarding probationary employees.

[34] I agree with the employer's arguments on statutory interpretation on this point. First, the employer's counsel referred to the case of *Hussman Store Equipment Ltd.* v. *Canada (M.N.R.)*, [1997] F.C.J. No. 912, at para. 12; affirmed [2000] F.C.J. No. 995, for the proposition that the grouping of provisions within a particular part of an Act can be used to interpret the provisions themselves. The Court in *Hussman* relied upon *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at p. 272, in coming to that conclusion.

[35] Second, if different words are used in different parts of a statute, this is an indication that the Legislature must have intended that two different meanings be assigned: *R.* v. *Barnier*, [1980] 1 S.C.R. 1124; and *Peach Hill Management Ltd.* v. *Canada*, [2000] F.C.J. No. 894 (FCA). In *Peach Hill*, the Federal Court of Appeal also referred to *Driedger on the Construction of Statutes*, 3rd ed. and said at para. 12:

> "When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning."

Thus, I infer that the Legislature intended that "rejection for cause" under s. 104 of the *PSA* was to have a different meaning than "dismissal" under Part 8.

[36] Third, there is no reference in Part 8 to employees who have been rejected for cause. In statutory interpretation, it is a recognized principle that the expression of one thing may lead to the exclusion of another (*expressio unius est exclusio alterius)*. In this context, the expressions of "suspension" and "dismissal" in Part 8 support the conclusion that rejection for cause was intended to be excluded from that Part of the *PSA*.

[37] Fourth, it is a principle of statutory interpretation that specific provisions supersede general ones. Therefore, since s. 104 is a very specific provision which applies to the termination of a probationary employee's employment, it should apply whenever that context arises, as opposed to the more general provisions regarding the dismissal of both probationary and non-probationary employees.

[38] Lastly, I agree with the employer's argument that an interpretation which provided the appeal remedies in Part 8 of the *PSA* to probationary employees rejected for cause under Part 6 would effectively neutralize the deputy minister's authority to terminate such an employee "at any time during the probationary period", since the termination would always be subject to appeal and may be reversed.

[39] For all these reasons, I conclude that a "rejection for cause" under s. 104 of the *PSA* cannot constitute a "dismissal" under s. 121. Consequently, an employee rejected under the former section does not have a right to appeal the rejection under s. 136 of the *PSA*.

Do the cases on the federal legislation apply to the Yukon context?

[40] The petitioner stressed the applicability of a line of cases beginning with *Jacmain* v. *Canada (Attorney General)*, [1978] 2 S.C.R. 15, which dealt with the federal *Public Service Act* and the federal *Public Service Staff Relations Act*. In *Jacmain*, the employee was given notice in writing of his rejection for cause. However, he presented a grievance under s. 91(1)(b) of the federal *PSSRA*, and he referred the matter to adjudication. The employer disputed the jurisdiction of the adjudicator on the basis that the rejection for cause during the probationary period did not constitute a disciplinary discharge under s. 91(1)(b). The four-to-three majority of the Supreme Court of Canada held that the

employer's right to reject an employee during the probationary period is very broad, providing there is a way to substantiate the "cause". Rejection of an employee on probation because of dissatisfactory performance does not constitute a disciplinary action which is subject to adjudication. However, the question remained open as to whether an adjudicator would have jurisdiction to review a rejection which was clearly a disciplinary action.

[41] Under s. 28 of the federal *PSA*, an employee could be rejected for cause at any time within the period of probation. In that sense, the legislation in *Jacmain* was similar to s. 104 of the Yukon *PSA*. However, under s. 91(1)(b) of the federal *PSSRA*, an employee was entitled to grieve disciplinary action resulting in their discharge and, importantly, such an employee "may refer the grievance to adjudication." There is no equivalent section in the Yukon legislation. While an employee can theoretically grieve disciplinary action in the Yukon, there are a number of distinguishing features from the federal context. First, pursuant to Article 28.04 of the collective agreement, an employee is entitled to present such a grievance:

> ". . . except that where there is another administrative procedure provided by or under any other Act to deal with his/her/their specific complaint, such procedure must be followed."

Thus, if s. 104 of the *PSA* is viewed as "another administrative procedure", authorizing the employer to reject probationary employees for cause, which could include disciplinary reasons, then that procedure "must be followed". Further, as I have just found, there is no appeal to an adjudicator from such a rejection for cause, as s. 136 of the *PSA* is not applicable. In addition, s. 78(3) prohibits a probationary employee from referring a grievance respecting a rejection for cause to adjudication. Finally, s. 81(3)(b)

of the *PSSRA* provides that a decision on a grievance by a probationary employee respecting rejection for cause taken at the final level in the grievance process “is final and binding for all purposes” under that *Act* and “no further action” under that *Act* may be taken on the matter. Finally, and in any event, the question of whether a probationary employee can refer a grievance respecting his rejection for cause to adjudication, even where the rejection is alleged to be for disciplinary reasons, it is not before me, as I ruled in my preliminary decision that the petitioner has no standing to make such an argument. Therefore, *Jacmain* is distinguishable.

[42] *Jacmain* was subsequently considered in *Canada (Attorney General)* v. *Penner (C.A.)*, [1989] 3 F.C. 429. There, the provision in the federal *PSSRA* entitling an employee to refer a grievance regarding a disciplinary discharge to adjudication was found in s. 92(1) and not 91(1) as in *Jacmain*. The Federal Court of Appeal reviewed the various judgments of the majority and the minority in *Jacmain* and concluded as follows, at para. 17:

> “It is clear that five of the nine judges who rendered this Jacmain judgment expressed the opinion that an adjudicator seized of a grievance by an employee rejected on probation is entitled to look into the matter to ascertain whether the case is really what it appears to be. That would be an application of the principle that form should not take precedence over substance. A camouflage to deprive a person of a protection given by statute is hardly tolerable. In fact, we there approach the most fundamental legal requirement for any form of activity to be defended at law, which is good faith. But I simply do not see how this Jacmain judgment can be interpreted as lending support to the proposition that an adjudicator acting under section 92 of the P.S.S.R. Act would have jurisdiction to intervene against a rejection of probation pursuant to section 28 of the P.S.E. Act, on the sole basis that the motives behind the employer’s decision were somehow linked to the misconduct or misbehaviour of the employee and could therefore have

> given rise to disciplinary measures. Even Mr. Justice Dickson, as I read his dissenting judgment, clearly disagrees with such a view, since, to the adjudicator called upon to verify the real meaning of the employer's decision, his sole admonition is, as we have seen: "it does not inexorably follow that, simply because there lurked in the background some cause which might justify rejection, the termination must, of necessity, be rejection and not disciplinary discharge".
>
> The basic conclusion of the Jacmain judgment, as I read it, is that an adjudicator appointed under the P.S.S.R. Act is not concerned with a rejection on probation, as soon as there is evidence satisfactory to him that the employer's representatives have acted, in good faith, on the ground that they were dissatisfied with the suitability of the employee for the position. And, to me, this conclusion follows inexorably from the legislation as it is." (emphasis added)

However, I repeat there is no provision in the Yukon legislation comparable to s. 92(1) of the federal *PSSRA*.

[43] The petitioner also relied upon the Supreme Court of Canada decision in *Longlois* v. *Quebec (Ministère de la Justice)*, [1984] 1 S.C.R. 472. That was a case involving the transfer of a civil servant, who argued that the decision was in fact an unjustified disciplinary action. Under s. 97 of the Quebec *Civil Service Act*, a civil servant was authorized to appeal "disciplinary action" to the Commission under that *Act*. Perhaps more significantly, the case revisited *Jacmain* and, in delivering the judgment of the Court, Chouinard J. stated at p. 9 of the QuickLaw report:

> "Thus, in the opinion of five judges of this Court, whereas during his probationary period an employee may be rejected without such administrative action being subjected to adjudication, an adjudicator has jurisdiction under the *Public Service Staff Relations Act* to examine whether the action was in fact a rejection or a disciplinary discharge, and to proceed in the latter case." (emphasis added)

Once again, *Jacmain* is distinguishable from the Yukon context. And, to the extent that s. 97 of the Quebec *Civil Service Act* may be comparable to s. 136 of the Yukon *PSA*, I have already found s. 136 is not applicable on the facts before me.

[44] Finally, the petitioner referred to *Canada (Attorney General)* v. *Leonarduzzi*, 2001 FCT 529. That case involved s. 28 of the federal *Public Service Employment Act*, which authorized employers to reject probationary employees for cause at any time during the probationary period, in much the same way as under s. 28 of the former federal *PSA*. Further, as in *Penner*, cited above, the provision in s. 91 of the federal *PSSRA* dealt with by the Supreme Court of Canada in *Jacmain*, was then found in s. 92(1). It similarly authorized an employee to grieve disciplinary action resulting in termination of employment and to refer such a grievance to adjudication. However, by virtue of an amended s. 92(3), an employee could not refer to adjudication a grievance arising out of a termination of employment under the federal *PSEA*. In that sense, s.92(3) was similar to s. 78(3) of the Yukon *PSSRA*. Lemieux J. said, at para. 47:

> "Although the decision in Penner, supra, predates the adoption of subsection 92(3), I am of the view that its principles still apply. As I see it, the purpose of subsection 92(3) of the PSSRA which was added by Parliament in 1993 was to make clear what Jacmain and Penner said about the flexibility to be accorded the employer in the rejection of a probationary employee under the PSEA and this without recourse to adjudication under the PSSRA. At the same time, its addition as was held by Justice Noël in Rinaldi, supra, does not remove the ability from the adjudicator solely because such a termination is relied upon by the employer. The reason he said so was because <u>subsection 93(2) only operates when there was in fact a termination under the PSEA.</u>" (emphasis added)

More specifically, Lemieux J. concluded in *Leonarduzzi* that the adjudicator there was acting within his jurisdiction when he required the employer to initially demonstrate that the rejection was for a reason relating to the suitability of the employee for the position.

Upon discharging that initial burden, the adjudicator said that the burden of proof then shifts to the employee to demonstrate that the employer's actions were in fact a sham or a camouflage, and therefore not in accordance with s. 28 of the *PSEA*. Finally, it was only upon the discharge of that burden that the adjudicator could take jurisdiction under s. 92 of the *PSSRA* and consider the grievance on its merits.

[45] Section 78(3) of the Yukon *PSSRA* is arguably much more specific than s. 92(3) of the federal *Act*, in that it refers to a particular subset of "termination of employment", that is "release (rejection) for cause" during probation. Also, there does not seem to be a counterpart in the federal legislation to s. 81(3)(b) of the Yukon *PSSRA*. Therefore, *Leonarduzzi* is distinguishable for those reasons alone. In any event, if the petitioner intends to rely on *Leonarduzzi* to argue that ss. 78(3) and 81(3)(b) are not applicable, then he is without standing to do so in the absence of Union representation. And if that argument cannot be made, I fail to see how *Leonarduzzi* assists the petitioner's position in this application for judicial review.

[46] In summary, the fundamental flaw in the petitioner's arguments relating to the *Jacmain* and *Penner* line of cases is that the Yukon legislation is significantly different from the federal legislation. Under the latter, probationary employees are specifically authorized to grieve disciplinary action resulting in the termination of their employment and, most importantly, to refer such grievances to adjudication. There is no corresponding provision in the Yukon legislation.

[47] In addition, although the collective agreement does allow grievances of discipline matters, there is an exception to the right to grieve such matters "where there is another administrative procedure provided by or under any other Act", in which case "such

procedure must be followed.” Section 104 of the *PSA* is such an administrative procedure and there is no provision within Part 6 of the *PSA* for a terminated probationary employee to grieve or appeal a rejection for cause.

[48] Further, as I have already found, s. 136 cannot be utilized by a probationary employee who is rejected for cause, since it is limited to employees, albeit including probationary employees, who have either been dismissed or suspended for one of the reasons in s. 121 of that Part. Such employees cannot refer a rejection for cause to adjudication because s. 78(3) of the *PSSRA* prohibits that. Still further, s. 81(3)(b) provides that a decision upon such a grievance at the final level of the grievance process “is final and binding”. And finally, the petitioner has no standing to argue the matter of his grievance in this application for judicial review.

[49] Therefore, the only avenue by which the petitioner could possibly obtain relief would be by way of an appeal under s. 136 of the *PSA*. And, since the petitioner was rejected for cause under s. 104, and not dismissed under s. 121, I find he has no right to appeal under s. 136.

4. If the petitioner cannot appeal a rejection for cause under s. 104 of the PSA under s. 136, then how may he challenge whether the rejection for cause was done in good faith?

[50] In fairness to the petitioner’s counsel, this issue was not specifically pled by him, however, it seemed to arise implicitly in the various arguments which were exchanged. My response to this question follows from my conclusions on the first three issues. First, there is no specific provision in the Yukon legislation which authorizes a probationary employee rejected for cause under s. 104 of the *PSA* to challenge whether the termination was done in good faith. Second, I agree with the employer’s counsel, that

the question, for present purposes, is irrelevant. My task on this judicial review application is to determine whether arbitrator Ready erred in concluding that s. 132 of the *PSA*, and therefore implicitly s. 136, is not available to an employee terminated under s. 104. I have already found that arbitrator Ready did not err in that regard. And since s. 136 deals exclusively with suspensions and dismissals, and not s. 104 rejections, then I do not have to pursue an academic inquiry into the *bona fides* of rejections for cause of probationary employees. Third, if there is an argument that s. 104 rejections may be referred to adjudication, notwithstanding ss. 78(3) and 81(3) of the *PSSRA*, that will have to await another day, since the petitioner has no standing to argue it here.

5. Did the arbitrator err by finding the petitioner was rejected "for cause" under s. 104 of the PSA?

[51] The petitioner's counsel argued that there was no evidence before the arbitrator on this point. He submitted that the record before arbitrator Ready was limited to the written submissions of the parties. There was no oral hearing and the agreed facts, said counsel, related only to the probationary history and the description of the position held by the petitioner. He further submitted that the ADR proceedings and the binding recommendations which resulted did not constitute evidence before arbitrator Ready. Finally, he said the submission to arbitration did not raise factual issues. As a result, the petitioner's counsel asks me to conclude that arbitrator Ready committed jurisdictional error by making findings of fact without any evidence and by deciding an issue outside of the arbitration submission.

[52] The first problem I have with this argument is that it totally ignores the fact that the employer's termination letter of June 3, 2003 was part of the record at the preliminary

arbitration. That letter purported to set out in detail what the deputy minister "determined" about the petitioner's misconduct with respect to computer use by accessing computer files containing sexually explicit material and nudity. The letter went on to state that such behaviour "represents serious misconduct and demonstrates an extreme lack of judgment, trustworthiness and professionalism" which called into question the petitioner's "ability to perform [his] duties". For those reasons, the deputy minister found that the misconduct "has established a fundamental and irreparable breach of trust in the employment relationship." These were not mere allegations, as represented by the petitioner in the petition; rather, they were determinations or findings made by the deputy minister. Therefore, I conclude that the letter of termination did constitute evidence upon which arbitrator Ready could base a finding of cause.

[53] Secondly, it is important to remember that the ADR process, which resulted in the binding recommendations, was a consensual one. The petitioner, as a member of the Union's bargaining unit, was represented by the Union at that time and is therefore deemed to have consented to that process. I gather from the submissions of the employer's counsel that the process was originally intended to be a mediation of the large group of grievances filed by the various employees who were disciplined. However, I take it from counsel's remarks that the process evolved into something closer to an arbitration, as it ultimately resulted in a set of binding recommendations. In addition to settling the grievances of the non-probationary employees, those binding recommendations attempted to address the specific situation of the petitioner (and one other probationary employee), because there was doubt about whether the petitioner had access to adjudication. Further, in his decision on the preliminary arbitration,

arbitrator Ready took into account certain generalized findings he made in his binding recommendations, including the following, which he quoted at p. 24:

> "I feel compelled to observe that the conduct identified in this case is certainly unacceptable workplace behaviour . . . "

Based upon that reference, arbitrator Ready concluded that there was "no doubt in this case that [the petitioner], and others involved, engaged in unacceptable workplace conduct." It is this conclusion which the petitioner's counsel submits is problematic.

[54] Admittedly, the submission to the preliminary arbitration may well have been limited to para. 13 of arbitrator Ready's binding recommendations, which were set out by him at p. 4 of the decision, where the petitioner is referred to as "grievor A":

> "With respect to grievors A and B (probationary employees): I recommend that the issue of whether or not these grievors have legal access to adjudication due to their employment status be referred to myself for adjudication on an expedited basis. The process of adjudication of this matter will be as follows:
>
> The parties will provide me with an agreed statement of facts setting out each employee's period of probation employment and their letters of dismissal, along with their respective written submissions on the issue at hand within 15 days after the publication of these recommendations and their rebuttals within 15 days thereafter …"

[55] However, the written submissions of the employer's counsel before arbitrator Ready, at p. 29, were as follows:

> "In our submission, it has been effectively accepted that the rejection of [the petitioner] was for an employment-related reason for cause. Every employee who was the subject of your binding mediation recommendation remained disciplined for misconduct. Therefore, there can be no issue that [the petitioner] should be treated any differently from all of the

> other employees for the purposes of assessing the existence of cause. In the case of [the petitioner] the existence of cause supports the cessation of [his] probationary employment. . . .”

The employer’s submissions continued that the petitioner’s behaviour, as identified in his termination letter, was “of the same kind and nature as other non-probationary employees’ conduct who were disciplined and is indistinguishable from them.” These submissions were filed by email a couple of days before the Union’s counsel filed her submissions, also by email. From that I infer that the Union had an opportunity to review the employer’s submissions before filing its own. Therefore, I find it to be significant that the above-quoted submissions of the employer were not specifically challenged by the Union. The only pertinent reply was a statement that it was the Union’s position that the petitioner was not “released for cause, but was rather discharged for disciplinary reasons.” If the petitioner wished to refute the employer’s statement of facts here or argue that the misconduct could not have constituted “cause”, but rather was a “sham or camouflage”, then he should have attempted to state facts or adduce evidence to that effect at the preliminary adjudication. Instead, he seeks yet a further adjudication to do so through his petition.

[56] It would seem artificial in the extreme to expect that arbitrator Ready, having gone through a consensual ADR process, which resulted in binding recommendations, and which in turn included the very submission to him on the petitioner’s preliminary arbitration, should somehow have disabused his mind of the findings he made regarding the conduct of all of the subject employees, including the petitioner. As I understand what happened in the ADR process, there was a general recognition that the misuse of computers by government employees in those instances was unacceptable workplace

conduct and that the petitioner was as guilty of that conduct as the non-probationary employees. However, the petitioner could not be dealt with in exactly the same fashion as those other employees because he was on probation at the time of his termination. Logically, it followed that there would have to be a preliminary adjudication on whether or not the petitioner had access to further adjudication or other appeal remedies under the legislation and the collective agreement.

[57] Even if I am incorrect in what I have just said, the petitioner's counsel, in his written outline, submitted that the basis for the relief sought included certain facts. Those stated facts were that the termination letter of June 3, 2003 from the deputy minister alleged that the petitioner had engaged in the misconduct I've mentioned and that this behaviour represented "serious misconduct" justifying his dismissal. The facts go on to talk about the 153 investigations which took place between May and September 2003 with respect to the alleged computer misuse by the various Government employees "including the Petitioner". And, as a result of the discipline imposed on approximately 96 bargaining unit employees, approximately 150 grievances were filed through the Union. And finally, the facts as stated by the petitioner include a reference to the government and the Union entering into "a mediation process with . . . Vincent L. Ready acting as mediator." It was further noted that part of that mediation process recommended that the issue of whether the petitioner had legal access to adjudication would be referred to arbitrator Ready for determination. Finally, the facts, as stated by the petitioner, are that Mr. Ready was appointed as arbitrator "by the parties", which I understand to mean the employer and the Union, since the petitioner was not individually "a party" to that appointment.

[58] While not putting too fine a point on it, I interpret the facts stated by the petitioner in this application as admissions. Thus, if it was clear that the ADR process engaged in was consensual and designed to resolve the grievances of the non-probationary employees and also to deal with the residual problem of the petitioner's status as a probationary employee, then why, logically, would the binding recommendations, including the finding of "unacceptable workplace conduct" not be something the arbitrator should have considered in the preliminary arbitration? The very reason arbitrator Ready recommended that the petitioner go through the preliminary arbitration was because he was found guilty of misconduct, but could not be simply disciplined in the same manner as the non-probationary employees. In my view, it was entirely logical and appropriate for arbitrator Ready to take that finding into account on the preliminary arbitration. As I implied earlier, to ignore it would have been to conduct the preliminary arbitration in an artificial vacuum.

[59] For all these reasons, I am satisfied that there was evidence to support arbitrator Ready's finding that the petitioner was rejected for cause under s. 104 of the *PSA*. Further, this determination was within the arbitration submission because it was directly relevant to whether the petitioner had legal access to any further adjudication or other appeal remedies. Indeed, what arbitrator Ready effectively did in the preliminary arbitration was in accord with what *Jacmain* and *Penner* direct – once credible evidence was tendered by the employer to the adjudicator pointing to some cause for rejection, valid on its face, he brought the hearing to a halt, by determining he had no jurisdiction to go further.

CONCLUSION

[60] For all the foregoing reasons, the petition is dismissed. Counsel have agreed to address the matter of costs at a later date, if necessary. I will remain seized for that purpose.

_____

GOWER J.

Appendix “A”

Public Service Act, R.S.Y. 2002, c. 183
Sections 102-111 and 121-126

Probationary period

102(1) Every person appointed to a position in the public service or promoted to a position in the public service shall serve a probationary period of six months, calculated from the date of their appointment to the position.

(2) Despite subsection (1), the probationary period for an auxiliary employee is 1000 working hours, exclusive of overtime hours.

(3) If a person is transferred or demoted to a position, the commission shall determine whether the person shall serve a probationary period having regard to the circumstances surrounding the transfer or demotion and any other factors the commission considers relevant.

Extended probationary period

103(1) A deputy head or unit head may extend the probationary period of an employee other than an auxiliary employee, for further periods not exceeding six months.

(2) A deputy head may extend the probationary period of an auxiliary employee for a further period of 1000 working hours, exclusive of overtime hours.

Rejection on probation

104 A deputy head or unit head may at any time during the probationary period or at any time during the extended probationary period of an employee, reject that employee for cause by written notice to the employee.

Effect of rejection

105 An employee who has been rejected under section 104 ceases to be an employee on the termination date mentioned in the notice.

Rejection if employee held a previous position

106(1) An employee with not less than five years continuous service in the public service of the Yukon who is appointed to a different position on probation and is later rejected during or at the end of their probationary period is, at the discretion of the commission, entitled for a period of one year from the date of their rejection to be reappointed to a position at the same class level as the position they occupied before the probationary appointment.

(2) Subsection (1) does not apply to auxiliary employees.

Notification to commission

107 A deputy head shall, before the expiry of an employee's probationary period, notify the commission

(a) whether in the deputy head's opinion the employee is suitable for continued employment in the position to which the employee was appointed or promoted;

(b) whether the employee's probationary period has been extended and the length of the extension; or

(c) whether the employee has been rejected or, in the opinion of the deputy head, will be rejected during the employee's probationary period.

Previous casual service

108(1) Casual service shall not be considered as part of a probationary period in respect of an appointment to a position in the public service.

(2) Service as an auxiliary employee shall not be considered as part of a probationary period in respect of an appointment to a position other than an auxiliary position.

Release for ill health

109 The commission may, pursuant to the regulations, release an employee for ill health by giving the employee notice in writing.

Effective date of release

110 On receipt of a notice mentioned in section 109, the employee will cease to be an employee in the public service effective on the date contained in the notice.

Consideration for re-employment

111 An employee released pursuant to section 109 who submits evidence satisfactory to the commission of the employee's fitness for re-employment may, for a period of one year after the submission of the evidence, be given preference over other applicants to a vacant position in the public service for which the employee is qualified next after a lay-off.

PART 8
SUSPENSION AND DISMISSAL

Power of deputy head to suspend or dismiss

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.

Suspension by Unit Head

Unit head or delegated officer may suspend

122 A unit head or officer to whom the authority has been delegated by the deputy head may suspend an employee for any of the reasons mentioned in section 121 and may, in conjunction with the suspension, recommend the dismissal of the employee to the deputy head.

Suspension by unit head or delegated officer

123 A unit head or officer who suspends an employee pursuant to section 122 shall immediately notify the employee and the deputy head in writing of the suspension, the effective date of the suspension, the reasons for the suspension, and whether any recommendation has been made for dismissal of the employee.

Appeal of suspension

124 An employee who has been suspended pursuant to section 122 may appeal the suspension to the deputy head by written notice not later than 10 working days from the date of receipt of the notice of suspension.

Failure to appeal

125 If no appeal against the suspension imposed pursuant to section 122 has been made within the period mentioned in section 124, the decision of the unit head or officer to suspend shall be final and binding.

Dismissal by deputy head

126 When a recommendation for dismissal has been made in conjunction with the suspension and no appeal has been made pursuant to section 124, the deputy head may, by notice in writing, dismiss the employee and the employee ceases to be an employee with effect from the day on which the employee was suspended.

Investigation on appeal of suspension

127 A deputy head who receives an appeal pursuant to section 124 shall, within 10 working days from the date of receiving the appeal, investigate the matter and give the employee an opportunity to make representations orally or in writing either personally or by counsel or agent or if the employee has so authorized, an official of the employee's bargaining agent.

Decision after investigation

128 If, after the investigation, the deputy head is satisfied that the suspension was warranted, the deputy head may confirm or modify the suspension and if the suspension was accompanied by a recommendation for dismissal, may dismiss the employee with effect from the date of the suspension or take any other action that the deputy head sees fit.

Notification of decision

129 The deputy head shall, within 10 working days of carrying out an appeal hearing pursuant to section 127, notify the employee and the public service commissioner in writing of the deputy head's decision.

Employee appeal to adjudication

130(1) An employee may, within 10 working days of the receipt of the decision of the deputy head pursuant to section 126 or 129, appeal the decision to an adjudicator appointed pursuant to the *Public Service Staff Relations Act*.

(2) Subsection (1) does not apply to an employee who is not a member of a bargaining unit under the *Public Service Staff Relations Act*.

Notice of appeal

131 An employee appealing pursuant to section 130 shall notify the deputy head in writing of the employee's appeal to adjudication.

Suspension or Dismissal by Deputy Head Alone

Request for hearing

132 If, of their own motion, a deputy head suspends or dismisses an employee, the employee may, by notice in writing within 10 working days from the date of receipt of the notification to the employee of the deputy head's decision, request a hearing by the deputy head.

Failure to request hearing

133 If the employee does not request a hearing within the time mentioned in section 132, the decision of the deputy head shall be final and binding and the employee shall not be entitled to submit their appeal to adjudication.

Hearing

134 If the employee requests a hearing pursuant to section 132, the deputy head shall investigate the matter and give the employee an opportunity to make representations orally or in writing either personally or by counsel or agent or if the employee has so authorized, an official of the employee's bargaining agent.

Notification of decision

135 If the deputy head conducts a hearing pursuant to section 134, the deputy head may confirm, modify, or revoke the earlier decision and shall notify the employee and the

public service commissioner in writing of the deputy head's final decision in the matter within 10 working days from the date of the hearing.

Appeal to adjudicator

136(1) An employee may, within 10 working days of the receipt of the final decision of the deputy head, appeal the decision to an adjudicator appointed pursuant to the *Public Service Staff Relations Act*.

(2) An employee who appeals pursuant to subsection (1) shall notify the deputy head in writing.

(3) Subsection (1) does not apply to an employee who is not a member of a bargaining unit under the *Public Service Staff Relations Act*.

Public Service Staff Relations Act**,** R.S.Y. 2002, c. 185
Sections 77 – 82

Right of employee to present grievance

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.

(3) An employee who is not included in a bargaining unit for which an employee organization has been certified as bargaining agent may seek the assistance of and, if the employee chooses, may be represented by any employee organization in the presentation of a grievance.

(4) No employee who is included in a bargaining unit for which an employee organization has been certified as bargaining agent may be represented by any employee organization, other than the employee organization certified as that bargaining agent, in the presentation or reference to adjudication of a grievance.

(5) Despite anything contained in subsections (1) to (4) the bargaining agent may present a grievance to the employer on behalf of one or more members of the bargaining unit with respect to the interpretation or application of a collective agreement or arbitral award in accordance with the grievance procedure provided for in this Act.

Reference to adjudication

78(1) If an employee has presented a grievance up to and including the final level in the grievance process with respect to the interpretation by, or application in respect of the employee of a provision of a collective agreement or an arbitral award, and the employee's grievance has not been dealt with to the employee's satisfaction, the employee may, subject to subsection (2) refer the grievance to adjudication.

(2) The employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies signifies in the prescribed manner

(a) its approval of the reference of the grievance to adjudication; and

(b) its willingness to represent the employee in the adjudication proceedings.

(3) An employee is not entitled to refer to adjudication, a grievance respecting release for cause during or at the end of the employee's probationary period.

(4) A grievance submitted by the bargaining agent to the employer in accordance with subsection 77(5) may be referred to an adjudicator who shall determine the question and whose decision on the matter shall be final and binding.

Adjudication system

79(1) The board shall appoint any officers, to be called adjudicators, that may be required to hear and adjudicate on grievances referred to adjudication under this Act or under section 130 or 136 of the Public Service Act.

(2) The chair shall administer the system of grievance adjudication established under this Act and may designate one of the adjudicators appointed under this section to

administer the system of grievance adjudication established under this Act on the chair's behalf.

(3) Subsections 54(2) and (3) apply *mutatis mutandis* in relation to the eligibility of a person to hold office or act as an adjudicator or to be named as an adjudicator in a collective agreement, in respect of any grievance referred to adjudication.

(4) An adjudicator appointed pursuant to this section has in relation to the hearing of any grievance referred to the adjudicator under this Act the power

(a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce any documents and things the adjudicator considers requisite to the full investigation and consideration of matters within the adjudicator's jurisdiction in the same manner and to the same extent as a judge of the Supreme Court;

(b) to administer oaths and affirmations;

(c) to receive and accept any evidence and information on oath, affidavit, or otherwise that the adjudicator sees fit, whether admissible in a court of law or not

Notice and reference to adjudicator

80(1) If a grievance has been referred to adjudication the aggrieved employee shall, in the manner prescribed, notify the chair and the employer and shall specify in the notice whether an adjudicator is named in the applicable collective agreement.

(2) If a grievance has been referred to adjudication and the aggrieved employee has notified the chair and the employer as required by subsection (1), the chair shall, in the manner and within the time prescribed,

(a) if an adjudicator is named in a collective agreement, refer the matter to the adjudicator so named; and

(b) in any other case, refer the matter to an adjudicator selected by the chair.

Jurisdiction of adjudicator

81(1) Subject to any regulation made by the Commissioner in Executive Council under paragraph 85(1)(d), no grievance shall be referred to adjudication and no adjudicator shall hear or render a decision on a grievance until all procedures established for the presenting of the grievance up to and including the final level in the grievance process have been complied with.

(2) No adjudicator shall, in respect of any grievance, render any decision thereon the effect of which would be to require the amendment of a collective agreement or an arbitral award.

(3) If

(a) a grievance has been presented up to and including the final level in the grievance process; and

(b) the grievance is not one that under section 78 may be referred to adjudication,

the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken thereon.

Hearing and decision

82(1) If a grievance is referred to adjudication, the adjudicator shall give both parties to the grievance an opportunity of being heard.

(2) After considering the grievance, the adjudicator shall render a decision thereon and

(a) send a copy thereof to each party and their or its representative and to the bargaining agent, if any, for the bargaining unit to which the employee whose grievance it is belongs; and

(b) deposit a copy of the decision with the chair.

(3) If a decision on any grievance referred to adjudication requires any action by or on the part of the employer, the employer shall take that action.

(4) If a decision on any grievance requires any action by or on the part of an employee or a bargaining agent or both of them, the employee or bargaining agent or both, as the case may be, shall take that action.

(5) The board may, in accordance with section 16, take any action that is contemplated by that section to give effect to the decision of an adjudicator on a grievance but shall not enquire into the basis or substance of the decision.

Collective Agreement
Effective January 1, 2003 to December 31, 2006
Article 28.04

28.04 Subject to and as provided in Section 77 of the Yukon Public Service Staff Relations Act, an employee or group of employees who feel(s) that he/she/they has/have been treated unjustly or considers himself/herself/themselves aggrieved by any action or lack of action by the Employer, is entitled to present a grievance in the manner prescribed in

Clause 28.02, except that where there is another administrative procedure provided by or under any other Act to deal with his/her/their specific complaint, such procedure must be followed.