IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Alford* v. *Government of Yukon,* 2005 YKSC 74 Date: 20051221
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 For the Respondents

REASONS FOR JUDGMENT

INTRODUCTION

[1] I have been asked to decide whether the petitioner has standing to bring an application for judicial review of an arbitrator's decision in a labour law context. The petitioner's employment with the Government of Yukon (the "employer") was terminated during his period of probation. He purported to appeal[1] and grieve[2] that termination under the applicable Yukon legislation and a collective agreement between the Government and

[1] Affidavit of D. Alford #1, Exhibit P.
[2] Affidavit of D. Alford #1, Exhibit Q.

the petitioner's union. With the consent of all the parties, the matter proceeded to arbitration on the preliminary issue of whether the petitioner, as a probationary employee, had access to adjudication under the legislation. The arbitrator effectively decided that the petitioner could not proceed to an adjudication. The union has taken no further steps and the petitioner has now applied for judicial review of the arbitrator's decision.

ISSUE

[2] Does the petitioner have standing to apply for judicial review of the arbitrator's decision?

ANALYSIS

[3] It is not disputed that the petitioner has *prima facie* standing, in the sense that he has been deprived of his employment, his source of income, and his livelihood as a result of the action of the employer. Thus, he has a sufficient interest to make this application for judicial review. However, the next question is whether that right of standing has been taken away by the applicable legislation and/or the collective agreement.

[4] The cases cited by the employer state the general principle that, where a union has the exclusive right to represent employees in presenting grievances, referring grievances to adjudication and on appeals, those employees have no standing to take such matters to court in the absence of union approval.

[5] One of the first cases on this point is *St. Anne Nackawic Pulp & Paper Co. Ltd.* v. *Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, where Estey J. delivered the judgment of the Supreme Court of Canada, and spoke about modern labour relations and the interplay between legislation and collective agreements. At para. 16 he said:

> "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. … 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."

[6] *Noël* v. *Société d'énergie de la Baie James*, 2001 SCC 39, dealt with the Quebec Labour Code, which gave the union the exclusive right of representation of its members. As LeBel J. noted at para. 3:

> "Under the collective agreement, the union had the exclusive authority to represent the employees for the purposes of the grievance and arbitration procedure. None of its provisions gave an employee the right to take a grievance to arbitration personally or to be a party to a proceeding before the arbitrator."

Indeed, at para. 41, the union was said to have a "monopoly" over the representation of employees. Finally, at para. 62, LeBel J. picked up on the theme from *St. Anne Nackawic* and stated as follows:

> "… While judicial review by the superior courts is an important principle, it cannot allow employees to jeopardize this expectation of stability in labour relations in a situation where there is union representation. Allowing an employee to take action against a decision made by his or her union, by applying for judicial review where he or she believes that the arbitration award was unreasonable, would offend the union's exclusive right of representation and the legislative intent regarding the finality of the arbitration process, and would jeopardize the effectiveness and speed of the arbitration process."

[7] The petitioner's counsel referred me to the case of *Weber* v. *Ontario Hydro,* [1995] 2 S.C.R. 929, which dealt with the Ontario *Labour Relations Act*. Section 45(1) of that *Act* provided that "all differences between the parties arising from the interpretation,

application, administration or alleged violation of the [collective] agreement, including any questions as to whether a matter is arbitral" were to be resolved by final and binding arbitration. McLachlin J., as she then was, said at para. 45 that the object of that provision is to exclude from the courts "all proceedings" arising from differences between the parties failing within the terms of the *Act*. Later, at para. 54, she qualified that this approach does not preclude all actions in the courts between an employer and employee, but only those disputes "which expressly or inferentially arise out of the collective agreement …"

[8] At the time of his termination by the employer, the petitioner was a member of the bargaining unit represented by the Public Service Alliance of Canada, which included the Yukon Employees' Union (collectively "the union"). As a union member, his ability to appeal his dismissal and to refer his grievance to adjudication depends on the provisions of the *Public Service Act*, R.S.Y. 2002, c. 183, ("*PSA*"), the *Public Service Staff Relations Act*, R.S.Y. 2002, c. 185, ("*PSSRA*") and the collective agreement (the relevant provisions are reproduced at Appendix A). However, the initial question is whether the union in this context has the exclusive right to represent employees on grievances and appeals. If it does, then the petitioner would have no further right to represent himself and his application for judicial review would be dismissed.

[9] Section 104 of the *PSA* provides that the employer may "reject [a probationary] employee for cause" at any time during the probationary period. Section 78(3) of the *PSSRA* provides that a grievance respecting "release for cause" of a probationary employee may not be referred to adjudication by that employee. Since it was not argued otherwise, I assume that "reject" and "release" mean the same thing.

[10] Section 78(1) of the *PSSRA* deals with grievances involving the interpretation or application "of a provision of a collective agreement or arbitral award", as either relate to

an employee. Section 78(2) requires the approval and representation of the union for such grievances. However, any grievance based on grounds *other than* the interpretation or application of the collective agreement or arbitral award respecting an employee can be grieved by the employee personally and without the union's approval or representation. Section 77(1)(a)(i) of the *PSSRA* sets out examples of the types of grievances which may be grieved by the employee personally. Thus, a probationary employee who grieves on the grounds of a rejection/release from employment "for cause" can similarly proceed on his own behalf, at least initially, without the approval or representation of the union.

[11] Whether or not the petitioner can refer his rejection/release for cause to adjudication is one of the substantive issues on his application for judicial review, which has yet to be fully argued. It is at issue because ss. 78(3) and 81(3) of the *PSSRA* purport to prevent him from making such a referral. However, on the preliminary issue of standing, the pertinent question is whether the union has the exclusive right to represent a probationary employee who wishes to refer such a matter to adjudication. There is nothing in either the *PSSRA* or the *PSA* which gives the union the exclusive right to represent employees who wish to refer to adjudication a grievance over their rejection/release from probationary employment for cause. On the other hand, that is not surprising, when ss. 78(3) and 81(3) purport to prohibit such referrals in the first place. In any event, that is not the end of the matter, as I must still consider the potential application of the collective agreement.

[12] Article 28.14 of the collective agreement provides that an employee who has presented a grievance about "the interpretation or application … of a provision of [the] Agreement or a related arbitral award" up to and including the final level of grievance, may refer that grievance to adjudication in accordance with the *PSSRA*. Such a grievance

would therefore engage ss. 78(1) and (2) of the *PSSRA*, and union approval would be required for the desired referral to adjudication.

[13] Article 28.15(1) of the collective agreement purports to be a general prohibition against individual employees taking *any* grievance to adjudication on their own behalf. It states as follows:

> "An employee must obtain the approval of the [union] and be represented by the [union] before a grievance can be referred to adjudication."

[14] I heard arguments from the parties about whether Article 28.15(1) should be read together with Article 28.14, so as to limit the employee's right to refer matters to adjudication only when the grievance is within the limited class in 28.14. I find that Article 28.15 must be read as a general requirement that all matters being referred to adjudication require union approval. It would make no sense to read Article 28.14 together with 28.15, since the former already has the effect of requiring union approval to refer those types of grievances to adjudication, by virtue of the application of ss. 78(1) and (2) of the *PSSRA*. Therefore, Article 28.15 would be redundant if read together with 28.14, since it too requires union approval.

[15] Thus, a probationary employee wishing to refer a rejection/release for cause to adjudication must have the approval of the union before doing so. In other words, the union has the exclusive right to represent such employees in that context.

[16] In the alternative, if I am in error on this point, I note that the grievance presentation form filed by the petitioner included a reference to the employer contravening "Articles 5.01, 5.02, 9.02 and 28.18 [as written]" of the collective agreement. Therefore, I also find that his grievance was one which involved the "interpretation or application" of the collective agreement. Thus, union approval to refer such a matter to adjudication is

required by both Article 28.14 and ss. 78(1) and (2) of the *PSSRA*. Accordingly, the union has the exclusive right to represent the petitioner in this context as well.

[17] Since the union has the exclusive right to represent employees in both the above contexts, then the general principle referred to in the case law should apply, prohibiting the petitioner from pursuing this application for judicial review on his own behalf, without union approval. If that were the end of the matter, I would find that he has no standing.

[18] However, the petitioner also purports to frame his dispute as an appeal under s. 136 of the *PSA*. I note that in his letter to the Deputy Minister dated June 11, 2003, he stated "I wish to appeal my dismissal" pursuant to s. 148 of the *Public Service Act*. More correctly, the petitioner was likely referring to s. 148 of the *Public Service Commission Act*. In any event, it is clear from this letter and the petitioner's arguments filed on this preliminary application for standing, that he intends to argue, as a substantive point on the main application for judicial review, that he is in fact pursuing an appeal of his dismissal under s. 136 of the *PSA*. Because the petitioner wishes to argue that matter in greater detail, I will express no opinion about it here. Rather, at this stage, the pertinent question is whether the petitioner requires the approval of the union in order to pursue such an appeal.

[19] Section 136 of the *PSA* says the appeal is to an adjudicator appointed pursuant to the *PSSRA.* However, there is nothing in s. 136, or elsewhere in the *PSA,* which expressly requires the approval of the union for such an appeal.

[20] Counsel for the petitioner and the employer both suggested that an appeal under s. 136 of the *PSA* is routed towards adjudication by the application of s. 78 of the *PSSRA*. Whether that is the correct approach or not, I also need not decide at this stage. However, I note that s. 79(1) of the *PSSRA* authorizes the Yukon Public Service Staff Relations

Board to appoint an adjudicator to hear “grievances” referred to adjudication under s. 136 of the *PSA*. Section 79(4) of the *PSSRA* sets out the powers of an adjudicator appointed in that circumstance and s. 81 provides the scope of the jurisdiction of an adjudicator to whom a grievance has been referred. Section 81(3)(b) states that if the grievance is one which under s. 78 may not be referred to adjudication, that is s. 78(3), then the decision on the grievance 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.” Beyond that, nothing in ss. 79 or 81, or elsewhere in the *PSSRA*, expressly specifies that the union has the exclusive right to represent a probationary employee who is appealing on the grounds of a dismissal for cause.

[21] To sum up, on the one hand, the union has the exclusive right to represent probationary employees who grieve their rejection/release for cause:

(a) whenever they wish to refer such grievance to adjudication (pursuant to Article 28.15 of the collective agreement); or

(b) whenever the grievance involves the interpretation or application of a provision of the collective agreement relating to the employee (pursuant to ss. 78(1) and (2) of the *PSSRA* and Article 28.14 of the collective agreement).

On the other hand, the union does not have the exclusive right, or indeed any right in the absence of consent, to represent a probationary employee appealing a dismissal for cause under s. 136 of the *PSA*. Thus, it would not offend the general principles set out in the cases of *St. Anne Nackawic*, *Noël* and *Weber*, cited above, to allow the petitioner to pursue his application for judicial review on his own behalf. Accordingly, I find the petitioner has standing to proceed.

[22] I would like to address the remaining question of whether the petitioner has waived his right to represent himself now, given that he was previously represented by the union. He expressly appointed the union to act as his agent on the preliminary hearing[3] and the union agreed to represent the petitioner before the arbitrator in that initial arbitration. However, I do not find that, as a result, the petitioner waived his right to represent himself in any future proceedings arising.

[23] In *Nicholson* v. *East Prince Regional Health Authority*, [1998] P.E.I.J. No. 48, Matheson J., after reviewing the decisions of the Supreme Court of Canada in *Weber* and *St. Anne Nackawic*, cited above, said as follows at para. 16:

> "The nub of these decisions is that once the employee joins the union **or agrees to have the union represent him** in the bargaining process, he signs away his individual rights and the union will represent him in dealings with the employer from then on. …"
>
> (Emphasis added)

While this comment initially appears to support the waiver argument, when Matheson J. refers to the employee's *agreement* to union representation, I understand him to mean agreement through joining the union and accepting the position of employment. I do not understand him to mean agreement in a "case by case" context, such as the petitioner's agreement to have the union act as his agent on the preliminary hearing. The petitioner did not "agree" to exclusive representation by the union for *all* matters by joining the union and accepting employment. As I have found, there are a number of instances where the employee may proceed with presenting a grievance or launching an appeal without union representation. In that respect, the situation in the Yukon is unlike many other collective bargaining regimes: *Laforet* v. *Public Service Alliance of Canada*, [1995] Y.J. No. 108.

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[3] Affidavit of D. Alford #1, Exhibits P and Q.

[24] I find the petitioner is not precluded from representing himself on this application for judicial review of the arbitrator's decision, notwithstanding that he earlier agreed to have the union represent him.

CONCLUSION

[25] The petitioner has standing to apply for judicial review of the arbitrator's decision.

[26] If the parties wish to make further submissions on costs, they may do so when the petition is set down for argument.

GOWER J.

Appendix “A”

Public Service Act, R.S.Y. 2002, c. 183
Sections 102 – 105

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.

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 Labour 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 Labour 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, 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 146 or 152 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 to

(a) summon and enforce the attendance of witnesses and compel them to

give oral or written evidence on oath in the same manner and to the same extent as a judge of the Supreme Court;

(b) compel at any stage of a proceeding, any person to produce the documents and things that may be relevant;

(c) administer oaths and solemn affirmations; and

(d) accept any evidence, 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 19.12, 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
Articles 28.14, 28.15 and 28.16

28.14	When a grievance has been presented, up to and including the Final Level in the grievance procedure with respect to the interpretation or application in respect of him/her of a provision of this Collective Agreement or a related arbitral award and his/her grievance has not been dealt with to his/her satisfaction, he/she may refer the grievance to adjudication in accordance with the provisions of the Yukon Public Service Staff Relations Act and Regulations.
28.15	(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.

28.16	An employee, subject to Clause 28.15(1), shall notify the Employer in writing within thirty (30) working days following the date of receipt of the decision at the Final Level of the grievance procedure of his/her intention to appeal the decision to adjudication.