COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Alford v. Government of Yukon***,
2006 YKCA 9

Date: 20060804
Docket: 05-YU552

Between:

Dominic Alford

Respondent
(Petitioner)

And

Government of Yukon,
as Represented by the Public Service Commission
and Vincent L. Ready, Arbitrator

Appellants
(Respondents)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Thackray

P.A. Csiszar and Z. Brown	Counsel for the Appellants
T.S. Preston, Q.C.	Counsel for the Respondent
Place and Date of Hearing:	Whitehorse, Yukon June 1, 2006
Place and Date of Judgment:	Vancouver, British Columbia August 4, 2006

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Thackray

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] This appeal concerns the standing of a dismissed employee to seek judicial review of an arbitrator's decision.

[2] The employee, the respondent Mr. Alford, was a probationary employee of the Government of Yukon and a member of a bargaining unit covered by a collective agreement. He was represented by the Yukon Employees' Union at the hearing before the arbitrator.

[3] The issue arises from Mr. Alford's attempts to challenge the loss of his employment. He purported both to appeal and to grieve his dismissal under Yukon legislation and the collective agreement. Mr. Ready, as arbitrator, heard the preliminary question of his jurisdiction to adjudicate the case. He held that he lacked jurisdiction to deal with the matter of Mr. Alford's loss of employment.

[4] Mr. Alford then filed a petition for judicial review of Mr. Ready's decision. The Government applied for an order dismissing the petition on the basis that Mr. Alford lacked standing to apply for judicial review. That application was dismissed by the learned chambers judge on December 23, 2005, by reasons for judgment indexed at 2005 YKSC 74.

[5] The chambers judge addressed two issues: (i) whether the Union had the exclusive right to represent employees on grievances; and (ii) whether the Union had the exclusive right to represent employees on appeals. He concluded that the Union did have such an exclusive right in respect of a grievance filed under the

Public Service Staff Relations Act, R.S.Y. 2002, c. 185, and the collective agreement, but that the Union did not have the right, exclusive or otherwise, to represent a probationary employee appealing a dismissal for cause under s. 136 of the ***Public Service Act***, R.S.Y. 2002, c. 183. It followed, in his view, that Mr. Alford had standing to proceed on the petition for judicial review.

[6] From that order the Government appeals to this Court. However, at the beginning of the appeal hearing Mr. Csiszar, counsel for the Government, advised the Court that the petition for judicial review had been heard on April 12, 2006 and dismissed on April 28, 2006. At the time of the hearing of the petition, the appeal was expected to proceed the week of May 29, 2006, as it did. The Government had asked unsuccessfully for a stay of proceedings or adjournment of the hearing of the petition pending the outcome of the appeal. Thus this appeal occurs out of order in the action below.

[7] Notwithstanding the Government's success on the petition which makes this appeal technically moot, Mr. Csiszar asked us to hear the appeal because the issue is important to the Government, the Union, and their on-going relationship.

[8] The parties have the right to appeal an interlocutory order without first obtaining leave to appeal. The order here appealed is interlocutory. The issue presented engages not only the terms of the collective agreement but also the correct interpretation of the ***Public Service Act*** and the ***Public Service Staff Relations Act***, matters important to the conduct of labour relations in the Government workplace. An important issue of procedure and statutory interpretation

should not be left unresolved, buried so to speak, because the underlying litigation has been concluded before the appeal, brought as of right, could reasonably be completed. I conclude that this appeal should be decided on its merits.

[9] I turn then to the issues raised by the appeal.

[10] The case concerns the ***Public Service Act*** and its relationship to the ***Public Service Staff Relations Act***. The ***Public Service Act*** has 13 Parts. Part 6 is entitled "Appointments". It has a sub-part entitled "Probation", containing ss. 102-111. This sub-part addresses the acquisition and termination of probationary employment but does not provide a right of appeal or review of termination of a probationary employee. In particular, it provides:

> **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.
>
> **105** An employee who has been rejected under section 104 ceases to be an employee on the termination date mentioned in the notice.
>
> [Emphasis added.]

[11] Part 8 of the same ***Act*** is entitled "Suspension and Dismissal". That part provides the statutory authority for a suspension or dismissal, establishes the basis for such action, and establishes the procedures required to be followed in the case of a suspension or dismissal. In particular, in respect of the suspension or dismissal of an employee by a deputy head, Part 8 provides that the employee may request a hearing by the deputy head and, provided the employee is a member of a bargaining

unit under the ***Public Service Staff Relations Act***, may appeal the decision to an 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*.
>
> [Emphasis added.]

[12] The second statute with which we are concerned, the ***Public Service Staff Relations Act,*** is the statute providing *inter alia* for acquisition of bargaining rights by an employee organization (the union), for collective bargaining dispute resolution during collective bargaining, and for adjudication of grievances. Those provisions include:

> **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.

…

78(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.

…

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*.

…

81(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.

[Emphasis added.]

Sections 146 and 152 referred to in s. 79(1) are now numbered 130 and 136 respectively.

[13] Further to the exclusive authority given to a union by s. 77(2) to control those matters referred to adjudication, the collective agreement provides:

> 9.01 The Employer recognizes the Alliance as the exclusive bargaining agent for all employees in the Bargaining Unit.
>
> …
>
> 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.

[14] The general principle is that an individual represented by a union lacks standing to seek judicial review of an arbitration decision conducted between an employer and union. This principle emerges from the exclusive bargaining authority of the union and the objective of promoting harmonious and stable labour relations. In ***Noël v. Société d'énergie de la Baie James***, [2001] 2 S.C.R. 207, 2001 SCC 39 LeBel J. described this principle:

> [62] … even in discipline and dismissal cases, the normal process provided by the Act ends with arbitration. That process represents the normal and exclusive method of resolving the conflicts that arise in the course of administering collective agreements, including disciplinary action. In fact, this Court gave strong support for the principle of exclusivity and finality in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at pp. 956-957 and 959, *per* McLachlin J. That approach is also intended to discourage challenges that are collateral to disputes which, as a general rule, will be definitively disposed of under the procedure for administering collective agreements. 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.

[15] ***Noël*** is an application of the approach famously stated in ***St. Anne Nackawic Pulp & Paper v. CPU***, [1986] 1 S.C.R. 704. In ***Weber v. Ontario Hydro***, [1995] 2 S.C.R. 929 at para. 41, McLachlin J. (as she then was) quoted from pp. 718-19 of ***St. Anne Nackawic***:

> 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.
>
> [Emphasis added.]

[16] And at 721:

> What is left is an attitude of judicial deference to the arbitration process. . . . It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration ... is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of a collective

> agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement.
>
> [Emphasis added.]

[17] Where, as here, the issue is one of statutory interpretation, the approach is that endorsed by the Supreme Court of Canada at para. 21 in ***Re Rizzo & Rizzo Shoes Ltd.***, [1998] 1 S.C.R. 27, adopted from Elmer Driedger, ***Construction of Statutes*** (2nd ed., 1983) at 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[18] The Court in ***Rizzo*** also emphasized the principle, encapsulated at s. 10 of the ***Interpretation Act***, R.S.Y. 2002, c. 125, that every act "shall be deemed remedial and shall receive the fair, large, and liberal interpretation that best insures the attainment of its object." The application of these principles in this case is animated by the policy expressed in ***Noël***, ***St. Anne Nackawic*** and ***Weber.***

[19] Applying the approach advocated in ***Noël***, and relying primarily on Article 28.15 of the collective agreement, the chambers judge correctly held that Mr. Alford lacked standing to seek judicial review on the basis of his grievance. However, he reached a different conclusion on the premise that Mr. Alford had also appealed under s. 136. In so concluding he held:

> [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.

[20] The critical question is whether s. 136, correctly interpreted, provides a second avenue of complaint to the employee, separate and independent of his right

to grieve under the authority of the union. With respect, I conclude that s. 136, contrary to the conclusion of the chambers judge, does not have this effect. I say this for two reasons:

1. Part 6 of the ***Public Service Act*** is an entire code for the appointment and termination of probationary employees. Termination of probationary employees occurs, in the language of s. 104, “by rejection … for cause". Part 8, on the other hand, of which s. 136 is a part, addresses suspension and dismissal of employees for one of four defined reasons. I conclude that s. 136 refers to a decision contemplated by Part 8 which does not include decisions as to the employment status of probationary employees; and

2. Section 136(3) which allows an employee to appeal to an adjudicator under the ***Public Service Relations Act*** but only if the employee is a member of a bargaining unit under that ***Act***, invokes all of the provisions of the ***Public Service Relations Act*** pertaining to adjudicators. This includes s. 79(1) of the ***Act***, replicated earlier, which provides for adjudicators to hear "grievances" under s. 136 (and of course an "appeal" under s. 136 is equally a "grievance" because it is a complaint by an aggrieved employee as to his or her treatment in the workplace). But by ss. 78(3) and 81(3)(b) of the ***Public Service Staff Relations Act***, grievances as to release of an employee during a probationary period may not be referred to adjudication, and adjudicators lack jurisdiction in respect of these matters.

> In the result, by tying s. 136 to the collective bargaining regime of the ***Public Service Relations Act***, the ***Public Service Act*** incorporates provisions that, consistent with Part 6 of the ***Public Service Act***, preclude a probationary employee from adjudicating his release from employment.

[21] The foregoing leads me to conclude that s. 136 is not, as advocated by Mr. Alford, a separate, independent right of hearing that he can invoke without reference to the union. Rather, it is a complementary provision to the ***Public Service Staff Relations Act*** which does not detract from the otherwise exclusive authority possessed by the union by virtue of its certificate of bargaining authority.

[22] The conclusion that two separate avenues may be open to a probationary employee, one an appeal in which a union has no right to represent the employee, and the other a grievance in which a union has exclusive rights of representation, while not impossible of creation, is so inconsistent with sound labour relations and the objectives of labour statutes that it should only result from the clearest of language. This language, in my view, does not compel that result and such an outcome is inconsistent with the approach described in ***Rizzo***. Rather, as I have sought to explain, the language and scheme leads inexorably to the opposite conclusion.

[23] On behalf of Mr. Alford, Mr. Preston contended that the arbitration decision challenged on judicial review was not, as I have concluded, pursuant to a grievance, but was rather the decision of an *ad hoc* consensual arbitrator. That is, he says the

Public Service Staff Relations Act did not apply at all. In my view, this submission is not open to Mr. Alford for several reasons. First, the petition for judicial review did not allege an *ad hoc* arbitration. Rather, it referred to a grievance and an agreement between the Government and the Union to arbitrate the issue of access to adjudication. On those pleadings the issue now raised was not addressed by the chambers judge.

[24] Second, had the decision of Mr. Ready not been the decision of an adjudicator under s. 136 and, by incorporation by reference, the ***Public Service Staff Relations Act***, it was a decision on a matter between the Union and the Government and, again for the policy reasons expressed in the cases I have referred to, is a matter Mr. Alford cannot bring to court. Third, if Mr. Ready was not an adjudicator under the ***Act*** and his proceeding not an adjudication but rather an *ad hoc* arbitration, the basis for judicial review evaporates. And, in any case, in my view, it was open to the adjudicator to deal with, as in the first issue before him, his jurisdiction to address the merits of the complaint.

[25] For the above reasons, I conclude that the legislative scheme has two complementary aspects: (i) that probationary employees' rights are determined by the sections of Part 6 of the ***Public Service Staff Relations Act*** pertaining to them; and (ii) that the union has exclusive rights in relation to the advancement of issues to adjudication (arbitration) for all members of the bargaining unit including probationary employees to the extent the scheme permits.

[26] It follows, on the authorities earlier referred to, that Mr. Alford lacks standing to challenge the decision of Mr. Ready. I would, therefore, allow the appeal. Costs follow the event, here and in the Supreme Court.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Smith"

I AGREE:

"The Honourable Mr. Justice Thackray"