In the Court of Appeal of Northwest Territories

Citation: del Valle v. Government of the Northwest Territories, 2011 NWTCA 03

Date: 2011 06 20
Docket: A1AP2007000012
Registry: Yellowknife, N.W.T.

Between:

Vaughn del Valle

Appellant

- and -

The Government of the Northwest Territories

Respondent

The Court:

The Honourable Mr. Justice Keith Ritter
The Honourable Mr. Justice Clifton O'Brien
The Honourable Madam Justice Louise Charbonneau

Memorandum of Judgment

Appeal from the Judgment of
The Honourable Madam Justice V.A. Schuler
Dated the 12th day of March, 2007

Memorandum of Judgment

The Court:

[1] The respondent applied to a judge of the Supreme Court of the Northwest Territories for an order dismissing the appellant's application for judicial review of an arbitration award on the basis that the appellant lacked standing. Schuler J. granted the respondent's application. The appellant now appeals.

[2] Although the appellant advances 20 separate grounds of appeal and seeks to have this Court adjudicate on the merits of the underlying matter, there are only two issues properly before us. The first is whether the appellant has status to seek judicial review of the arbitration decision. The second issue is whether the appellant should have been permitted to act for the Union that was a party to the collective agreement at issue. If the appellant is successful on either ground, the matter should be returned to the NWT Supreme Court for hearing of those issues that form part of a judicial review. If the appellant does not have status and should not be permitted to act for the Union, then his appeal should be dismissed in its entirety as he is not properly before the courts.

[3] In support of his appeal, the appellant filed a 163-page factum. However, not all of it deals with the status issue, much of it being devoted to the underlying merits. Some of the factum advances new claims not set out in the Originating Notice filed by the Public Service Alliance of Canada ("PSAC") or in the Notice of Motion filed by the appellant in PSAC's name seeking judicial review.

[4] Because this appeal is on the record before the NWT Supreme Court, the only issues we can deal with are those set out above.

Background

[5] The chambers judge's Reasons, cited as *Public Service Alliance of Canada v. Northwest Territories*, 2007 NWTSC 20, 62 Admin. L.R. (4th) 191, succinctly set out the background to this action:

> 2 Mr. del Valle was an employee of the GNWT and a member of PSAC. He was laid off and grieved the way that the GNWT dealt with his priority status for other positions. His grievance was taken to arbitration by PSAC. By an award dated October 6, 2004, the Arbitrator dismissed the grievance on the merits and also as having been filed beyond the time limits set out in the collective agreement. The award indicates that PSAC was represented by counsel and that Mr. del Valle was a witness at the arbitration hearing.

3 On November 5, 2004, PSAC through its local counsel filed an originating notice seeking judicial review of the arbitration award. The parties named in the originating notice were, and still are, PSAC as applicant and the GNWT as respondent.

4 On November 19, 2004, the return date in the originating notice, PSAC's local counsel appeared in Supreme Court Chambers. He advised the Court that service of the originating notice had not yet been effected on either the GNWT or the Arbitrator. He advised further that PSAC "is not going to proceed with this. They're going to allow the grievor, Vaughn del Valle, to proceed with it on his own, and he is going to proceed as an unrepresented litigant". Counsel also advised the Court that PSAC had commenced the judicial review proceedings at Mr. del Valle's request to meet the 30 day time limit for filing under the Rules of Court. He asked that the proceedings be adjourned *sine die* and said that Mr. del Valle would be informed that he had to proceed with service.

5 In December 2004, local counsel for PSAC filed a notice of intention to cease acting. That notice shows the last known address for PSAC in care of Mr. del Valle.

6 The GNWT and the Arbitrator were not served with the originating notice by Mr. del Valle until approximately the last week of February 2005. The Arbitrator corresponded with counsel for the GNWT, indicating that he had the original copy of the award, but none of the materials filed by the parties in the arbitration, having disposed of them once the appeal period had expired. He also indicated that copies only, not originals, of documents had been filed and that no arrangements had been made by the parties to the arbitration for the evidence taken to be recorded or transcribed. The Arbitrator has not made a return of the record to this Court nor has he filed anything with this Court to comply with Rule 598(3) in explanation of the absence of a record as required by Rule 598(1).

7 In September 2006, Mr. del Valle filed a notice of motion subtitled "Application for Judicial Review", in which further grounds for judicial review are set out and further relief is sought in the form of summary judgment, a hearing *de novo* in this Court and a direction that the Legislative Assembly Management Board conduct certain investigations. The notice of motion was filed in the proceeding commenced by PSAC's originating notice.

8 In October 2006, the GNWT filed its application for dismissal of the judicial review proceedings.

Decision Below

[6] In her Reasons, the chambers judge first considered whether the appellant could represent PSAC. She noted the evidence, according to which PSAC instructed its solicitor to file the Originating Notice to preserve the limitation period, but declined to proceed with the application. Instead, PSAC authorized the appellant to either act for it or to apply to amend the style of cause and substitute his name for PSAC's as the party seeking judicial review. She then turned to Rule 7 of the *Rules of the Supreme Court of the Northwest Territories*, which provides:

> 7.(1) A party to a proceeding who is under disability or acts in a representative capacity shall be represented by a solicitor.
>
> (2) Unless otherwise ordered by the Court, a party that is a corporation shall be represented by a solicitor.
>
> (3) Any party other than one referred to in subrule (1) or (2) may act in person or be represented by a solicitor.
>
> (4) Notwithstanding subrules (1) and (2), the Court may grant audience to any individual where it considers it appropriate in the interests of justice.

[7] On the assumption that PSAC was not a corporation, she held that it could proceed in person (through one of its officers) or be represented by a solicitor. However, the appellant was neither a solicitor nor an officer of PSAC. The chambers judge ultimately concluded that it was not in the interests of justice to permit the appellant to represent PSAC, given that it was unclear whether PSAC intended for the appellant to do so or whether it filed only to preserve the limitation with the intention that the appellant would replace it as the party to the application. She also noted that PSAC filed nothing to support any request to have the appellant represent it.

[8] Although there was no formal application to permit the appellant to pursue the judicial review application in his own name, the chambers judge nevertheless dealt with this issue. She noted that PSAC filed the grievance under Art. 37.19 of the Collective Agreement, which provides:

> 37.19 Where a difference arises between the parties relating to the interpretation, application or administration of this Agreement including any question as to whether a matter is arbitrable or where an allegation is made that a term or condition of this Agreement has been violated, either of the parties may, after exhausting the grievance procedure in this Article, notify the other party in writing within twenty-one (21) days of the receipt of the reply at the Final Level of his/her desire to submit the difference or allegation to arbitration under the Public Service Act.

[9] She concluded that the parties to that agreement were PSAC and the government based

on Art. 3.01, which provides that PSAC was the exclusive bargaining agent for all employees. This conclusion was additionally supported by Art. 37.24, which states that if an arbitrator's decision was not implemented, "either party or employee affected by the decision" could take certain steps. This provision implies that the parties to the Collective Agreement are PSAC and the government and not the individual employees.

[10] Next, the chambers judge reviewed ***Yashin v. National Hockey League*** (2000), 192 D.L.R. (4th) 747 (Ont. Sup. Ct. J.) and ***Canadian Union of Public Employees, Local 59 v. Saskatoon (City)***, 2001 SKCA 67, 207 Sask. R. 222. Those decisions establish that where the collective agreement provides that a union is the sole bargaining agent for the employees, any individual right to contract has been removed and only the parties to the collective agreement can seek arbitration and attack the resulting arbitration award. She carefully reviewed the Supreme Court's decision in ***Noël v. Société d'énergie de la Baie James,*** 2001 SCC 39, [2001] 2 S.C.R. 207, where the court decided that under collective agreements employees do not have the necessary "interest" to seek judicial review of arbitrators' decisions.

[11] Next, the chambers judge referred to s. 28 of the ***Arbitration Act***, R.S.N.W.T. 1988, c. A-5, which provides:

> 28. (1) Whether or not a submission provides for an appeal from an award, a party to a submission or a person claiming under that party may apply to a judge to set aside an award on the grounds that
>
> > (a) an arbitrator or umpire has misconducted himself or herself, or
> > (b) an arbitration or an award has been improperly procured,
>
> and the judge may, in the discretion of the judge, dismiss the application or set aside the award.

She held that s. 28 applies to successor unions who would claim "under" the name of the original union (presumably, the same would apply to successor employers). However, giving this provision the interpretation sought by the appellant would undermine the nature of the collective bargaining regime as described in ***Noël***.

[12] The chambers judge held that the appellant could neither seek judicial review himself nor act for PSAC. However, she permitted PSAC to continue the judicial review provided that it took steps to do so within 45 days of her decision. PSAC has declined to act and the judicial review now stands as dismissed.

Analysis

[13] On appeal, the appellant repeats the arguments made before the chambers judge. However, we perceive no legal error in her Reasons. Her analysis complies with the dictates of

the Supreme Court regarding collective bargaining between unions and employees and with respect to the interpretation of statutes. Most recently, the British Columbia Court of Appeal confirmed in ***Driol v. Canadian National Railway Co.***, 2011 BCCA 74 that individual union members give up individual contractual rights in exchange for collective rights provided by the collective agreement. These rights are surrendered in return for the greater power gained by being able to bargain with employers collectively.

[14] In his factum and at the hearing of his appeal, the appellant argued that he initially sought to have the merits of his claims dealt with under a parallel alternative route, with the decision maker being the Minister of the department responsible for his employment. He says that although he squarely placed the issues in front of the Minister, the Minister took no action. Later he decided not to pursue judicial review of the Minister's alleged failure to act, but proceeded with the arbitration route provided by the collective agreement. He describes this choice as a "Catch-22" and now appears to also seek judicial review of the Minister's alleged inaction. It is now several years since this alleged inaction occurred and it has nothing to do with the arbitration the appellant seeks to have judicially reviewed. Even if the appellant could have personally sought judicial review of the Minister's alleged inaction, that does not support his right to personally seek judicial review of the arbitration conducted under the Collective Agreement.

[15] The appellant is not a party to the Collective Agreement and cannot legally represent PSAC except if the interests of justice would permit his doing so. The chambers judge concluded that they did not. That decision is discretionary and is reviewed on the reasonableness standard.

[16] The chambers judge set out her reasons for reaching her conclusion and those reasons meet this standard. In fact, the length and nature of the appellant's factum buttress her conclusion. The appellant is now attempting to attach claims to his proposed judicial review of the arbitration decision that cannot possibly be dealt with under the rubric of judicial review. It is not in the interests of justice to permit the appellant to "represent" PSAC in the pursuit of the remedies he now advances.

[17] This appeal is dismissed.

Appeal heard on June 14, 2011

Memorandum filed at Yellowknife, N.W.T.
this day of June, 2011

Ritter J.A.

As authorized: O'Brien J.A.

As authorized: Charbonneau J.A.

Appearances:

J. Holden
for the Respondent

In Person
for the Appellant

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