

~~3~~

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KRISTINE ROME,

Applicant

- and -

THE COMMISSIONER OF THE
NORTHWEST TERRITORIES,

Respondent

*C.C.
1963 v.
Lug. Corp.
of Mar 2/79*

Application for an Order appointing an Arbitrator

Heard at Yellowknife February 28, 1978

Application granted

Reasons for Judgment filed: March 10, 1978.

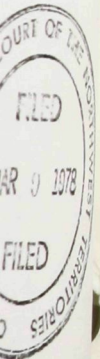
Reasons for Judgment by:

The Honourable Mr. Justice C. F. Tallis

Counsel on the Hearing:

Mr. W. Stefura for the Applicant

Mr. A. Brien for the Respondent



COURT OF THE
NORTHWEST TERRITORIES
TREESHIN,
and -
OF YELLOWKNIFE,
nation of Jack
21st day of Oc
Informant,

Faint bleed-through text from the reverse side of the page, including the words 'Application', 'the file', and 'Northwest Territories'.

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KRISTINE ROME,

Applicant

- and -

THE COMMISSIONER OF THE
NORTHWEST TERRITORIES,

Respondent

Counsel on the Hearing: Mr. W. Stefura for the Applicant

Mr. A. Brien for the Respondent

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE C. F. TALLIS

This is an Application for an Order appointing an arbitrator pursuant to Section 12 of the *Arbitration Ordinance*, R.O.N.W.T. 1974 Ch. A-4 and Section 32 of the *Public Service Ordinance*, R.O.N.W.T. 1974 Ch. P-13.

It is common ground between the parties that there is no collective bargaining agreement involved in this application.

In support of this application the Applicant filed her affidavit which reads as follows:

"I, KRISTINE ROME, of the City of Yellowknife in the Northwest Territories, MAKE OATH AND SAY:

1. That I am the Applicant in the within application.
2. That I first became an employee within the Public Service of the Government of the Northwest Territories on or about the first

"day of May, 1974 in the position of a clerk-steno with the Department of Social Development.

3. That on the 7th day of June, 1976, I submitted my notice of transfer as steno 3 with the Department of Social Development by reason of my transfer to the position of steno 3 with the Health Care Division of the Department of Social Development, at Yellowknife, Northwest Territories, which appointment commenced the 14th day of June, 1976.

4. That on or about the 7th day of January, 1977, I submitted my notice of transfer for my position of steno 3 with the Health Care Division of the Department of Social Development effective January 10th, 1977 and transferred to the position of steno 3 with the Research and Development division of the Department of Local Government at Yellowknife, Northwest Territories, commencing January 10th, 1977.

5. On or about the 11th day of August, 1977, I accepted a promotion to the position of steno 4 with the Department of Education in Yellowknife, effective August 22nd, 1977.

6. That on or about the 14th day of December, 1977, I received a letter from the Commissioner of the Northwest Territories advising me that my employment had been terminated effective such date. Attached hereto and marked Exhibit "A" to this my Affidavit is a copy of such letter.

7. That on or about the 22nd day of December, 1977, Mr. Ed McCrae, on my behalf, delivered to the Commissioner of the Northwest Territories a letter contesting the termination of my employ and requesting an appeal. Attached hereto and marked as Exhibit "B" to this my Affidavit is a copy of said letter.

8. That on or about the 3rd day of January, 1978, I received from the Commissioner of the Northwest Territories, a letter attached hereto and marked as Exhibit "C" to this my Affidavit, advising that the matter had been reconsidered, and that the decision to terminate my employment with the Government of the Northwest Territories

"had been upheld.

9. That on or about the 6th day of January, 1978, Mr. Ed McCrae, on my behalf, delivered to the Commissioner of the Northwest Territories a letter requesting that the matter of the termination of my employ be referred to arbitration. Attached hereto marked Exhibit "D" to this my Affidavit is a copy of said letter.

10. On or about the 16th day of January, 1978, Mr. Ed McCrae received on my behalf a letter from the Commissioner of the Northwest Territories advising that I had been rejected on probation in accordance with Section 20 of the Public Service Ordinance and that therefore the matter was not referable to an Arbitration Board. Attached hereto marked as Exhibit "E" to this my Affidavit is a copy of said letter.

11. That on or about the 25th day of January, 1978, Ed McCrae, on my behalf, delivered to the Commissioner of the Northwest Territories a notice to concur in the appointment of a single arbitrator or to appoint an arbitrator. Attached hereto and marked as Exhibit "F" is a copy of said letter.

12. On or about January 27th, 1978, Mr. R. H. Bates, Director, Department of Personnel for the Government of the Northwest Territories, delivered to Mr. Ed McCrae a letter advising that it was their position that I had been rejected during probation and as a result, reference to arbitration was not applicable. Attached hereto and marked as Exhibit "G" to this my Affidavit is a copy of said letter.

13. That at the commencement of my employ with the Government of the Northwest Territories the first day of May, 1974, I was subjected to a one year term of probation and upon each transfer or promotion, to a six month term of probation by the Government of the Northwest Territories and was evaluated during such probationary periods.

14. That I have not been advised by the Commissioner of the Northwest Territories in what

"manner I failed to discharge my duties while employed as steno 4 with the Department of Education, other than has been indicated in the letters from the Commissioner of the Northwest Territories dated December 14th, 1977 and January 3rd, 1978.

15. That the following parties are acceptable to myself for appointment as arbitrator and I am informed by Ed McCrae and do verily believe that such parties are likely to be acceptable to the Commissioner of the Northwest Territories for appointment as arbitrator:

Anton Melnyk, Lawyer, City of Edmonton,
Province of Alberta

Richard Abbott, Professor of Law,
Carleton, Ontario

Duncan A. Stewart, Lawyer, Edmonton,
Province of Alberta

Maurice Sychuk, Professor of Law,
Edmonton, Alberta

Peter Owen, Lawyer, Edmonton, Province
of Alberta

16. That I make this Affidavit in support of an application for the appointment of an arbitrator pursuant to Section 32 of the Public Service Ordinance, R.O.N.W.T. 1974 C. P-13, and Section 12 of the Arbitration Ordinance, R.O.N.W.T. 1974 C. A-4."

The exhibits to this affidavit are as follows:

OFFICE OF THE COMMISSIONER
NORTHWEST TERRITORIES
CANADA

" PERSONAL AND CONFIDENTIAL "

HAND DELIVERED

Yellowknife, N.W.T.

X1A 2L9

DEC 14 1977

Ms. Kristine Rome,
Department of Education.

Dear Ms. Rome:

I have received a recommendation from the Director of the Department of Education that you be rejected from employment during your probationary period.

I have reviewed Mr. Lewis' recommendation and find that you have not performed the duties of your position in a wholly satisfactory manner during your period of probation.

Therefore, in accordance with section 20 of the Public Service Ordinance, I have decided to terminate your employment in the Public Service effective at 5:00 p.m. on Wednesday, December 14, 1977.


I am sorry things have not worked out for you, and in consideration of this you will receive salary up to and including December 31, 1977.

THIS IS EXHIBIT "A"
referred to in the Affidavit of

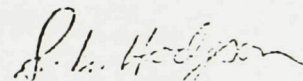
Kristine Rome

Sworn before me this 14

day of December, A.D. 1977


A Commissioner for Oaths and for the
Northwest Territories, being a Justice

Yours sincerely,



S.M. Hodgson,
Commissioner. "

22 December 1977

" DELIVERED BY HAND

Mr. S. Hodgson
Commissioner
Government of N.W.T.
Yellowknife, N.W.T.
XOE 1H0

Dear Mr. Hodgson:

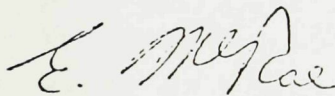
Re: Kristine Rome

The purpose of this letter is to advise you that I am a representative of Ms. Rome and that I am appealing the rejection of Ms. Rome without cause during probation.

I will be prepared to meet with you at your earliest convenience to discuss this matter more fully. It is our position that Ms. Rome should be re-instated as an employee of the Public Service of the Government of Northwest Territories with all rights and benefits and no loss of monies.

Your prompt attention to this matter would be appreciated.

Yours truly,



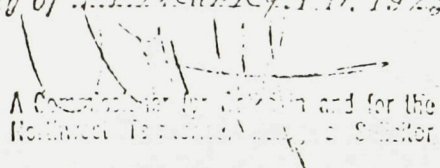
E. McRae

cc: K. Rome

THIS IS EXHIBIT " B ⁵⁰
referred to in the Affidavit of
Kristine Rome

Sworn before me this 20

day of February, A.D. 1978


A Commissioner for the Government of the Northwest Territories and for the Yukon Territory

*The Northwest Territories
Public Service Association*

BOX 1116 YELLOWKNIFE N.W.T.

TEL 403 873-5668

DATE: 6 January 1978

"Mr. S. Hodgson
Commissioner
Government of N.W.T.
Yellowknife, N.W.T.

Dear Mr. Hodgson:

Re: Kristine Rome

Please be advised that I have received your letter of 3 January in which you state that Ms. Rome was dismissed for cause and your elaboration of that cause.

It is the opinion of this writer that Ms. Rome is now considered to be dismissed and that your letter of 3 January is in answer to an appeal for reconsideration.

Accordingly, it is the position of this writer that Ms. Rome can now appeal this unjust dismissal to an arbitrator pursuant to the Arbitration Ordinance.

Therefore, it is respectfully submitted that this matter should be referred to a Board of Arbitration constituted as follows: one person appointed by each party and a mutually satisfactory chairman to be agreed to by the parties.

Please be advised that Ms. Rome's nominee to the Board of Arbitration is:

Mr. J. S. Breckenridge
P.O. Box 1530
Yellowknife, N.W.T.

(403) 873-5670

Your prompt attention to this matter will be appreciated.

Yours truly,



E. McRae
Executive Secretary-Treasurer

EM/jp

THIS IS EXHIBIT "D" referred to in the Affidavit of

K. Kristine Rome

Sworn before me this _____

day of February A.D. 1978

[Signature]
A Commissioner for Oaths and for the Northwest Territories

OFFICE OF THE COMMISSIONER
NORTHWEST TERRITORIES
CANADA

Yellowknife, N.W.T.
X1A 2L9
JAN 16 1978

"Mr. E. McRae,
Executive Secretary-Treasurer,
The Northwest Territories
Public Service Association,
Box 1116,
Yellowknife, N.W.T.

Dear Mr. McRae:

Rejection on Probation - Ms. Kristine Rome

Your letter of January 6, 1978, is misleading in that it infers Ms. Rome was dismissed for cause from the Public Service. I must point out to you that Ms. Rome was not dismissed. She was rejected on probation, in accordance with Section 20 of the Public Service Ordinance.

Section 20 establishes my right to reject an employee for cause during a probationary period. Although I did reconsider the matter at your request, there is no appeal against my decision provided in the Public Service Ordinance. There is therefore no matter to refer to an Arbitration Board.

Yours sincerely,

S. M. Hodgson
S.M. Hodgson,
Commissioner.

THIS IS EXHIBIT " F " referred to in the Affidavit of

KRISTINE ROME

Sworn before me this 20

day of FEBRUARY, A.D. 1978

[Signature]
A Commissioner for Oaths in and for the
Northwest Territories, being a Senator

The Northwest Territories
Public Service Association

TEL 403 873-5668

DATE: 25 January 1978

DOUBLE REGISTERED

Mr. S. Hodgson
Commissioner
Government of N.W.T.
Yellowknife, N.W.T.

Dear Mr. Hodgson:

Re: Kristine Rome

It is with considerable interest that this writer noted your correspondence of 16 January 1978 in which you state, "...Ms. Rome was not dismissed."

Upon consultation with Ms. Rome, this writer finds that she is not working for the Public Service and that she has not resigned. It is this writer's opinion that there can be no other conclusion other than she was dismissed.

Accordingly, it is the position of this writer that if, within seven clear days from the receipt of this letter, you have not provided a nominee to the Board of Arbitration, we will petition the Northwest Territories Supreme Court to appoint an arbitrator under the provisions of the Arbitration Ordinance.

Yours truly,

E. McRae

E. McRae
Executive Secretary-Treasurer

JB/jp

THIS IS EXHIBIT "F"
referred to in the Affidavit of
KRISTINE ROME
Sworn before me this 20
day of FEBRUARY 1978

[Signature]
A Commissioner for Canada and for the
Northwest Territories, City of Yellowknife

GOVERNMENT OF THE NORTHWEST TERRITORIES
CANADA

Yellowknife, N.W.T.
X1A 2L9
January 27, 1978

" DOUBLE REGISTERED

Mr. E. McRae,
Executive Secretary-Treasurer,
The Northwest Territories
Public Service Association,
Box 1116,
Yellowknife, N.W.T.

Dear Mr. McRae:

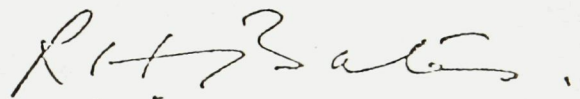
Kristine Rome

This is to acknowledge your letter addressed to the Commissioner on the above matter and dated January 25, 1978.

The position of this Government is that the individual was rejected during probation and as a result of the provision of Section 32 of the Public Service Ordinance, reference to arbitration is not applicable.

In arriving at this conclusion, we have made note of the distinction made within the Ordinance between dismissal and rejection on probation.

Yours sincerely,



R.H. Bates,
Director,
Department of Personnel."

cc: Commissioner
Assistant Commissioner

THIS IS EXHIBIT "C"
referred to in the Affidavit of
Kristine Rome

Sworn before me this 27th

day of January, A.D. 1978

A Commissioner for the Government of the Northwest Territories

The respondent filed the affidavit of Robin H. Bates which reads as follows:

" I, Robin H. Bates, of the City of Yellowknife in the Northwest Territories, Director of Personnel, Government of the Northwest Territories, MAKE OATH AND SAY as follows:

1. THAT as the Director of Personnel, I have personal knowledge of the employment records of employees of the Government of the Northwest Territories.
2. THAT on or about the 15 day of July, 1977, Kristine Rome, an employee of the said Government in the position of Steno III, made application for the position of Steno IV.
3. THAT on the 8 day of August, 1977, the said Kristine Rome was advised of her appointment to the position of Steno IV effective August 22, 1977, and annexed hereto and marked "A" is a copy of the letter of appointment.
4. THAT the said appointment was made from within the public service, and that the Commissioner did not further reduce or waive the probationary period pursuant to subsection 19(3) of the *Public Service Ordinance*."

Exhibit "A" to this affidavit reads as follows:

"Kristine Rome,
Site 5, Box 47,
YELLOWKNIFE, N.W.T.

Dear Kristine:

Congratulations on your promotion to the position of Steno IV with the Department of Education in Yellowknife. Mr. G. Mulders will be your supervisor and your salary will be increased to \$13,531 per annum. Your promotion is subject to a six month probationary period and we'd like you to start on August 22, 1977.

"I am sending this letter in two copies and I'd like you to read the position description we've attached. Please sign the second copy of the offer and return it to me as confirmation of your acceptance.

Please contact me if you have any questions or you'd like to discuss the offer."

Yours sincerely,

Jean M. Fowler,
Staffing Officer,
Department of Personnel.

FWLER/kb
Encl.

ACCEPTANCE OF APPOINTMENT

I accept the appointment offered in the above letter and I've read the attached position description.

"Kristine Rome"
(Signature)

11 August 1977
(Date)

From the foregoing material it will be seen that the Applicant seeks to appeal what could be characterized as the termination of her employment with the Government of the Northwest Territories after serving in various capacities since about May 1, 1974.

At the hearing of this Application Counsel for the Applicant made it quite clear that the Applicant was seeking the appointment of an arbitrator so that the issues between the parties, including any jurisdictional issue could be determined by the arbitration tribunal once it was constituted. Counsel for the Applicant submitted that the primary jurisdiction to

make decisions on preliminary matters such as arbitrability rests with the arbitration tribunal once it is duly appointed. In other words all evidence relevant to the issue of jurisdiction should be placed before the arbitration tribunal so that it could determine whether or not there is jurisdiction to hear the Applicant's appeal.

In the event that this position was rejected learned Counsel for the Applicant asked for the trial of an issue on the preliminary question of jurisdiction with leave to call *viva vice* evidence which might be relevant to the issue but which in his view should be placed before the arbitration tribunal.

Learned Counsel for the Respondent initially submitted that this Court should not appoint an arbitrator unless the Applicant makes out a *prima facie* case that the arbitration tribunal would have jurisdiction to hear and determine the matter in issue. Learned Counsel for the Respondent resiled from this position and indicated that there should be at least some evidence that the arbitration tribunal would have jurisdiction over the issue raised.

Learned Counsel for the Respondent summarized his position as follows:

(1) The Applicant has ceased to be an employee by operation of statute and accordingly there is no right to grieve or appeal the termination of her employment.

(2) There is no evidence that the Applicant was dismissed and the right to appeal to an

arbitration tribunal applies only to the dismissal of an employee.

In this connection the following *inter alia* sections of the *Public Service Ordinance* R.O.N.W.T. 1974 Ch. P-13 were referred to along with the affidavit evidence:

"19. (1) An employee shall be considered to be on probation for a period of one year after he has taken up the duties of his position or for such longer period as the Commissioner may establish for any class or grade of the position.

(2) The Commissioner may, on the recommendation of the head of a department extend the probationary period of an employee, but the period of extension shall not exceed the period specified in or established in relation to that position under subsection (1).

(3) Where an appointment is made from within the public service, the probationary period shall be reduced to six months and the Commissioner may, if he considers it appropriate, further reduce or waive the probationary period."

"20. (1) The Commissioner may, on the recommendation of the head of a department, at any time during the probationary period of an employee, reject that employee for cause.

(2) An employee who has been rejected under this section ceases to be an employee."

"22. The tenure of office of an employee is, subject to the provisions of this Ordinance and the regulations made there under and, unless some other period of employment is specified, for an indeterminate period."

"32. (1) Where the Commissioner has decided that an employee should be dismissed, he shall give to that employee notice in writing of his decision and his reasons therefor.

" (2) Within thirty days after receiving a notice under subsection (1), the employee may appeal to the Commissioner for reconsideration of his dismissal.

(3) If

(a) no appeal is taken within the period prescribed in subsection (a), or

(b) an appeal is taken and on reconsideration the Commissioner has decided to dismiss the employee,

the Commissioner shall give to that employee notice in writing of his dismissal as of the date fixed therein, which date shall not be earlier than the date of the notice of dismissal.

(4) From the notice of dismissal the employee may appeal to an arbitrator pursuant to the *Arbitration Ordinance*."

Learned Counsel for the Respondent cited the case of *Roland Jacmain v. The Attorney General of Canada* (Supreme Court of Canada - unreported September 30, 1977) in support of his position.

In *Jacmain v. The Attorney General of Canada* the appellant was dismissed for cause during the probationary period as a public servant pursuant to Section 28(3) of the *Public Service Employment Act* R.S.C. 1970 C. P-32. The Appellant thereupon referred a grievance for adjudication on the ground that his dismissal was a "disciplinary action" and thereby adjudicable under section 91(1)(b) of the *Public Service Staff Relations Act*. The adjudicator held that the dismissal was "disciplinary" and that he had jurisdiction. The Federal Court of Appeal on an application under Section 28 of the *Federal*

Court Act held that the dismissal was not "disciplinary" but for "cause" and therefore the adjudicator was without jurisdiction.

On appeal, the Supreme Court of Canada, by a majority judgment held that the Federal Court of Appeal did not err in holding that the adjudicator was without jurisdiction.

After carefully considering *Jacmain v. The Attorney General of Canada*, I do not view the judgment of the Federal Court of Appeal or the Supreme Court of Canada as support for the proposition that this Court should rule at this time on the arbitrability of the proposed issue and decline on application to appoint an arbitrator as requested by the Applicant.

It is in my view significant that the adjudicator in *Jacmain v. The Attorney General of Canada* made a full inquiry into the jurisdictional facts before deciding that he had jurisdiction. After determining the question of jurisdiction the adjudicator then dealt with the merits of the case.

In my opinion this is the correct procedure to be followed in the present case. I do not feel that this Court should determine the jurisdictional issue at this time. It would be highly undesirable for this Court to rule at this time that an arbitration tribunal would be without jurisdiction to hear the case which the Applicant proposes to present. The primary jurisdiction to make decisions on preliminary matters such as jurisdiction and the arbitrability rests with the arbitration tribunal and courts will not normally intervene until an arbitration tri-

bunal has decided either to entertain or decline jurisdiction.

In many cases an arbitration tribunal may bring special experience and knowledge to the hearing and this may include weighing and considering the evidence that goes to the issue of jurisdiction. While the Court retains the power to review jurisdictional questions by the prerogative writs, it should not on an application of this nature determine the issue of arbitrability which would in effect deprive an applicant of the right to present a case to a tribunal that is constituted with a view to giving the parties a fair hearing on all issues including the question of jurisdiction and arbitrability.

In this connection I have also considered the judgment of the Federal Court of Appeal in *Re Gloin et al and Attorney General of Canada; Public Services Staff Relations Board* (December 20, 1977 - unreported). In this particular case the applicants had grieved their rejection on probation and the employer denied their grievances. An adjudicator sitting pursuant to Section 91(1) of the *Public Service Staff Relations Act* rejected their grievances upholding the employer's objection to her jurisdiction because the grievors were not "employees" at the time of the reference to adjudication or at the time the grievances were filed.

On an application under Section 28 of the *Federal Court Act*, the Federal Court of Appeal in a unanimous judgment set aside the decision of the adjudicator and remitted the matter

to the adjudicator to determine on proper evidence, whether or not she had jurisdiction to hear the appeals. The Court held that the adjudicator did not have before her sufficient "jurisdictional" facts to enable her to make a proper determination of her jurisdiction.

This judgment of the Federal Court of Appeal is subsequent to the unreported judgment of the Supreme Court of Canada in *Roland Jacmain v. The Attorney General of Canada et al* pronounced on September 30, 1977 and in my opinion the following statement of Mr. Justice Urie at page 9 of the written Reasons for Judgment of the Federal Court of Appeal is significant:

" These omissions, or at least the lack of certainty that the evidence was before her, leaves me with considerable doubt as to whether the Adjudicator had before her sufficient "jurisdictional facts" to enable her to make a proper determination of her jurisdiction under section 91(1)(a). There is no question that the decision of the Supreme Court of Canada in *Roland Jacmain v. The Attorney General of Canada et al*, an unreported Judgment pronounced on September 30, 1977, establishes that an Adjudicator is entitled to inquire into the facts to ascertain whether he has jurisdiction under section 91(1)(b) notwithstanding the fact that the employer has characterized its action as a rejection for cause."

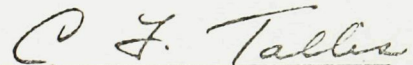
I have also considered the following, *inter alia*, authorities: *Re Richard and Public Service Staff Relations Board* (unreported Judgment of Federal Court of Appeal pronounced on December 13, 1977); *Canadian Labour Arbitration* by Brown and Beatty 29.

In argument before me the parties proceeded on the footing that if an arbitration tribunal is to be set up then it would be before a single arbitrator. Under the circumstances I accordingly grant the Application of the Applicant to appoint Professor Maurice Sychuk of Edmonton, Alberta as an arbitrator pursuant to the provisions of the *Arbitration Ordinance* and Section 32 of the *Public Service Ordinance*. In granting this application I want to make it abundantly clear that I do so on the footing that the arbitration tribunal will deal with the preliminary question of its jurisdiction if an objection is taken and will accordingly hear all of the relevant evidence that is presented on the issue. Having heard full argument on various aspects of this Application, I have no doubt that a preliminary objection to jurisdiction of the arbitration tribunal will be raised and the parties will no doubt call all the relevant evidence in order to place the jurisdictional facts before the tribunal.

In view of the conclusion I have reached it is not necessary for me to deal with the Application of the Applicant for leave to call *viva voce* evidence on the issue of jurisdiction. If I had decided that the Court itself should determine the issue of arbitrability I would have directed the trial of such an issue and allowed *viva voce* evidence on behalf of the applicant.

I am indebted to both counsel for their able arguments in this matter and leave is reserved to Counsel to speak to the question of costs.

Dated at Yellowknife, Northwest Territories this 10th day of March, 1978.


C. F. Tallis, J.S.C.

NO. SC

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

KRISTINE ROME,

Applica

- and -

THE COMMISSIONER OF THE
NORTHWEST TERRITORIES,

Responde

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE C. F. TALLIS

