IN THE SUPREME COURT OF YUKON

Citation: *Yukon Teachers' Association v. Government of Yukon,* 2010 YKSC 40

Date: 20100727
Docket No.: S.C. No. 10-A0064
Registry: Whitehorse

Between:

YUKON TEACHERS' ASSOCIATION

Plaintiff/Petitioner

And

GOVERNMENT OF YUKON

Defendant/Respondent

Before: Mr. Justice Veale]

Appearances:

Christopher J. Foy — Counsel for the Plaintiff/Petitioner
Judith M. Hartling — Counsel for the Defendant/Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the Yukon Teachers' Association ("Y.T.A.") on behalf of Michael Girard, a permanent employee at J.V. Clark School in Mayo, Yukon, whose probationary period expires on August 25, 2010. The Yukon Government ("Y.G.") has dismissed Mr. Girard from his teaching position effective June 30, 2010.

[2] Y.T.A. applies for injunctive relief suspending the dismissal pending the outcome of an appeal hearing in front of the Deputy Minister of Education and an adjudication of Mr. Girard's dismissal grievance at the Yukon Teachers Labour Relations Board.

BACKGROUND

[3] Mr. Girard's teaching position with Y.G. became permanent on August 26, 2009, subject to a probationary period ending August 25, 2010 and a 'satisfactory' performance rating from the principal at J.V. Clark School. Mr. Girard has put roots into the Mayo community and his wife is employed there.

[4] During the 2009-2010 school year, under a new principal than the one who hired him, Mr. Girard received an overall 'less than satisfactory' performance rating. This performance evaluation on March 19, 2010 did not properly follow the Handbook for the Evaluation of School-based Teachers.

[5] After the evaluation, the Y.T.A. and Y.G. representatives agreed that the process of evaluation was flawed, but they could not reach agreement on how to resolve the situation. Y.G. agreed to remove the flawed report from Mr. Girard's permanent record.

[6] Y.G. then followed up with a document on April 27, 2010 entitled "2009/2010 Expectations following up on Teacher Evaluation Mike Girard". These expectations were to be met by May 28, 2010. Mr. Girard says that the second evaluation process did not follow either the Handbook or the 2009/2010 Expectations document. He was dismissed from employment on May 31, 2010, effective June 30, 2010.

[7] On June 3, 2010, the President of the Y.T.A. wrote the Deputy Minister requesting an appeal hearing. A grievance level meeting took place with the Superintendent of Education on June 8, 2010 and the grievance was denied on June 21, 2010. Mr. Girard's job was posted on June 9, 2010.

[8] On June 25, 2010, Y.T.A. filed a "Reference to Adjudication" with the Yukon Teachers Labour Relations Board.

[9] A new teacher has been hired to replace Mr. Girard on a temporary basis. This contract may be terminated on 15 days notice in the event that Mr. Girard is reinstated.

THE LAW FOR PROBATIONARY EMPLOYEES

[10] The common law for probationary employees requires the employer to act on a good faith basis. The details of that good faith are summarized in *O'Hara v. Selwyn Resources Ltd.,* 2009 YKSM 6, at paras. 47-49:

> [47] The standard for termination of an employee during the probationary period is one of suitability, *Jadot* v. *Concert Industries Ltd.* (1997) 98 B.C.A.C. 100, at paras. 28, 29:
>
> > ...an employer during a probationary period "has the implied contractual right to dismiss a probationary employee without notice and without giving reasons provided the employer acts in good faith in the assessment of a probationary employee's suitability for the permanent position".
>
> [48] Good faith requires that the employer make it clear to the probationary employee what the employer's expectations are, and give the employee every reasonable opportunity to prove himself or herself in the job they have been employed to do. A court examining the "good faith" actions of an employer in dismissing a probationary employee must look beyond the conscious motives of the employer, and look at both sides of the situation from the perspectives of the parties. The onus rests on the employer to justify the dismissal to the extent that:
>
> > (1) he had given the probationary a reasonable opportunity to demonstrate his suitability for the job;
> > (2) he decided that the employee was not suitable for the job;
> > (3) that his decision was based on an honest, fair and reasonable assessment of the suitability of the employee, including not only job skills and performance by character, judgment, compatibility, reliability and future with the company.
>
> In cases of a probationary review, the court will not require that the employer establish actual cause, just that the

> employer decided that the employee was unsuitable, on the criteria indicated above. *(Higginson* v. *Rocky Credit Union Ltd.*, (1995), 27 Alta. L.R. (3d) 348, (C.A.) at para. 6)
>
> [49] The employer must show "...that he acted fairly and with reasonable diligence in determining whether the proposed employee was suitable in the job for which he was being tested". (*Higginson*, at para. 5, citing from *Ritchie* v. *Intercontinental Packers Ltd.* (1962), 2 C.C.E.L. 147 (S.C.Q.B.); See also *Longshaw* v. *Monarch Beauty Supply Co.*, (1995), 14 B.C.L.R. (3d) 88 (S.C.), at paras. 38-44; *Miguna*, at para. 9).

[11] However, here the common law is subject to the *Education Labour Relations Act,* R.S.Y. 2002, c. 62, as amended by S.Y. 2004, c. 8:

> Grievance procedure
>
> 63(1) If any employee feels aggrieved
>
> ...
>
> (b) as a result of any occurrence or matter affecting 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.
>
> ...
>
> Reference to an adjudication
>
> 64(1) Where an employee has presented a grievance to the final level in the grievance process referred to in subsection 63(1) and the grievance has not been dealt with to the satisfaction of the employee, the employee may refer the grievance to adjudication.
>
> ...
>
> (3) An employee is not entitled to refer a grievance respecting dismissal for cause during or at the end of the probationary period to adjudication.

...

> Probation for school personnel
>
> 106(1) A person employed pursuant to this Act is on probation for two years from the date of commencement of employment.
> (2) At any time during the probationary period, the superintendent may terminate the employee's contract of employment on giving 30 days prior written notice specifying the reasons for the termination to the employee.
> ...
> (4) Any employee who is terminated during a probationary period by a superintendent shall have the right to appeal the decision to the deputy minister and not pursuant to section 63 of this Act.

[12] The jurisdiction for this court to grant interim injunctions was stated in *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 at para. 5:

> The governing principle on this issue is that notwithstanding the existence of a comprehensive code for settling labour disputes, where "no adequate alternative remedy exists" the courts retain a residual discretionary power to grant interlocutory relief such as injunctions, a power which flows from the inherent jurisdiction of the courts over interlocutory matters: *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219,* [1986] 1 S.C.R. 704, at p. 727. The "residual discretionary authority in courts of inherent jurisdiction to grant relief not available under the statutory arbitration scheme" was most recently affirmed by this Court in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 967, at paras. 41, 54, 57 and 67 and *New Brunswick v. O'Leary,* [1995] 2 S.C.R. 967 at para. 3.

[13] While there is no doubt that Y.T.A. must exhaust all remedies, the question remains whether Mr. Girard should be reinstated pending the outcome of his appeal to the Deputy Minister and the adjudication at the Yukon Teachers Labour Relations Board.

DISPOSITION

[14] My initial concern in this matter was whether Mr. Girard had any right to a grievance at all based on a reading of s. 64(3), which prohibits the reference of a grievance for "dismissal for cause" to adjudication.

[15] However, counsel for Y.G. acknowledged that the grievance of the performance evaluation could proceed to adjudication, although she questioned whether the adjudicator would have the jurisdiction to reinstate a probationary employee.

[16] I conclude that s. 64(3) of the *Education Labour Relations Act* should be read narrowly. As Mr. Girard has not been dismissed for cause but rather based upon a finding of unsatisfactory performance, there will be some delay in holding the adjudication hearing. In the circumstances, it is appropriate to consider whether interim injunctive relief should be granted pending the adjudication.

[17] The test for an interim injunction set out in *RJR.-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, places the onus on the applicant to establish that:

1. There is a serious question to be tried;
2. The applicant will suffer irreparable harm if the injunction is not granted;
3. The balance of convenience, taking into account the public interest, must favour the injunction.

SERIOUS QUESTION

[18] The threshold to establish a serious question is a low one, as the Chambers Judge should not delve into the merits beyond making a preliminary assessment. In the case of Mr. Girard, I am of the view that there is a serious question to be considered by the

adjudicator as to whether the performance evaluation was flawed and the remedies that may flow from that determination. The claim is not frivolous or vexatious.

IRREPARABLE HARM

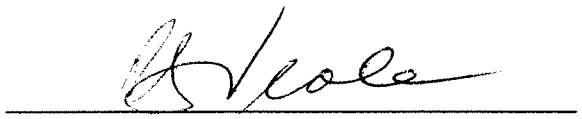
[19] As set out in para. 59 of *RJR.-MacDonald,* "irreparable" refers to the nature of the harm rather than its magnitude. In this case, Mr. Girard faces the loss of permanent employment and a move from a community, not to mention the potential loss of reputation.

THE BALANCE OF CONVENIENCE

[20] In this factor, the court must determine which of the two parties will suffer the greatest harm from the granting or refusal of an interim injunction. There are many factors to consider in the public interest in these circumstances. The Yukon Government raises the public interest in the context of appropriate education for the children of Mayo as opposed to Mr. Girard's personal harm as a result of his dismissal. Neither party has a monopoly on the public interest. Mr. Girard's counsel submits that the public interest is best served by keeping Mr. Girard as a teacher in Mayo, and there are indications of support for this.

[21] However, it is my view that the public interest is best met by granting Mr. Girard's application to the extent of reinstating him so he is not harmed during the period to determine if he should be permanently reinstated. However, he will not go back to J.V. Clark School. This solution also meets the public interest as seen by the Yukon Government to continue the temporary employment of a replacement teacher pending the outcome of the adjudication. Thus, I do not think it appropriate to interfere with the decision to replace Mr. Girard at the J.V. Clark school pending the adjudication.

[22] I therefore order that the operation of the letter dated May 31, 2010 be suspended and Mr. Gerard be reinstated as an employee of the Yukon Government pending the adjudication decision.



Veale J.