CITATION: Vallabh v. Air Canada and Unifor Local 2002, 2019 ONSC 4016
DIVISIONAL COURT FILE NO.: 071/19
DATE: 20190702

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: MAYESH VALLABH, Applicant

AND:

AIR CANADA AND UNIFOR LOCAL 2002, Respondents

BEFORE: Kiteley J.

COUNSEL: *L. Leslie Dizgun,* for the Applicant/Responding Party

Christopher D. Pigott and Gillian Round, for the Respondent/Moving Party Air Canada

Anthony Dale, for the Respondent Unifor Local 2002

HEARD at Toronto: June 25, 2019

ENDORSEMENT

[1] This is a motion by Air Canada (the "Company") to dismiss this Application for Judicial Review on the basis that the Applicant has no standing to bring the Application. For the reasons that follow, the motion is granted and the Application is dismissed.

Background

[2] The Applicant had been employed with the Company from April 13, 1998 to February 19, 2018. In February 2018, he was a full time Lead Customer Sales and Service Agent at Toronto Pearson Airport.

[3] The Company and Unifor Local 2002 (the "Union") are parties to a collective agreement (the "Collective Agreement'). The Union is the certified and sole bargaining agent for certain employees and the Applicant was a member of the bargaining unit.

[4] On February 19, 2018, the Company met with the Applicant and a Union Chairperson to notify the Applicant that he was suspended pending investigation for theft of time. On February 20, 2018, the Union filed a grievance challenging the Company's decision.

[5] The Company and the Union were unable to resolve the grievance at Steps 1 and 2 of the appeals procedure. As a result, the grievance was submitted to binding arbitration in accordance with Article 17 and Letter of Understanding No. 30 of the Collective Agreement.

[6] Arbitrator Tom Hodges (the "Arbitrator") held the arbitration on April 3, 2018. The Company and the Union made written submissions in advance and oral submissions at the hearing. The applicant testified and was cross-examined. In his decision dated April 16, 2018, the Arbitrator upheld the discharge. The written decision is styled as follows:

> In the Matter of an Arbitration between Air Canada (hereinafter the "Employer") and Unifor Local 2002 (hereinafter the "Union") – Mayesh Vallabh Termination Grievance.

[7] The Union did not apply for judicial review of the decision of the Arbitrator.

[8] On February 7, 2019, the Applicant issued an Application for Judicial Review of the April 16, 2018 decision. The applicant asked for the following relief:

(a) A declaration that the Applicant's employment with Air Canada was terminated without just cause;

(b) A declaration that the Arbitrator's decision dated April 16, 2018 denying the Applicant's grievance was unreasonable, or in breach of the rules of natural justice;

(c) An order quashing the arbitral decision;

(d) An order requiring Air Canada to reinstate the Applicant's employment;

(e) Alternatively, an order directing a new arbitration before a different arbitrator regarding the termination of the Applicant's employment with Air Canada; and an order directing the Respondent, Unifor Local 2002, to represent the Applicant in the arbitration, if required.

[9] The Application includes excerpts from the Collective Agreement and contains the assertion that, pursuant to Article 16.02, the Applicant has standing to bring this Application on his own behalf. The Application includes the allegation that the decision was unreasonable or in breach of the rules of natural justice because the Arbitrator referred to and drew conclusions from 6 letters in the employee file. The Applicant takes the position that all of the letters were subject to Article 16.08 of the Collective Agreement (the "Sunset Clause") and that none should have been relied on by the Company or by the Arbitrator.

Motion to Dismiss

[10] The Company brought this motion on the basis that the Applicant lacks standing. The Union has not responded to the Application and did not file responding material in the motion.

Counsel for the Union, Mr. Dale, attended and advised that the Union supports the position taken by the Company. Mr. Dale responded to a question I posed about the "sunset clause". But he did not otherwise participate.

[11] The Applicant filed a responding affidavit in which he described the cross-examination at the hearing during which the Company referred to six letters from his personnel file. He asserted that the Union permitted the letters to form part of the arbitration proceeding and were admitted into evidence, contrary to his understanding of Article 16.08 of the Collective Agreement. He quoted paragraph 22 of the Arbitrator's decision as an indication of how the Arbitrator had treated the letters. He deposed that the letters ought not to have been admitted as evidence and his belief that "they materially tainted the Arbitrator's decision about whether [his] termination ought to be upheld or some lesser penalty imposed". He explained the circumstances in which the "alleged time theft" arose.

The Issues

[12] The Company relies on the general rule that a union has the exclusive right to represent employees in the bargaining unit and that the union's role as exclusive representative continues after an arbitration award is issued, including where the award is unfavourable to the employee.[1]

[13] The Company takes the position that none of the exceptional circumstances identified in *Yee v. Trent University*[2] are present and, accordingly, the general rule applies. As a result, the Applicant lacks standing and the Notice of Application should be dismissed.

[14] The Applicant takes the position that he has standing on these grounds:

(a) Article 16.02.01 of the Collective Agreement expressly provides that he has a right to represent himself, including, but not limited to, arbitration; and

(b) There was a breach of natural justice because the Company put into evidence the Applicant's prior disciplinary history contrary to and in breach of the Sunset Clause and that that evidence was material to the decision to uphold the termination.

The Collective Agreement

[15] The following is the Article on which the Applicant relies:

> 16.02.01 If the employee feels they have been unjustly dealt with, they shall have the *right to initiate an appeal or to request the Union to initiate an appeal*

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[1] *Noël v. Société d'énergie de la Baie James,* 2001 SCC 39 at para. 58 [*Noël*].
[2] 2010 ONSC 3307 [*Yee*].

> on their behalf under this Article. Throughout the procedures the employee shall have *the right to be represented by the union. The employee may, however, handle the matter on their own behalf if they so desire, including arbitration, in accordance with such special procedures as may be arranged between the employee and the Company.* In such cases, the employee shall have to assume all fees and expenses involved in the process, including arbitration. [emphasis added]

[16] Article 16.08 makes provision for correspondence to an employee concerning discipline. It includes a direction that such correspondence remains on the employee's personal file for a period of two years, with some qualifications. The Applicant relies on this article:

> 16.08.06 When correspondence of a disciplinary nature is removed from the employee's personal file, the circumstances that led to the discipline shall not be referred to in relation to any subsequent disciplinary action.

Analysis

[17] The general rule is that the union has a right to exclusively represent the employee. Labour arbitrations are intended to conclusively dispose of disputes in unionized workplaces.[3] Judicial review cannot be used by employees to override a union's decision not to challenge an arbitration award. Where a union is unsuccessful in arbitration and does not seek judicial review of the unfavourable award, an affected employee does not have standing to seek judicial review of that award on his or her own.[4]

[18] In *Yee*, Swinton J. indicated that the case law had identified three exceptional circumstances in which an individual may have standing to pursue arbitration or judicial review:

> (a) where the collective agreement confers a right on the individual to pursue a matter to arbitration,
>
> (b) where the union takes a position adverse in interest to the employee, and
>
> (c) where the union's representation of the employee has been so deficient that the employee should be given a right to pursue judicial review.[5]

[19] The Applicant noted that in *Misra v. City of Toronto and CUPE Local 79*[6] the Divisional Court identified the three exceptional circumstances somewhat differently as follows:

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[3] *Noël* at paras. 62-63.
[4] *Tait v. New Brunswick (Board of Management)*, 2013 NBCA 71 at para. 4.
[5] *Yee* at para. 8.
[6] 2016 ONSC 2246 at para. 56. [*Misra*].

(a) where the collective agreement expressly confers a right on the individual to pursue a matter to arbitration in his/her individual capacity;

(b) where the union takes a position adverse in interest to the employee (described also as where the right of the employee to the procedural protections of natural justice has been breached); or

(c) where the union's representation of the employee was unfair or so deficient that the employee should be given a right to pursue judicial review.

[20] The Applicant takes the position that the exceptions as described in (a) and (b) of *Misra* apply here.

A. Where the Collective Agreement confers a right on the employee to pursue the matter

[21] As indicated above, the Collective Agreement did confer a right to initiate an appeal of the Company's decision or the right to request the Union to initiate an appeal. The Union initiated the appeal.

[22] While the Applicant had the right to pursue the appeal of the discharge, he did not do so. The issue is whether his failure to act on the right to pursue it directly disentitles him from relying on Article 16.02.01 as a basis for having standing in the Superior Court on a Notice of Application for judicial review.

[23] If the Applicant had exercised the right to pursue it on his own, the following would have taken place. Probably at the outset, he would have had to negotiate with the Company the arrangements for the "special procedures" required by Article 16.02.01. At a time when he had no employment income, he would have had to assume and pay "all fees and expenses involved in the process", including the fees of the Arbitrator and the expenses involved in the arbitration. He would have prepared and delivered the formal grievance. He would have participated in a Step 1 hearing and a Step 2 hearing and in the Arbitration without union representation. He would have made his own written and oral submissions and received and reviewed the written and oral submissions of the Company. He would have had to identify witnesses whose evidence was relevant, arrange for their attendance and conduct examination-in-chief of each of them, including his own testimony. He would have had to conduct cross-examination of the witness(es) called by the Company. The arbitration would have been styled as follows:

> "In the Matter of an Arbitration between Air Canada and Mayesh Vallabh – Mayesh Vallabh Termination Grievance."

[24] The difference in style is more than a formality. It signifies that the Applicant is an equal participant in the entire grievance procedure. Under those circumstances, he would have acquired standing to also bring an application for judicial review.

[25] Instead, the Union initiated an appeal and took all of those steps. Under those circumstances, the two parties to the arbitration, the Company and the Union, have standing.

[26] In *Yee*, the employee did have a right to pursue dismissal proceedings to arbitration. But "dismissal" was defined as occurring before the end of the appointment period. Yee challenged denial of tenure. In other words, there was a limited right to pursue the matter which did not apply. It was in that context that the Divisional Court recognized that having such a right was an exceptional circumstance.

[27] In *Migneault v. New Brunswick (Board of Management)*[7] the Court of Appeal quoted *Yee* with approval. In that case, the statutory scheme gave a right to the employee to refer a grievance to adjudication where the grievance arose out of an action resulting in discharge, suspension or a financial penalty *and* the bargaining agent refused to signify its approval of the reference to adjudication. The Court of Appeal found that the bargaining agent had approved the reference to adjudication and therefore the parties to the arbitration were the Professional Institute of the Public Service of Canada and the employer. As in *Yee*, there was a limited right to pursue the matter which did not apply.

[28] In this case, the Collective Agreement has a broader right for the employee. But the Applicant did not exercise that right. As a result, the entire process, including the arbitration, was between the Company and the Union.

[29] In my view, in articulating the first exceptional circumstance, the Divisional Court in *Yee* did not anticipate that an existing right would not be exercised. As counsel agreed during submissions, the circumstances in which an employee has an individual right pursuant to a Collective Agreement to pursue a grievance are rare. It would not be reasonable to interpret a rare term of a Collective Agreement to allow the employee to take the assistance of the union so long as it was helpful and pursue an individual right when the employee perceived the union assistance as no longer helpful. That would be inconsistent with the labour principles of exclusivity and finality.

[30] In that context, the more reasonable interpretation is that the general rule of exclusivity must be respected *unless the employee exercises the right to proceed without the union*. I am satisfied that a refinement of the first exceptional circumstance is required which I restate as follows:

> Where the collective agreement confers a right on the individual to pursue a matter to arbitration and the individual pursues that right such that the parties to the arbitration are the employer and the employee.

[31] On the basis of that refinement, the Applicant does not have standing.

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[7] 2016 NBCA 52.

B. Adverse in interest and breach of the procedural protections of natural justice

[32] As indicated above, the Applicant relies on *Misra* for the modification of the second exceptional circumstance. At paragraph 57, the Divisional Court listed some indicia of union compliance with the requirements of natural justice including employee awareness of the arbitration; employee attendance at the arbitration; employee opportunity to testify at the arbitration; evidence presented on the employee's behalf, through the Union or otherwise; witnesses called by the employer cross-examined by Union counsel; submissions made by the Union in support of the employee's position; and a decision rendered and reasons provided.

[33] In this case, the submissions made by the Union and the decision of the Arbitrator indicated that the Union was not acting adversely to the Applicant. There is no allegation by the Applicant to that effect. Furthermore, the Applicant had the benefit of all of the indicia of union compliance.

[34] To the extent that the Applicant asserts that the 6 letters ought not to have been admitted as evidence in the hearing, that does not fit within the second exceptional circumstance.

C. Union's deficient representation

[35] As indicated above, the Applicant relies on the first and second exceptional circumstances. He does not rely on this third exceptional circumstance. However, there can be a perceived overlap between the second and third exceptional circumstances and for that reason, I address it briefly.

[36] In criticizing the admissibility of evidence, the Applicant would, in effect, challenge the litigation strategy of the Union. That is a matter between the Union and the Applicant and the remedy may be a s. 74 complaint before the Labour Relations Board.[8]

Costs

[37] Counsel for the Company took the position that costs of $2500 should be awarded to the successful party. Counsel for the Applicant took the position that neither party should recover costs but, if costs were awarded, $2500 was reasonable.

[38] In my view, no costs should be awarded. The Applicant was not successful but it was not unreasonable for him to have brought the Application.

ORDER TO GO AS FOLLOWS:

[39] The motion is granted. The Application for Judicial Review is dismissed. No costs.

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[8] *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, s. 74.

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Kiteley J.

Date: July 02, 2019