SUPREME COURT OF YUKON

Citation: *Emery v Yukon Association of Education Professionals*, 2025 YKSC 26

Date: 20250521
S.C. No. 22-A0126
Registry: Whitehorse

BETWEEN:

MICHEL EMERY

PLAINTIFF

AND

YUKON ASSOCIATION OF EDUCATION PROFESSIONALS, GOVERNMENT OF YUKON, ETHAN EMERY, TED HUPÉ

DEFENDANTS

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff	Jennifer R. Loeb
Counsel for the Yukon Government	I.H. Fraser
Counsel for the Yukon Association of Education, Ethan Emery, and Ted Hupé	William Clements and Emily Wunder

REASONS FOR DECISION

OVERVIEW

[1] Two applications were brought by the defendants, Yukon Association Education Professionals ("YAEP"), Ethan Emery, and Ted Hupé, to strike the plaintiff's claims in conspiracy and defamation. The underlying dispute arose from the plaintiff's removal from an elected position on the executive of YAEP, an entity that is the teachers' professional association and their bargaining agent for their collective agreement with the Yukon government. The plaintiff's removal from the executive position was a

culmination of ongoing difficulties in his working relationship with the defendants that spawned complaints by him to the employment standards office, the Human Rights Commission, Workers' Safety and Compensation Board, the Ombudsman's office, and led to two independent investigations.

[2] The main issue to be determined on these applications is whether this Court has jurisdiction to determine the plaintiff's claims in conspiracy and defamation, or whether they are more properly addressed by the Teachers Labour Relations Board ("TLRB") under the *Education Labour Relations Act,* RSY 2002, c. 62 ("*ELRA*"). This requires a determination of the essential character of the dispute; a review and interpretation of the statutory provisions, including to whom the statute applies, what matters are covered, and what remedies are available; and the application of the appropriate law on the jurisdiction of the court in this context.

[3] Originally brought in 2023, the applications' scope and basis changed by the time they were argued in December 2024 and January 2025. The first applications to strike included the plaintiff's claim for wrongful dismissal, but shortly before the hearing of the applications, the plaintiff advised of his intention to file an Amended Amended Statement of Claim withdrawing his claim for wrongful dismissal. This was done before the plaintiff's argument on the applications was completed. The jurisdictional argument became the main focus of the defendants' argument and the plaintiff's response.

[4] For the reasons that follow, I find that this Court should decline to exercise jurisdiction over these claims. The Yukon legislature has bestowed on the TLRB the legislative competence to determine internal employee organization labour relations disputes such as this one. The statutory provisions apply to the plaintiff and the defendants and are sufficient to cover the matters complained of in the claim, all of

which I have determined are related to the disciplinary actions and penalty imposed upon the plaintiff in his capacity as an executive member of the YAEP. There is no basis for the Court to exercise its residual or inherent jurisdiction, because the application of the *ELRA* provisions does not result in a real deprivation of ultimate remedy.

[5] After setting out the issues, I will review the factual background, the test for an application to strike for want of jurisdiction, address the legislative context, including who is covered by the relevant legislation, discuss the essential nature of the dispute, show how the statutory provisions apply to the plaintiff and his claims of conspiracy and defamation, and why the court should not exercise any residual jurisdiction.

ISSUES

i) What is the test for an application to strike for want of jurisdiction?

ii) What is the nature and purpose of the applicable statutory scheme?

iii) Are the plaintiff and the defendants covered by the statutory scheme?

iv) What is the effect of a statutory scheme such as this on a civil action?

v) What is the essential character of the plaintiff's claim?

vi) Can the plaintiff's claim be resolved under the statutory scheme?

vii) If so, should the Court exercise its residual jurisdiction in this case?

BACKGROUND

The parties

[6] The plaintiff Michel Emery is a public school teacher employed by the Yukon government. He has held this position since 2004. In October 2020, he was elected to the full-time position of Professional Development Chair ("PD Chair") at the YAEP in a by-election. On April 24, 2021, he was re-elected to the position for a two-year term. While he was PD Chair, he continued to be employed by the Yukon government. He

was granted “leave” from his teaching position to be the PD Chair but continued to receive the same salary and was entitled to the same terms and conditions of employment, including benefits, seniority, leave entitlements, and calculation of severance pay or other termination payouts. At the end of his service as PD Chair, he had the right to return to his teaching position. He did not sign any employment agreement or contract with YAEP while in the position of PD Chair.

[7] The role of the PD Chair is to coordinate the development and delivery of professional development opportunities to members of the YAEP, maintain records of personal development expenditures, and develop and present financial plans, budgets, and reports. The PD Chair is a member of the executive and also the chair of the Professional Development Fund, an annual grant of $475,000 from the Yukon government for professional development. The PD Chair is responsible for oversight, accountability, and reporting for the Professional Development Fund, and for ensuring it is administered like a trust fund, in a transparent, equitable, and fiscally responsible way. The remuneration for the position of PD Chair is funded 50% by the Yukon government and 50% by YAEP.

[8] The defendant YAEP is the professional association for public school teachers, principals, and education assistants. It is a statutory body established by and operating under the *Teaching Profession Act*, RSY 2002, c. 215 (“*TPA*”). It is separate from the Yukon government, with the objectives of acting as a bargaining agent on behalf of teachers and improving teachers’ working conditions, competence, and professional development opportunities. All Yukon public school teachers are required to be members of the YAEP as a condition of their employment.

[9] The defendant Ethan Emery (not related to the plaintiff) is the Executive Director of YAEP, a hired staff position. Hired staff are non-voting YAEP members.

[10] The defendant Ted Hupé is the President of YAEP, also a full-time elected position.

[11] The defendant Yukon government is the territorial government of the Yukon and the employer of all public school teachers in the Yukon, including the plaintiff.

The plaintiff's experience as PD Chair

[12] After his initial election to the position of PD Chair in October 2020, in the winter and spring of 2021, the plaintiff began to experience difficulties in his work relationships at YAEP. In particular, the plaintiff alleged he felt intimidated, threatened, coerced, demeaned, belittled, and embarrassed by the defendant Emery through emails and office interactions. Despite bringing this unwelcome conduct to the attention of the YAEP President, Ted Hupé, the plaintiff stated he continued to experience the unwanted bullying and harassment from the defendant Emery and also received harassing emails and statements from Ted Hupé between April 2021 and December 2022.

[13] The plaintiff made a formal harassment complaint about the conduct of the defendant Emery on May 14, 2021, to the YAEP. An independent investigator hired by YAEP issued a report with findings that two of the plaintiff's allegations about the defendant Emery's conduct constituted harassment and abuse of authority. The defendant Emery filed his own harassment complaint against the plaintiff after the plaintiff submitted his complaint.

[14] On September 14, 2021, the finance committee of YAEP issued a letter finding that the defendant Emery's conduct did not breach YAEP's harassment policy. The

executive committee dismissed the plaintiff's appeal of the finance committee's September 14 decision, writing that the defendant Emery "has the more vulnerable employment position than [the plaintiff], as he can be terminated without cause at the pleasure of the [YAEP] provided the [YAEP] abides by its employment contract obligations, while [the plaintiff is] a [YAEP] full-time elected Executive Officer and retains a substantive teaching position within the Department of Education."

[15] On October 13, 2021, the plaintiff filed a second harassment complaint with the YAEP Ethics Chair against four members of the finance committee alleging harassment, intimidation, interference, and inappropriate behaviour, as well as inadequate handling of harassment within the YAEP. The plaintiff later amended this complaint to include his removal from the role of PD Chair, alleging it was motivated by reprisal or retaliation. The investigator's acceptance of some of his allegations of harassment and retaliation were accepted by the Ethics Chair in a decision dated June 7, 2023, but the remedy of ordering the executive members to attend training had already been done as a result of the adjudication of another complaint by the plaintiff under the *Occupational Health and Safety Act*, RSY 2002, c. 159 ("*OHSA*"). The plaintiff's appeal of the Ethics Chair's decision was dismissed.

[16] On October 14, 2021, the YAEP advised the plaintiff by letter that they intended to conduct a psychiatric evaluation of him on October 22, 2021, because of behaviour they said gave them concerns about his mental health. This did not occur because other events intervened. In early November 2021, a second request was made for a psychiatric evaluation to occur on November 16, 2021. This did not occur either because of other events, including the plaintiff taking sick leave from his position at YAEP as a result of mental stress.

[17] On November 1, 2021, the YAEP wrote to the plaintiff to advise him that the executive committee had unanimously passed a motion for a determination of whether the position of PD Chair would be declared vacant under the bylaws because the plaintiff had engaged in gross misconduct of a kind that was wholly incompatible with continuing to hold office in the YAEP. The particulars of his gross misconduct included: non-compliance with duties of the PD Chair, including administration of the Professional Development Fund like a trust fund; refusing to attend scheduled meetings on developing the year end procedures for the Professional Development Fund, as directed by the executive, thereby failing to participate meaningfully; misleading the Central Council and deceiving the membership on the directions given to him by the executive; and giving ultimatums, including threatening to resign, unless the YAEP agreed to modify its public record of meeting minutes.

[18] The plaintiff responded as permitted under the bylaw procedure. Nevertheless, the executive voted to declare the position of PD Chair vacant on November 22, 2021. On November 23, 2021, the YAEP issued a statement to the membership that the plaintiff was no longer PD Chair, effective immediately. The Central Council dismissed the plaintiff's appeal at its meeting on February 19, 2022.

[19] In addition to the harassment complaints described above, the plaintiff made eight complaints to other administrative tribunals and three other complaints to the YAEP. These included:

- a complaint of harassment against the defendant Emery under the Yukon *OHSA* – file closed after investigator's report was provided and after an order that YAEP update its harassment policy;

- a second complaint under the *OHSA* of prohibited reprisal by the YAEP for his removal from the role of PD Chair after he filed a harassment complaint – they did not rule out that the plaintiff's harassment complaint may have played a role in his removal and ordered the executive to attend training, which they did;
- a claim to the Yukon Workers' Safety and Compensation Boad for a psychological work-related injury, due to bullying and harassment, which was accepted and entitled him to benefits;
- a complaint of discrimination to the Yukon Human Rights Commission – it was allowed to proceed against the YAEP but was stayed pending the disposition of the civil action;
- a complaint against the YAEP for unpaid overtime and an unpaid stipend under the *Employment Standards Act,* RSY 2002, c. 72 ("*ESA"*) – dismissed on the basis that the plaintiff was an employee of the Yukon government, not YAEP, and the *ESA* does not apply to employees of the Yukon government;
- an ethics complaint against Ted Hupé for informing the YAEP membership of the plaintiff's removal as PD Chair at an annual general meeting, as well as two other ethics complaints against other members of the executive – there is no evidence about what occurred with these complaints;
- a complaint to the Ombudsman about the procedural fairness of his removal – the Ombudsman identified some concerns and made recommendations to improve the removal process – such as defining

gross misconduct, allowing for written submissions in the Central Council appeal process, providing more details about the appeal process when the person being removed receives notification, explaining the pre-vote deliberation procedure, standardizing the timeline for receiving written reasons for an executive decision, and providing more information to the membership as a whole for the appeal process – however, none of these concerns rendered the decision unfair and the Ombudsman noted the YAEP's efforts to ensure a fair process;

- two additional complaints to the Ombudsman, first alleging the YAEP's unfairness in implementing the appeal process and making an unfair appeal decision, and second alleging unfairness because YAEP took no action to address the three ethics complaints – both complaints ongoing;

[20] The plaintiff did not have legal representation for any of the complaints he brought.

Basis of the statement of claim

[21] The original statement of claim was issued on January 6, 2023, seeking damages for wrongful dismissal, conspiracy, and defamation. The factual basis for the claims was the alleged bullying, harassment, and other poor treatment that the plaintiff experienced from the YAEP defendants while he was the PD Chair, culminating in his removal from the position.

[22] On January 8, 2025, the day plaintiff's counsel commenced her argument on these applications, an Amended Amended Statement of Claim was filed, without the wrongful dismissal claim. The plaintiff's claim now seeks general, special, aggravated, punitive, and bad faith damages for conspiracy and defamation against the defendants

Emery and Hupé, the YAEP, and the government of Yukon. As well, he seeks a permanent injunction to prevent the defendants from publishing the same or similar defamatory statements by any means.

[23] In support of the defamation claim, the plaintiff provided examples in his pleading of emails and statements made by the defendants Emery, Hupé, and other YAEP executive members. The plaintiff has claimed these statements meant that he was incompetent, not diligent at work, unintelligent, and unable to perform his job correctly; a liar, dishonest, deceitful, and untrustworthy; not a team player or good co-worker, disrespectful to colleagues and those who report to him; disregarded the norms of a healthy workplace; harassed, intimidated and bullied co-workers, and was a disruptive and negative presence in the workplace; caused or contributed to some form of financial mismanagement, impropriety, fraud, and could not be trusted with money, budgeting or bookkeeping; was lazy, unproductive, and an absent and disinterested employee; conducted himself inappropriately; disregarded the privacy of others in the workplace; engaged in gross misconduct; was litigious and a complainer; was not suitable for the PD Chair position; could not follow directions; was difficult and non-responsive; did not abide by workplace rules and norms and requirements.

[24] The plaintiff claimed the defamatory words were read by many people and were clearly about him. He alleged the defendants acted with malice because they intentionally and deliberately spread false information about him to damage his reputation, undermined his ability to complete his duties as PD Chair, intentionally deceived others about his conduct to justify his removal from the YAEP executive, intentionally isolated him from other members of the YAEP, retaliated against him for

making complaints against the defendants, harassed, bullied, insulted and humiliated him to intimidate him and cause him distress.

[25] The plaintiff's claim of conspiracy is based on the defendants Emery and Hupé allegedly forming an agreement to remove him from his position as PD Chair, and to prevent him from disclosing his complaints to the YAEP membership about the conduct of the defendant Emery and the finance committee, and from pursuing these complaints. The statement of claim further alleged the motivation of the defendants was to maintain control over the executive committee and the YAEP.

Positions of the parties

[26] The defendants seek to strike the entire claim under Rule 20(26)(a), (c) and (d) of the *Rules of Court* of the Supreme Court of Yukon – no reasonable cause of action, embarrassing, and abuse of process – because it falls under the exclusive jurisdiction of the Yukon TLRB. The essential character of the dispute, though characterized as the legal claims of conspiracy and defamation, is the plaintiff's allegation that he was unfairly treated, targeted, and wrongfully removed by the defendants from his position as PD Chair. The *ELRA* is a comprehensive labour relations code that applies to the parties and includes provisions prohibiting the YAEP from engaging in the kind of conduct complained about by the plaintiff, and a remedy.

[27] The plaintiff's response is first, it is not clear that the plaintiff is an employee as defined under the *ELRA*, particularly whether he is acting in a managerial capacity, and it is premature to determine this as the full scope of his duties needs to be fleshed out through evidence. The plaintiff also questions whether the *ELRA* covers the defendant Emery, given he is not an elected officer of the YAEP. The plaintiff argues that the prohibited practices in s. 85 of the *ELRA* do not cover the conduct at issue here. The

allegations of conspiracy and defamation were not disciplinary actions or an imposition of a penalty. Plaintiff's counsel argues they are independent claims and not dependent upon his removal from the role of PD Chair. The remedies available through a court action are not available under the *ELRA* – in particular, no damages are recoverable under the statute.

[28] If the defendants are unsuccessful in their applications to strike, the plaintiff requests the matter be adjourned generally until discovery is completed, noting that the threshold to be met for striking a claim before discovery is very low.

ANALYSIS

i) **What is the test for an application to strike for want of jurisdiction?**

[29] Under Rule 20(26), the Court may at any stage of a proceeding, strike out the whole or any part of a pleading if:

a. it discloses no reasonable claim;

b. it is unnecessary, scandalous, frivolous or vexatious

c. it may prejudice, embarrass or delay the fair trial or hearing of the proceeding; or

d. it is otherwise an abuse of process of the court.

[30] The reason for such a rule is to promote efficiency and fairness in the conduct of litigation and to help ensure court resources are used properly. Claims that are, for example, hopeless, improperly pleaded, without foundation, or duplicative can be dismissed under this rule. A claim that falls outside of the court's jurisdiction may also be struck under this rule, on the basis that it lacks a reasonable claim, is embarrassing, or is an abuse of process. Courts have held it is inappropriate to use court resources to

resolve a matter for which there is an alternative, often more specialized and suitable process chosen by the legislature.

[31] The test under any of the subrules requires the moving party to show on a balance of probabilities that it is plain and obvious the pleading should be struck.

[32] No reasonable claim has been interpreted to mean it is plain and obvious that the claim has no reasonable prospect of success or that the action is certain to fail. More specifically, the essential elements of the test are:

i) a claim should be struck out if it is plain and obvious that the claim is bound to fail;

ii) the fact that a case is weak or unlikely to succeed is not a sufficient ground to strike a claim;

iii) if the claim raises serious questions of law or fact, it should not be struck;

iv) at this stage, the court must read the pleadings generously, with allowances for inadequacies due to deficient drafting.

(see *McDiarmid v Yukon*, 2014 YKSC 31 at para. 14; *R v Imperial Tobacco Canada Ltd,* 2011 SCC 42 at paras. 17 and 21)

[33] In interpreting this last factor, courts have stated that allegations in pleadings based on speculation or assumptions, bare allegations or bald assertions without factual foundation, or allegations that are incapable of proof or patently ridiculous are not assumed to be true.

[34] Generally, evidence is not admissible on an application to strike for no reasonable claim. However, in an application under this section for want of jurisdiction, affidavit evidence may be relied on where the pleading does not contain any allegations addressing jurisdiction or that are insufficiently particularized (*Ó Murchú v Yukon,* 2020 YKSC 21(“*Ó Murchú*”) at para. 15; *Kornelsen v Yukon*, 2019 YKSC 69 at para. 33).

[35] A pleading is embarrassing if it is plain and obvious that it will be a waste of court resources to adjudicate.

[36] A pleading is an abuse of process, a broad concept, if it is plain and obvious that it has no useful purpose, is attempting to relitigate an issue that has been decided, is one of multiple proceedings likely to cause vexation or oppression, or a collateral attack on a decision of an administrative tribunal.

[37] Evidence is admissible on an application to strike on any other ground in Rule 20(26).

[38] Before a court strikes a pleading, it usually considers whether it should grant leave to amend the pleading if the deficiency can be rectified, or if the merits of the claim can be ascertained. A pleading that is deficient for want of jurisdiction generally cannot be saved by amendment.

ii) What is the nature and purpose of the applicable statutory scheme?

[39] To determine whether the dispute between the plaintiff and the defendants can and should be resolved under the *ELRA*, instead of in the courts, it is necessary to assess the nature and purpose of the statutory scheme.

[40] The legislative framework governing education in the Yukon is complex. As noted above there are three relevant statutes: the *Education Act*, RSY 2002 c. 61, the *TPA,* and the *ELRA*.

[41] The *Education Act* addresses the rights of students and parents; the statutory qualifications for teachers and principals; and the governance responsibilities of school councils and boards. Teachers are employed by the Yukon government pursuant to the *Education Act*. It codifies the status of YAEP as a bargaining agent, part of a separate labour relations regime for those Yukon government employees who work in education.

[42] The *TPA* establishes objectives to serve the public good, creates the YAEP and grants it the statutory authority to manage its own affairs and requires it to exercise its authority. More specifically, the *TPA* sets out the YAEP's objectives, powers, membership, meeting requirements, the subject matter of its bylaws, the governance and fee structure, and the process for initiating and resolving complaints of unethical or unprofessional conduct by a member, including a discipline process, hearing and appeal. The *TPA* focuses on the objectives of the YAEP in its role as an association for teachers: advancing and promoting the importance of education in the Yukon, improving the teaching profession by supporting good recruitment practices, teacher training, and ongoing professional development and competence development; improving working conditions for teachers; and assisting with ensuring professional duties and responsibilities and standards are maintained through the discipline process.

[43] While the role of PD Chair is not specifically referenced in the statute, the chairs of standing committees are part of the executive of the YAEP, and the Professional Development Committee is a standing committee.

[44] The *TPA* references the Central Council, made up of the elected representatives from each school, the executive (president, vice-president, past-president, treasurer, and chairs of each of the five standing committees), and the table officers (president, vice-president, past president, and treasurer), who are required to "exercise all rights and powers vested in the [YAEP] by this Act" and to "govern, control, and administer the affairs of the [YAEP]", "subject to and in accordance with the [YAEP's] bylaws and any resolution of the annual general meeting."(s. 9)

[45] The bylaws authorized by the *TPA* address matters such as the election of the executive and appointment of committees, the investigation of complaints of unethical or

unprofessional conduct by members of the YAEP and the disciplinary procedures for breaches of ethical or professional standards, the management of property, affairs, and internal organization and administration, the time, place, and conduct of the annual and other meetings of the teachers' association, among other things. The bylaws state that all YAEP members shall be bound by the bylaws and policies of the Association. They are passed by the YAEP's membership at general meetings.

[46] The bylaws allow the executive to declare any elected position to be vacant in several situations, including by vote of at least 75% of the executive, where the elected official has engaged in gross misconduct of a kind that is wholly incompatible with continuing to hold office in the YAEP. The individual in the position must be given advance notice of the vote, the particulars of the misconduct and an opportunity to reply and has the right to appeal to the next meeting of the Central Council.

[47] The *ELRA* creates a comprehensive specialized labour relations regime for public school education in the Yukon, including provisions about strikes, lockouts and grievance/arbitration procedures, as well as the scope and parameters of internal union powers. The *ELRA* sets out the role of the YAEP as a bargaining agent on behalf of teachers with the employer, the Yukon government. It establishes the TLRB, a specialized adjudicative board for hearing applications for certification of bargaining agents and related issues, for overseeing the process of achieving a collective agreement where negotiations are deadlocked, including the appointment of a mediator, arbitrator, or conciliation board, for resolving disputes between the employer and the bargaining agent about protocols during a strike or lockout, and for appointing adjudicators to resolve grievances of employee members under the collective agreement through arbitration.

[48] Most significantly for this case, the TLRB is also responsible for receiving, examining and inquiring into any complaints that the employer, bargaining agent, or any person has not complied with the provisions of the *ELRA* or has engaged in any prohibited practice. Prohibited practices in *ELRA* by the employee organization, which is also the bargaining agent, and any of its officers, representatives or persons acting on behalf of the employee organization include they shall not:

a) expel or suspend an employee from membership in the employee organization or deny membership in the employee organization to an employee by applying to the employee in a discriminatory manner the membership rules of the employee organization (s. 85(3)(a));

b) take disciplinary action against or impose any form of penalty on an employee, by applying to the employee in a discriminatory manner the standards of discipline of the employee organization (s. 85(3)(b)); or

c) expel or suspend an employee from membership in the employee organization or take disciplinary action against or impose any form of penalty on an employee by reason of the employee having refused to perform an act that is contrary to the *ELRA* (s. 85(3)(c)).

[49] The TLRB can order the employee organization (YAEP) to reinstate or admit any employee as a member in the employee organization who has been disciplined under s. 85(3)(b) (s. 90(2)(b)). There is no specific remedy in the statute for a breach of s. 85(3)(c). However, there is a general provision in s. 90(1) that applies where any person, bargaining agent or the employer has failed to observe any prohibition or to comply with any provision, regulation, order or direction as described in s. 88. The TLRB may make an order addressed to that person, bargaining agent or employer

directing it to observe the prohibition, give effect to the provision, regulation, direction or order or take such act as may be required within a specified period it considers appropriate. Where an order is directed at a person acting on behalf of the bargaining agent, the board shall also direct the order to the chief of the bargaining agent.

[50] The TLRB thus has oversight and enforcement powers over the conduct of those with union governance and internal management responsibilities.

iii) Are the plaintiff and the defendants covered by the statutory scheme?

[51] The plaintiff's counsel argues that he may not be an employee under the *ELRA* and that the defendant Emery, may not be covered by the *ELRA* either.

[52] The *ELRA* applies to all employees as defined in s. 1 of that statute as follows:

> a person who is employed under the provisions of this Act, or who is a member of the bargaining unit, but does not include
>
> (a) a person who is an employee within the meaning of the *Public Service Act*,
>
> (b) A person employed in a managerial capacity, or
>
> (c) A person employed on a casual basis

[53] A person employed in a managerial capacity means:

> (a) any person who regularly participates to a significant degree in the formulation and determination of government policies and proposals,
>
> (b) any person who is directly involved on behalf of the employer in the processes provided for in this Act,
>
> (c) any person who is appointed in a managerial or confidential capacity, and

> (d) does not include a principal or vice-principal appointed under the *Education Act*

[54] In this case, the plaintiff continued to be a member of the bargaining unit when he became PD Chair at the YAEP. He continued to receive the same salary and benefits from the Yukon government and to accrue vacation entitlement and seniority as he did when he was teaching. In fact, in order to be elected to the position of PD Chair, the YAEP bylaws required the plaintiff to be a bargaining unit member. If for any reason they are no longer a bargaining unit member, they are no longer eligible for the position and the YAEP executive can hold a vote to remove them from the elected position.

[55] At all times when he was with the YAEP, the plaintiff's employer remained the Yukon government. The plaintiff's argument that this may not be accurate, due to the finding of the Workers' Safety and Compensation Board that the YAEP was his employer is not persuasive. That finding was for a different purpose and does not reflect the reality created by the statutes (*Education Act* and *TPA*) and the bylaws governing the YAEP.

[56] The plaintiff in his role as PD Chair did not fit under any of the statutory exclusions of an employee under the *ELRA* because:

a) he was not an employee under the *Public Service Act,* RSY 2002, c. 183. That statute defines an employee as one who is appointed to a position in the public service exclusively by the Public Service Commission (ss.1(1), 81). The YAEP is a statutory body, separate from the Yukon government, and therefore not part of the public service. Further, the plaintiff was not appointed to his position as PD Chair by the Public Service Commission.

b) he was not employed in a managerial capacity as PD Chair. He was not involved in formulating and determining government policies – he was working for YAEP; he represented YAEP, not the Yukon government in carrying out his duties as the elected YAEP PD Chair; he was not "appointed" in a managerial or confidential capacity on behalf of the employer, Yukon government, as otherwise he would not be part of the bargaining unit. The plaintiff's counsel argued that the determination of whether he was in a managerial capacity should wait until his full duties and responsibilities as PD Chair can be assessed. However, the overall responsibilities of the PD Chair were sufficiently described in the materials filed on this application. Applying the modern principle of statutory interpretation – described as reading statutory provisions in their entire context, including their grammatical and ordinary sense, in a way that harmonizes with the overall scheme, object, and legislative intent of the act – the scheme, object and legislative intent of the *ELRA* is to establish a comprehensive labour relations scheme for education professionals and their employer, the Yukon government, and to address related issues such as the internal governance of the employee organization. Managerial capacity thus needs to be interpreted in the context of these purposes. The duties of the PD Chair at YAEP are not consistent with a managerial or confidential exclusion from the bargaining unit for the purpose of collective bargaining. Normally a person in a managerial capacity in a labour relations context has "real or final decision-making powers impacting the employment of other employees" (*Unifor v Persona*

> *Communications Inc*, 2015 CIRB 760 at para. 31). While the person in the PD Chair position had some supervisory responsibilities over staff, they did not have the ability to hire and fire those staff. Further, the PD Chair does not have access to confidential information from the employer, Yukon government, such as information about employees, financial position of the government, or early development of policy.

c) the plaintiff was not employed on a casual basis.

[57] The *ELRA* also applies to the defendants. Section 85(3) prohibits "[t]he employee organization [in this case YAEP] and any of its officers, representatives or persons acting on behalf of the employee organization" from engaging in the prohibitive practices. As Executive Director of the YAEP, the defendant Emery is a representative or person acting on behalf of the YAEP, and as President of the YAEP, the Ted Hupé is an officer.

iv) What is the effect of statutory schemes such as this on a civil action?

[58] Many courts have confirmed that statutory schemes such as this one require court deference. As noted in *Ó Murchú* at para 42, the Supreme Court of Canada has acknowledged the importance of court deference where there is a comprehensive labour relations scheme in place that applies to a dispute. The most well-known of these decisions is *Weber v Ontario Hydro*, [1995] 2 SCR 929 ("*Weber*") where the Court quoted *St. Anne Nackawic Pulp & Paper v CPU,* [1986] 1 SCR 704 at 718-9 wrote:

> … 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.

[59] This principle has been extended to disputes relating to the internal affairs of unions, including discrimination and abuse of powers. In *Clark v Air Line Pilots Association*, 2022 FCA 217 ("*Clark*"), an airline pilot, a member of the Airline Pilots Association, the certified bargaining agent for pilots, complained he was subject to a campaign of harassment, coercion, and intimidation by his union, culminating in disciplinary charges against him. He claimed the union had engaged in discriminatory treatment of him and he was the subject of reprisals for filing a duty of fair representation complaint with the Canada Industrial Relations Board ("CIRB"). The dispute in that case was an application for judicial review of the CIRB's dismissal of his complaint, a different issue than in the case at bar. However, the decision is relevant here because of its findings on the jurisdictional issues created by the legislative provisions of the Canada Labour Code relating to internal union disputes.

[60] The wording of the legislative provisions in the Canada Labour Code at issue in *Clark* are very similar to those in the Yukon *ELRA*. The Court in *Clark* wrote:

> [41] Paragraphs 95(f) and (g) of the *Code*, [the same wording as s. 85(3)(a) and (b) of the *ELRA*] are directed at the internal affairs of unions and the discriminatory abuse of union powers. In recognition of a reluctance [by courts] to interfere in internal union matters, Parliament provided an opportunity for union members and their unions to resolve disputes through unions' internal appeal processes. …

The Court in *Clark* went on to say at para. 42 that "[t]he role of the Board is to ensure that discipline standards, including the basis for their application, the manner in which they are applied and the results of their application are free from discriminatory practices: *Wheadon (Re)*, 5 CLRBR (NS) 192."

[61] Similarly, the Ontario Superior Court of Justice in *Pileggi v Canadian Union of Postal Workers*, [2005] OJ No 1734 ("*Pileggi"*), found that the CIRB had exclusive jurisdiction over the plaintiff's claims that she was improperly removed by the union executive from her elected full-time position as a regional education and organization officer with the Canadian Union of Postal Workers. She sought an order of reinstatement, a declaration of wrongful suspension, an order that the union pay for lost wages during her suspension, an order to pay legal costs and damages for mental distress as well as punitive, aggravated and exemplary damages. The motion before the court was to determine whether she could bring her claim in court, or whether it was within the exclusive jurisdiction of the Board.

[62] After reviewing the essential character of the dispute, the Court held at para. 53 that "the Courts should strive to give effect to the comprehensive code enacted by Parliament in respect of labour relations: see, for example, the dictum of Estey J. in St. Anne [the same quote set out in para. 57 above]. While the Courts retain inherent jurisdiction to review internal union disputes, they should only do so if the Code provisions result in a "real deprivation of ultimate remedy"".

[63] The Court in *Pileggi* at para. 58 also relied on the Supreme Court of Canada's conclusion in *Gendron v Supply & Services Union of the Public Service Alliance of Canada, Local 50067*, [1990] 1 SCR 1298, that courts should accord deference to the statutory dispute resolution process established in comprehensive labour relations legislation.

> [58] …
>
> > It is clear then that this Court has enunciated a principle of deference, not only to decision-making structures under the collective agreement but as well to structures

> set up by labour legislation and in general, to specialized tribunals operating within their fields of expertise … Allowing parties to disputes which, by their very nature, are those contemplated and regulated by labour legislation, to have recourse to the ordinary courts would fly in the face of the demonstrated intention of Parliament to provide an exclusive and comprehensive mechanism for labour dispute resolution…

v) What is the essential character of the plaintiff's claim?

[64] Given the legal principle of court deference to a comprehensive labour relations statutory scheme, an examination of the essential character of the dispute is the first step in determining if it can be resolved under the statute. Here, the essential nature of the dispute is the plaintiff's alleged unfair, unjust, and unfounded treatment by the Executive Director of the YAEP and members of the executive of the YAEP, culminating in his removal from his position as PD Chair. His claims of defamation and conspiracy are legal characterizations that are not the essence of the claim. The plaintiff's argument that the claims of defamation and conspiracy are independent of his removal from his position as PD Chair and exist on their own is not reflected by the factual underpinnings.

[65] The concept of determining the essential nature of the dispute arose first in the context of whether a court has any jurisdiction over disputes arising under a collective agreement in *Weber*:

> [43] … the analysis of whether a matter falls within the exclusive arbitration clause must proceed on the basis of the facts surrounding the dispute between the parties, not on the basis of the legal issues which may be framed. … Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it.

[66] The Court in *Weber* established a two-part test: what is the nature or essential character of the dispute and does the essential character of the dispute fall within the scope of the collective agreement?

[67] This test has been extended to apply to the scope of a legislated scheme that creates an administrative tribunal for the resolution of complaints and disputes. For example, in *Nagra v Coast Mountain Bus Company (TransLink)*, 2023 BCSC 2312, the court found the plaintiff's actions for wrongful dismissal, workplace injuries arising from bullying and harassment, and violations of human rights, were within the exclusive jurisdiction of a labour arbitrator, the Workers' Compensation Board, the Employment Standards Branch, the Labour Relations Board, and the Human Rights Tribunal, depending upon the essential nature of each of the claims. In *Chestacow v Mount St. Mary Hospital of Marie Esther Society*, 2024 BCSC 783, a resident care attendant at the hospital claimed in a civil action that the conduct of some managerial employees forced her to resign by creating an intolerable work environment and causing mental injuries and loss. The court struck her claim, because the essential character of the dispute was either about the terms and conditions of work and therefore within the exclusive jurisdiction of a grievance arbitrator, or about an injury arising in the course of employment and therefore within the exclusive jurisdiction of the Workers' Compensation Board (at para. 40).

[68] There are many decisions where allegations of conspiracy and defamation made in a labour relations context were assessed and found not to be the essential nature of the dispute. In *Bergman v Canadian Union of Public Employees (Local 608),* [1999] BCJ No 1242 (SC), the plaintiff Mr. Bergman sought damages from his employer for wrongful and constructive dismissal and breach of contract and from his union for a breach of its

duty of fair representation and of fiduciary duty. He alleged conspiracy and defamation against both defendants. The court held it had no jurisdiction to decide either claim because both the conspiracy and the defamation allegations related solely to the issues of the plaintiff's employment with the employer and the union's duty of fair representation owed to him (at paras. 26-27).

[69] Another example is the case of *International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 97 v Canadian Iron, Steel and Industrial Workers' Union, Local 1,* 2023 BCSC 568, in which the plaintiff union brought a claim for damages for defamatory statements made by the defendant union in the course of and in the context of a union raid. The court held at para. 48 that the dispute was in the exclusive jurisdiction of the Labour Relations Board because the allegedly defamatory statements were made during the union raid, and the Labour Relations Board had jurisdiction to deal with a change in union representation, which is a union raid. The essential character of the dispute was the defamatory comments made in the context of a union raid, a labour relations matter, over which the Board had exclusive jurisdiction. The court considered the text, context and purpose of the Labour Relations Code in coming to its conclusion.

[70] Further, in *Lapchuk v Saskatchewan*, 2017 SKCA 68, an employee who was injured at work brought a civil action against his employer claiming damages in conspiracy, among other things. In dismissing his claim for conspiracy, the court held that the essence of his conspiracy claim was the propriety of his suspension and ultimate dismissal by his employer, as well as the conduct of the union in representing him. The Court wrote "[he] cannot avoid this reality simply by framing his complaint as a 'conspiracy' … 'it is the essential character of the difference between the parties, not the

legal framework in which the dispute is cast, which will be determinative of the appropriate forum for settlement of the issue'" (at para. 25, quoting *New Brunswick v O'Leary*, [1995] 2 SCR 967 at para. 6).

[71] Here, the plaintiff's allegations of defamatory statements by the defendants Hupé and Emery in emails or verbally about or to him can all be described as criticisms of his performance of his duties as PD Chair, his conduct in general in the workplace of the YAEP, or conduct arising from conflict in the workplace, such as information about his complaint to the Employment Standards Branch. As noted above in para. 23, the plaintiff alleges all these comments were understood to mean, among other things, that he was incompetent, untrustworthy, dishonest, disrespectful or bullying to colleagues, unproductive, adversarial and in the end unworthy of continuing on in the role of PD Chair at YAEP.

[72] These criticisms by the defendants Emery and Hupé, whether legally characterized as defamatory or not, allegedly made the workplace intolerable for the plaintiff by targeting him, singling him out, and unfairly criticizing him. Many of the criticisms were relied upon as the basis for his removal from the executive position.

[73] The plaintiff's allegation of conspiracy in his statement of claim also relates exclusively to his treatment by the defendants Emery and Hupé in the workplace of the YAEP. More particularly, the plaintiff alleges that Emery and Hupé formed an agreement to bully, harass, and defame him culminating in his removal from the role as part of the Executive, and to prevent him from pursuing his complaints against them and other members of the YAEP. The conspiracy allegation is actually the unfair treatment of the plaintiff by the YAEP and its representatives in the workplace through targeting him, singling him out, and treating him unfairly.

vi) Can the plaintiff's claim be resolved under the statutory scheme?

[74] Given my findings that the plaintiff and the defendants are covered by the *ELRA* and the essential character of this dispute is the plaintiff's unfair treatment in the workplace by his employee organization and its representatives, and the applicable legal principle of court deference to statutory schemes such as this one, the question is whether there are sufficient provisions in the *ELRA* to address this dispute. The plaintiff argues that the dispute is not covered by s. 85.

[75] As noted above, s. 85(3)(b) prohibits the employee organization and any of its officers, representatives, or persons acting on their behalf from taking disciplinary action against or imposing any form of penalty on an employee by applying standards of discipline in a discriminatory manner. Section 85(3)(b) directly applies to this dispute.

[76] This section is modelled on the provisions in the *Canada Labour Code,* RSC 1985, c. L-2 (formerly s. 185 and now s. 95). There is no Yukon jurisprudence interpreting s. 85 of the *ELRA*. Helpful guidance is provided by Canada Labour Relations Board (the "CLRB") decisions interpreting the similar *Canada Labour Code* sections.

[77] In *Solly v Communications Workers of Canada, Local 48*, [1981] 2 Can LRBR 245 ("*Solly*"), the dispute before the CLRB was about whether the plaintiff had been unfairly expelled from union membership. The CLRB commented on the unique aspects of these provisions of the Code to address internal union disputes:

> [37] In most provincial jurisdictions legislative regulation of the internal affairs of trade unions is not as extensive as under the federal Code. In some the legislative language is similar but has received differing interpretations. … In British Columbia where there is little regulation of internal union affairs the statutory duty of fair representation has been a

> vehicle for labour relations board supervision of union conduct. … [citations omitted]

[78] Most provincial labour laws do not have the statutory mechanism that gives a labour board oversight of disputes arising from a union unfairly applying its standards of discipline to one of its members. As a result, jurisdictional issues in this context do not arise the way they do in the federal context, or, in this case.

[79] The CLRB in *Solly* referenced its decision in *Gerald Abbott v International Longshoremen's Assn*, *Local 1953*, [1978] 1 Can LRBR 305, and *Udvarhely (Re)*, [1979] 2 Can LRBR 569, in describing how to interpret the prohibition on applying standards of discipline in a discriminatory manner at para. 45 (see s. 85(3)(b)):

> [45] …
>
> > The thrust of this statement is that an individual should not be singled out for special treatment either in a decision to charge, the procedural format or the penalty. This is easily understood by trade unions which have vigorously defended their members to insure that standards of industrial discipline imposed by employers are fair and non-discriminatory. Also unions are subject to a common law or statutory duty of fair representation which includes a prohibition against acting discriminately in representing employees. That standard requires that employees not be treated unequally because of race, sex, etc., personal favouritism or animosity…
> >
> > As a minimum, a similar standard of equal treatment must apply in determining where a union has acted discriminatorily in the expulsion, suspension or other discipline of a member or denial of membership. … [citations omitted]

[80] More generally, the CLRB in *Solly* described the purpose of s.185(f) and (g) – the same wording as s. 85(3)(a) and (b) – at paras. 43 and 45 as:

> [43] … First, the sections are intended to protect and advance individual rights against the previously unfettered authority of the union organization. Second, they do not

> abolish the right of the union to expel, suspend or discipline members or deny membership to non-members…
>
> …
>
> [45] The task left to the Board is not to set standards for what unions may consider vital institutional interests or to dictate when those interests must yield to the interests of an individual. Our task is to ensure the union does not act discriminatorily and one measure is the reasonableness of the union's action. …

[81] In other words, an individual must not be singled out for special treatment in the decision of a union to impose discipline, to follow certain procedures, or to administer a penalty.

[82] Section 85(3)(b) prohibits the YAEP defendants from taking disciplinary action against the plaintiff in a way that applies the YAEP's standards of discipline in a discriminatory manner. YAEP's standards of discipline may arise from its constitution, bylaws, or rules – written or unwritten.

[83] Here, the plaintiff claims he was targeted by the defendants Emery and Hupé who sought to remove him from his position as PD Chair and prevent him from complaining about them (see paragraphs 23, 39, 45,46,51-63, ,65-70, and 84 of the Amended Amended Statement of Claim). The plaintiff claims his removal was unfair, and the allegedly defamatory comments made by the defendants about his behaviour and abilities in the workplace, also characterized as bullying and harassing, were part of his unfair treatment. Whether these statements and actions of the YAEP and its representatives constituted a discriminatory application of YAEP standards of discipline is a question to be decided by the TLRB under the *ELRA*.

vii) Should the Court exercise its residual jurisdiction in this case?

[84] In cases such as labour relations disputes where the court is found to have no jurisdiction, there is still discretion for a court to exercise residual jurisdiction. That discretion should be exercised only in exceptional cases where otherwise the plaintiff would have no remedy. It is noteworthy that deference by courts to the legislative scheme has been required even in cases where courts have been found to have a residual discretion to deal with the dispute (*Vaughan v Canada*, 2005 SCC 11 at paras. 2, 17, 22, 29, 39).

[85] The plaintiff says the *ELRA* does not provide a remedy in damages, which the plaintiff is seeking through the civil claim, and so the court should exercise its discretion and take jurisdiction. I find the *ELRA* does have a broad remedial authority that could include compensation, and the court does not need to take jurisdiction.

[86] This issue of the absence of a remedy under an administrative tribunal process was addressed in *Pileggi* at para 53. The court adopted the test in *Weber* that the statutory provisions must result in a "real deprivation of ultimate remedy" in order for the court to exercise jurisdiction. This test does not require that all possible heads of damage at common law be available to the plaintiff under the statutory provisions in order to oust the common law action. Instead, the correct standard is whether an adequate remedy exists under the statutory provisions. The unavailability of certain heads of damages such as punitive damages from an administrative tribunal is not sufficient for the court to conclude that the restriction of the defendant's rights to an action under the statutory provisions would result in a real deprivation of ultimate remedy.

[87] In this case, the plaintiff seeks damages for defamation and conspiracy. However, as concluded above, the essential character of the plaintiff's claim, as determined by the factual allegations plead, is the YAEP's unfair treatment of him, evidenced through the statements made about his work performance, culminating in his removal from his elected executive position. This dispute is covered by the *ELRA* provisions related to the discriminatory application of disciplinary standards by the YAEP (s. 85(3)(b)). The plaintiff did not lose his paid employment: he retained his position as a teacher and suffered no loss of income. He also received workers' compensation benefits for the psychological injury he experienced in the workplace.

[88] This is unlike the case of *Piko v Hudson's Bay Company* (1998), 41 OR (3d) 729 (CA), relied on by the plaintiff, in which the Ontario Court of Appeal held that the plaintiff could pursue her civil claim for malicious prosecution and mental distress, arising from the employer's instigation of criminal proceedings against her for fraud in the workplace. The Court of Appeal in that case found that because the defendant employer went outside the collective bargaining regime into the criminal courts, the dispute was no longer only a labour relations dispute to be resolved under the collective agreement. The essential character of the dispute was now about the defendant employer's use of criminal proceedings against the plaintiff employee, and not a matter arising from the collective agreement such as an unjust discharge. In the case at bar, the essence of the dispute did not change to bring it outside of the workplace context. The dispute remained at all times the plaintiff's unfair treatment by the YAEP and its representatives in the workplace and his eventual removal from the executive position.

[89] As noted above, ss. 90(1) of the *ELRA* gives the TLRB a broad authority to make an order against a person, bargaining agent, or employer who has been found not to

have observed a prohibition under the *ELRA*, to give effect to the provision, regulation, direction or order, or **to take such act as may be required within such specified period as the board may consider appropriate** [my emphasis]. This power is broad enough to encompass compensation for unfair treatment, if the TLRB considered it appropriate. Further, the plaintiff's stipend of $1,500 while in the position of PD Chair may be able to be awarded to him if he were successful before the TLRB for the remainder of his term. Reinstatement to the position is also a possible remedy from the TLRB under s. 90(2)(b). The wording is also broad enough to prohibit the defendants from making further comments to and about the plaintiff. This broad remedial authority under the *ELRA* makes it unnecessary for the Court to exercise its residual jurisdiction in this case.

PROCEDURAL ISSUES

[90] Affidavit evidence filed by the plaintiff on December 20, 2024, set out his conclusion that his only recourse against the defendants in the situation he described was through a civil claim and private counsel after receiving advice from a labour relations advisor with the Yukon Public Service Commission and earlier from an employment relations advisor about the collective agreement. The plaintiff was not directed to the remedy under the *ELRA*, at least by these two advisors. This is unfortunate, but understandable given that the Public Service Commission advisor clearly described his role to the plaintiff as providing advice to the Yukon government in its role as employer, and the employee relations advisor described his role as providing information about events/circumstances relevant to the plaintiff's employment relationship with the Yukon government, not the YAEP. There is no evidence of any inquiries the plaintiff made with YAEP or anyone else about a process under the *ELRA*.

I note that the plaintiff had no trouble in making numerous other complaints as noted above, both internally at YAEP and with other administrative bodies. Without coming to any conclusion as to what information the plaintiff may or may not have had about this process under the *ELRA*, YAEP may want to examine their communication of recourse under s. 88 of the *ELRA* by the employees to whom it applies, in an effort to prevent the costs in time and money of a similar situation arising again.

[91] There is a 90-day time limit for bringing a complaint before the TLRB. However, affidavit evidence filed by the plaintiff before the conclusion of the hearing confirmed that he did file a complaint under s. 85 of the *ELRA* to the TLRB on December 13, 2024, and asked that the sections relating to defamation and conspiracy be held in abeyance. The subject matter of the complaint is the same as is set out in the statement of claim. The defendants also filed an affidavit appending a letter from the TLRB requesting a response to the plaintiff's complaint from the YAEP and the Yukon government. This strongly suggests or confirms that the 90-day time limit has been waived by the TLRB. It would be disingenuous of the YAEP or the Yukon government to raise a limitations defence to the complaint to the TLRB after taking the position they have in this case.

[92] Although this was not pursued extensively in argument, the possibility of a judicial review of the YAEP executive decision to remove the plaintiff from his position was available to the plaintiff. Similarly, a judicial review of any decision of the TLRB is possible in accordance with the limits set out in s. 95 in the *ELRA*.

ALTERNATIVE ARGUMENTS

[93] As a result of my findings on the jurisdictional argument, it is unnecessary to consider the alternative arguments raised by the defendants about the flaws in the conspiracy and defamation claims.

[94] Further, the paragraphs in the Amended Amended Statement of Claim adding breach of fiduciary duties and negligence as tortious claims do not change the above analysis. They are legal characterizations of the same underlying factual dispute, which is covered by the *ELRA*.

CONCLUSION

[95] For the above reasons, the plaintiff's claim in conspiracy and defamation is dismissed for lack of jurisdiction.

[96] Costs may be spoken to if necessary, in case management.

_____

DUNCAN C.J.