

IN THE COURT OF APPEAL OF NEW BRUNSWICK

Angers, Ayles and Ryan, J.J.A.

Date: 19920206

Docket: 110/91/CA

BETWEEN:

ROGER A. GERRARD

(APPLICANT)

APPELLANT

-and-

TOWN OF SACKVILLE

(RESPONDENT)

RESPONDENT

DECISION APPEALED FROM

Landry, J., May 10, 1991

DATE OF HEARING

October 15, 1991

DATE OF DECISION

February 6, 1992

REASONS FOR JUDGMENT BY

Ryan, J.A.

CONCURRED IN BY

Ayles, J.A.

DISSENTING REASONS BY

Angers, J.A.

COUNSEL

J. Gordon Petrie, Q.C. for the Appellant

James F. LeMesurier, Esq. for the Respondent

BY THE COURT

The appeal is allowed and the judgment of the Court of Queen's Bench

dismissing an application for judicial review is set aside. The decision of the Town of Sackville to dismiss the appellant as of November 30, 1990 is removed into this Court and quashed.

ANGERS, J.A.

I have read the reasons for judgment of my colleague Ryan J.A. and I agree with his conclusions with respect to the nature of Mr. Gerrard's employment and the resulting entitlement to procedural fairness. However, I do not share his views with respect to the availability of an adequate alternative remedy.

Perhaps I should indicate that I would prefer a consolidation of remedies irrespective of the nature of the proceedings, as suggested in H. W. R. Wade, **Administrative Law**, 4th edition, (Oxford: Clarendon Press, 1977) at p.489:

There is now a recognised need for the removal of anomalies in the law of remedies and the subject has been under study by the Law Commission. The anomalies are the consequence of the fact that remedies belong to two different families: there is the family of ordinary private law remedies such as damages, injunction, and declaration; and there is a special family of public law remedies, the prerogative remedies, such as mandamus, certiorari and prohibition. The private law remedies are sought in an ordinary action and any or all of them may be sought simultaneously. The prerogative remedies require special procedure and have rules of their own, for example as to allowing persons to sue who would not have a sufficiently direct personal interest to sue for a private law remedy. Although between them the two families provide very effective remedies, it has for some time been clear that they ought to be amalgamated under a single procedure so that the litigant may have the benefit of any of them without having to choose his remedy in advance.

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However, that is not the case at present and Wade, **Administrative Law**, *supra*, says at p.552:

A serious defect of prerogative remedy procedure is its incompatibility with the procedure for obtaining private law remedies. In principle a litigant ought to be able to ask for all possible remedies in the alternative. The remedies of private law, such as damages, injunction and declaration, are all available in the ordinary form of action and a plaintiff may seek any or all of them simultaneously. But the

prerogative remedies can be sought only by their own special procedure, in which the court is asked to extend a royal privilege to a subject.

Judicial Review enables the courts to exercise control and ensure legality in proceedings other than judicial ones. The remedy, in this case of certiorari as it was formerly called, exists primarily to provide relief in cases of absence or loss of jurisdiction by inferior tribunals or boards or as in this case, a public body. It is restrictive in the sense that it involves the quashing of a decision and no other redress. It is considered a prerogative remedy and a discretionary one. See Wade, **Administrative Law**, chapter 17, beginning at page 518. It is not to be used where there exists an adequate alternative remedy. The jurisprudence with respect to this last point was reviewed by Jones J. in **Hitchcock v. New Brunswick (Deputy Solicitor General)** (1988), 93 N.B.R. (2d) 294 at p.308.

In **Hitchcock**, Jones J. declined to exercise his discretionary jurisdiction and grant an application for Judicial Review on the grounds that the grievance procedure provided an

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adequate alternative remedy. In the authorities reviewed, the following were considered adequate alternative remedies: an appeal to a university senate committee in **Harelkin v. University of Regina**, [1979] 2 S.C.R. 561; a grievance procedure in **Lewis v. Canada Employment and Immigration Commission** (1986), 60 N.R. 14.

The question in this case is whether the ordinary remedy obtainable in a civil action for breach of contract provides an adequate alternative remedy.

Initially, I would point out that an alternative remedy need not be the same remedy by an alternative procedure but another remedy that adequately redresses the wrong. In the present case, the relationship between the parties was one of contract. The duty of the Town of Sackville to treat Mr. Gerrard with procedural fairness arose partly out of those contractual obligations.

In **Knight v. Indian Head School Division No. 19**, [1990] 1 S.C.R. 653, the majority decision of the Supreme Court pointed out, in a case similar to this one, that the duty to act fairly arose primarily because of the public nature of the decision-making body. Where there is an employment contract, procedural fairness will be presumed to be part of the contract. Madam Justice L'Heureux-Dubé said at page 681:

In interpreting the contract of employment, it will be presumed, as was the case with the statute, that the parties intended that procedural fairness would apply and it will take an explicit or clearly implicit

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provision to the contrary to override this presumption.

The minority decision was of the view that the duty to act fairly ought not to be implied in the contract.

In my opinion, the failure to act fairly, although it constituted a breach of a public duty, also amounted to a breach of contract. A civil action has always been, not an alternative, but the proper legal procedure for dealing with such breaches. In cases where there is no contract, it may well be that there are no other adequate remedies except Judicial Review, but that is not the situation here.

In his application for Judicial Review, Mr. Gerrard sought to have the decision to dismiss him from his employment removed into this court and quashed. The grounds upon which he relies are that the Town of Sackville breached its duty of fairness in failing to advise him of the reason for the dismissal and failing to give him an opportunity to be heard before dismissing him. I would point out that the letter of dismissal dated November 30, 1990 gave the reason for the termination of employment. That reason was stated as "an inability to effectively function with other members of the office staff". Considering that he could be dismissed without cause, the only breach of procedural fairness was in not giving him an opportunity to be heard.

If the decision to dismiss him is quashed, the effect might be to reinstate him, presumably as of November 30, 1990. He could then have a hearing, be heard and possibly be

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dismissed fairly but retroactively to November 30, 1990. From a practical point of view it appears unlikely that Mr. Gerrard would be reinstated and paid for the year and more during which he did not work. In those circumstances, it seems to me that the redress available on Judicial Review is unrealistic. It is certainly contrary to the rule that specific performance ought not be granted for personal services. See **Garnett v. Armstrong** (1977), 83 D.L.R.(3d) 717 (N.B.C.A.) and **Emerald Resources Ltd. v. Sterling Oil Properties Management Ltd.** (1969), 3 D.L.R. (3d) 630 where Allen J.A. for the Alberta Supreme Court, Appellate Division said at 647, relying on **Anson's Law of Contract**, 22nd ed.:

An example of a contract of which the Court will not compel specific performance is a contract of personal service, or one which requires the use of personal skill such as the one we have under consideration. Anson says this seems to be based on the grounds of public policy...

Moreover, it is unlikely that the remedy provided by the judicial review would be final. Should Mr. Gerrard be reinstated and dismissed, he might still pursue an action for breach of contract. Multiplicity of actions should be discouraged. Here, the alternative remedy of a civil action is not only adequate but preferable.

It may be sufficient for Mr. Gerrard to obtain, in a civil action, a declaration that his dismissal was void. J. M. Evans, **De Smith's Judicial Review of Administrative Action**, 4th edition (London: Stevens & Sons Limited, 1980) at p.24 seems to suggest that such a declaration is obtainable in

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a civil action. Wade, **Administrative Law** at p.553 relying on the words of Denning

L.J. in **Barnard v. National Dock Labour Board**, [1953] 2 Q.B. 18 strongly encourages such a course of action. In **Knight v. Indian Head School Division No. 19**, supra, such a declaration was sought and the plaintiff also asked for reinstatement, but because of the ultimate decision, the remedy sought did not become an issue.

Finally, from a purely procedural point of view, judicial review may not be a remedy here. Unless the Town of Sackville acted contrary to or in excess of its statutory powers, its decision to terminate Mr. Gerrard's contract was within its jurisdiction. Perhaps it erred but within such jurisdiction, it has the right to be wrong and the courts should not interfere by prerogative authority. **De Smith's**, supra at p.34 says it in these words:

Whilst public officials enjoy no special immunity from the degree of fallibility common to the human species it is in general not for the judges to correct them. And judges should beware of unduly extending their principal weapon of control, the requirement of legality, so as to bring within their purview matters that should properly be let to lie elsewhere.

In my opinion, the matters in this case properly lie in a civil action for breach of contract. For those reasons, I would dismiss the appeal with costs to the respondent as per the Schedule.

[S]

J.-C. ANGERS, J.A.

RYAN, J.A.

Fourteen months after hiring the appellant, Roger A. Gerrard, as Manager of Industrial & Commercial Development the Town of Sackville fired him. He was not told in advance the reasons why his dismissal was being considered by the town council. Nor was he given an opportunity to try to change the council's mind about dismissing him. Gerrard claims that the office he held with the town entitled him to procedural fairness in being advised of the reasons in advance as to why he was being considered for dismissal and in being given an opportunity to be heard.

A judge of the Court of Queen's Bench dismissed Gerrard's application for judicial review. Gerrard claimed that the Town of Sackville had breached its duty of fairness to him. The judge held that the Town and Gerrard were in a master and servant relationship and that Gerrard was therefore not entitled to this particular type of procedural fairness. I disagree. I think that he held an office at pleasure as described by Lord Reid in **Ridge v. Baldwin**, [1963] 2 All E.R. 66 at pp.71-72 and as referred to by L'Heureux-Dube J. in **Knight v. Indian Head School Division No. 19**, [1990] 1 S.C.R. 653 at pp. 670-671 and was in middle management as found by Stevenson J. in **Hughes v. Moncton** (1990), 111 N.B.R (2d) 184.

The judge of first instance had this to say about the commencement and the termination of Gerrard's employment:

The applicant commenced employment with the Town as its manager of Industrial & Commercial Development on July 31, 1989, in accordance with the offer of employment addressed to him on July 12, 1989, as follows:

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This will confirm our telephone conversation of this morning.

The Town of Sackville offers you the position of Manager of Industrial & Commercial Development. Employment to commence July 31, 1989 at a

salary of \$36,000.00 per annum. On successful completion of 6 months probationary employment, salary will be increase (sic) to \$37,000 per annum and further increased to \$39,000 on January 1, 1991 and to \$41,000 on January 1, 1992.

All standard employee benefits will be made available on completion of normal waiting periods.

Expense allowances are available at approved rates.

I do feel that you have the ability to do a good job for the Town and I look forward to working with you.

One year and four months after commencement of his employment with the Town, on November 30, 1990, the applicant received the following letter from the Town advising him that his employment would be terminated on that date:

Kindly be advised that the Town Council, at a Special Meeting held on November 28, 1990, passed a motion whereby they have directed that your employment with the Town of Sackville be terminated as of November 30, 1990.

As Chief Administration Officer it is my responsibility to pass this directive on to you as the employee and to inform you that the reason that Council feels that your employment is no longer required is that there have been occasions in the past where you have displayed an inability to effectively function with other members of the office staff. It

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is recognized, as well, by the Town Council that they need to provide you with notice of any termination. Having not provided you with notice, they are hereby authorizing me to extend to you a three months's (sic) severance pay in lieu of notice and to inform you that all of your employee benefits shall be maintained by the Town of Sackville up to and including February 29, 1991.

The applicant was paid three months' salary and benefits in lieu of notice as provided for in the above letter.

The applicant was not provided with any hearing or other opportunity to be heard with respect to the alleged grounds or reasons for his dismissal. He was not requested to and did not attend the special meeting held on November 28, 1990.

In the letter of July 12th, the offer of employment, reference was made to a probationary period of six months. The town council made no formal acceptance upon his successful completion of the probationary period. This was completed, however, and an increase in pay was given to Gerrard although there was an attempt to change the terms to a one year contract. He declined the offer of a one year contract.

In the course of his employment, Gerrard made a number of complaints about subordinate staff members. On November 22, 1990, Gerrard delivered a written complaint to the town clerk about a secretary. The secretary was given a copy of his complaint. The secretary replied to the complaint directly to town officials and raised complaints of her own against Gerrard. Gerrard was neither given a copy nor was he told of the secretary's complaints against him although the town clerk

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held a meeting with Gerrard to discuss Gerrard's letter of November 22.

As well as lodging complaints against Gerrard, the secretary informed town officials that she had filed a complaint with the New Brunswick Advisory Council on the Status of Women.

A special meeting of the Sackville Town Council was called for November 28th, 1990. The secretary who made the allegations of misconduct against Gerrard was present. The Town Council decided to fire Gerrard. He was unaware that this meeting was being held until after the fact.

Under s.4(3) of the **Municipalities Act**, R.S.N.B. 1973, c.M-22, the Town of Sackville is empowered to create offices and delegate powers and duties:

4(3) A municipality may provide for, create, alter and abolish committees, departments, bureaus, divisions, boards, commissions, officials and agencies of the municipality and delegate administrative powers and duties to them.

The town council exercised this power when it created the office of Manager of Industrial & Commercial Development.

The Town submits that in spite of this the relationship with Gerrard was one of master and servant. On this point, I would refer to what Lord Wilberforce said in **Malloch v. Aberdeen Corporation**, [1971] 2 All E.R. 1278 (H.L) at 1294 that "pure master and servant cases"

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. . . mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter partes aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void.

Mr. Justice Stevenson held in **Hughes v. Moncton** that Mr. Hughes, a solicitor for the City, was in a stratum of employees between those entitled to the protection of collective bargaining and those protected by s.74 of the **Municipalities Act**. His position was described as one of middle management. In the case of Mr. Hughes, his position was specifically created by the city council. The same formalities were not followed in creating Gerrard's position but the result is, in my opinion, the same. The office was created by the town council, funds were appropriated by council for payment of the office holder and a job description was subsequently prepared by the council.

In the **Hughes** case, Stevenson J. made the following references to case law which are also pertinent to the case on appeal. He said at pp 196-199:

The latest case in this developing area of the law is **Knight v. Indian Head School**

Division No. 19, [1990] 1 S.C.R. 653; 106 N.R. 17; 83 Sask. R. 81. That case involved the termination of employment of a director of education. The employment contract allowed for termination by either party on three months' notice or termination by the Board for just cause subject to a fair

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hearing and investigation pursuant to the **Education Act**. L'Heureux-Dube, J., concluded the director's employment could be terminated without just cause upon three months' notice but that that did not necessarily entail that the procedure could be arbitrary. Neither the contract nor the statute conferred a right to procedural fairness. Madam Justice L'Heureux-Dube said the duty to act fairly stemmed from the fact the employer was a public body whose powers were derived from statute and must be exercised according to the rules of administrative law. She then discussed the application to the case of the three factors laid down by the court in **Cardinal and Oswald v. Kent Institution, Director of**, (1985] 2 S.C.R. 643; 63 N.R. 353, as determinative of whether there is a general right to procedural fairness. As the decision of the Board was of a final and specific nature, directed to termination of the employment, it could possibly entail the existence of a duty to act fairly. With respect to the relationship between the Board and the director she said the office held was not of a "pure" master and servant type since it encompassed some elements of a public nature. The office was established by statute and the **Act** set out some of the director's duties. She proceeded to determine that the office was one held at pleasure and then said, at page 672:

Administrative law has evolved in recent years, particularly in the Canadian context, so as to make procedural fairness an essential requirement of an administrative decision to terminate either of the last two classes of employment described by Lord Reid.

and at page 674-675:

The justification for granting to the holder of an office at pleasure the right to procedural fairness is that, whether or not just cause is necessary to terminate the employment, fairness

dictates that the administrative body making the decision be cognizant of all relevant circumstances surrounding the employment and its termination (**Nicholson**, supra, at p. 328, per Laskin, C.J.) One person capable of providing the administrative body with important insights into the situation is the office holder himself. As pointed out by Lord Reid in **Malloch v. Aberdeen Corp.**, [1971] 2 All E.R. 1278, at p. 1282: 'The right of a man to be heard in his own defense is the most elementary protection of all . . .' To grant such a right to the holder of an office at pleasure would not import into the termination decision the necessity to show just cause, but would only require the administration body to give the office holder reasons for the dismissal and an opportunity to be heard. I would adopt Wade's reasoning when he writes about offices held at pleasure (**Administrative Law** (5th Ed. 1982), at pp.500-501):

If the officer is subject to some accusation, justice requires that he should be allowed a fair opportunity to defend himself, whatever the terms of his tenure. To deny it to him is to confuse the substance of the decision. which may be based on any reason at all, with the procedure which ought first to be followed for purposes of fairness. It is then an example of the fallacy, already mentioned, that the argument for natural justice is weaker where the discretionary power is wide.

...

. . . it would seem right therefore to protect the officer or member against wrongful deprivation of every kind and to accord him the

procedural rights without which deprivation is not fair and lawful. Whether he is removable for cause or at pleasure should in principle make no difference. [Emphasis is that of L'Heureux-Dube, J.]

I conclude that the judge hearing the judicial review was in error in finding that the principle of fairness did not apply to the dismissal of Gerrard from his office and employment by the town. The Town of Sackville is a public body,

deriving its powers from statute. It exercises its public powers on behalf of the citizens it serves. The exercise of these public powers apply in the creation of the position, in filling it and in firing Gerrard. Other factors that lead me to the conclusion that procedural fairness rules must be observed in this case are that the town gave the holder of the office an official title and it placed him in a managerial position. As well, the office was one capable of some protection and he had staff subordinate to him.

I further conclude that Gerrard was employed at pleasure and could be removed without cause. Nonetheless, he was entitled to be treated fairly. He was entitled, before being dismissed, to be told the reasons why his dismissal was being considered and to an opportunity to try to change the town council's mind concerning his dismissal. If, as in the **Knight** case, Gerrard had been aware of the reasons, in advance, for his dismissal and had had a reasonable opportunity to be heard, the town's duty to act fairly would have been satisfied.

There is one further area of law which must be considered, that is, whether there is an adequate alternative

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remedy. This issue was canvassed by Jones, J. in **Hitchcock v. New Brunswick** (1988), 93 N.B.R.(2d) 294 beginning at 308. Jones, J. reviewed the cases of **Harelkin v. The University of Regina**, [1979] 2 S.C.R. 561; 26 N.R. 364 where it was held that the Saskatchewan Court of Appeal was right in refusing certiorari and mandamus because Harelkin ought to have pursued his right of appeal to the university senate before resorting to prerogative writs; and **Lewis v. Canada Employment and Immigration Commission** (1986), 60 N.R. 14, (Stone, J.) where an adequate alternative remedy was available to Lewis under the adjudication process whereby he could have been restored to his former position, thus curing the procedural defect. The Federal Court of Appeal upheld this decision. In the **Hitchcock** case, Jones, J. determined that there was an adequate alternative remedy under the grievance procedure available to Hitchcock pursuant to the

Public Service Labour Relations Act, R.S.N.B. 1973, c.P-25.

Here, in the case on appeal, the alternative remedy is damages for breach of contract. This is not, in my opinion, an adequate alternative remedy. Refusing Gerrard's application for judicial review would deprive him of the most important remedy, that is, an opportunity to present his case to the town council as to why he should not be dismissed. Whether the council accepts or rejects his submission is not our concern but the council has an obligation to hear him. Gerrard seeks procedural fairness. He should have it. In this case, damages for breach of contract is not an adequate alternative remedy for breach of a procedural right of fairness.

As L'Heureux-Dubé J. said in the **Knight** case at pp.668-669:

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. . . It should be noted at this point that the duty to act fairly does not depend on doctrines of employment law, but stems from the fact that the employer is a public body whose powers are derived from statute, powers that must be exercised according to the rules of administrative law. It is in that context that the employee-employer relationship between the respondent and the appellant Board must be examined, with the result that the analysis must go beyond the contract of employment to encompass arguments of public policy.

I would allow the appeal and order that the decision of the Town of Sackville to dismiss Roger A. Gerrard as of November 30, 1990, be removed into this Court and quashed.

The appellant is entitled to costs here and in the Court of Queen's Bench in the total sum of \$1,000.00.

[S]

PATRICK A.A. RYAN, J.A.

I CONCUR:

[S]

LEWIS C. AYLES, J.A.