

Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653

**The Board of Education of the Indian Head
School Division No. 19 of Saskatchewan**

Appellant

v.

Ronald Gary Knight *Respondent*

indexed as: knight v. indian head school division no. 19

File No.: 21040.

1989: November 28, 29; 1990: March 29.

Present: Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory and McLachlin JJ.

on appeal from the court of appeal for saskatchewan

Administrative law -- Procedural fairness -- School board dismissing employee hired under contract -- Contract providing for dismissal on notice -- Employee's position made known to Board -- No hearing as to whether or not employee should be dismissed -- Whether or not duty of procedural fairness required generally, under The Education Act or under contract -- If so, whether or not duty of procedural fairness breached -- The Education Act, R.S.S. 1978, c. E-0.1, ss. 91(x), 112, 113, 206(d).

Labour law -- Contract -- Wrongful dismissal -- Position created by and duties defined in statute -- School board dismissing employee hired under contract -- Contract providing for dismissal on

notice -- Whether or not employee could be dismissed only for cause under The Education Act or employment contract -- The Education Act, R.S.S. 1978, c. E-0.1, s. 106.

The respondent, who was director of education for the appellant Board, was dismissed by the appellant on three months' notice. He took action against the appellant Board for wrongful and unlawful dismissal, alleging the absence of procedural fairness. The written contract of employment provided for an annual review with a view to the possibility of revision, provided the agreement had not otherwise been terminated. Termination could be effected by either party on three months' notice in writing or by resolution of the Board for just cause provided the employee be given a fair hearing and investigation. Two Board members met with the respondent and informed him that the Board did not intend to renew the existing contract but was ready to negotiate a new contract on a one-year basis. Respondent neither accepted nor rejected the Board's proposal. The parties were unable to reach an agreement. The respondent insisted that the term of the contract extend for the balance of the three-year period originally provided for and the appellant Board insisted on a one-year term. The appellant Board passed resolutions to terminate the respondent's employment and to give him three months' notice of the termination.

The respondent brought an action against the appellant claiming unlawful and wrongful dismissal and seeking reinstatement with back pay and benefits owed by virtue of the employment contract. The Court of Queen's Bench dismissed the action. The Court of Appeal, however, allowed the appeal and made an order for damages equivalent to the respondent's salary from the date of dismissal until the expiration of the contract, August 31, 1985.

The questions at issue here are: (1) could the respondent be fired only for cause under the terms of *The Education Act* or his employment contract; (2) was respondent entitled to procedural

fairness; (3) if so, what is the scope of the duty to act fairly in the context of an employee-employer relationship; and (4) given there was a duty to act fairly, was it complied with?

Held: The appeal should be allowed.

Per Dickson C.J. and La Forest, L'Heureux-Dubé and Cory JJ.: Section 112 of *The Education Act* deals with the dismissal of non-teaching personnel. It relies on the terms of the employment contract and provides for a minimum thirty-day notice if the contract does not contain such provisions. It does not list specific grounds for dismissal or explicitly provide for a notice of such grounds or for a procedure to be followed.

The contract provides for termination for cause or termination which is not dependent on cause simply upon a three months' written notice. This latter route does not necessarily entail that the procedure involved can be arbitrary. A general right to procedural fairness, or one arising from *The Education Act* or the contract, may exist.

Neither the statute nor the contract accords a right to procedural fairness. The duty to act fairly does not form part of employment law but stems from the fact that the employer is a public body whose powers are derived from statute and must be exercised according to the rules of administrative law. The existence of a general duty of fairness depends on: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights.

It is no longer necessary to consider whether a decision is judicial, quasi-judicial or administrative because the duty to act judicially and the duty to act fairly arise from the same

general principles of natural justice. Not all administrative bodies, however, are under a duty to act fairly. Decisions of a legislative and general nature can be distinguished from acts of a more administrative and specific nature which do not entail such a duty. Further, decisions of a final nature may attract this duty unlike decisions of a preliminary nature. The Board's decision here was of a final and specific nature and accordingly could entail the existence of a duty to act fairly on the part of the Board.

The employment relationship between an employer and an employee were traditionally classified into three categories: (i) the master and servant relationship, where there is no duty to act fairly when deciding to terminate the employment; (ii) the office held at pleasure, where no duty to act fairly exists, since the employer can decide to terminate the employment for no other reason than his displeasure; and (iii) the office from which one cannot be removed except for cause, where there exists a duty to act fairly on the part of the employer.

The employment relationship here was not that of master and servant but rather an office which encompassed some elements of a public nature and some elements that were clearly contractual. This office, since respondent could be dismissed for reasons other than cause, was one held at pleasure. Recent developments in administrative law make procedural fairness an essential requirement of an administrative decision to terminate either of the last two classes of employment. The employee is therefore accorded an opportunity, quite independent of the grounds triggering the dismissal, to try to change employer's mind about the dismissal.

On a wider policy level, the powers exercised by the Board are delegated statutory powers which should be put only to legitimate use. Unlike "pure master and servant" relationships, the public has an interest in the proper use of delegated power by administrative bodies. The fact that an office holder could be dismissed for cause or at pleasure would not warrant a distinction

with regard to the existence of a duty to act fairly, since in both cases statutory powers are exercised. It is not necessary, in this respect, to characterize the employment so that it fits into one or the other of those classes. The distinction, however, is not obsolete in all respects. In the case of an office held at pleasure, even after the giving of reasons and the granting of a hearing, the employer's mere displeasure is still justification enough to validly terminate the employment.

The right to procedural fairness exists only if the decision is a significant one and has an important impact on the individual. Loss of employment against the office holder's will is such a decision.

The Education Act does not explicitly or implicitly excuse the Board from acting fairly when terminating the employment contract of one of its administrative personnel. The Act sets out a procedure available to, amongst others, a director of education who has been dismissed and grants the Education Minister discretion to order that a board of review investigate the termination. The rationale of the first safeguard is to ensure that the Board gave the employee the opportunity to try and change its mind and, of the second, to review the basis of the school board's decision to dismiss an employee. Since the two rights have distinct rationales, the existence of an investigatory process does not preclude a duty to act fairly on the part of the Board.

An explicit or clearly implicit provision was required to overcome the presumption that the parties to the contract intended procedural fairness to apply. The fact the contract does not refer to the necessity of a hearing where no cause is invoked to justify the dismissal does not amount to a clear implicit waiver of the application of the duty to act fairly.

The concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case. It is not, however, purely subjective. The closeness of the administrative process to the judicial process should indicate how much of the principles governing the judicial process should be imported into the realm of administrative decision making. The content of the duty of fairness would be minimal where dismissal is at pleasure. It was met here because respondent had been notified of the Board's reasons for dissatisfaction and had been given an opportunity to be heard.

Every administrative body is the master of its own procedure and need not assume the trappings of a court. Here, the requirements of procedural fairness were satisfied, even absent a structured "hearing". "Everything that had to be said had been said," and accordingly, the requirement of the formal giving of reasons and the holding of a hearing would achieve no more than to impose upon the Board a purely procedural requirement at odds with the principles of flexibility of administrative procedure.

Per Wilson, Sopinka and McLachlin JJ.: The appellant owed no duty of fairness to the respondent.

For the reasons stated by L'Heureux-Dubé J., the appellant was entitled to dismiss the respondent without cause. Respondent held office at pleasure and this category of employment, as a general rule, does not attract the duty of procedural fairness because the employer can terminate the employment without cause and without giving any reason. An exception may be made in special cases where an employee can identify provisions in the statute, the regulations or the contractual provisions governing the relationship, which expressly or by implication confer a right to be heard or to make representations upon the employee. The statute, regulations and contract must be examined to determine whether the respondent falls within the exception.

The Act does not create specifically or by necessary implication any duty of procedural fairness on the termination of the contract of a director of education. Where the statute intended to create the right to be heard or to make representations, it was careful to say so. The legislature left to agreement of the parties the matter of how the contract was to be terminated.

The contract implemented Regulation 21(4)(c) by providing a procedure for review which specifically entitled the employee to make representations. The employer, following the review, could decide to terminate. No duty, other than the duty to give the notice, could be implied. Reading a duty of procedural fairness into the contract would be to rewrite it for the parties.

Cases Cited

By L'Heureux-Dubé J.

Considered: *Barrett v. Nor. Lights Sch. Div. 113 Bd. of Educ.*, [1988] 3 W.W.R. 500; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Ridge v. Baldwin*, [1963] 2 All E.R. 66; *Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; **referred to:** *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Nova Scotia Government Employees Association v. Civil Service Commission of Nova Scotia*, [1981] 1 S.C.R. 211; *Wiseman v. Borneman*, [1969] 3 All E.R. 275; *Furnell v. Whangarei High Schools Board*, [1973] A.C. 660; *Maxwell v. Department of Trade and Industry*, [1974] Q.B. 523; *R. v. Beare*, [1988] 2 S.C.R. 387; *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12.

By Sopinka J.

Considered: *Ridge v. Baldwin*, [1963] 2 All E.R. 66; *Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.

Statutes and Regulations Cited

Education Act, R.S.S. 1978, c. E-0.1, ss. 91(x), (4), 106, 107, 108, 112, 113, 206(d), 209, 106-116, 206-211, 212-226, 196-271.

Education Regulations, Sask. Reg. 1/79, ss. 21(4), 37(1).

Education (Scotland) Act, 1962 (U.K.), 1962, c. 47, s. 85(1)(a).

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Dussault, René et Louis Borgeat. *Traité de droit administratif*, t. III, 2^e éd. Québec: Les Presses de l'Université Laval, 1989.

Molot, Henry. "Employment During Good Behaviour or at Pleasure" (1989), 2 *C.J.A.L.P.* 238.

Pépin, Gilles et Yves Ouellette. *Principes de contentieux administratif*, 2^e éd. Cowansville, Québec: Yvon Blais Inc., 1982.

Wade, H. W. R. *Administrative Law*, 5th ed. Oxford: Clarendon Press, 1982.

APPEAL from a judgment of the Saskatchewan Court of Appeal (1988), 66 Sask. R. 308, allowing an appeal from a judgment of Lawton J. (1986), 53 Sask. R. 278. Appeal allowed.

G. L. Gerrand, Q.C., for the appellant.

F. L. Dunbar, for the respondent.

//*L'Heureux-Dubé*//

The judgment of Dickson C.J. and La Forest, *L'Heureux-Dubé* and Cory JJ. was delivered by

L'Heureux-Dubé J. -- The respondent, director of education for the appellant Board, was dismissed by the appellant on three months' notice. He took action against the appellant Board for wrongful and unlawful dismissal, alleging the absence of procedural fairness. This case raises questions about the relationship between the employment contract, *The Education Act* of Saskatchewan (R.S.S. 1978, c. E-0.1) and the existence and scope of the general duty of fairness resting on a public body in the context of an employer-employee relationship.

Facts

In March 1980, pursuant to the provisions of *The Education Act*, the respondent Ronald Gary Knight was hired as the director of education for the appellant, The Board of Education of the Indian Head School Division No. 19 of Saskatchewan. The written contract of employment involved in the present proceedings, dated May 25, 1981, was drafted by the respondent himself at the request of the appellant Board. The relevant provisions of the contract, ss. 2 and 3, read as follow:

2. The Board shall review this Agreement on or before the 31st day of May each year, provided this Agreement has not been otherwise terminated, with a view to the possibility of its revision. The Employee shall be entitled to make representations to the Board in this regard. Following the said review, the Board may elect to terminate this Agreement at the expiration thereof and shall notify the Employee of its decision in writing forthwith. If the Board makes no such election, this Agreement shall automatically be extended for a period of

three (3) years from September 1, 1981, and the same procedure shall be followed on or before the 31st day of May of each year thereafter the intent being that unless so terminated, this Agreement shall, as and from September 1st of each year thereafter have three (3) years to run.

3. This Agreement, being the Employee's Contract of Employment with the Board, may be terminated by:
 - (a) either party serving the other three months notice in writing;
 - (b) at any time by mutual consent in writing by the parties;
 - (c) the expiration of the Agreement; or
 - (d) by resolution of the Board for reasons of just cause provided that the Employee shall be entitled to a fair hearing and investigation pursuant to Section 113 of The Education Act. [Emphasis added.]

In January 1983, a completely new Board -- with the exception of two members -- was sworn in and replaced the Board that had hired the respondent. Some of the new members of the Board became concerned with the working relationship between the appellant Board and the respondent. They felt that they needed to evaluate that relationship before making a commitment of two further years of employment. In April 1983, one of the members of the Board, who had sat on the Board which had hired the respondent, warned the respondent that his position was in jeopardy, and advised him to start looking for alternate employment.

On May 10, 1983, two of the Board members met with the respondent and informed him how the Board intended to proceed, i.e., that it did not intend to renew the existing contract but was ready to negotiate a new contract on a one year basis. At this meeting, the respondent neither accepted nor rejected the Board's proposal. At the Board's regular meeting on May 30, in keeping with the previous discussions with the respondent, the appellant Board passed the following resolution:

Be it resolved that the Board serves notice to Ronald Gary Knight, Director of Education, in accordance with Section 2 of the Contract of employment, following review of same, elects not to extend the contract beyond the date agreed to as of May 31st, 1982.

Be it resolved that this Board serves notice to Ronald Gary Knight, Director of Education, its intent to renegotiate the same employee's contract with a view to providing a one year agreement.

The respondent was present at the May 30 meeting but did not voice any objection. Rather he consulted and mandated counsel to conduct negotiations with the Board on his behalf. On two occasions, at meetings held on June 30 and July 7, the respondent's counsel met with the Board in attempts to negotiate the terms of a new contract. While flexible on the issues of vacations, overtime, leave of absence and sick leave, the parties were nevertheless unable to reach an agreement as the respondent was insistent that the term of the contract extend for the balance of the three-year period originally provided for, the appellant Board equally insisting on a one-year term. On July 14, a letter from the respondent's solicitor was sent to the appellant Board, confirming the position of his client and outlining the disagreement with regard to the duration of the contract. The last paragraph reads:

As a result, I can confirm what was indicated to you in our meeting of July 7th with regard to duration, namely that Mr. Knight feels strongly that the contract ought to have a two year duration and he will not deviate from that position at this time. I understand that you will consult with your colleagues on the Board at the regular monthly meeting of July 25th. I will be available any time thereafter for a further negotiating session if you feel that such a meeting could be fruitful. If your Board feels inclined to take more precipitous action, I am instructed by my client to receive any and all documents which you would normally serve upon him and in that event, I would ask that you notify me of the solicitors who will be representing the School Division.

On August 9, 1983, the appellant Board passed resolutions to terminate the respondent's employment and to give him three months' notice of the termination.

The respondent brought an action against the appellant, claiming that he had been unlawfully and wrongfully dismissed and asking to be reinstated in his position as director of education along with back pay and benefits owed him by virtue of the employment contract. The Court of Queen's Bench dismissed the action. The Court of Appeal allowed the appeal and made an order for damages equivalent to the respondent's salary from the date of dismissal until the expiration of the contract, on August 31, 1985.

Judgments

Court of Queen's Bench (1986), 53 Sask. R. 278 (Lawton J.)

The trial judge reviewed the terms of the contract and the relevant sections of *The Education Act*. He was unable to accept the respondent's contention that the three month notice in paragraph 3(a) of the contract was a recognition of the three months between the May 31 and August 31 referred to in paragraph 2 of the contract. He found that the respondent's employment had not been terminated for cause and that, accordingly, s. 91(x) of *The Education Act*, relevant in his view only where the employment is terminated for cause, had no application to the case. The trial judge concluded that the respondent's employment "was lawfully and properly terminated by the [appellant] Board" pursuant to the August 9 resolution of the Board.

While Lawton J. agreed with the respondent's argument that he held a public office and that the appellant Board was a statutory authority bound to act in accordance with the principles of procedural fairness, he was of the view that the requirement of procedural fairness was met in that the respondent had been given every opportunity to present his case and renegotiate the agreement.

Court of Appeal (1988), 66 Sask. R. 308 (Bayda C.J.S. and Vancise and Sherstobitoff JJ.A.)

Following *Barrett v. Nor. Lights Sch. Div. 113 Bd. of Educ.*, [1988] 3 W.W.R. 500 (Sask. C.A.), the Court of Appeal held that whether the dismissal was for cause or not, the respondent was entitled to have his employment terminated in accordance with the principles of procedural fairness as an office holder appointed under *The Education Act*. The court further found that the respondent could only be removed for cause according to the provisions of *The Education Act*.

In the opinion of the court, the principles of procedural fairness required that the respondent be given reasons for his dismissal as well as a hearing. The court held that those requirements were not met as the respondent was given neither; the negotiations between the parties did not amount to a hearing, and the threat of dismissal was not sufficient to constitute a notice of intention to terminate the employment. It was necessary accordingly that a full hearing be held following the principles set out in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643. The termination was declared null and void and the appeal was allowed. Damages were assessed as equivalent to the salary the respondent would have earned from the date of termination until August 31, 1985, less any money earned during that period.

Issues

The questions at issue here are as follow:

- (1) Could the respondent be fired only for cause under the terms of *The Education Act* or his employment contract?
- (2) In any event, was the respondent entitled to procedural fairness?

- (3) If so, what is the scope of the duty to act fairly in the context of an employee-employer relationship?
- (4) Given there was a duty to act fairly, was it complied with?

Analysis

The appellant Board admitted that the respondent's employment was not terminated for cause. It contended that the respondent's employment, though governed by the provisions of *The Education Act*, could be terminated on a simple three-month notice according to the terms of the employment contract entered into by the parties.

Since the respondent's first argument rests on the submission that the provisions of *The Education Act* applied and that, under its terms, he could be dismissed only for just cause, a conclusion also reached by the Court of Appeal, this issue will be dealt with at the outset.

As the Court of Appeal also held that whether or not the respondent could be dismissed only for cause, the appellant Board had a duty to act fairly, the issue of dismissal for cause can be dealt with quite quickly.

1. *Dismissal for Cause*

Sherstobitoff J.A., for the Court of Appeal, found that ss. 91(x) and 112 of *The Education Act* necessarily implied that a director of education be dismissed only for cause. Those provisions, as well as s. 206(d) of *The Education Act* which is also relevant here, read:

DUTIES AND POWERS OF BOARDS OF EDUCATION

91. A board of education shall:

...

(x) enter into written contracts of employment with teachers and other personnel required for the administration of the services of the board and terminate such contracts for cause in accordance with the provisions of this Act;

...

ADMINISTRATION IN SCHOOL DIVISIONS

...

112. Unless otherwise provided under the contract of employment between the board of education and the secretary, treasurer, secretary treasurer, superintendent of administration or director, either party to that contract of employment may terminate the contract by giving, to the other party to the contract, not less than thirty days' notice in writing of his intention to terminate the contract.

TERMINATION OF CONTRACTS OF TEACHERS

206. A board of education may:

...

(d) terminate its contract of employment with a teacher, where the termination is to be effective on a date other than June 30 in any year, by sending the teacher by registered or certified mail, no less than 30 days prior to the day upon which the termination is to take effect, a notice of termination in the prescribed form, and each such notice shall set out the reason or reasons for the termination. [Emphasis added.]

Sherstobitoff J.A. drew a parallel between the status under *The Education Act* of the office of director of education and the position of teacher. As provided by s. 206 of *The Education Act* (and s. 37(1) of *The Education Regulations*, Sask. Reg. 1/79), a teacher cannot be dismissed without being given a formal notice stating the reasons for the dismissal. Holding that the duties of the director of education are as important as those of a teacher, the Court of Appeal drew the conclusion that a director of education could not be dismissed without cause.

With deference, I read the provisions of *The Education Act* differently than the Court of Appeal. The office of director of education and the position of teacher receive clearly different treatment under *The Education Act*, regardless of the comparative importance to be attached to these two positions. First, the employment relationship is of a different nature since the teachers are employed pursuant to the terms of a collective agreement (s. 230 *et seq.* of *The Education Act*) while the director of education's employment is governed solely by an individual contract with a board of education. Secondly, the statutory framework in *The Education Act* is much more elaborate in relation to the employment of teachers (ss. 196 to 271) than it is for the appointment of a director of education (ss. 106 to 116). Regarding dismissal, *The Education Act* devotes an entire section exclusively to the termination of teachers' employment (ss. 206 to 211), detailing at length the procedure to be followed and providing for grounds for dismissal. There exist no such provisions as regards the termination of employment of administrative personnel such as the respondent. The only provision in *The Education Act* in that respect is s. 112, reproduced above, a provision very general in nature. This difference in statutory treatment between teachers and administrative personnel seems to indicate that the termination of employment of those two categories of employees was to be dealt with differently. Otherwise, why would the provisions relating to the termination of the employment of teachers not also include the administrative personnel? This, of course, is not determinative of the issue of whether or not, under *The Education Act*, the respondent could only be dismissed for cause. It indicates, however, that the provisions relating to the dismissal of teachers do not bear directly on the interpretation of those provisions applying more specifically to the dismissal of administrative personnel.

As its title indicates, s. 91(x), upon which the respondent relies, deals with the duties and powers of the Board to hire and dismiss employees, teachers and administrative personnel alike. The respondent invokes the phrase "shall . . . terminate such contracts for cause in accordance with the provisions of this Act" to buttress his argument that no employee, be they teachers or

administrative personnel, can be dismissed by the Board unless there is just cause. If that were so, there would hardly be any point to s. 112 or for that matter s. 206 *et seq.* Moreover, I doubt that such a restriction would be placed in a section dealing with the Board's powers and duties in respect of hiring and dismissal of employees rather than in a section dealing specifically with the dismissal of a particular category of employee. A better reading of that phrase, one more compatible with both the text of s. 91(x) and the other provisions of *The Education Act*, is that it simply confers a limited power to dismiss for cause on the Board, in that it specifies that the termination of contracts for cause is to be done "in accordance with the provisions of this Act". In the case of administrative personnel, the "provisions of this Act" which must be complied with before the power to dismiss for cause can be validly exercised consist solely of the notice requirement found in s. 112, since that is the only section of *The Education Act* dealing with Board's power to dismiss such personnel. That section relies first on the terms of the employment contract, and only if such contract does not contain provisions dealing with the dismissal procedure does it provide for a minimum of thirty days' written notice. It is to be noted that, contrary to s. 206, s. 112 does not list any specific grounds for dismissal, nor does it explicitly provide for a notice of such grounds or the procedure to be followed prior to dismissal. It would follow that, save the possible effect of the contract, s. 112 merely requires that a three-month notice be given in the case of dismissal for cause. Furthermore, s. 112 is of general application in that it confers an unqualified power to dismiss, even absent just cause, provided that the three month notice or its contractual substitute is given to the employee. As far as s. 113 is concerned, it has no relevance here since it deals only with the review of the decision to dismiss.

In my view then, the respondent's argument relying on *The Education Act* cannot be entertained and I adopt in this respect the appellant Board's submissions. Section 112's reliance on the employment contract thus brings us to an examination of the terms of that contract.

The relevant portion of the respondent's employment contract is s. 3, which I reproduce again for ease of reference:

3. This Agreement, being the Employees's Contract of Employment with the Board, may be terminated by:
 - (a) either party serving the other three months notice in writing;
 - (b) at any time by mutual consent in writing by the parties;
 - (c) the expiration of the Agreement; or
 - (d) by resolution of the Board for reasons of just cause provided that the Employee shall be entitled to a fair hearing and investigation pursuant to Section 113 of The Education Act. [Emphasis added.]

Given its interpretation of *The Education Act*, the Saskatchewan Court of Appeal did not specifically deal with the terms of the contract.

I share Lawton J.'s view that the language of this section is "simple and direct". Under paragraph (a), either party to the agreement can terminate the contract without any requirement that just cause exists. I find it clear that paragraphs (a) and (d) envisage two distinct ways of terminating the employment relationship between the respondent and the appellant Board, i.e., termination for cause (under paragraph (d)) or otherwise simply upon a three months written notice (under paragraph(a)). To interpret this provision in the manner suggested by the respondent, i.e., that termination after three months' notice under paragraph (a) could only apply if there exists just cause, would run contrary to the plain meaning of that section and in particular would strip of any meaning the conjunction "or" between paragraphs (c) and (d). Furthermore, such an interpretation would oblige the Board to give the respondent three months' notice even in the case of a dismissal for negligent or fraudulent conduct, a conclusion so extreme that it could not reasonably be supported by the terms of the provision.

I can only conclude that the respondent's employment could be terminated even without just cause upon three months' notice pursuant to paragraph 3(a) of the employment contract. This, however, is not the end of the matter.

2. *Procedural Fairness*

The conclusion that the respondent's employment could be legally terminated without a showing of just cause does not necessarily entail that the procedure involved can be arbitrary. There may be a general right to procedural fairness, autonomous of the operation of any statute, depending on consideration of three factors which have been held by this Court to be determinative of the existence of such a right (*Cardinal v. Director of Kent Institution, supra*). If consideration of these factors in the context of the present appeal leads to the conclusion that the respondent was entitled to procedural fairness, *The Education Act* and, in this case, the terms of the contract of employment, must then be considered to determine whether this entitlement is either limited or excluded entirely. 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.

Obviously, if either the statute or the contract confers upon the employee a right to procedural fairness, there is no need to consider the factors I have alluded to above in order to determine the existence of a similar general right, such a right becoming redundant. Since, however, I believe that in the case at bar neither the statute nor the contract do accord such a right, I will begin with an analysis of those factors.

A. General Duty of Fairness

The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights. This Court has stated in *Cardinal v. Director of Kent Institution*, *supra*, that whenever those three elements are to be found, there is a general duty to act fairly on a public decision-making body (Le Dain J. for the Court at p. 653).

(i) *The Nature of the Decision*

There is no longer a need, except perhaps where the statute mandates it, to distinguish between judicial, quasi-judicial and administrative decisions. Such a distinction may have been necessary before the decision of this Court in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. Prior to this case, the "duty to act judicially" was thought to apply only to tribunals rendering decisions of a judicial or quasi-judicial nature, to the exclusion of those of an administrative nature. Following *Nicholson*, that distinction became less important and was found to be of little utility since both the duty to act fairly and the duty to act judicially have their roots in the same general principles of natural justice (see *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at pp. 895-96, *per* Sopinka J. for the majority).

On the other hand, not all administrative bodies are under a duty to act fairly. Over the years, legislatures have transferred to administrative bodies some of the duties they have traditionally performed. Decisions of a legislative and general nature can be distinguished in this respect from acts of a more administrative and specific nature, which do not entail such a duty (see Dussault

and Borgeat, *Traité de droit administratif*, t. III, 2nd ed., at p. 370; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 758, *per* Estey J. for the Court). The finality of the decision will also be a factor to consider. A decision of a preliminary nature will not in general trigger the duty to act fairly, whereas a decision of a more final nature may have such an effect (Dussault and Borgeat, *op. cit.*, at p. 372).

In the case at bar, the decision made by the appellant Board was of a final and specific nature, directed as it was at terminating the employment of the respondent. As such, the decision to dismiss could possibly entail the existence of a duty to act fairly on the part of the appellant Board.

(ii) *The Relationship Between the Employer and the Employee*

The second element to be considered is the nature of the relationship between the Board and the respondent. In an oft-cited decision of the House of Lords, *Ridge v. Baldwin*, [1963] 2 All E.R. 66, Lord Reid classified the possible employment relationship between an employer and an employee into three categories (at pp. 71-72): (i) the master and servant relationship, where there is no duty to act fairly when deciding to terminate the employment; (ii) the office held at pleasure, where no duty to act fairly exists, since the employer can decide to terminate the employment for no other reason than his displeasure; and (iii) the office from which one cannot be removed except for cause, where there exists a duty to act fairly on the part of the employer. These categories are creations of the common law. They can of course be altered by the terms of an employment contract or the governing legislation, with the result that the employment relationship may fall within more than one category (see *Nova Scotia Government Employees Association v. Civil Service Commission of Nova Scotia*, [1981] 1 S.C.R. 211, at p. 222, *per* Laskin C.J. for the majority). Lord Reid did not examine the possible implications of the non-renewal

of a fixed-term employment contract, but since it was not alleged in the present appeal that the employment was terminated by non-renewal of the employee's contract, I will not address this question.

In the case at bar, the office held by the respondent was not of a "pure" master and servant type since it encompassed some elements of a public nature. The office of director of education is established by s. 106 of *The Education Act*, which requires the Board to appoint a director. His duties are at least partly set out in ss. 107 and 108 of *The Education Act*. These sections provide that:

106(1) Subject to subsections (2) and (3), a board of education shall appoint a director of education and shall appoint a secretary and a treasurer, or a secretary treasurer, who meet the qualifications prescribed by the regulations, and, in addition, may appoint such other officials, assistants and support personnel as the board may consider necessary for the proper and efficient administration of the business of the division.

...

107 The director shall be designated as the chief executive officer of the board of education.

108 The board of education shall prescribe the powers and duties of the director and, in addition, the director shall:

- (a) prepare and transmit to the department such reports and returns as may from time to time be required by the minister;
- (b) insure that the schools are conducted in accordance with this Act, the regulations and the policies of the board in all matters within its jurisdiction;
- (c) exercise general supervision of the schools and the work of principals, teachers and other personnel employed by the board;
- (d) provide educational leadership and liaison involving the board, the professional staff and the public pertaining to the efficiency and advancement of education in the division.

In a recent decision of the Saskatchewan Court of Appeal, *Barrett v. Nor. Lights Sch. Div. 133 Bd. of Educ.*, *supra*, at p. 520 (*per* Sherstobitoff J.A. for the majority), that court found that the office of secretary treasurer under the same *Education Act* was of a statutory nature and not that of master and servant, eliminating the first of Lord Reid's category. There may be a clear contractual element to the respondent's employment, which may give the impression that his function is not "purely" statutory; I find, however, that this is not a case of a "pure master and servant" relationship but that it has on the contrary a strong "statutory flavour", so as to be categorized as an office (Wade, *Administrative Law* (5th ed. 1982), at pp. 498-99; *Malloch v. Aberdeen Corp.*, [1971] 2 All. E.R. 1278 (H.L.), at p. 1294, *per* Lord Wilberforce).

Being an office, the respondent's situation would fall into one of the last two of Lord Reid's categories. As I have already analyzed the employment contract and *The Education Act* with regard to the question of whether the respondent could be dismissed only for cause, and concluded in the negative, the employment relation existing between the respondent and the appellant Board would fall into the second of Lord Reid's category, i.e., an office held at pleasure. I find, however, that this conclusion does not ineluctably lead to the conclusion that the appellant Board was not under a duty to act fairly, as may seem to flow from the judgment of the House of Lord in *Ridge v. Baldwin*, *supra*. 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. In *Nicholson*, *supra*, although the employee was found to be dismissable for cause, Laskin C.J., after referring to the three-class system developed by Lord Reid in *Ridge v. Baldwin*, *supra*, expressed some doubts about limiting the duty to act fairly to cases of dismissal for cause, to the exclusion of cases where offices are held at pleasure. He writes for the majority at pp. 322-23:

I would observe here that the old common law rule, deriving much of its force from Crown law, that a person engaged as an office holder at pleasure may be put out without reason or prior notice ought itself to be re-examined. It has an anachronistic flavour in the light of collective agreements, which are pervasive in both public and private employment, and which offer broad protection against arbitrary dismissal in the case of employees who cannot claim the status of office holders. As de Smith has pointed out in his book *Judicial Review of Administrative Action* (3rd ed. 1973), at p. 200, "public policy does not dictate that tenure of an office held at pleasure should be terminable without allowing its occupant any right to make prior representations on his own behalf; indeed, the unreviewability of the substantive grounds for removal indicates that procedural protection may be all the more necessary". [Emphasis added.]

The Chief Justice goes on to quote from a decision of the House of Lords, *Malloch v. Aberdeen Corp.*, [1971] 2 All. E.R. 1278, in which the absence of a right to procedural fairness for those holding office at pleasure was somewhat mitigated, the court concluding that in certain circumstances procedural fairness may be necessarily implied. In that case, teachers were dismissed for refusing to register as required under a new regulation, whose validity they disputed, without being afforded either a hearing or reasons; Lord Wilberforce wrote at p. 1294:

One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called 'pure master and servant cases', which I take to 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. [Emphasis added.]

There is thus in England no longer an automatic exclusion of the rule of procedural fairness for employment falling into Lord Reid's second class.

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., supra*, 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 administrative 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 added.]

(See also Molot, "Employment During Good Behaviour or at Pleasure" (1989), 2 *C.J.A.L.P.* 238, at p. 250). The argument to the effect that, since the employer can dismiss his employee for unreasonable or capricious reasons, the giving of an opportunity to participate in the decision-making would be meaningless, is unconvincing. In both the situation of an office held at pleasure and an office from which one can be dismissed only for cause, one of the purposes of the imposition on the administrative body of a duty to act fairly is the same, i.e., enabling the employee to try to change the employer's mind about the dismissal. The value of such an opportunity should not be dependant on the grounds triggering the dismissal.

There is also a wider public policy argument militating in favour of the imposition of a duty to act fairly on administrative bodies making decisions similar to the one impugned in the case at bar. The powers exercised by the appellant Board are delegated statutory powers which, as much as the statutory powers exercised directly by the government, should be put only to legitimate use. As opposed to the employment cases dealing with "pure master and servant" relationships, where no delegated statutory powers are involved, the public has an interest in the proper use of delegated power by administrative bodies. In the House of Lords decision of *Malloch v. Aberdeen Corp.*, *supra*, Lord Wilberforce noted this additional rationale underlying the imposition of procedural fairness (at p. 1293):

The respondents are a public authority, the appellant holds a public position fortified by statute. The considerations which determine whether he has been validly removed from that position go beyond the mere contract of employment, though no doubt including it. They are, in my opinion, to be tested broadly on arguments of public policy and not to be resolved on narrow verbal distinctions.

From this perspective, the fact that an office holder could be dismissed for cause or at pleasure would not warrant a distinction with regard to the existence of a duty to act fairly, since in both cases statutory powers are exercised. As pointed out by Wade in the above-quoted passage (at p. 500), dismissal for displeasure should be all the more the object of scrutiny as it is a power of a wider discretionary nature.

In reaching the conclusion that both of Lord Reid's last two classes require an administrative body to act fairly, the necessity of characterizing the employment so that it fits into one or the other of those classes is rendered unnecessary. Not only does this eliminate an "anachronistic" distinction -- to use the words of Laskin C.J. in *Nicholson*, *supra* -- between offices held at pleasure and offices from which one can only be dismissed with cause, but it also does away with what is in many cases a troublesome task since employment relationships are rarely easily

categorized into one or the other class, being usually -- as in the case at bar -- of a mixed nature brought about by the terms of the employment contract or the governing legislation. In my opinion, such a simplification of these principles of administrative law is not only desirable but necessary. Of course, this does not mean that the distinction between offices from which one can be dismissed at pleasure and those from which one must be dismissed for cause becomes obsolete in all respects. In the case of an office held at pleasure, even after the giving of reasons and the granting of a hearing, the employer's mere displeasure is still justification enough to validly terminate the employment.

I conclude accordingly that the characterization of the respondent's employment as an office held at pleasure is not incompatible with the imposition of a duty to act fairly on the part of the appellant Board.

(iii) *The Impact of the Decision on the Employee*

This point can be dealt with summarily. There is a right to procedural fairness only if the decision is a significant one and has an important impact on the individual. Various courts have recognized that the loss of employment against the office holder's will is a significant decision that could justify imposing a duty to act fairly on the administrative decision-making body. For example, this Court in *Nicholson, supra*, found that "Status in office deserves this minimal protection, however brief the period for which the office is held" (at p. 328, *per* Laskin C.J.) Also, in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, this Court noted that "A high standard of justice is required when the right to continue in one's profession or employment is at stake" (at p. 1113, *per* Dickson J. for the majority). In view of this clear recognition of the importance of the right to retain one's employment, and absent any factual basis allowing us to distinguish these cases from the situation in the case at bar, there is

no need to labour the point further. I conclude that the impact of the decision made by the appellant Board is compatible with the imposition of a duty to act fairly.

On the whole, the nature of the decision, the relationship existing between the respondent and the appellant Board and the impact on the respondent of the impugned decision lead to the conclusion that there was a general duty to act fairly on the part of the appellant Board in the circumstances of this case.

B. Under *The Education Act*

Having come to the conclusion that there exists a general right to procedural fairness, the statutory framework must be examined in order to see if it modifies this right (*Wiseman v. Borneman*, [1969] 3 All. E.R. 275, at p. 277, *per* Lord Reid). However, as was pointed out by Dickson J., as he then was, in *Kane v. Board of Governors of the University of British Columbia*, *supra*, at p. 1113: "To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument." Thus, the provisions of *The Education Act* must be quite clear to lead us to the conclusion that the respondent's general right to procedural fairness has been restricted.

The Saskatchewan Court of Appeal found that *The Education Act* imposed on the appellant Board a duty to act fairly by necessary implication. The argument is twofold. First, the office could not be terminated at pleasure but only for cause, and so it would fall into Lord Reid's third class and entail a duty to act fairly. I have already discussed this point and expressed my disagreement with it. Secondly, the Court of Appeal concludes that since s. 112 requires a "notice . . . of . . . intention to terminate the contract", as opposed to a "notice of termination", an inference can be made that the legislator clearly contemplated that a hearing be held. In my

opinion, this argument is not conclusive, particularly when s. 112 is compared with the wording of s. 206(d) of *The Education Act*, requiring the Board to send a "notice of termination". That provision governs the dismissal for cause of a teacher who has a right to attend a meeting of the Board to show cause why the employment should not be terminated (s. 209). In that case, the statute clearly states that there is a right to a hearing and yet the expression "notice of termination" is used to describe the notice to be sent to the teacher. When put in this perspective, the use of the expression "notice . . . of . . . intention to terminate" in s. 112 does not appear to carry the weight accorded it by the Court of Appeal. The Court was referred to the decision of the House of Lords in *Malloch v. Aberdeen Corp.*, *supra*, as authority for the proposition that "notice of intention to terminate" meant a notice prior to the making of the decision. I find this decision to be of little help since, in that case, the legislation (the *Education (Scotland) Act, 1962*, 1962 (U.K.), c. 47) clearly stated that the notice in question had to be sent ". . . not less than three weeks before the meeting at which the resolution is adopted . . ." (s. 85(1)(a)). Thus, in that case, Parliament clearly stated the nature of the notice. I can find no such indicia in the Saskatchewan *Education Act*.

An interpretation of the term "notice of intention to terminate" that suggests that a director of education could be dismissed without just cause upon thirty days notice was described by the Saskatchewan Court of Appeal as "both unreal and unreasonable" (p. 313). While the length of such a notice is shorter than what may perhaps be considered reasonable, the language of the statute is clear and so is, for that matter, the employment contract. I find support for such a conclusion in the fact that, under s. 206 of *The Education Act*, a teacher can be dismissed for reason of redundancy after a similar thirty-day notice. In that case, the wording of the provision leaves no doubt that the notice is to be sent prior to termination and not prior to the decision to terminate the employment.

Section 113 of *The Education Act* sets out a procedure available to, amongst others, a director of education who has been dismissed. The provision grants the Education Minister discretion to order that a board of review investigate the termination. Part of it provides that:

113.--(1) A secretary, treasurer, secretary treasurer, superintendent of administration or director whose contract of employment has been terminated by the board of education may apply to the minister for an investigation of the termination and, upon receipt of the application, the minister may appoint a board of review consisting of

...

(3) The board of review shall hold an investigation and make its report within thirty days after the appointment of the chairman.

...

(9) The scope of the investigation and the findings of the board of review thereon shall, unless the board of review otherwise determines, be limited to the reasons for the termination of the contract.

The appellant Board submits that since the respondent could obtain the reasons for dismissal through such an investigation, it is pointless to impose on the Board a duty to give grounds prior to the decision to dismiss. The purpose of those two procedural safeguards are, however, inherently different. The duty to act fairly aims at insuring that the procedure followed by the appellant Board in reaching its decision to terminate the respondent's employment was fair to the respondent, i.e., that it gave him the opportunity to try and change the appellant Board's mind; the purpose of the investigation ordered pursuant to s. 113 of *The Education Act* is to review the basis of the school board's decision to dismiss an employee, i.e., the merits of the dismissal. The House of Lords was faced with a somewhat similar situation in *Malloch v. Aberdeen Corp.*, *supra*, where the dismissed teacher had a right to ask the Secretary of State to enquire into the reasons for the dismissal. As pointed out by Lord Wilberforce (at p. 1297):

A limited right of appeal on the merits affords no arguments against the existence of a right to a precedent hearing, and, if that is denied, to have the decision declared void.

The two rights have distinct rationales and therefore I find that the existence of an investigatory process pursuant to s. 113 does not preclude this Court from concluding that the appellant Board had a duty to act fairly.

I have thus come to the conclusion that *The Education Act* does not explicitly or implicitly excuse the appellant Board from acting fairly when terminating the employment contract of one of its administrative personnel such as the respondent. But this is not determinative of the appellant Board's obligations or the respondent's entitlement in regards to procedural fairness. Section 112 of *The Education Act* and s. 21(4) of *The Education Regulations*, enacted pursuant to that statute (Sask. Reg. 1/79), demand by necessary implication that reference be made to the contract of employment in order to determine whether the rules of natural justice have been abrogated. Section 21(4) of *The Education Regulations* provides that:

21.-- . . .

(4) A director of education shall be engaged under a written contract which shall specify:

. . .

(d) such terms and conditions of employment, including the procedure for termination of the contract by either party, as may be mutually agreed upon. [Emphasis added.]

We are thus led to review the employment contract in order to see if it in fact dealt fully with the termination procedure.

C. Under the Employment Contract

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 provision to the contrary to override this presumption (*Kane v. Board of Governors of the University of British Columbia, supra*, at p. 1113, *per* Dickson J.)

Unlike paragraph 3(d) of the contract, which states that the respondent could be dismissed for cause ". . . provided that the Employee shall be entitled to a fair hearing and investigation", paragraph 3(a), applicable where no cause is invoked to justify the dismissal, does not refer to the necessity of a hearing. The appellant Board construes this silence in paragraph 3(a) as meaning that the giving of reasons and the holding of a hearing were not contemplated under that provision. I would rather interpret this silence as a referral to the normal procedure applicable when an employee is dismissed for reasons that could not constitute just cause. As such, this procedure would encompass the relevant administrative law rules, including the imposition of a duty to act fairly on the part of the appellant Board. The referral to a three-month notice period is a substantive term of the agreement. Rather than specifying a procedure to be followed before a decision to terminate the employment is made, it simply sets out the manner in which such a decision is to be implemented after it has been made. In any event, I can see in the silence of the contract on this point no clear implicit waiver of the application of the duty to act fairly.

The general duty to act fairly for an administrative decision-making body making a decision that has a significant impact on an individual would thus apply, unaltered here by either *The Education Act* or the employment contract.

3. *The Content of the Duty to Act Fairly*

Like the principles of natural justice, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case. In *Nicholson, supra*, at pp. 326-27, Laskin C.J. adopts the following passage from the decision of the Privy Council in *Furnell v. Whangarei High Schools Board*, [1973] A.C. 660, a New Zealand appeal where Lord Morris of Borth-y-Gest, writing for the majority, held at p. 679:

Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker L.J. in *Russel v. Duke of Norfolk* [1949] 1 All. E.R. 109, 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration. [Emphasis added.]

This was underlined again very recently by this Court in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, *supra*, where Sopinka J. was writing for the majority at pp. 895-96:

Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provision and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates. [Emphasis added.]

The approach to be adopted by a court in deciding if the duty to act fairly was complied with is thus close to empiric. Pépin and Ouellette, *Principes de contentieux administratif*, at p. 249, quote the following colourful comment of an English judge to the effect that "from time to time . . . lawyers and judges have tried to define what constitutes fairness. Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognize" (*Maxwell v. Department of Trade and Industry*, [1974] Q.B. 523, at p. 539). Of course

with this flexibility comes the inherent difficulty of differing notions of fairness amongst those called upon to determine if the duty to act fairly was complied with. Therefore it is necessary to temper assertions that the concept of fairness is a purely subjective one. Like the principles of fundamental justice in s. 7 of the *Canadian Charter of Rights and Freedoms*, the concept of fairness is entrenched in the principles governing our legal system (*R. v. Beare*, [1988] 2 S.C.R. 387, at pp. 402-3, *per* La Forest J. for the Court), and the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making.

In the case at bar the Saskatchewan Court of Appeal found that the basic requirements of the duty to act fairly are the giving of reasons for the dismissal and a hearing, adding that the content will vary according to the circumstances of each case. Since the respondent could be dismissed at pleasure, the content of the duty of fairness would be minimal and I would tend to agree that notice of the reasons for the appellant Board's dissatisfaction with the respondent's employment and affording him an opportunity to be heard would be sufficient to meet the requirement of fairness. This Court in *Nicholson*, *supra*, at p. 328, *per* Laskin C.J. for the majority, found similar requirements to be sufficient in a case where the employee was dismissable from office only for cause.

4. *Compliance with the Duty to Act Fairly*

The trial judge and the Court of Appeal disagreed on whether the respondent was provided with reasons for his dismissal and the opportunity to be heard. In the Court of Queen's Bench, Lawton J. found that through the negotiation sessions between the respondent's attorney and the appellant Board, the respondent was made fully aware of the grievances of the Board and had ample opportunity to present his side of the story. Lawton J. writes at p. 283:

The failure to agree on a one-year contract, which from the beginning was the major reason for the negotiations, finished them. But there had been negotiations up until that time -- the lines of communication had been open and Knight, through his solicitor, had been actively involved in presenting his case to the Board. He was being heard. By August, everything that had to be said had been said by both parties. [Emphasis added.]

He therefore concluded that the procedure followed by the appellant Board was fair. The Saskatchewan Court of Appeal found that the respondent got neither reasons for his dismissal nor a hearing. It disagreed with the trial judge's finding that the negotiations leading to a new employment contract could be construed as equalling the giving of reasons and an opportunity to be heard. Sherstobitoff J.A. found for the court, at p. 313, that:

The trial judge seemed to proceed on the assumption that the appellant knew, or should have known, that if he did not agree to a new one-year contract that he would be fired and we must accept that finding of fact. However, the fact remained that he was never told that he would be fired unless he accepted a one-year contract until he was actually fired. The trial judge was wrong in accepting the implied threat of termination on the part of the employer as a notice of intention to terminate and the failed negotiations as reasons for dismissal as required by the rules of procedural fairness. It is difficult to think of anything more unfair to an employee than to tell him that he must accept a threat which he should have inferred from the employer's conduct as formal notice of intention to terminate, and must treat a purported renegotiation of an employment contract as a hearing into whether or not he should be terminated. [Emphasis added.]

The disagreement between the two courts below lies therefore not so much in the content of the communication but rather in the significance to be attached to the negotiations between the parties.

It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (*Judicial Review of Administrative Action* (4th

ed. 1980), at p. 240), the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome. Hence, in the case at bar, if it can be found that the respondent indeed had knowledge of the reasons for his dismissal and had an opportunity to be heard by the Board, the requirements of procedural fairness will be satisfied even if there was no structured "hearing" in the judicial meaning of the word. I would agree with Wade when he writes (*Administrative Law* (5th ed.), at pp. 482-83):

A 'hearing' will normally be an oral hearing. But it has been held that a statutory board, acting in an administrative capacity, may decide for itself whether to deal with applications by oral hearing or merely on written evidence and argument, provided that it does in substance 'hear' them"; . . . [Emphasis added; footnotes omitted.]

Laskin C.J. echoed this view in *Nicholson, supra*, at p. 328, when he stated that the Police Commissioners should have 'heard' Nicholson before deciding to terminate his employment, but not implying that there should be a formal hearing. (See also *Cardinal v. Director of Kent Institution, supra*, at p. 659, *per* Le Dain J.) In the same vein, the duty to give reasons need not involve a full and complete disclosure by the administrative body of all of its reasons for dismissing the employee, but rather the communication of the broad grounds revealing the general substance of the reason for dismissal (*Selvarajan v. Race Relations Board*, [1976] 1 All. E.R. 12, at p. 19, *per* Lord Denning M.R.)

In the present case, the trial judge found as a fact that the respondent knew or should have known why the appellant Board was unhappy with his employment contract and that if he did not accept a one-year contract he would be dismissed. In my view, the record amply supports this finding, which was not disputed by the Court of Appeal. I recognize the Court of Appeal's concern that the respondent was never officially notified of the reasons for his dismissal, but it is clear that he was informed of those reasons through his meetings with the appellant Board,

sometimes personally, sometimes through his solicitor. In conformity with s. 2 of the contract of employment, the respondent was present at the appellant Board's meeting on May 30, 1983, where his contract was not renewed, and had the opportunity to make representations if he so wished. Further, during the summer, the respondent's attorney met twice with the appellant Board to negotiate a new contract, and all issues appeared to have been settled except as to the duration of the contract, the respondent pressing for a minimum two-year term while the Board insisted on a one-year contract. Both parties appear to have been adamant on this point and it can be presumed that it caused the negotiations to fall through. Since I accept the trial judge's finding of facts that "everything that had to be said had been said" (at p. 283), the requirement of the formal giving of reasons and the holding of a hearing would achieve no more, in my respectful view, than to impose upon the appellant Board a purely procedural requirement, against the above-stated principles of flexibility of administrative procedure.

In my view, the appellant Board has made itself sufficiently available for discussion through meetings with the respondent and his lawyer so that each party's concerns were made fully known to the other. This can only lead to the conclusion that the respondent knew the reasons for his dismissal and was provided with every opportunity to be heard. The requirements of the duty to act fairly in the scope of the employer-employee relationship in the case at bar have been met. I therefore conclude that the respondent was properly dismissed and that his action must fail.

Disposition

Accordingly I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of Lawton J. in the Court of Queen's Bench, the whole with costs throughout.

//Sopinka J.//

The reasons of Wilson, Sopinka and McLachlin JJ. were delivered by

Sopinka J. -- I have had the advantage of reading the reasons of my colleague, Justice L'Heureux-Dubé. While I agree with her disposition of this matter, I cannot agree that in the circumstances of this case the appellant owed a duty of fairness to the respondent.

The facts are stated in the judgment of L'Heureux-Dubé J. and I would merely observe that while the original statement of claim was delivered on October 11, 1983, the assertion of a duty of fairness was not made until February 24, 1986, two days before the trial.

The starting point in considering the presence of a duty of procedural fairness in an employment situation is the decision of the House of Lords in *Ridge v. Baldwin*, [1963] 2 All E.R. 66. Lord Reid set out three categories of employment relationship (at pp. 71-72): (1) the master servant relationship; (2) the office held at pleasure; and (3) the office from which one cannot be removed except for cause. In his opinion, the duty of procedural fairness arose only in the third category.

For the reasons stated by L'Heureux-Dubé J., the appellant was entitled to dismiss the respondent without cause. Furthermore, I agree with her that the respondent's employment relationship falls into the second category.

As a general rule, this category does not attract the duty of procedural fairness because the employer can terminate the employment without cause and without giving any reason. It would therefore be inconsistent with the above to require the employer to give a reason for terminating

the employee's employment in order to comply with the dictates of procedural fairness. If a duty of fairness arises, it would be of a limited nature. The employer would be required to allow the employee to state his or her case. Furthermore, the employer would be bound to consider any representations made by the employee.

I am not prepared, however, to completely shut the door on the existence of a duty of fairness in relation to the termination of an office held at pleasure. An exception may be made in special cases where a sound basis for an exception is put forward. In order to bring himself or herself within the exception to the general rule, an employee in the position of the respondent must be able to identify in the statute, regulations or contractual provisions governing the relationship, provisions which expressly or by necessary implication confer upon the employee a right to be heard or to make representations.

In this regard, I accept as a correct statement of the law the following passage from the judgment of Lord Wilberforce in *Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278, at p. 1295, which was quoted with approval by Chief Justice Laskin in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, at pp. 323-24:

. . . As a general principle, I respectfully agree; and I think it important not to weaken a principle which, for reasons of public policy, applies, at least as a starting point, to so wide a range of the public service. The difficulty arises when, as here, there are other incidents of the employment laid down by statute, or regulations, or code of employment or agreement. The rigour of the principle is often, in modern practice, mitigated for it has come to be perceived that the very possibility of dismissal without reason being given -- action which may vitally affect a man's career or his pension -- makes it all the more important for him, in suitable circumstances, to be able to state his case and, if denied the right to do so, to be able to have his dismissal declared void. So, while the courts will necessarily respect the right, for good reasons of public policy, to dismiss without assigned reasons, this should not, in my opinion, prevent them from examining the framework and context of the employment to see whether elementary rights are conferred on him expressly or by necessary implication, and how far these extend. The present case is, in my opinion, just such a case where there are strong indications that a right to be heard, in appropriate circumstances, should not be denied.

The strong indications in *Malloch, supra*, which led the House of Lords to find a duty of fairness were statutory requirements that enabled the employer to dismiss a teacher only after "due deliberation" at a meeting of which the teacher was required to receive notice.

In *Nicholson, supra*, the other case relied on by L'Heureux-Dubé J. in finding a duty of fairness, Laskin C.J. did not find it necessary to apply the above statement of Lord Wilberforce, cited by him. It was not applicable because the appellant, a probationary constable, was found not to be dismissable at pleasure. At page 324, Laskin C.J. stated:

This case does not, however, fall to be determined on the ground that the appellant was dismissable at pleasure. The dropping of the phrase "at pleasure" from the statutory provision for engagement of constables, and its replacement by a regime under which regulations fix the temporal point at which full procedural protection is given to a constable, indicates to me a turning away from the old common law rule even in cases where the full period of time has not fully run. The status enjoyed by the office holder must now be taken to have more substance than to be dependent upon the whim of the Board up to the point where it has been enjoyed for eighteen months.

In her reasons, my colleague concludes, at p. 000, that a common law duty of fairness arises from "the nature of the decision, the relationship existing between the respondent and the appellant Board and the impact on the respondent of the impugned decision". This precedes her detailed examination of the statute, the regulations and the contract with a view to identifying therein the indicia of a duty of fairness. An examination in detail of the statute, regulations and contract is made after a common law duty is "presumed to exist" and then only to determine whether such a duty has been ruled out.

In my respectful opinion, that approach converts the exception into the rule. The correct approach requires an examination of the statute, regulations and contract to determine whether the respondent has brought himself within the exception to the general rule that an office

terminable at pleasure does not attract the duty of fairness. To do so, provisions of the governing instruments must be identified which specifically or by implication point to a duty of fairness. These governing instruments are the framework and context of the employment to which Lord Wilberforce refers and which must constitute the source of the indicia of a duty of fairness. I now turn to the task of examining these instruments.

The Statute and Regulations

Section 91(x) of *The Education Act*, R.S.S., 1978, c. E-O.1, empowers the Board to enter into written contracts with teachers and other personnel and to "terminate such contracts for cause in accordance with the provisions of this Act". As explained by my colleague, the words quoted do not mean that cause is required in the case of every contract.

Section 112 provides for termination of contracts of employment, including that of the director of education, by either party giving to the other thirty days' notice of "his intention to terminate the contract". By virtue of s. 113, senior officials of the Board, including the director of education, whose contracts have been terminated, may apply to the Minister for a Board of Review. The function of the Board of Review is to investigate the reasons for termination of the contract and report to the Minister. Both parties to the contract may be represented by counsel at the investigation. The Board of Review has no power to provide relief and its report appears to be purely advisory.

Although not strictly relevant to the contract of a director of education, the provisions dealing with teacher contracts shed light on the interpretation to be given to the sections I have reviewed above. Section 206 makes provision for termination of teachers' contracts for various causes. In some cases, termination is immediate but the teacher is entitled to a written notice of

termination upon request. In other cases, a period of notice is required. In either case, the notice must set out the reason or reasons for termination. Section 209 specifically provides that upon application by the teacher, the Board must make provision for the attendance by the teacher at a Board meeting to show cause why the contract should not be terminated.

Sections 212 to 226 provide for appeals on termination of contract to a Board of Reference. With some limited exceptions, any teacher whose contract has been terminated is entitled to have a Board of Reference appointed. Provision is made for a hearing. The Board is empowered to provide specified relief including reinstatement. Its decision is final and binding on the parties. These powers of the Board of Reference are in marked contrast to the limited power of a Board of Review.

I have dealt with these sections of the Act in some detail because it becomes apparent that there is nothing in them that specifically or by necessary implication creates a duty of procedural fairness on the termination of the contract of a director of education. The Court of Appeal thought that the phrase "notice of intention to terminate" imported an intention to hold a hearing, but I agree with L'Heureux-Dubé J. that these words cannot have this effect. In addition to what she has said, I point out that the use of the words "intention to terminate" rather than "termination" is simply a more accurate description of what the notice is. Since termination is not immediate, it is not quite accurate to call it a notice of termination. What happens is that the Board decides that in thirty days the contract will be terminated. Hence the phrase "intention to terminate in thirty days".

I conclude that where the statute intended to create a right to be heard or to make representations, it was careful to say so. This is apparent in s. 113 and the provisions dealing with teachers' contracts. If the legislature intended to provide both a teacher and a director of

education with a hearing before a Board of Reference or Review and a right to be heard by the Board, it is peculiar that it specified both these rights in the case of a teacher but only one, a more limited right of review, in the case of the director of education.

I further conclude that in the case of a director of education, the legislature left to agreement between the parties the matter of how the contract was to be terminated. Section 112, which provides for a period of notice, makes this subject to the terms of the contract. This conclusion is reinforced by the regulations. Section 21(4) of the Regulations provides as follows:

21.-- . . .

(4) A director of education shall be engaged under a written contract which shall specify:

- (a) the yearly salary and other allowances;
- (b) the vacation entitlement;
- (c) the procedure for review of the terms of the contract;
- (d) such other terms and conditions of employment, including the procedure for termination of the contract by either party, as may be mutually agreed upon.

The contract is to specify the procedure for review of and termination of the contract. If a duty to provide procedural fairness exists in the case of these parties, it must be found in the provisions of the contract to which I now turn.

The relevant provisions of the contract are set out in the reasons of L'Heureux-Dubé J. but I reproduce them here for ease of reference:

2. The Board shall review this Agreement on or before the 31st day of May each year, provided this Agreement has not been otherwise terminated, with a view

to the possibility of its revision. The Employee shall be entitled to make representations to the Board in this regard. Following the said review, the Board may elect to terminate this Agreement at the expiration thereof and shall notify the Employee of its decision in writing forthwith. If the Board makes no such election, this Agreement shall automatically be extended for a period of three (3) years from September 1, 1981, and the same procedure shall be followed on or before the 31st day of May of each year thereafter the intent being that unless so terminated, this Agreement shall, as and from September 1st of each year thereafter have three (3) years to run.

3. This Agreement, being the Employee's Contract of Employment with the Board, may be terminated by:
 - (a) either party serving the other three months notice in writing;
 - (b) at any time by mutual consent in writing by the parties;
 - (c) the expiration of the Agreement; or
 - (d) by resolution of the Board for reasons of just cause provided that the Employee shall be entitled to a fair hearing and investigation pursuant to Section 113 of The Education Act.

Paragraph 2 of the contract implements Regulation 21(4)(c) by providing a procedure for review. It specifically entitles the employee to make representations. Following the review, the employer may decide to terminate. The issue in this appeal is whether in those circumstances the contract requires that the employee be given a right to be heard, to make representations or otherwise accorded procedural fairness. The relevant provision is paragraph 3. Paragraph 3(a) responds to the power in s. 112 to amend the period of notice when termination is not for cause. Paragraphs (b) and (c) are not relevant. Paragraph 3(d) deals with termination for cause and specifically provides for a fair hearing and investigation in accordance with the Act. I can find no room for the implication of a duty to do anything under paragraph 3(a) other than give the notice. In the circumstances, reading in a duty of procedural fairness would be to rewrite the contract for the parties. This is something that the legislature left to them.

I would therefore dispose of the appeal as proposed by L'Heureux-Dubé J.

Appeal allowed with costs.

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