S.C.A. No. 02748

NOVA SCOTIA COURT OF APPEAL

Matthews, Chipman and Freeman, JJ.A.

Cite as: Nova Scotia (Attorney General) v. McNaughton, 1993 NSCA 77

BETWEEN:	)	
	)	
THE ATTORNEY GENERAL OF NOVA SCOTIA	)	Jonathan Davies
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
DONALD M. MCNAUGHTON	)	Ronald A. Pink,Q.C.
	)	and
Respondent	)	Leanne W. MacMillan
	)	for the Respondent
	)	
	)	
	)	
	)	Appeal Heard:
	)	March 22, 1993
	)	
	)	
	)	
	)	Judgment Delivered:
	)	April 13, 1993

THE COURT: The appeal is allowed without costs and the decision and order of the chambers judge are set aside as per reasons for judgment of Chipman, J.A.; Matthews and Freeman, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal by the Crown from a decision in the Supreme Court in Chambers holding that a non-unionized civil servant may not be laid off by compliance only with the provisions of the Civil Service Act, R.S.N.S. 1989, c. 70 and the Regulations pursuant thereto.

The respondent, a civil servant under the Act, was employed as Director of Administration of the Victoria General Hospital at Halifax for nearly 20 years. On May 24, 1991, he was laid off in accordance with s. 25 of the Act and Regulation 90 made pursuant thereto. The reason given for the layoff was that as a result of a major reorganization of the management of the hospital, his position was eliminated.

Section 25 of the Act provides:

> "Notwithstanding any other enactment, when the services of an employee are no longer required because of shortage of work or funds or because of the discontinuance of a function or program, the deputy head, in accordance with the regulations or in accordance with the terms of a collective agreement, may lay off the employee or terminate his services."

Regulation 90 provides in part:

> "90 (1) Where the services of a permanent employee are no longer required, the Commission on the recommendation of a Deputy Head may lay off the employee. Without limiting the generality of the foregoing, an employee may be laid off because of shortage of work or funds or because of the discontinuance of a function or a reorganization of a function.
>
> (2) The employment of an employee shall terminate when the employee is laid off pursuant to subsection (3).
>
> (3) No employee shall be laid off by the Commission until:
>
> > (a) The Deputy Head notifies the Commission of the name and position title of the employee whose services are not longer required;
> >
> > (b) The Commission notifies the employee in writing by personal service or by registered letter that the employee is to be laid off;
> >
> > (c) The notification indicates that the employee may be laid off after a period of 40 working days from the date of notification;

. . .

(4) Notwithstanding Section (3), the Commission may terminate forthwith the employment of an employee who is employed on a permanent basis where the employee is notified in writing to that effect and where payment is made to the employee in an amount equal to all pay for the period of notice to which the employee is entitled.

(5) The Commission shall maintain a list of employees who have been notified of lay off and shall endeavour to place the employees in vacant positions for which they are qualified.

(6) An employee who has been notified of lay off may be assigned to another department, board or agency or commission where a need for temporary assistance exists.

(7) An employee who is laid off shall be considered on lay off status for a period of six months following the effective date of termination and shall be entitled to enter any competition and be assessed for selection as if still employed.

(8) The layoff shall be a termination of employment and reemployment rights shall lapse if the layoffs lasts more than six consecutive months without reemployment.

(9) At the end of the six month period referred to in subsection (8) an employee shall be granted a termination allowance as follows:

. . .

(c) two month's pay if he has been employed for fifteen years, but less than twenty years;

. . .

(10) The amount of termination allowance provided under (9) shall be calculated by the formula:

$$\text{bi-weekly rate} \times \frac{26}{12} = \text{one month"}$$

On February 25, 1992, the respondent commenced action against the appellant for damages for wrongful dismissal. The respondent was not a unionized civil servant governed by the terms of any collective agreement and there was no other written contract governing his employment. It was the respondent's position that the parties had entered into an employment contract which contained implied terms that the respondent could not be discharged without cause or without

reasonable notice of termination. The rights under such contract, in the submission of the respondent, exceeded the provision of eight weeks pay in lieu of notice and the six month period of layoff status provided to the respondent following the layoff pursuant to Regulation 90.

The respondent applied in chambers for the determination of a question of law, namely whether the Act and Regulations precluded him from seeking damages for wrongful dismissal. An agreed statement of facts was filed. It was agreed that the respondent was laid off from employment in accordance with Section 25 of the Act and Regulation 90 and that the issue for determination was whether these provisions precluded the respondent from seeking damages for wrongful dismissal.

The chambers judge, after referring to the Act and Regulations, noted that there was no suggestion of any wrongful act on the part of either of the parties. He referred to the appellant's submission that it had no obligation beyond compliance with the requirements of the Act and the Regulations. He referred extensively to case law and concluded that the Act and Regulations did not constitute all of the terms and conditions of the employment contract, as they were not exclusive in nature. Referring in particular to Attorney General of Quebec v. Labrecque, et al (1980), 125 D.L.R. (3d) 54 and N.S.G.E.A., et al. v. Civil Service Commission of Nova Scotia (1981), 119 D.L.R. (3d) 1, he concluded that in the context of this case, provincial civil servants are subject not only to the Act and Regulations, but to an implied employment contract. Regulation 90 established but minimum standards of lay off periods and did not preclude an action seeking damages for dismissal based on lack of reasonable notice.

I am of the opinion that the appeal should be allowed.

Labrecque, supra, was a decision relating to the employment of a casual employee expressly exempted from the provisions of the Quebec Civil Service Act and not subject to a collective agreement. In such limited circumstances, it was appropriate to infer that there was a contractual basis for such hiring upon which an action could be founded. In N.S.G.E.A., supra, while Laskin, C.J. expressed disapproval of the power of the Crown to dismiss at pleasure, the case

dealt with an employee whose hiring was subject to the provisions of a collective agreement. This collective agreement, authorized by the Act, operated as a subordination of whatever unilateral power of dismissal the Crown might otherwise have had.

In Clarke v. Attorney General of Ontario, et al. (1966), 1 O.R. 539, Aylesworth, J.A., for the Court said at p. 532:

> " . . . in the absence of statutory provisions otherwise providing, a civil servant such as the appellant here, holds office at the pleasure of the Crown."

In Malone v. The Queen in Right of Ontario (1983), 45 O.R. (2d) 206 Galligan, J. said at p. 210:

> "*Clarke v. A.-G. Ont., supra,* holds that the power of the Crown to discharge at pleasure remains. Notwithstanding Mr. Grant's able and forceful argument it is not the duty of this court to pass upon the wisdom of that decision, even though in *Nicholson v. Haldimand-Norfolk Regional Board of Com'rs of Police*, [1979] 1 S.C.R. 311 at pp. 332-3, 88 D.L.R. (3d) 671 at p. 679, 78 C.L.L.C. para. 14, 191, and in *Nova Scotia Government Employees Ass'n et al. v. Civil Service Com'n of Nova Scotia et al.*, [1981] 1 S.C.R. 211 at p. 222, 119 D.L.R. (3d) 1 at p. 8, 43 N.S.R. (2d) 631 *sub nom. Wilson et al v. Civil Service Com'n of Nova Scotia*, Chief Justice Laskin has expressed disapproval of the power of the Crown to discharge at pleasure. I am unable to find that *Clarke v. A.-G. Ont.* has been overruled. I note that since the comments by the Chief Justice in those cases, the Legislature of Ontario has not seen fit to repeal ss. 21 and 27(1) of the *Interpretation Act*, R.S.O. 1980, c. 219. *Clarke v. A.-G. Ont.* is binding upon me and I must follow it."

Sections 6(1), 17 and 18(1) of the Interpretation Act provide:

> "6(1) Except where a contrary intention appears, every provision of this Act applies to this Act and to every enactment made at the time, before or after this Act comes into force.
>
> . . .
>
> 17 Except when otherwise expressed in the enactment or in his commission or appointment, a public officer, appointed before or after this Act comes into force under authority of an enactment or otherwise, holds office during pleasure only.
>
> 18(1) Words authorizing the appointment of a public officer include the power of

> (a) removing or suspending him;
>
> (b) re-appointing or reinstating him;
>
> (c) appointing another in his stead or to act in his stead; and
>
> (d) fixing his remuneration and varying or terminating it, in the discretion of the authority in whom power of appointment is vested."

A "public officer" is defined in Section 7(w) as including a person in the public service of the Province. Under the Act, "Civil Service" and "employee" are defined respectively as follows:

> "2 In this Act,
>
> . . .
>
> (b) 'Civil Service' means the positions in the public service of the Province to which appointments may be made by the Commission and such other positions as may be designated as positions in the Civil Service by the Governor in Council;
>
> . . .
>
> (g) 'employee' means a person appointed to the Civil Service;"

There is no question but that the respondent is a "public officer" as that term is used in Sections 17 and 18(1) of the Interpretation Act. These provisions preserve the power of the Crown to dismiss at pleasure unless "otherwise expressed" in the provisions of the Civil Service Act or other legislation or in the express terms of the employee's hiring. There is no recognition of implied terms. An employee such as the respondent must therefore look to the provisions of the Act and the Regulations only for protection against dismissal at pleasure.

Prior to 1980 the Civil Service Act contained a provision that except where otherwise expressly provided all appointments to the civil service were during pleasure. This was replaced by a provision in the Civil Service Act, S.N.S. 1980, Chapter 3 in the same terms as Section 27 of the present Act:

> "27. A Deputy Head may for cause dismiss an employee in his department from employment in accordance with the Regulations or the terms of the collective agreement."

This section materially diminishes the power of the Crown to dismiss a civil servant. It must, however, be read with Section 25 set out previously which expressly reserves to the Crown the power to lay off in accordance with the Regulations or the terms of a collective agreement. See also Gelfand v. R. (1990), 31 C.C.E.L. 172 (F.C.A.D.) and P.S.A.C. v. Canada, (1989) 1 F.C. 511 (F.C.T.D.) which deal with Section 29 of the Public Employment Act - a provision as the Chambers judge here said was virtually identical to Section 25 of the Act.

While the Crown's power to dismiss civil servants has been substantially reduced by statute its right to dismiss cannot be supplanted by resort to the principles of implied contract. The civil servant not subject to a collective agreement or other express contractual arrangement must look to the Act and the regulations for the terms of his or her employment. These provisions constitute a comprehensive scheme outlining the basis of such employment. It is legislation validly enacted by the Province acting within its constitutional powers and governs in all respects the employment of such civil servants by the Crown. There is no basis on which it can be said that there is as well an implied contract of employment between them.

I would allow the appeal without costs and set aside the decision and order of the chambers judge.

J.A.

Concurred in:

Matthews, J.A.

Freeman, J.A.