

Docket: 170698
Date: 20010622

NOVA SCOTIA COURT OF APPEAL
[Cite as: *Dalhousie University v. Dalhousie
Faculty Association, 2001 NSCA 103*]

BETWEEN:

DALHOUSIE FACULTY ASSOCIATION

Applicant

- and -

DALHOUSIE UNIVERSITY

Respondent

DECISION

Counsel: Gordon Forsyth, for the applicant
Peter McLellan, Q.C. and Tara Erskine, for the respondent

Application Heard: June 15, 2001

Decision delivered: June 22, 2001

**BEFORE THE HONOURABLE JUSTICE DOANE HALLETT
IN CHAMBERS**

Hallett, J.A. (in Chambers):

- [1] The Dalhousie Faculty Association has applied for a stay, pending disposition of the Association's appeal to this court of the judgment of Kennedy, C.J., of the Nova Scotia Supreme Court, in which he quashed an arbitrator's award which had reversed the decision of Dalhousie University refusing tenure to Dr. Bruce Mathieson, an assistant professor in the Department of Anatomy and Neurobiology. The Association's appeal is scheduled to be heard October 1, 2001. The application for the stay was supported by the affidavit of Dr. Mathieson. The University, in opposition to the application, filed an affidavit of Dr. David Hopkins, professor and head of the Department of Anatomy and Neurobiology. The Association filed a supplementary affidavit of Dr. Mathieson in response to the assertion in Dr. Hopkins' affidavit.
- [2] At the hearing of the application counsel for the parties did not seek to cross-examine either deponent.
- [3] I have read the affidavits and the written pre-hearing briefs of both counsel and have heard oral submissions.
- [4] There are no real conflicts in the evidence, although some aspects of the evidence leave a few lingering questions. In particular, whether Dr. Mathieson performed research while at Mount St. Vincent University following his dismissal from Dalhousie effective July 1, 1999.
- [5] The evidence shows that Dr. Mathieson was working on a research grant which was transferred to Mount St. Vincent University (the Mount) following Dr. Mathieson's termination by the University effective July 1, 1999. Dr. Mathieson taught at the Mount in the academic year September 1999 to May 2000. He had a lab at the Mount and apparently still has access to this lab. There is no evidence as to whether or not Dr. Mathieson did research in the academic year September, 1999 - May, 2000, the period in which he was not employed by Dalhousie. In August of 2000 an arbitrator allowed the grievance filed on Dr. Mathieson's behalf with respect to the refusal of the University to grant Dr. Mathieson tenure. As a result, in September 2000 Dr. Mathieson was reinstated by the University and assigned a lab. Apparently he did research at Dalhousie for the academic year September 2000 - May 2001. On May 11, 2001, he was again terminated by the University following Kennedy, C.J.'s decision to quash the arbitrator's award.
- [6] Dr. Mathieson has engaged three summer students from the Mount to assist him in his research project this summer. The four-year research grant, which

was originally registered at Dalhousie, was transferred to the Mount in 1999 and has remained registered at the Mount. Dr. Mathieson deposes that the lab at the Mount is inadequate.

- [7] It is impossible for me, based on the limited evidence, to make a determination as to what research he may be able to accomplish if the stay is not granted. On the one hand, he may be able to “make do” with the Mount laboratory and carry out research during the summer months with the assistance of the summer students. As the summer months are the most productive months with respect to doing research, he may be able to expend most of the remaining research funds he has at his disposal and be well on his way to completing his research by March of 2002, as required by the terms of the grant. On the other hand, the inadequacy of the lab facility may not permit this.
- [8] The University does not have a lab to assign to Dr. Mathieson and as the grant is registered at the Mount the University is not in a position to supervise the expenditure of grant funds as required. There is a process for transferring grant funds to a university but that has not happened. If the stay of Kennedy, C.J.’s decision were to be granted, the arbitrator’s award would govern. As a result, the University would have to reinstate Dr. Mathieson, provide him with a lab, and inject him into a teaching role. This will disrupt the University’s allocation of space, funding and staff. The University asserts that the balance of convenience is in favour of the University.
- [9] If the Association appeal fails, then Chief Justice Kennedy’s decision would stand. Dr. Mathieson’s grievance would, in accordance with that decision, be re- heard by an arbitrator other than the arbitrator who made the initial award.
- [10] I have decided not to grant the stay.
- [11] Counsel are in agreement that the test to be applied by a judge of this court in deciding whether or not to grant a stay is as set out in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d). The test is well known and need not be set out.
- [12] The Association asserts that if the stay is not granted and the appeal is successful, Dr. Mathieson will suffer the following irreparable harm:
- (i) he will not be able to continue his research as he will not have a lab at the University and as a consequence will lose the balance of his research grant as his research must be done by March, 2002;
 - (ii) his reputation will suffer as a consequence;
 - (iii) he will have a gap in his curriculum vitae;

- (iv) he will not likely qualify for further research grants, having failed to perform the research required for the grant he is presently receiving;
- (v) if he does not get research done on time someone else might beat him to the punch on the subject matter of his research.

The Association submits this irreparable harm warrants the granting of the stay.

- [13] Clearly, there is an arguable issue on this appeal. However, the Association has failed to satisfy me that Dr. Mathieson will suffer irreparable harm if the stay is not granted and the appeal is successful.
- [14] If the appeal succeeds, the arbitrator's award will be reinstated and the University will be required to pay salary lost by Dr. Mathieson as a result of the most recent termination of his employment on May 11, 2001.
- [15] If the appeal is successful, Dr. Mathieson will be able to explain to research granting bodies and others interested in his career, including potential employers, that he was wrongfully dismissed by the University and it was that wrong that caused him to default in performance of his research. Under such circumstances, any fair minded person would recognize that it was through no fault of his that his research project was not completed if that is the case. Likewise, a gap in his C.V. can be quickly and satisfactorily explained. If the appeal succeeds his reputation will be restored. There is no evidence that another researcher is working on a similar project. It is pure speculation that some other researcher will get ahead of him as a result of any delay in his research.
- [16] In summary, the Association has failed to satisfy me that it has met the primary test as outlined in **Fulton Insurance**. Furthermore, I am not satisfied that the facts of this case are so exceptional that notwithstanding the failure of the applicant to meet the primary test, it would nevertheless be fit and just that the stay be granted. In short, the Association has failed to meet the heavy burden of proving that a stay of Kennedy, C.J.'s judgment should be granted pending the outcome of the appeal.
- [17] I dismiss the application with costs to the University of \$800 inclusive of disbursements payable forthwith.

Hallett, J.A.