Date: 19991118
Docket: CA 155824

NOVA SCOTIA COURT OF APPEAL

[Cite as: Keddy v. Western Regional Health Board, 1999 NSCA 141]

Freeman, Hallett and Bateman, JJ.A.

BETWEEN:

MARILYN KEDDY	)	Bernadette C. Maxwell
	)	and Ronald A. Stockton
Appellant	)	for the appellant
	)	
- and -	)	
	)	
WESTERN REGIONAL HEALTH BOARD	)	Peter D. Nathanson
	)	and Michael G. Forse, Q.C.
	)	for the respondent
Respondent	)	
	)	
	)	
	)	Date heard:
	)	November 9, 1999
	)	
	)	Judgment delivered:
	)	November 18, 1999
	)	
	)	

THE COURT: Appeal dismissed, with costs to the respondent fixed at $2,500 plus disbursements, per reasons for judgment of Bateman, J.A.; Freeman and Hallett, JJ.A. concurring.

BATEMAN, J.A.:

[1] This is an appeal from a decision of Justice Linda Lee Oland of the Supreme Court, reported at (1999) 176 N.S.R. (2d) 35.

Background:

[2] The appellant, Marilyn Keddy, was director of the South Shore Drug Dependency Program (SSDDP). She was employed by a contract originally dated March 20, 1991 and renewed on March 30, 1993. She did her job well. On April 1, 1997 responsibility for administering four regional drug dependency programs, including the SSDDP, as a result of legislation devolved to the respondent Board (WRHB). Upon reorganization the appellant's director position was eliminated. A more geographically comprehensive senior management position was created and opened to competition. Ms. Keddy applied for that job but was not hired. She then applied, unsuccessfully, for two more subordinate management positions. Ms. Keddy's employment with the Board thus ended. She was offered, but refused, a severance package including six months pay in lieu of notice.

[3] The Statement of Claim alleged that the appellant's employment with the respondent, Western Regional Health Board, was terminated in breach of the conditions of her employment, in bad faith and was an unfair dismissal. Ms. Keddy pleaded, as well, that in failing to hire her for the new senior position or the subordinate management jobs, the Board was biased and motivated by bad faith.

[4] Prior to launching this action, Ms. Keddy had commenced, but abandoned, an application for *certiorari* in relation to the Board's failure to hire her for the senior position.

Issues:

[5] The appellant says that the trial judge erred:

1. In finding that a valid employment contract existed which restricted the appellant's common law right to pay in lieu of reasonable notice;

2. In her application of the duty to be fair and of the rule against bias, having assumed, without deciding, that administrative law principles applied to the WRHB;

3. In failing to award damages for wrongful dismissal, including augmented damages;

4. In failing to award the appellant compensation for her pension loss.

Standard of Review:

[6] Errors of law ought to be corrected on appeal but findings of fact and evidentiary conclusions drawn from such findings are viewed more deferentially. As McLachlin, J. said in **Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital**,

[1994] 1 SCR 114 at 121:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at pp. 188-89 (per L'Heureux-Dubé J.), and all cases cited therein, as well as *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at pp. 388-89 (per Wilson J.), and *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-8 (per Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.
> (Emphasis added)

Analysis:

[7] In a comprehensive and well reasoned decision, Justice Oland dismissed the appellant's action. She accepted that Ms. Keddy's employment was governed by a renewable annual contract which expressly permitted termination by either party on two months notice. The package offered was more generous than that provided for in the contract.

[8] The appellant had argued at trial that the contract no longer governed the employment relationship because, upon devolution, Ms. Keddy became an employee of the WRHB. On this issue the appellant cited **Sharpe v. Computer Innovations Distribution Inc**. (1994), 2 C.C.E.L. (2d) 157 (N.B.C.A.). Mr. Sharpe, hired in 1986 as a sales representative with the defendant company, through a series of promotions and restructuring commencing in 1988, became District Manager for Atlantic Canada at a salary substantially greater than that at which he was first hired. He enquired about the status of his original employment contract. He was told by his superior that there was

no need to prepare a new one and the contract was not referred to again. When Mr. Sharpe sued for wrongful dismissal the employment contract was initially not pleaded as a defence to Mr. Sharpe's action. The pleadings were subsequently amended to plead the contract. The trial judge found that "the change in Mr. Sharpe's status in 1988 effectively put the contract at an end for he then ceased to hold the position specified in the contract" (per Stevenson, J. in [1993] N.B.J. No. 447 para 13). On appeal, the court upheld that finding of the trial judge, commenting at para 7, *per curiam*:

> . . . the appellant considered that the contract had been overtaken by events. For example, not only had Mr. Sharpe's salary been considerably increased but his duties had been significantly altered when he became Manager for Atlantic Canada. . . . The termination notice referred to "Provincial Legislation" and not to the 1986 Agreement as the basis for Mr. Sharpe's notice period. While that in itself may not have been fatal, it corroborates Mr. Sharpe's submission that <u>both parties had treated the original employment contract as at an end</u>. In addition, Lorraine Bowen, who prepared Mr. Sharpe's termination notice in 1993, prepared the 1986 employment agreement.
> (Emphasis added)

[9] In my view, this decision is factually distinct and does not assist the appellant. Ms. Keddy remained in the same job after devolution, with the same duties and at the same salary. The SSDDP ceased to exist and was replaced by the WRHB. There was no evidence that either party treated her contract as at an end. In my view, there was evidence to support Justice Oland's finding that the contract continued in effect.

[10] In addition Ms. Keddy submitted that a new contract was created when the WRHB assumed responsibility for the delivery of health services. It was a term of this contract she says, or an implied term of her existing contract, that she could not be dismissed but for cause. In this regard she relied upon a letter dated February 26, 1997

and purportedly signed by the Deputy Minister of Health, E. G. Cramm. The letter was received by the then Chair of the SSDDP Board. It provided in relevant part:

> Effective April 1, 1997, the responsibility for governance, funding and administration of Drug Dependency Programs in the Western Region will devolve to the Western Regional Health Board. In accepting these responsibilities for devolution, the Western Regional Health Board has committed to the principal of fairness, equity, and no loss of staff employment as a direct result of devolution. (Emphasis added)

[11] In addressing this argument Justice Oland said:

> The phrase "no loss of staff employment as a direct result of devolution" in the Cramm letter received different interpretations. Dr. Perkin and Mr. Maddalena testified that devolution was a date certain, namely April 1, 1997, and that while there was to be no job loss on that date as a direct result of devolution, there could be after that date because of budgetary impacts or reorganization. Dr. Perkin testified that they were at pains to draw this distinction throughout the transition because jobs had been lost immediately when hospitals were designated, but conceded that it may not have been made in every discussion about devolution. Mr. Maddalena's evidence was that in all his meetings with the boards of the drug dependency programs which were to devolve to the WRHB, he took the same position - there would be no job loss as a direct result of devolution, but he could make no long term commitment and management restructuring would take place. Ms. Keddy and Mr. Simonds each felt reassured by the Cramm letter which they read to mean that no jobs would be lost following devolution. I find that the WRHB was sufficiently consistent in its message prior to devolution that the interpretation held by Ms. Keddy and Mr. Simonds was a hopeful one rather than one based on statements by the WRHB at meetings or on a careful reading of the Cramm letter.

[12] There was evidence to support Justice Oland's conclusion that Ms. Keddy's employment was not guaranteed.

[13] Ms. Keddy argued, in the alternative, that if the contract governed, the termination provision was ambiguous. It is not clear from the trial record that such an argument formed part of her case at trial. Assuming, however, that ambiguity was raised at trial, I am not persuaded that the termination provision in the contract is

ambiguous.

[14] A significant part of the appellant's case at trial focused upon the process undertaken by the Board in selecting the successful candidates for the senior and subordinate positions for which Ms. Keddy unsuccessfully applied. She alleged that the process was tainted by unfairness and, in particular, bias or a reasonable apprehension of bias. Justice Oland found that not to be so. In so doing she accepted, for the purposes of her decision, Ms. Keddy's submission that she was owed a duty of fairness in the process leading to her dismissal and in the selection process for the new jobs.

[15] Since the decision at trial, the Supreme Court of Canada has released its judgment in **Wells v. Newfoundland** [1999] S.C.J. No. 50. Mr. Wells was appointed a member of the Public Utilities Board and, by contract, entitled to hold the office "during good behaviour until the age of 70". Due to a reorganization and reduction in the size of the Board, Mr. Wells lost his position. He sued for wrongful dismissal. The Court confirmed, Major, J. writing, that where a government employee's position is subject to a contract, then the general law of contract will apply and the court should focus upon the terms of that contract. Mr. Wells, having a tenured job pursuant to the terms of his contract, was entitled to damages for wrongful dismissal. Because the Court resolved the appeal on contract principles, Major, J. noted that it was unnecessary to consider Mr. Wells' assertion that the Crown had breached a duty of fairness in the decision-making process which resulted in his termination. Major, J. commented, in *obiter*, that although Mr. Wells' job loss had profound impact upon him, the decision to reduce the

size of the Board was not directed at him personally:

> [para61] The respondent's loss resulted from a legitimately enacted "legislative and general" decision, not an "administrative and specific" one: see *Knight* at p. 670. While the impact on him may be singularly severe, it did not constitute a direct and intentional attack upon his interests. His position is no different in kind than that of an unhappy tax-payer who is out-of-pocket as a result of a newly enacted budget, or an impoverished welfare recipient whose benefits are reduced as a result of a legislative change in eligibility criteria. This was not a personal matter, it was a legislative policy choice. The procedural rights arising in *Nicholson*, supra and *Knight*, supra, do not apply. There is no general right to judicial review of the fairness of such decisions or their implications for individuals: *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735. The respondent has no claim to participation in the decisions leading to the elimination of his position through comprehensive reforms.
>
> [para62] The respondent also has no basis to challenge the decision not to re-appoint him. The question of the respondent's re-appointment is reached once it has been decided that his termination upon the dissolution of the previous Board was lawful and effective. At that point the respondent would be in no different position than any other member of the public vying for an appointment. It is difficult to comprehend how a candidate for public office can claim a right to participate in the appointment process. There is no vested interest at stake causing a duty of fairness to arise (*Knight*, supra). . . .

[16] It may be that in these circumstances, as in **Wells**, the duty of fairness did not arise. (See **Knight v. Indian Head School Division No. 19** (1990) 69 D.L.R. (4th) 489 (S.C.C.) per L'Heureux- Dubé, J. at p. 500) As I would agree with the trial judge that, even if there was a duty of fairness, in dismissing Ms. Keddy the Board did not act unfairly or with bias, it is unnecessary to further analyze the nature of the action which resulted in the elimination of Ms. Keddy's position. My reservations about the aspects of this claim which encompass Ms. Keddy's unsuccessful application for the two new positions are fortified by the comments of Major, J. in **Wells**. Without deciding that such a cause of action exists outside of the administrative law remedies, I would agree with the trial judge that the appellant has not demonstrated that the selection process was actionably flawed. In particular, the appellant has not established that the trial judge

erred at law, nor that she made palpable and overriding error in her conclusions on matters of fact.

Disposition:

[17] I would dismiss the appeal with costs to the respondent fixed at $2,500 plus disbursements.

Bateman, J.A.

Concurred in:

Freeman, J.A.

Hallett, J.A.