CV 06811

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DAVID WILMAN

Applicant

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES
as represented by the FINANCIAL MANAGEMENT BOARD SECRETARIAT
and NUNAVUT ARCTIC COLLEGE

Respondents

Application for orders in the nature of *certiorari* and *mandamus*.
Application for an extension of time for bringing an application for judicial review. Denied.

Heard at Yellowknife on February 13, 1997

Reasons for Judgment filed: March 12, 1997

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Applicant: Olivia Rebeiro
Counsel for the Respondents: Karan M. Shaner

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REASONS FOR JUDGMENT

1 The applicant is a public servant in the employ of the Government of the Northwest Territories. In July 1996, his employer subjected him to discipline proceedings because of alleged misconduct, resulting in a five-day suspension, without pay. Such suspension is contemplated by the provisions of the *Public Service Act*, R.S.N.W.T. 1988, ch.P-16, dealing with the terms and conditions of employment of those persons employed in the public service. The applicant appealed his suspension to the Minister, pursuant to a statutory right of appeal in s.29 of the Act. The Minister confirmed the suspension. The applicant now makes application in this Court for judicial review, seeking orders in the nature of *certiorari* and *mandamus*.

2 The statute does not give the aggrieved applicant a right to a further appeal to this Court. This Court, however, has the historic and inherent jurisdiction to review the *legality* of actions taken by any public authority whose decisions affect the rights, privileges and interests of individuals. *Hallett v Minister of Personnel for N.W.T.* [1987] N.W.T.R 263.

3 In this case, it must be reiterated that it is the *legality* of the government's decisions which are subject to review and not the *merits* of allegations of conduct/misconduct or of the suspension itself. This Court has no jurisdiction to review the merits of either the applicant's conduct/misconduct or the level of discipline imposed.

4 On this application, *in form*, the applicant complains of the legality of the government's actions. *In reality*, he is seeking a review on the merits, in my respectful view.

5 The applicant's specified complaints are twofold. Firstly, he says that he was not afforded procedural fairness either by his immediate supervisor who imposed the suspension or by the Minister who confirmed the suspension. Secondly, he says that there existed an apprehension of bias on the part of his immediate supervisor.

6 The law is clear that both the applicant's supervisor (a Deputy Minister

equivalent for purposes of the Act) and the Minister who entertained the appeal had a duty to act fairly. *Cardinal v Kent Institution* [1985] 2 S.C.R.643; *Knight v Board of Education* (1990) 69 D.L.R. (4th) 489 (S.C.C.); *Nicholson v Board of Police Commissioners* [1979] 1 S.C.R.311. Similarly, the law provides that where there exists a reasonable apprehension of bias on the part of a public decision-maker, his or her decision may be declared void by this Court on judicial review.

7 I have read and reviewed the contents of the Record returned to this Court pursuant to Rule 598 and of the affidavit evidence tendered and have considered carefully the submissions advanced on behalf of the applicant. I am unable to find that the immediate supervisor or the Minister breached their duty to act fairly (save in one minor respect regarding the appeal before the Minister which I shall discuss below) nor can I find anything to justify any apprehension of bias.

8 I note that this application for judicial review, commenced pursuant to Part 44 of the Rules of Court, was filed outside the time limit prescribed by those Rules:

> 596.(1) Unless otherwise provided by statute, where the relief sought in an application for judicial review is an order to set aside a decision or act, the originating notice shall be filed and served within 30 days after the decision or act to which it relates.
>
> (2) Unless an enactment otherwise provides, the Court may extend the time for bringing an application for judicial review before or after the expiration of the 30 day time limit set out in subrule (1).

9 The applicant seeks an extension of time as contemplated by Rule 596(2); however, in my respectful view he does not provide adequate or satisfactory reason or

explanation for the delay in commencing these proceedings.

10 The applicant received notice of the suspension on July 10, 1996. He did not then seek judicial review of the supervisor's actions on the grounds of procedural unfairness or apprehension of bias. Rather, he exercised his statutory right of appeal to the Minister, forwarding a detailed, well-expressed and comprehensive letter to the Minister, explaining his position on the allegations against him and on the merits of the suspension itself.

11 The Minister issued his decision on August 15, 1996, denying the appeal and confirming the suspension. The applicant did not then seek judicial review of the Minister's decision on the grounds of procedural unfairness. Rather, on September 11, 1996, he had his lawyer write a detailed and comprehensive letter to the Minister, asking the Minister to reconsider his decision and again setting forth the applicant's position on the nature of the misdeed alleged and of the severity of the five-day suspension. By letter of October 7, 1996 to the applicant's lawyer, the employer stated that the Act did not provide for a further appeal of the Minister's decision, and that the suspension (long since served) would not be set aside.

12 The application for judicial review, in which the Court is asked to set aside the decisions of July 10, 1996 and August 15, 1996 on the grounds of a lack of procedural fairness and bias, was filed in this Court on December 12, 1996. No

satisfactory explanation has been provided for the delay to justify the granting of an extension of time outside the 30 days specified in the Rules of Court.

13 The 30-day time requirement in Rule 596 is not to be lightly disregarded. It exists for valid reasons. One reason is that public authorities require effective and reliable administration and this, of course, includes finality in decision-making.

14 One readily gains the impression that the applicant awaited the outcome of his appeal and his request for reconsideration before launching *certiorari* proceedings on procedural grounds. In these circumstances an extension of time ought not be granted, in my view.

15 I turn briefly to a consideration of the procedural irregularities alleged.

16 Firstly, it is alleged that the immediate supervisor made the decision to discipline the applicant before giving the applicant an opportunity to be heard. In this, reliance is placed on a letter which the supervisor wrote to his own superior in which he stated he was about to initiate discipline proceedings against the applicant as a result of something that had occurred. The applicant's interpretation of this letter, i.e., that it shows bias and a predisposition, is not a reasonable interpretation.

17 Secondly, it is alleged that the applicant was not informed of why he was

being disciplined. The evidence before me is to the contrary. The applicant knew from the onset exactly the nature of his superiors' complaint about his specific conduct, and he was given an opportunity to be heard and present his case. He did so, in person, and with the assistance of a spokesperson.

18 Next, it is said that the employer in imposing a five-day suspension for a first offence did not adhere to its own Human Resources Policy and Procedure Manual with respect to the steps for progressive discipline. In support of this contention, the Court was provided with partial excerpts from such Manual. The evidence before me is incomplete with respect to this Manual, its status, binding effect, etc.; however, in any event, it has not been shown that to impose a five-day suspension against a first offender for misconduct in the performance of his duties is not prohibited by the Manual or by the employer's policies.

19 It is further submitted on the applicant's behalf that the Minister, in making his decision on the appeal, failed to take into consideration the points/arguments/concerns in the applicant's favour. In support of this submission, the applicant points to the contents of the Minister's letter of decision. It is submitted that the failure of the Minister to make reference to the specific concerns and arguments raised by the applicant in his letter of appeal suggests that the Minister did not in fact take those matters into consideration, thereby committing jurisdictional error. I find there is no merit in that submission. An appeal tribunal or other decision-making body is not obliged, in issuing

its decision, to make an explicit reference to each item of evidence or every argument placed before it, leading to its final conclusion or decision. *Woolaston v Minister of Manpower and Immigration* [1973] S.C.R. 102; *Services' Employees International Union v Nipawin District Staff Nurses Association et al* [1975] 1 S.C.R 382; *Labour Relations Board of Alberta v International Woodworkers of America* (1989) 94 A.R. 293.

20 The Record returned to this Court indicates that the Minister had before him the submissions made by the applicant. There is nothing in that Record to suggest that those submissions were not considered by the Minister. *Omnia presumuntur rite esse acta* (a *prima facie* presumption of the regularity of the acts of public officers exists until the contrary appears).

21 There is, however, one aspect of the proceedings before the Minister which is troublesome, though not fatal. This is not a matter which was raised by the applicant in his Originating Notice filed on December 12, 1996 in commencing this application for judicial review. This procedural flaw was only revealed when the government made its return to this Court upon being served with the Originating Notice, in accordance with Rule 598.

> 598(1) On receiving an originating notice endorsed in accordance with rule 595, the person in respect of whose decision or act relief is claimed shall return forthwith to the Clerk
>
> (a) the judgment, order or decision, as the case may be;
> (b) the process commencing the proceeding;
> (c) the evidence and all exhibits filed, if any;
> (d) all things touching the matter;

> (e) the originating notice served on the person; and
> (f) a certificate in the following form:
>
> > "Pursuant to the accompanying originating notice, I hereby return to the Honourable Supreme Court the following papers and documents:
> >
> > > (a) the judgment, order or decision, as the case may be, and the reasons for it;
> > > (b) the process commencing the proceeding;
> > > (c) the evidence taken at the hearing and all exhibits filed;
> > > (d) all other papers or documents touching the matter.
> >
> > And I hereby certify to the Honourable Supreme Court that I have enclosed in this return all the papers and documents in my custody relating to the matter set forth in the originating notice.".

22 The Record returned contains three parts. Part A is the Minister's decision. Part B is the applicant's letter of appeal with its seven attachments. Part C is described as "evidence and other materials available to the Minister touching on this matter".

23 The documents comprising Part C of the Record can fairly be categorized as follows:

(a) copies of prior correspondence between the applicant and his supervisor, and

(b) a Labour Relations Report dated July 26, 1996, which appears to be a document prepared by a Labour Relations officer within the government for the assistance of the Minister, in which the officer summarizes the issues on the appeal and recommends that the appeal be denied.

24 There is no evidence that the fact that the Part C documents were before

the Minister was made known to the applicant. This should have been disclosed to him. An appellant is entitled to know what materials are to be considered by the appeal tribunal and is entitled to an opportunity to address the tribunal with respect to the relevance of those materials. It has been stated by this Court that a tribunal breaches its duty of fairness to an appellant if it does not notify the appellant of all submissions, memoranda, etc., that it will be taking into consideration in deciding the appeal. See *Echo Bay Mines Ltd. v Labour Standards Board* [1992] N.W.T.R. 289.

25 In the present case, the correspondence referred to as (a) of Part C above was within the knowledge and possession of the applicant and, in any event, I find its contents innocuous in the context of the appeal. The Labour Relations Report is, as described, a summary of the issues and positions on the appeal, but partisan.

26 Although I find that the failure to notify the applicant of the presence of the Part C documents before the Minister (I am assuming there was such a failure) constitutes a breach of the duty of procedural fairness, I would not exercise the Court's jurisdiction to quash the Minister's decision on that ground alone. Such a breach does not justify such a remedy in this particular case.

27 I therefore find that the applicant has failed to establish any valid ground for quashing either the supervisor's decision or the Minister's confirmation of that decision. The applicant was afforded procedural fairness by his employer, with the one exception noted above.

28 The misconduct of the applicant which gave rise to discipline measures by his employer was, in general terms, the unauthorized "airing" of internal disagreements or differences to outside agencies (i.e. outside GNWT). The penalty meted out by the employer was five days' suspension, without pay. The applicant views this as harsh and excessive.

29 It is not for this Court to agree or disagree with the severity of the discipline imposed. A revisiting of the *merits* of the supervisor's decision or the Minister's decision is outside the parameters of applications brought under Part 44 of the Rules of Court.

30 This Court's jurisdiction on such applications is confined to a supervisory, as opposed to an appellate, jurisdiction:

> "Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its, the judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the court in the exercise of its supervisory role will quash that decision. Such a decision is correctly, though unattractively, described as a "perverse" decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made is to invite the court to adjudicate as if Parliament has provided a right of appeal against the decision -- that is, to invite an abuse of power by the judiciary."

R v Secretary of State for the Home Department, ex parte Brind [1991] 1 A.C. 696 (H.L.) per Lord Ackner at p.757-758.

31 To conclude:

(a) the application for an extension of time for bringing an application for judicial review is denied.

(b) in any event, the application for orders in the nature of *certiorari* and *mandamus* is without merit.

(c) the respondents shall be entitled to one set of costs in column 5.

J.E. Richard,
J.S.C.

Yellowknife, NT
Dated this 12th day of March 1997

Counsel for the Applicant: Olivia Rebeiro
Counsel for the Respondents: Karan M. Shaner