Date: 19980924
Docket: CV 07655

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

CHUCK PERRY

Applicant

- and -

COMMISSIONER OF THE NORTHWEST TERRITORIES and KEN LOVELY

Respondents

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Application for judicial review and an order quashing the dismissal of the Applicant from employment.

Heard at Yellowknife on July 29, 1998

Filed: September 28, 1998

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Applicant: Austin F. Marshall

Counsel for the Respondents: Karan Shaner

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REASONS FOR JUDGMENT

[1] This is an application for judicial review of the Applicant's dismissal from his employment as a Regional Project Manager with the Department of Public Works and Services of the Government of the Northwest Territories.

[2] The Applicant argues that the dismissal should be reviewed, and the notice of dismissal quashed, on the following grounds:

1. the dismissal was not conducted fairly in that the oral hearing requested by the Applicant was not held and he was not given disclosure of relevant documents;

2. the authority to dismiss was not properly delegated to the Respondent Lovely;

3. because of Lovely's position, there was an appearance of bias.

*Facts*

[3] On February 11, 1998, the Applicant met with his supervisor, Mr. Lemax. On that same date Lemax prepared a summary of that meeting, which forms part of the record. The summary indicates that Lemax advised the Applicant that he was not happy with the way the Applicant had managed three recent projects in Colville Lake and Deline. The problems were related to schedules and budgets. The summary outlines the Applicant's responses to these concerns and indicates that Lemax pointed out to the Applicant that similar problems had been raised with him in 1995 and 1996. Lemax told the Applicant that he would be recommending further action to the Deputy Minister of the Department and that this might include a recommendation for dismissal. The summary notes that the Applicant said he would strenuously oppose such a recommendation.

[4] On February 12, 1998, the Applicant sent a memorandum to Lemax in which he provided details about the projects and the budgets and scheduling matters.

[5] On February 12, Lemax sent a memorandum to the Respondent Lovely, the Deputy Minister for the Department, referring to the 1995 and 1996 problems and the three recent projects and recommending that the Applicant be dismissed.

[6] By letter dated February 17, 1998, Lovely advised the Applicant that Lemax had recommended dismissal. The only detail in that letter was as follows:

> You have been advised that there have been problems related to the management of projects in the Inuvik Region in past years. Recently, three projects in the Inuvik Region were behind schedule, over budget and in jeopardy of being cancelled. It appears you have failed to effectively manage project activity in your region.

[7] Lovely requested a response and written submission from the Applicant by February 24, 1998, saying that he awaited same before making a final decision.

[8] By letter dated February 24, 1998, counsel for the Applicant wrote to Lovely, demanding a clearer explanation of the shortcomings alleged, identification of the projects in question and a particularized statement of the grounds supporting the recommendation for dismissal. An extension of time to respond to Lovely's initial letter was requested, as was a copy of the procedure which Lovely intended to follow.

[9] Lovely's response came in a letter to counsel for the Applicant dated February 26, 1998. In it, Lovely identified the three projects and referred to failures to keep to and control schedules, manage the architectural services contract and control the budget. The time for the Applicant's response was extended to March 5, 1998.

[10] From February 26 to March 6, 1998 a number of letters were sent by counsel for the Applicant to Lovely requesting information as to the procedure he would follow in considering whether to dismiss the Applicant. That information was eventually provided by counsel for the Respondents and the deadline for the Applicant's response to the allegations was extended to March 13, 1998.

[11] On March 13, counsel for the Applicant wrote to Lovely that the Applicant would provide a detailed written response on that date. He also requested an oral hearing at which witnesses could be examined and cross-examined and all relevant documentation could be reviewed. The basis for the request was two-fold: first, that the facts which the Applicant would rely on to answer the allegations against him required detailed analysis and second, that the Applicant had seen nothing from his supervisor giving any background for the recommendation for dismissal. Counsel referred to his expectation that, given the serious nature of the penalty, there would be a report setting out all the pertinent facts rather than just Lovely's letter, "stating in skeleton form that you have a recommendation that you are prepared to act upon".

[12] Along with an oral hearing, counsel requested that Lovely provide him with any other material which he intended to consider. By this he clearly meant material other than Lovely's letters of February 17 and 26 and the Applicant's response of March 13. Lovely's response of March 17, 1998 indicated that he was not prepared to schedule an oral hearing and that should any further relevant materials or facts come to light, he would provide them to the Applicant for a response. He made no reference to the material which he had already received from Lemax, nor did he provide copies of that material.

[13] On March 13, the Applicant sent Lovely a lengthy and detailed response, complete with attachments. It seems obvious from his response that in preparing same he must have had access to the files on the projects in question. The main thrust of the response was that, in the Applicant's view, factors outside of his control caused budget and scheduling problems and he dealt with them appropriately.

[14] Lovely forwarded the Applicant's response to Lemax who, on March 16, 1998, provided Lovely with a three page memorandum in reply . The memorandum was in a sense favourable to the Applicant because in the case of each of the three projects, Lemax said that the Applicant was not solely responsible for the problems but that he had to take some of the responsibility.

[15] Lovely did not provide the Applicant with a copy of Lemax's March 16 memorandum or otherwise disclose its contents to him. Nor did he disclose a memorandum dated March 19 which he received from the Manager of Project Support in Yellowknife, setting out the projected shortfall for two of the projects.

[16] By letter dated March 19, 1998, Lovely announced to the Applicant that he accepted the recommendation for dismissal and the Applicant's employment was terminated. The letter reviewed some of the problems with the three projects and made statements about the standard of performance expected from someone in the Applicant's position. I shall refer to those statements further on.

[17] The Applicant asks that this notice of dismissal be quashed.

*The duty of fairness*

[18] It was not disputed on this application that judicial review is available to supervise disciplinary decisions made under the *Public Service Act*, R.S.N.W.T. 1988, c.P-16 as amended, and that a duty of procedural fairness lies on public authorities making decisions affecting the rights, privileges or interests of individuals: *Hallett v. N.W.T. (Min. of Personnel)*, [1987] N.W.T.R. 263 (S.C.), citing *Cardinal v. Kent Inst.*, [1985] 2 S.C.R. 643; *Martineau v. Matsqui Inst. Disciplinary Bd.*, [1980] 1 S.C.R. 602; *Nicholson v. Haldimand-Norfolk Reg. Bd. of Police Commrs.*, [1979] 1 S.C.R. 311. The decision to dismiss the Applicant is subject to judicial review because it affects his rights, privileges or interests.

[19] The question on judicial review is not whether the decision to dismiss the Applicant was correct. I am not asked to review the decision on its merits. The question is simply whether the process leading to the decision was fair.

[20] The Applicant says that the Respondents breached their duty of procedural fairness in not giving him the oral hearing he requested and in not disclosing documents to him.

*Is there a requirement for an oral hearing in these circumstances?*

[21] The law is clear that a hearing with witnesses subject to examination and cross-examination is not required in every case where an administrative body takes a decision which affects the rights, privileges or interests of an individual. What is required in each

case will depend on the circumstances of the case. Where dismissal from employment is at stake, the important factors are that the individual have knowledge of the reasons for dismissal and have an opportunity to be "heard". The requirement that the individual affected be heard does not mean there must be a full hearing as would be conducted by a court: *Knight v. Indian Head School Division No. 19* (1990), 69 D.L.R. (4th) 489 (S.C.C.), citing also *Nicholson, supra*.

[22] The *Public Service Act* does not contain any requirement for an oral hearing where dismissal is contemplated.

[23] In arguing that an oral hearing should have been conducted in this case, the Applicant relied on *Khan v. University of Ottawa* (1997), 34 O.R. (3d) 535 (Ont. C.A.). In that case, a student had failed an examination but claimed that the professor had not received and considered one of the examination books she had completed. There was no other evidence to substantiate her claim to have completed the missing examination book and so her credibility on that point was pivotal. The Court held that in disbelieving her explanation without hearing from her and assessing her credibility, which could only be done by way of an oral hearing, the University's Examinations Committee had breached the duty of procedural fairness.

[24] In my view, the issue in this case was not one of credibility. The facts pertaining to the projects in question were not in dispute to any significant degree and there is no suggestion in any of the material that Lovely did not believe the Applicant's version of events. Indeed, Lovely said in his letter of March 19 that there was no contest as to what had transpired. What was in dispute was the degree to which the Applicant should be held responsible for the problems that occurred.

[25] The differences between the positions taken by Lemax and Lovely on the one hand and the Applicant on the other were ones of opinion, rather than fact. They had different opinions about the level or extent of responsibility that should be borne by the Applicant rather than what he did or did not do in a given situation. The Applicant's credibility was not put in issue. In my view, this is not the type of dispute that requires an oral hearing.

[26] The Applicant also relied on *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 178 and *Re Crandell and Manitoba Association of Registered Nurses* (1976), 72 D.L.R. (3d) 602 (Man. Q.B.), both of which involved factual disputes and credibility and are distinguishable on that basis.

[27] Accordingly, I conclude that an oral hearing was not required in this case and that Lovely did not act unfairly in refusing the Applicant's request for same.

*Did the failure to disclose documents amount to unfairness?*

[28] It is clear that the following documents which form part of the record and were available to Lovely were not disclosed to the Applicant: the Lemax summary of his February 11, 1998 meeting with the Applicant; the Lemax memorandum of February 12, 1998 to Lovely, recommending dismissal; the Lemax memorandum of March 16, 1998 to Lovely, commenting on the Applicant's detailed letter of March 13; and the memorandum of March 19, 1998 regarding the project shortfalls.

[29] It is significant that the latter two items are dated close to March 17, 1998, which is when Lovely assured the Applicant's counsel that "should any further relevant materials or facts come to light", he would provide them to the Applicant for a response. It is also significant that not only did Lovely not disclose the listed items to the Applicant, he also did not disclose their existence. It is difficult to understand this failure given the specific request for any such information in counsel's March 13 letter.

[30] There is no suggestion in this case that Lovely had any reason to withhold the listed items from the Applicant, nor has any explanation been put forward as to why they were not provided. I did not understand counsel for the Respondent to be attempting to justify the failure to disclose. Rather, she argued that failure to produce documents is not in itself determinative and that the test is as set out in *Demaria v. Regional Classification Board*, [1987] 1 F.C. 74 (C.A.) (at p. 78): "whether enough information has been revealed to allow the person concerned to answer the case against him". Her argument was that the Applicant had sufficient information to answer the case against him and that nothing in the documents that were not provided would have made a difference to the outcome of the dismissal proceedings.

[31] Counsel for the Applicant relied mainly on *Echo Bay Mines Ltd. v. Labour Standards Board*, [1992] N.W.T.R. 289 (S.C.). In that case, the Labour Standards Board had considered a memorandum from the official whose decision was on appeal before it. The existence of the memorandum was not made known to the appellant. It was held by de Weerdt J. that failure to take the elementary steps of notifying the appellant of the intention to obtain the memorandum and allowing it to make submissions on whether that was appropriate, and then if the memorandum was obtained, making it available to the appellant as part of the case against him, was a departure from the requirements of fairness.

[32] *Echo Bay Mines Ltd*. was followed in *Wilman v. The Commissioner of the Northwest Territories et al*, S.C.N.W.T. no. C.V. 06811, March 12, 1997 (unreported). In that case, involving judicial review of dismissal by a Minister of an appeal from suspension under the *Public Service Act*, Richard J. held that failure to disclose to the appellant documents which were before the Minister on the appeal was a breach of the duty of procedural fairness. He declined, however, to quash the Minister's decision on that ground alone, in part because some of the documents were innocuous in the context of the appeal and were within the knowledge and possession of the appellant.

[33] The principle that the duty of fairness requires full disclosure of the case the individual has to meet is also found in *Re Napoli and Workers' Compensation Board* (1981), 126 D.L.R. (3d) 179 (B.C.C.A.) and *Carlin v. Registered Psychiatric Nurses' Assn. (Alberta)* (1996), 39 Admin. L.R. (2d) 177 (Alta. Q.B.).

[34] I find that there was a breach of procedural fairness in the failure to disclose to the Applicant the four items referred to above. Fairness requires that those items should have been disclosed, particularly where, as here, any such materials were specifically requested by counsel and Lovely agreed to provide them.

[35] Having found that there was a failure of the procedural duty of fairness, I turn to what the result of that failure should be. It is here that I think the principle set out in *Demaria* comes into play. Despite the failure, was sufficient information provided to the Applicant to allow him to meet the case against him?

[36] There can be no doubt that the problems which occurred with the three projects were well known to the Applicant. He met with Lemax on February 11, 1998, at which time the problems were discussed in some detail, according to the Lemax summary of that meeting. Although the Applicant did not have a copy of that summary, it was not suggested to me that he disputes the contents. The Applicant's response of March 13 makes it clear that he was well aware of the scheduling and budget problems. In his affidavit filed in support of this application, he does not allege that he was unaware of the facts.

[37] The more difficult issue is the failure to disclose what standard the Applicant was expected to meet and against which his performance was being judged.

[38] There is some indication of the general standard against which the Applicant's performance was judged in Lemax's summary of their February 11 meeting. The

summary indicates that Lemax told the Applicant that it was the project manager's responsibility to make sure that difficulties are avoided and problems solved.

[39] In his March 13 response, the Applicant stated:

> ...the allegations charged are unreasonable and are based on misconceptions of selected events or schedules which were beyond my personal and immediate control. It is unreasonable to select only one point in a project schedule and use this point alone to judge a manager's performance, particularly when the project is ultimately on schedule. The accusations are fallacious and I have gone to some length to spell out the events which I did not have power over and which affected the project budgets or schedules.

[40] The Applicant then went on to set out what he considered to be the test he must meet:

> The test of a professional's conduct asks if another similar trained professional at the same time, with the same information and under the same circumstances would have acted in a similar manner. I acted in a professional and proper manner in accordance with the circumstances, the guidance of the department and the past precedence *(sic)* of the Inuvik office's project work.

[41] As I pointed out earlier, Lemax's memorandum of March 16 acknowledged that the Applicant was not solely responsible but stated that he must take some of the responsibility for the problems in each project. Lemax concluded that memorandum by saying:

> In project management a lot of things can and do create problems and delays. One of the responsibilities of a project manager is to anticipate what can go wrong, take action to make sure it doesn't happen, or to fix it if it does. A lot of things can be and are pulled off at the last minute, but that often is the result of good luck, rather than good management.
>
> There are events outside a project managers' *(sic)* control that can affect the schedule and the budget. Project managers are expected to successfully deal with these events rather than to explain why things went wrong.

[42] Finally, in the March 19, 1998 termination letter, Lovely made the following comments:

> I have considered your detailed explanations about the difficulties you had in managing these project *(sic*) effectively through your subordinate staff. Project management is never

> an easy job, and as noted, it carries with it a great deal of responsibility, requiring effective management skills. Success is achieved by overcoming the technical and human relations obstacles that arise in all phases of the projects. I carefully reviewed the files and other information on these projects and, in spite of your explanations, I am unable to conclude that there were extraordinary challenges or obstacles that had to be overcome by you as the Supervisor of the Regional Project Officers. You did not deal with the projects in a results oriented manner and this is unacceptable for a person in your position.

[43] It appears to me from reviewing the correspondence referred to above that the Applicant focussed his response to Lovely on showing how certain delays and problems arose and what steps he took to deal with them as well as what other individuals and factors intervened. He addressed his own actions in the context of what a similar professional would do in similar circumstances to deal with the same problems. Lemax, though, appears to have judged the Applicant against a broad standard by which all problems are anticipated and successfully resolved without affecting the project. That standard appears also to have been adopted by Lovely in the termination letter.

[44] The point is that the Applicant was not advised that that was the standard against which he was being judged and was not given the opportunity to make submissions about it. He was not told what standard his work performance would be judged against and was not given the opportunity to be "heard" either about the standard itself or whether his performance measured up to it. In *Knight v. Indian Head School Division No. 19*, L'Heureux-Dubé J. said that in an employment context, one of the purposes of imposing on an administrative body a duty to act fairly is to enable the employee to try to change the employer's mind about the dismissal. I am not satisfied that the Applicant in this case was given that opportunity in an effective way.

[45] The Respondents' argument is that the Lemax memorandum raised nothing new to which the Applicant could reply which would have made a difference to the outcome. With respect, however, the issue is not whether anything the Applicant could have said in reply to the Lemax memorandum would have changed the outcome. The issue is whether the procedure used in terminating the Applicant's employment was a fair one.

[46] The words of Le Dain J., speaking for the Court in *Cardinal*, *supra*, are relevant:

> ... I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as

> an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

[47] The Applicant also argued that the Respondents failed to disclose to the Applicant whether his past work record was taken into account. Although the February 17 letter from Lovely refers to past problems, the termination letter makes no reference to them. It is not clear whether Lovely took those past problems into account when making the decision to terminate. His February 17 correspondence suggests that he may have. The *Employee Discipline Guidelines* of the Government of the Northwest Territories which form part of the record and which were disclosed to counsel for the Applicant as containing the procedure which would be followed in considering dismissal say that the employee's past record should be considered. However, counsel for the Respondents took the position that Lovely had not considered the past record since it was not referred to in the termination letter.

[48] It is not necessary for me to decide whether Lovely did or did not take into account the Applicant's past work record. Had the February 12 memorandum from Lemax to Lovely been disclosed to the Applicant as it should have been, the Applicant would have been alerted to the fact that Lovely had before him information about specific dates when problems with the Applicant's work were raised. Instead, the Applicant had only the rather vague statement in Lovely's February 17 letter that, "You have been advised that there have been problems related to the management of projects in the Inuvik Region in past years". Again, and particularly considering the fact that his counsel had asked for, but did not receive, disclosure of Lemax's recommendation, there was a lack of fairness.

[49] The fact that Lemax discussed the past problems with the Applicant when they met on February 11 does not cure the failure to disclose to the Applicant the material that was considered by Lovely. Nor does the fact that the Applicant was obviously aware of problems in the past cure the failure. What is important is that the Applicant did not know whether Lovely was considering those problems in deciding whether to dismiss him.

[50] I find therefore that the Respondents' failure to disclose to the Applicant the documents authored by Lemax amounts to a denial of procedural fairness which is

aggravated by the fact that the Applicant's counsel had made a request for such materials and was assured materials would be provided to him.

[51] The memorandum about the project shortfalls should also have been disclosed, although it is not related to the performance standard and I would not have found unfairness for failure to disclose it alone.

*Was authority to dismiss properly delegated to Lovely?*

[52] The final issues raised by the Applicant are whether the authority to dismiss was properly delegated to Lovely and whether there was an appearance of bias because of Lovely's position as Deputy Minister. I find no merit in these arguments and they can be disposed of quite briefly. The *Public Service Act*, in s. 4, provides that the Minister



may authorize an employee to exercise and perform, subject to the terms and conditions that the Minister directs, any of the Minister's powers, functions and duties under the *Act*, other than those in relation to appeals under s. 29. Since the power to dismiss has nothing to do with an appeal, clearly the Minister is enabled by s. 4 to delegate his power to dismiss.

[53] The *Act* does not prescribe the form that the authorization from the Minister to an employee must take. In this case, counsel for the Respondent presented a document in which the Secretary of the Financial Management Board proposed to the Minister (as Chairman of the Financial Management Board and Minister Responsible for the *Public Service Act*) that certain of the Minister's functions, including dismissal of employees, be delegated to Deputy Ministers. The document states that should the Minister approve the delegation, certain processes and steps will be put into place, including training and consultation programs. From my reading of the document, it appears that any such programs and any other steps would follow the delegation itself, as opposed to being conditions of the delegation taking place. The Minister signed his approval and agreement to the proposed delegation. Upon so doing, he effectively delegated to Deputy Ministers of the Government his authority to dismiss employees. He therefore delegated that authority to Lovely as Deputy Minister of the relevant Department.

*Was there an appearance of bias because of Lovely's position?*

[54] As I understand the Applicant's argument about bias on the part of Lovely, it is that Lovely, by making statements in the termination letter about the performance level

required of a project manager, became what counsel called a "witness to management philosophy" and was therefore biased. However I see Lovely's references to the standard of performance simply as statements of the standard expected of the Applicant and against which his performance was measured. I do not see how, where the employer is the decision-maker, the fact that the employer has a view as to the standards to be met by the employee can create bias. In my view, the real problem is that Lovely did not disclose to the Applicant the standard against which his performance was being judged.

*Conclusion*

[55] In conclusion, the procedure by which the Applicant was dismissed lacked fairness by reason of the failure to disclose to him documents that were before Lovely. On that basis I grant the application and quash the notice of dismissal.

[56] Costs normally follow the event. However, should counsel wish to make submissions on costs they may do so by arranging to address the matter in Chambers within 30 days of the date these Reasons for Judgment are filed or by filing written submissions, also within the said 30 days.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
28th of September 1998

Counsel for the Applicant: Austin F. Marshall
Counsel for the Respondents: Karan Shaner

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