Woodley v. Yellowknife Education District, 2000 NWTSC 30

Date: 2000 05 05
Docket: CV 08514

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DR. KENNETH F. WOODLEY

Applicant

- and -

YELLOWKNIFE EDUCATION DISTRICT NO.1

Respondent

Application for Judicial Review of Respondent's decision to dismiss the Applicant from employment.

Heard at Yellowknife, NT, on March 22 and 23, 2000

Reasons filed: May 5, 2000

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

Counsel for the Applicant: Austin Marshall
Counsel for the Respondent: Adrian Wright

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DR. KENNETH F. WOODLEY

Applicant

- and -

YELLOWKNIFE EDUCATION DISTRICT NO.1

Respondent

REASONS FOR JUDGMENT

[1] As a result of my decision in *Woodley v. Yellowknife Education District No.1*, 1999 NWTSC 1 (CV 08329), the Respondent continued its dismissal proceedings against the Applicant and has now terminated his employment as its Superintendent of Education. The Applicant now seeks judicial review of the proceedings which resulted in the resolution to dismiss him and an order quashing that resolution.

[2] The issue on this application is not whether the Respondent had cause to dismiss the Applicant or whether it made the right decision. The issue is whether the procedure it used was fair.

[3] The events may be summarized as follows. On October 1, 1999, my judgment in *Woodley v. Yellowknife Education District No.1*, 1999 NWTSC 1 (CV 08329) (which I will refer to as my earlier judgment) was filed. As a result of that judgment, which quashed the Respondent's resolution suspending the Applicant, the Applicant returned to work on October 6, 1999. On that date, he received written notice that a special meeting of the Respondent's Board had been scheduled for that same evening to consider a personnel item. Reference was made in the notice to "a recent judgment regarding the suspension of Superintendent Ken Woodley".

[4] The Applicant attended the October 6 meeting. The Board went into an in camera meeting from which the Applicant was excluded. When the Board came out of the in camera portion of the meeting, it unanimously passed the following motion:

> "that the Board will provide by Friday, October 8th, 1999, a report indicating reasons for dismissal of Dr. Ken Woodley as Superintendent of Education for Yellowknife Education District No.1. Dr. Woodley will have until Friday, October 15th, 1999, by 4:00 p.m. to provide a written response to the report. The Board will at that time review the response and make a final decision regarding dismissal on Tuesday, October 19th, 1999. Also during this time period, Dr. Woodley be allowed time-off with pay in order to prepare his written response."

[5] On October 8, 1999, the Board's chairperson delivered a report to the Applicant. The report was entitled "Report of Chairperson Dan Schofield Regarding Dismissal for Cause of Superintendent Dr. Ken Woodley". It was signed by Mr. Schofield and contained his recommendations to the Board, to which I will refer further on.

[6] The Applicant delivered his written response to the Schofield report on October 15, 1999.

[7] By notice dated October 14, 1999, the chairperson called a special meeting of the Board for October 19,1999 to deal with the Applicant's employment status.

[8] At the October 19 meeting the Board went in camera with its lawyers to discuss the item concerning the Applicant, who was excluded from that portion of the meeting. The minutes of the meeting which form part of the record show that the Board went in camera at 7:20 p.m. and moved out of camera at 9:45 p.m. A motion was subsequently passed which was recorded as follows:

> In response to concerns about procedural fairness expressed in Dr. Woodley's October 15, 1999 response to Chairman Dan Schofield's report, Chairperson Dan Schofield did not participate in the discussions on the personnel issue. Dan Schofield did not vote on the personnel issue.
>
> LOAN/BROOKES. "That Superintendent, Dr. Kenneth Woodley be terminated from employment as Superintendent of Yellowknife Education District No.1 effective immediately. The termination of Dr. Woodley's employment shall be for cause. Dr. Judith Knapp is appointed Interim Superintendent of the district. The Chairperson is authorized to effect all necessary transitional arrangements including obtaining all District property

from Dr. Woodley, terminating Dr. Woodley's access to all District property and allowing Dr. Woodley to retrieve his personal belongings from District premises."

M. Loan requested a recorded vote.

For: D. MacDonald

W. Bisaro

T. Brookes

M. Loan

B. Patterson

Carried unanimously.

W. Bisaro requested that the minutes reflect the following. The group was presented with three options and spent considerable time discussing all options before eliminating the other two.

[9] The Board filed on this application an affidavit of Board member Wendy Bisaro deposing that the three options presented to the Board and referred to in the minutes of the October 19, 1999 meeting were the following: dismissing the Applicant for cause, dismissing him without cause and not dismissing him; that is, allowing him to continue his employment.

[10] After the Board passed the motion, its vice chair gave the Applicant a letter dated October 19, 1999, which read as follows:

Re: Employment with the Yellowknife School District No.1

This is to advise you that your employment with Yellowknife School District No.1 herein called "the District" is terminated effective immediately. The District has the following cause for your termination:

1. You were found by the investigator, Shannon Gullberg, to have authorized a breach of the Child Abuse Protocol and the Child Welfare Act by requiring Linda Takacs to consult management before reporting an allegation of child abuse. Furthermore, the proposed procedure which you developed for the future reporting of child abuse

allegations would have required such consultation before any further reports were made.

2. You dishonestly failed to advise the Board of the District that District funds were being used to pay Austin Marshall to perform services which you knew or ought to have known would not have been approved by the District.

3. You dishonestly failed to advise the District Board when asked about an offer to settle made by the Defendant, Laurie Sarkadi in the litigation Woodley v. Sarkadi.

4. You were insubordinate in that you failed to follow the Board's direction to co-operate with Shannon Gullberg in the course of her investigation of the Child Abuse Protocol.

5. Generally, you have been insubordinate and disrespectful toward the Board of the District throughout your course of employment with the District but, especially, during the course of the last year.

6. In such other matters as may be established by the Board should this matter proceed to trial.

I have been authorized by the Board to obtain all the District property from you immediately. Furthermore, I will arrange with you to remove your personal effects from your office in the District office at a time that is convenient to you and the Board.

Yours truly,

"D.MacDonald"

"for": DAN SCHOFIELD

[11] The Applicant argued that these dismissal proceedings were unfair for the following reasons:

1. The Schofield report did not comply with the hearing process prescribed by the Board;

2. The Schofield report did not comply with directions I gave in my earlier judgment;

3. The Board considered options that went beyond the terms of reference in the dismissal proceedings;
4. The Board failed to hold an oral hearing;
5. The Board deferred to advice from the Minister of Education, Culture and Employment to discipline the Applicant based on the findings in the Gullberg report and relied on the Gullberg report without conducting its own investigation into the allegations contained in it;
6. The Board considered the financial consequences of termination without cause, which were irrelevant;
7. Board members Bisaro and Schofield were biased;
8. The involvement of Mr. Schofield tainted the proceedings.

[12] The Respondent takes the position that the proceedings complied with the requirement for fairness as set out in *Knight v. Indian Head School Division No.19*, [1990] 3 W.W.R. 289 (S.C.C.) and in my earlier judgment.

[13] I have already reviewed much of the background of this matter in my earlier judgment. The Applicant was employed by the Respondent as its Superintendent of Education under an ongoing contract subject to annual review. That contract provided that the Respondent could terminate the Applicant's employment for cause at any time and without notice. The Respondent could also terminate without cause on twenty-four months' notice or salary in lieu thereof plus two additional months' notice or salary in lieu thereof for each complete year of service, not exceeding thirty-six months' total salary. The Applicant could terminate the contract on ninety days' notice

[14] There is no statutory provision governing termination of the employment of the Superintendent, nor does the Applicant's contract provide for any particular process other than with respect to notice as set out above. Accordingly, it is the common law that governs.

<u>The Duty of Fairness</u>

[15] The Respondent is a public authority established by regulation under the *Education Act*, S.N.W.T. 1995, c.28. It operates through a Board of elected members. The position of Superintendent is also created by the Act and accordingly the Superintendent is a holder of public office.

[16] As I noted in my earlier judgment, Canadian law has developed the principle that a duty of procedural fairness lies on public authorities making decisions which affect the rights, privileges or interests of individuals. The content of that duty will vary depending on the situation. It is based "on a number of factors including the terms of the statute pursuant to which the body operates, the nature of the particular function of which it is seized and the type of decision it is called upon to make": *Old St. Boniface Residents Association Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 at 1191 per Sopinka J.

[17] The Board's duty under the *Education Act* is to administer the school district. It is the employer of the Superintendent. As his employer, it was engaged in making a decision whether to continue his employment. The Board members had worked with the Applicant as Superintendent for some time and their relationship with him was marked by a number of difficulties, as is clear from both the Schofield report and the response to it by the Applicant.

[18] The Board had the right under the contract to dismiss the Applicant with or without cause. If it wished to exercise its right to terminate without cause, it had to comply with the notice requirements or in lieu thereof the financial provisions.

[19] In my view, the fact that this was an employer-employee relationship is relevant to the content of the duty of fairness. As I stated in my earlier judgment, and at the risk of repeating some of what I said there, it is important to distinguish between cases where an employer is dealing with its own employee and those where the administrative body making the decision is truly an impartial tribunal charged with the task of choosing between competing interests. An arbitrator under a collective agreement would fall into the latter category, as would a tribunal sitting on appeal from the decision of another administrative decision-maker.

[20] The Supreme Court of Canada dealt with the duty of fairness in an employer-employee relationship involving a public authority in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. In that case, a police constable was dismissed from his employment without notice and without being told the reason why. The governing statute permitted the Board of Commissioners to dispense with the services of any constable within eighteen months of his becoming a constable and did not provide for a hearing. The majority of the Court held that the police constable was a holder of public office, that he did not hold office during pleasure and that he fit more closely into the third class of dismissal in the classification formulated by Lord Reid in *Ridge v. Baldwin*, [1964] A.C. 40, where there must be cause for dismissing him.

[21] The content of the duty of fairness was described as follows by then Chief Justice Laskin for the majority in *Nicholson* (at page 328):

> In my opinion, the appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to respond. The Board itself, I would think would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination. Once it had the appellant's response, it would be for the Board to decide on what action to take, without its decision being reviewable elsewhere, always premising good faith. Such a course provides fairness to the appellant, and it is fair as well to the Board's right, as a public authority to decide, once it had the appellant's response, whether a person in his position should be allowed to continue in office to the point where his right to procedural protection was enlarged. Status in office deserves this minimal protection, however brief the period for which the office is held.

[22] More recently, in *Knight*, *supra*, the Supreme Court of Canada dealt with the content of the duty of fairness where a school board terminated the employment of its director of education, who, under the terms of his contract, could be dismissed with or without cause. In *Knight*, L'Heureux-Dubé J. speaking for the majority said that whether the employee can be dismissed with or without cause, one of the purposes of requiring that the public body which is the employer act fairly is the same, i.e. "enabling the employee to try to change the employer's mind about the dismissal". The content of that duty, according to both *Nicholson* and *Knight*, is minimal, consisting of the giving of notice of the reasons for the employer's dissatisfaction with the employee's performance and affording him the opportunity to be heard.

[23] In *Knight*, Her Ladyship also stated (at p.313): "It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair".

[24] The Applicant in this case argued that the principles in *Knight* should be restricted to cases of dismissal without cause. That is not how I understand *Knight*, particularly

when one considers the statement referred to above about the common purpose of the requirement that the employer act fairly in cases of termination with and without cause. And certainly *Nicholson*, which dealt with the duty of fairness in a case which did involve termination for cause, prescribes a level of fairness which is very like that described in *Knight*.

[25] In *McColl v. Gravenhurst (Town)* (1998), 11 Admin.L.R. (3d) 235 (leave to appeal to the S.C.C. refused January 7, 1999, Doc.26845), the Ontario Court of Appeal dealt with the content of the duty of fairness when a municipal council held a statutorily required hearing regarding dismissal of its chief administrative officer. In dealing with an allegation of bias, Goudge J.A. said the following about the duty to act fairly in the particular circumstances:

> There is another powerful reason for applying the *Old St. Boniface* test for bias in this case rather than the more stringent standard required of a decision maker more akin to a court. Not only is it municipal councillors who are required by the statute to hold the hearing and then decide. In addition, the town council holding the hearing is the employer of the officer and will be holding the hearing only because it has reached the tentative view that it must consider the officer's dismissal. The hearing required by s.99(2) of the Act is not an adjudication by an independent tribunal of the employer's decision to dismiss. Rather, it is the officer's opportunity to try to change the employer council's mind as to the possibility of dismissal. A hearing will only be held where there has been some prejudgment. The Legislature, in requiring a hearing, could ask no more of the town council than that it be capable of being persuaded that the dismissal was not necessary. Indeed, this requirement is consistent with the elements of the duty to act fairly as described in *Knight v. Indian Head School Division No.19*, [1990] 1 S.C.R. 653 (S.C.C.), particularly at 680.

[26] In determining the nature and extent of the common law duty of fairness in a particular case, it is clear that one of the considerations is the importance of the decision to the individual or individuals affected: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. The importance of the right to retain one's employment was expressly recognized in *Knight* as a factor giving rise to procedural fairness in cases of dismissal. Still, L'Heureux-Dubé J. viewed the content of the duty of fairness as "minimal" (at p.312):

> In the case at bar the Saskatchewan Court of Appeal found that the basic requirements of the duty to act fairly are the giving of reasons for the dismissal and a hearing, adding that the content will vary according to the circumstances of each case. Since the respondent could be dismissed at pleasure, the content of the duty of fairness would be minimal and

> I would tend to agree that notice of the reasons for the appellant board's dissatisfaction with the respondent's employment and affording him an opportunity to be heard would be sufficient to meet the requirement of fairness. The court in *Nicholson*, supra, at p.328, per Laskin C.J.C. for the majority, found similar requirements to be sufficient in a case where the employee was dismissible from office only for cause.

[27] Having regard to these authorities and the fact that in this case the Board had, under the contract, the right to dismiss the Applicant for or without cause, I conclude that the content of the duty of fairness is the giving of notice for the Board's dissatisfaction and an opportunity for the Applicant to be heard.

[28] I now turn to the Applicant's submissions on the procedure used in this case.

Did the Schofield report comply with the hearing process prescribed by the Board?

[29] The Applicant submits that the Schofield report did not comply with the hearing process that the Board had said would be followed because it was the report of the chairperson alone, not that of the Board. Consideration of this argument necessitates a review of some of the statements made by or on behalf of the Board about this.

[30] By letter dated June 17, 1999, then counsel for the Board wrote to the Applicant's counsel that the Board's personnel committee would prepare a report which would, "recommend that the chairperson in consultation with legal counsel commence a process leading to dismissal for cause. This would include setting out in a letter the allegations of cause along with supporting documentation and allowing your client five days to make a written submission before the final decision is made by the board."

[31] On June 22, 1999, the Board passed a resolution accepting the recommendation of the personnel committee and authorizing the chairperson in consultation with legal counsel to commence the process leading to the dismissal for cause of the Applicant.

[32] In my earlier judgment, I declined to quash the dismissal proceedings which were put into place by the above resolution.

[33] The resolution which was passed on October 6, 1999, after the Applicant returned to his position as Superintendent, provided that, "the Board will provide...a report indicating reasons for dismissal of [the Applicant]".

[34] In the letter dated October 8, 1999, addressed to the Applicant and which accompanied the report, the chairperson, Dan Schofield, stated, "... I enclose a copy of my report ...".

[35] Board member Wendy Bisaro was cross-examined on her affidavit about how the report came to be done. After referring to the breakdown of the relationship between the chairperson and the Applicant, she stated that the chairperson was authorized by the Board to prepare the report and that to her "it was a Board report written by the Chair". When asked what direction the Board gave the chairperson with respect to preparing the report, Ms. Bisaro said that he was not given "carte blanche"; she described it instead as follows:

> Quite often the Board will authorize generally the Chair to do something and basically say, Go away and do it and this is what we would like you to do, and I believe that was the direction that was given in this instance.

[36] She said that there had been work done prior to October 6 about putting together reasons for dismissal or a report on the Applicant's employment. She also said that it was not expected that the report would come before the Board before it was delivered to the Applicant.

[37] From all of this, it appears that the Board had input into the preparation of the report, that it directed the chairperson to prepare the report and to give it to the Applicant. I conclude that it was the Board's report in that it set out the Board's concerns as well as the concerns of its chairperson and that it was not something outside the contemplation of the resolutions to which I have referred.

Did the Schofield report comply with the directions in my earlier judgment?

[38] The Applicant submits that the resolutions which I have referred to authorized the preparation of a report on dismissal for cause only. The Applicant also points to the following portion of my earlier judgment:

> In my view, the Applicant is entitled to know, before he is heard on the issue, whether the Respondent does intend to proceed with dismissal for cause or without cause and, if it is the former, what specific actions on his part are alleged to constitute cause for dismissal. He is entitled to put forward his position on the alleged facts and to be heard on whether cause has been established. He is entitled to be heard as to the consequences that should flow from his contract should the decision be to dismiss him.

[39] As I have already noted, the resolutions passed by the Board leading up to the meeting on October 19, 1999, all refer to dismissal for cause. The report prepared at the Board's direction is entitled "Report of Chairperson Dan Schofield Regarding Dismissal For Cause of Superintendent Dr. Ken Woodley". The second paragraph on page 2 of the report, which itself starts with the heading "Report on Cause to Terminate Superintendent", says, "The report will provide the particulars of the cause including reference to any relevant documentation to enable Dr. Woodley and his counsel the opportunity to be heard by the board consistent with the legal duty of fairness".

[40] The report is divided into two main parts, entitled (I) Introduction, and (II) Grounds To Terminate For Cause. All of what I will call the "complaints" against the Applicant are listed under Part II. At the very end of Part II is a paragraph under the heading "Conclusion" and it is here that one finds Mr. Schofield's recommendation that the Board dismiss the Applicant for cause. Immediately thereafter one finds the following sentence:

> In the event the Board does (*sic*) accept the recommendation to dismiss for cause I recommend that the board utilize the clause in the contract of employment to terminate the contract without cause because of the irreparable damage which has occurred to the employment relationship which would make any further employment impossible.

[41] In argument, counsel for the Respondent took the position that the report mixes matters which do constitute cause with those which would not constitute cause. It may well be that among the complaints listed in the report are those which could not legally amount to cause. However, in my view, it is clear that the stated intention of the report was to list the complaints alleged to constitute cause for dismissal. The recommendation for termination without cause can only be read as a "fall back" position in the event that the Board decided not to terminate for cause (for example, in the event that it was

persuaded by the Applicant that some of the facts as set out in the report were wrong or that they did not amount to cause).

[42] The reason given for the recommendation for termination without cause was the irreparable damage to the employment relationship. Information about that allegation is located in the report's subsections on "Relationship with the Board" and "Management Style", among others. I infer that Mr. Schofield, the author of the report, may not have been certain whether the various complaints could amount to cause or whether the Board would accept them as cause and he wanted to put the option of dismissal without cause on the table.

[43] The real question is whether the options to be considered by the Board would have been clear to the Applicant. In my view, they would have been clear.

[44] The report does not contravene the direction I gave in my earlier judgment. That direction was given at a point in the proceedings when all indications were that the Board intended to proceed with dismissal for cause. The main thing was that the Board make clear what its intentions were. As it turned out, the report did make it clear that both dismissal for cause and dismissal without cause would be considered. It was open to the Applicant, in response, to state his position on the alleged complaints, on whether they amounted to cause and on what should happen if they did not amount to cause. It was also open to him to present his views on whether he should be dismissed without cause.

[45] I bear in mind that most of what was in the report was already known to the Applicant and had been presented to him through the affidavits filed on the earlier judicial review application. It is also clear that the Applicant understood that the report contained recommendations for dismissal for cause and without cause; he refers to this in the introduction to his response to the Board's report.

[46] The Applicant having been made aware that at the October 19 meeting the Board would be considering dismissal for cause and dismissal without cause, I find that he was not prejudiced by the fact that the report contained the two recommendations.

[47] Counsel for the Applicant argued that the insertion of the "without cause" option into the Board's consideration would indicate to the Applicant that the Board was not serious about the "with cause" option and that had they been willing to consider dismissal

without cause they would not have gone into all of the very serious allegations against the Applicant.

[48] There is no indication, however, in the Applicant's response to the Schofield report that he was led to view the allegations of cause as being less serious because of the alternate recommendation for dismissal without cause. Some of the allegations, such as dishonesty and misleading the Board, are such that it would not have been reasonable for him not to take them seriously. It is speculation to say that the Board need not have gone into all of the allegations had it really wanted to deal with the matter as a dismissal without cause. The irreparable damage to the relationship that was cited as the reason the Board might dismiss without cause is directly related to the specific allegations about the Applicant's dealings with the Board so that it is likely that some reference would have been made to them in any event.

Did the Board consider options that went beyond the terms of reference in the dismissal proceedings?

[49] The Applicant submits that in the in camera hearing the Board considered options other than dismissal for cause and therefore went beyond the notice that had been given in the dismissal proceedings.

[50] As far as what took place during the in camera hearing on October 19, 1999, there is little material before me. Both parties have to some extent asked that I speculate about what took place. Whatever did happen is uniquely within the knowledge of the Board, which provided only the minutes set out above and the affidavit of Wendy Bisaro, on which she was cross-examined. I will therefore assume that the relevant information is contained in these items and I will not speculate as to what else may have happened.

[51] On the question of the options considered by the Board, Ms. Bisaro explained that there were three:

(i) dismissing the Applicant for cause;
(ii) dismissing the Applicant without cause;
(iii) not dismissing the Applicant; that is, allowing him to continue in his employment as Superintendent.

[52] Counsel for the Applicant argued that one could interpret options (i) and (ii) to include as alternatives the possibility that the Applicant continue on as Superintendent and that option (iii) may have been something quite different, for example, that he continue on as Superintendent but on certain conditions.

[53] There is no evidence to support the existence of the suggested third option. When Ms. Bisaro was cross-examined on her affidavit, she referred only to the three options as I have set them out in (i) to (iii) above.

[54] Since one of the purposes of a hearing in a case like this is to allow the employee to try to change the employer's mind, the Applicant in responding would want not only to express his view on the complaints against him, but also to address the possibility of retaining his employment. That is exactly what the Applicant did. In the last few pages of his response, he speaks about some of the challenges he faced in his position and suggests how he and the Board might continue to work together despite the issues on which they are in conflict.

[55] I have already dealt with the inclusion of the option of dismissal without cause above and so need not consider it further here. In my view, it was open to the Board to consider that option, it having been put forward in the Schofield report.

[56] I conclude that the options were made clear to the Applicant and that there was no prejudice to his ability to respond to them. The fact that all three options referred to by Ms. Bisaro were not spelled out in the Board resolutions preceding the meeting on October 19 is not fatal because the Applicant was aware of the options through the Schofield report.

Should the Board have held an oral hearing?

[57] The Applicant says that an oral hearing should have been held because his honesty and credibility were impugned in the Schofield report, because he contested many of the factual allegations set out in the report and because in some instances the information in the report was incomplete or was not specific enough to allow him to respond adequately.

[58] That the Applicant's honesty and credibility were at issue is clear from the report itself and the letter of October 19, 1999, setting out the reasons for dismissal, among them that the Applicant dishonestly failed to advise the Board about the use of funds to

pay legal fees relating to the Sarkadi litigation and dishonestly failed to advise the Board about an offer to settle that litigation. These are very serious allegations, which, if true, will certainly have an adverse impact on the Applicant's future employment prospects. They were strenuously denied by the Applicant, as were many of the other allegations in the report.

[59] Initially, counsel for the Applicant submitted that the Board should have had an independent third party hold an oral hearing at which evidence would be presented and questioning of witnesses take place. He then made the further submission that an oral hearing could take place by way of evidence being presented to the Board by the chairperson, Mr. Schofield, and by the Applicant, after which the Board would make a decision. As I understand it, this proposal would exclude Mr. Schofield from the decision-making process.

[60] The Respondent, relying on my earlier judgment, argues that there was no obligation to hold an oral hearing. The Respondent also points out that the Applicant can challenge the alleged cause for his dismissal by way of a wrongful dismissal action, in which he will have the usual opportunities of discovery, cross-examination of witnesses at trial and presenting his own evidence.

[61] In the earlier judicial review application, the Applicant sought to quash the dismissal proceedings that were underway prior to my judgment of October 1, 1999, and asked that, if I ruled the dismissal proceedings could continue, I order that an oral hearing be held by the Board. In the judgment on that application, I referred to the words of L'Heureux-Dubé J. in *Knight* at pp.313-314. In summary, she said that the employee must have knowledge of the reasons for his dismissal and an opportunity to be heard by the employer and that the employer may decide for itself whether to "hear" by way of oral hearing or written evidence and argument. I held that the duty in this case was set out in *Knight* and that the Board was not obliged to hold an oral hearing when considering dismissal of the Applicant.

[62] The requirements set out by L'Heureux-Dubé J. are minimal ones. My ruling did not prevent the Board in this case from holding an oral hearing; I simply said that it did not have to proceed that way.

[63] It seems to me that, on being confronted with the Applicant's adamant denials that there was any dishonesty in his dealings with the Board regarding the legal fees and the

settlement offer, as well as his denials with respect to some of the factual allegations and his statements that some were not sufficiently clear, the Board had a choice. It could have provided him with further information if it had any; it could have decided to hear from those who made the allegations, or from the Applicant, or both; it could have inquired further into the allegations and put off a final decision until it had done so and allowed the Applicant to respond to whatever its further inquiries might reveal. Or, as in fact happened, the Board could simply have proceeded to make a decision, knowing that if it dismissed for cause it might be called upon to prove that cause in a suit for wrongful dismissal.

[64] Most of what was in the Schofield report was known to the Applicant previously because it was contained in affidavits filed on the earlier application. There is nothing new in the factual allegations which forms a basis upon which I should revisit my earlier ruling that an oral hearing was not required.

[65] The Applicant argued that whenever credibility is an issue, an oral hearing should be held. I disagree; I think one has to look closely at the nature of the administrative body and its relationship to the party or parties involved in the issue, as well as the nature of the decision it is called upon to make. Counsel for the Applicant relied on the case of *Khan v. University of Ottawa* (1997), 34 O.R. (3d) 536 (Ont.C.A.). The various factors I have just referred to were, however, quite different in *Khan* than in this case.

[66] In *Khan*, a student was given a failing grade on an examination. She claimed that she had completed a fourth examination booklet which the professor had not marked. The professor claimed not to have received a fourth booklet. The student appealed to the Examinations Committee by delivering a letter setting out her account of the missing booklet. The Committee met in her absence and denied her appeal. She applied for judicial review.

[67] The Ontario Court of Appeal concluded that the Committee should have given Ms. Khan an oral hearing because her credibility was a critical issue on her appeal. Laskin J.A., for the majority, stated that this would involve a hearing in which Ms. Khan had an opportunity to appear in person before the Committee and an opportunity to make oral representations to it. If the Committee believed her when she said that she had completed a fourth booklet at the examination, it would have to allow her appeal.

[68] In coming to his conclusion, Laskin J.A. referred to a decision of Doherty J. in *Masciangelo v. Spensieri* (1990), 1 C.P.C. (3d) 124 (Ont.H.C.J.), where an application for summary judgment was refused. In referring to the advantage a trier of fact has in hearing and seeing witnesses when the issue is credibility, Doherty J. said the following:

> Where the outcome of a lawsuit hinges on the assessment of credibility, a trial in which evidence is called and the competing stories are told and challenged before a trier of fact has traditionally been viewed as the ideal forum. This is so, not only because the trier of fact has the advantage of hearing and seeing the witnesses, but also because the parties are given their day in court during which they have the oportunity to present their entire case, face the judge, and tell their story. The quality of justice is measured not only by the accuracy of the result reached but by the way that result is reached. That quality may suffer if litigants are judged unworthy of belief by someone who has never seen them or heard them, but instead has examined only written material.

[69] Laskin J.A. stated that these observations applied to Ms. Khan's appeal to the Examinations Committee. Clearly, then, the concern was that Ms. Khan's credibility was judged by a committee of people who did not know her and had only her written statement before them.

[70] The relationship between the Applicant and the Board was quite different. The Board had worked with the Applicant for some time and he was well known to its members. So far as his credibility was an issue, the Board members had a basis upon which to assess it; they were not simply looking at a written statement made by someone unfamiliar to them about circumstances of which they had no knowledge.

[71] The Board is not an independent arbitrator or trier of disputes. It is in the business of administering the school district for which it is responsible. It is also the employer of the Superintendent and familiar with his work performance. It should not be held to the same standard of hearing as an independent tribunal. The Board's obligation was to hear what the Applicant had to say about the complaints. It was not required to prove anything to him. That is not to say that the Applicant will not have the chance to challenge the complaints. If he does bring a suit for wrongful dismissal, he will have the right to require that the Board prove its case.

[72] In his response to the Board, the Applicant provided explanations for, among other things, the legal fees billed to the Board, his reaction when he was asked about a settlement offer in the Sarkadi litigation and why he did not wish to be involved in the Gullberg investigation. The Board obviously chose not to accept these explanations and

his denials regarding other complaints. In doing so, the Board was essentially making a decision about its relationship with its senior employee. That is quite different from an Examinations Committee making a decision about whether to accept a version of events told by a student with whom it has no prior relationship.

[73] The final point to consider is whether an oral hearing should have been held to address those complaints as to which the Applicant responded that insufficient information had been provided in the Schofield report.

[74] The complaints in question are found mainly in commentary in the Schofield report about the Applicant's relationship with others and the reporting of statements made by others about things said or done by the Applicant.

[75] The Applicant's response was very clear in pointing out the lack of factual detail in certain instances (for example, the complaint that he made "disturbing" comments to an employee's wife) and the possibly flawed reasoning in others (for example, the complaint that it was due to his allegedly poor relationship with City councillors that a school did not receive funding for a gymnasium). The Board members would certainly have realized that some of the reported statements contained in the Schofield report were lacking detail or might be subject to interpretation or might benefit from some context. However, once the Applicant had pointed out the report's shortcomings, it was for the Board to decide whether to make further inquiries or simply proceed to make a decision on dismissal.

[76] I also note that none of the complaints about which the Applicant expressed concern over a lack of information were listed as a cause for dismissal in points 1 to 5 of the October 19, 1999 termination letter. Point 6 in that letter is, in my view, of no relevance to this judicial review application, although it may become relevant in any proceedings taken for wrongful dismissal.

[77] I do not think it can be said that the Applicant was unable to respond to the complaints in the Schofield report and accordingly I do not view it as unfair that the Board did not proceed to an oral hearing when the Applicant pointed out the lack of detail in some of the complaints

[78] I conclude therefore that in all the circumstances the Board was not required to hold an oral hearing and the lack of same is not a basis upon which to quash the decision to dismiss.

Did the Board defer to advice from the Minister of Education, Culture and Employment and the findings in the Gullberg report?

[79] The Applicant submits that in deciding to dismiss him, the Board simply adopted the Gullberg report without any independent investigation or consideration of the allegations and findings it makes against him. He also submits that the Board deferred to advice from the Minister that something had to be done about him, again without making an independent assessment of the situation. The end result, he argues, is that the Board did not make the decision.

[80] Ms. Gullberg was appointed by the Minister in late 1998 to review the implementation of a child abuse reporting protocol. She found that the Applicant had violated the protocol and the *Child Welfare Act* and that he had taken certain actions which were not in keeping with the spirit and intent of the protocol. The specific incident that was at issue occurred in 1997, although there is also reference in her report to conversations she had with the Applicant sometime after that. Ms. Gullberg's report was made available to the Board by the Minister in May of 1999. At that time, the Minister told the Board that the Gullberg report identified a serious personnel problem and that the Minister wanted something done about it (or words to that effect).

[81] The Applicant also submits that in making findings against him, Ms. Gullberg exceeded the scope of the review she was authorized to conduct. I am not persuaded that this is so. The Terms of Reference of her review directed her to examine the processes and procedures used by the Respondent in the application of the protocol and the handling of complaints as well as the actions taken by the Respondent to assure implementation of the protocol. This would necessarily involve an examination of what the Respondent's senior employee, the Applicant, had done and whether it was in keeping with the protocol.

[82] In my view, the Gullberg report was a piece of information which the Board was entitled to consider if it saw fit, so long as it gave the Applicant the opportunity to address it. In her report, Ms. Gullberg made no decision or recommendation about the Applicant's employment; she addressed only his actions in specific circumstances and in relation to the requirements of the protocol and the *Child Welfare Act*.

[83] The Applicant chose to respond by pointing out that the findings in the Gullberg report were the opinion of Ms. Gullberg and that he viewed her investigation as an invasion into his defamation action against Ms. Sarkadi, which was related to the same matters investigated by Ms. Gullberg. He urged the Board to draw no inferences from her report.

[84] The Board accepted the Gullberg report findings; the first ground set out in its letter of dismissal states that the Applicant was found by Ms. Gullberg to have authorized a breach of the child abuse protocol and the *Child Welfare Act*. It relied on Ms. Gullberg's information and findings as to the Applicant's conduct. It did not, either expressly or by implication, delegate to her the ultimate decision it had to make as was done in *Vine v. National Dock Labour Board*, [1956] 3 All E.R. 939 (H.L.) and *Muliadi v. Canada (Min. of Employment and Immigration)* (1986), 18 Admin.L.R. 253 (Fed.C.A.), the cases cited by the Applicant.

[85] Once again bearing in mind that the Board could dismiss the Applicant with or without cause and that it is not my function on this judicial review application to determine whether the Board in fact had cause for dismissal, I find that the Board did not have to make an independent investigation into the allegations in the Gullberg report. In a different context, in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, the Supreme Court of Canada found that the duty of fairness which arose when a prison warden decided to continue segregation of inmates against the recommendation of the applicable classification board did not require the warden to conduct an independent inquiry into the incident which led to their segregation and he was entitled to rely on information he had received from other persons about the incident. At the same time he had a duty to hear and consider what the inmates had to say about their alleged involvement in that incident. Although the context is completely different from this case, I think the same principle applies such that the Board was not required to make an independent investigation in making the decision to dismiss. What the consequences of that may be are for determination in a wrongful dismissal action if there is one.

[86] Similarly, any statements made by the Minister were simply information and advice. The fact that the Minister felt there was a problem and urged the Board to do something about it does not mean that the Board let the Minister make the decision to dismiss. There is no evidence that the Minister had any involvement after the May meeting or that the Board felt that it had to do what the Minister had suggested or even

that it considered the Minister's statement as a direction to dismiss the Applicant. There is no evidence that the Board deferred to the Minister instead of making its own decision.

[87] The Gullberg report and the Minister's comments are but two of a number of circumstances leading up to the Applicant's dismissal. I find that they constitute information available to the Board and which the Board could consider in making its decision. There is no basis upon which to say that it was Ms. Gullberg or the Minister who made the decision rather than the Board.

Did the Board consider the financial consequences of termination without cause and if so, was that an irrelevant consideration?

[88] The Applicant submits that the Board wanted to dismiss him for cause so that it would not have to pay him his severance entitlement under the contract. He submits that this was an irrelevant consideration akin to a pecuniary bias and is a ground upon which the dismissal should be quashed.

[89] The evidence is that some Board members thought that the Applicant's severance entitlement was overly generous. The Board had, at an earlier date, attempted to convince the Applicant to resign with a payout package less than what he was entitled to under the contract. I accept that money was a consideration in the Board's decision to pursue the issue of cause rather than simply to dismiss without cause and pay the Applicant the amount under his contract.

[90] Having decided to pursue dismissal for cause, it seems to me that unless it is shown that the Board acted in bad faith in the sense of not believing that it had cause but acting as if it did only to avoid paying the Applicant, the Board's decision is not tainted by any initial financial considerations. There is no evidence that the Board did not believe that it had cause to dismiss the Applicant. Whether it was right is not the issue.

[91] On the question of pecuniary bias, I see no difference between this case and *McColl v. Gravenhurst (Town), supra*. There, Mr. McColl, the chief administrative officer, was dismissed by the town council, which hired Mr. Weingard in his place. On judicial review, it was held that the town council had failed to give Mr. McColl a hearing and so a hearing was convened, which resulted again in Mr. McColl's dismissal. Mr. Weingard remained in his position throughout.

[92] On appeal from a further unsuccessful judicial review application, the Ontario Court of Appeal said the following (at p.242):

> The appellant also suggested that because of the potential cost to the town of terminating Mr. Weingard's contract, the town council had a financial interest in his dismissal decision, and that this also constituted disqualifying bias. This argument is without merit. A financial interest can only constitute disqualifying bias it if attaches to the councillors in their personal capacity. That is not this case.

[93] The same can be said here. Dismissal without cause would lead to financial consequences under the contract that dismissal with cause would not. There may have been a financial interest, but it was not one attaching to the Board members in their personal capacity. Thus there was no disqualifying bias.

Was there bias on the part of Board members Bisaro and Schofield and did the involvement of Mr. Schofield taint the proceedings?

[94] It is convenient to deal with both of these issues together.

[95] In my earlier judgment, I ruled that the Applicant had not shown that members of the Board were biased in the sense of having opinions which could not be dislodged or having taken positions which were incapable of change.

[96] The Applicant now argues that there is evidence that since my earlier ruling, Ms. Bisaro and Mr. Schofield have shown bias which ought to result in the quashing of the decision to dismiss.

[97] Again, I find the *McColl* case helpful, in which the Ontario Court of Appeal applied the *Old St. Boniface* test for bias where a town council held a statutorily-required hearing into the proposed dismissal of its chief administrative officer. The Court said in *McColl* that (at p.240):

> ... the town council holding the hearing is the employer of the officer and will be holding the hearing only because it has reached the tentative view that it must consider the officer's dismissal. The hearing required by s.99(2) of the Act is not an adjudication by an independent tribunal of the employer's decision to dismiss. Rather, it is the officer's opportunity to try to change the employer council's mind as to the possibility of dismissal. A hearing will only be held where there has been some prejudgment. The Legislature, in

> requiring a hearing, could ask no more of the town council than that it be capable of being persuaded that the dismissal was not necessary ...

[98] The requirement that a decision maker act without bias does not have a single fixed meaning but must be assessed in light of all the circumstances in which a decision is made: *McColl* and *Old St. Boniface*.

[99] In my view, the fact that the Board is the employer and it, or some of its members, will naturally therefore have formed an opinion about the desirability of dismissing the Applicant and the fact that the Board is composed of elected lay people who by statute have the responsibility of governing the education district and administering its educational affairs, means that the test for bias should be the same as that in *McColl* or at least no more stringent. Accordingly I disagree with the submission of the Applicant that the mere appearance of bias is determinative.

[100] I will deal first with the allegation of bias on the part of Ms. Bisaro.

[101] The Applicant relies on Ms. Bisaro's cross-examination where, in speaking of the October 6 meeting, when the motion was passed to present a report on the reasons for dismissal of the Applicant, she said that she felt that the relationship between the chairperson and the Applicant was irreparable and untenable, that the Applicant and the Board could no longer work together and that some sort of solution was needed to that problem. She also said that at that point she did not see any solution other than the severance of the relationship between the Board and the Applicant.

[102] She did not say, nor is there any evidence which suggests, that she would not consider any other solution that might be proposed. Indeed, at one point in her cross-examination she stated that she wanted the Board to have a thorough discussion of options at the October 19 meeting.

[103] The context has to be considered as well. At the point in question, October 6, 1999, the problems between the Board and the Applicant had been ongoing for at least five months, the Board having sought his resignation in early May 1999. There had already been one judicial review application. It should not come as a surprise if all the Board members felt that there were serious problems between the Board and the Applicant and had thoughts about what the solution should be.

[104] The evidence does not establish that Ms. Bisaro had taken a position which was incapable of chanage. It is quite the opposite; I understand her comments to mean that she was concerned that she could see only one option but wanted to make sure that all options were considered. She had not closed off the possibility of being persuaded that an option other than dismissal could work.

[105] Mr. Schofield's situation is quite different.

[106] Clearly, one of the problems was the poor relationship between chairperson Schofield and the Applicant, as can be seen from the above reference to Ms. Bisaro's cross-examination. In my earlier judgment, I noted that Mr. Schofield had already spoken in favour of the Applicant leaving his position. I stated that because Board members had expressed opinions on the issue of dismissal, the Board would have to be scrupulous to ensure that it does hear and consider what is presented to it by the Applicant.

[107] Notwithstanding the obviously difficult relationship between Mr. Schofield and the Applicant, the Board gave Mr. Schofield the task of preparing the report on the reasons for dismissal. It is fair to say that in the report, Mr. Schofield expressed some strong opinions and used some strong language.

[108] The Applicant raised the issue of bias on the part of Mr. Schofield in his response to the report, saying that as a result of the recommendations for dismissal for cause or dismissal without cause, "Clearly the Board Chair has his mind made up in this matter and his recommendation has come forward before having heard my responses to the contents of this "Report". Naturally, this leads to questions of procedural fairness once again." Later in his response, the Applicant expressed the concern that Mr. Schofield had already concluded the matter in making a formal recommendation to the Board.

[109] Ms. Bisaro raised a similar concern in an electronic message she sent to Mr. Schofield two days before the October 19 meeting and after reviewing the Applicant's response. She asked, "Are we compromised (in regard to the duty of fairness and bias) by the last paragraph of the report (your recommendation)?"

[110] The evidence before me does not reveal whether Ms. Bisaro received a response to that question prior to the October 19 meeting. The evidence as to what happened at the meeting is somewhat sketchy. The Applicant's recollection, which is not disputed, is that prior to going in camera on October 19, the Board tried to reach Mr.

Schofield by telephone but could not do so. The Board then went in camera and after emerging into public meeting again, made a motion for dismissal for cause which was passed unimously. The vice chair asked that the record note that out of concern for procedural fairness the chairperson had not taken part in discussion of the item concerning the Applicant's dismissal.

[111] Although the above is taken from the Applicant's recollection of the sequence of events, the minutes of the Board actually indicate that the chairperson was present by teleconference and that the announcement about him not taking part in discussion of or the vote on the personnel issue was made prior to the motion for dismissal. However, in my view, nothing turns on the apparent inaccuracy.

[112] As to what happened when the Board went in camera, there is only the evidence of Ms. Bisaro on her cross-examination. She conceded that it was possible that chairperson Schofield was reached by telephone only after the Board went in camera. Although admitting that she could not recall very much, she said she thought Mr. Schofield participated in a discussion as to whether he should participate in the discussion about the Applicant or the vote on any motion made. On re-examination, she said that anything that Mr. Schofield spoke about was at the beginning part of the meeting, which was an "information-sharing type session" as opposed to anything relative to the three options which were considered.

[113] Subsequent to the dismissal motion being passed, the Applicant was handed a letter signed by the vice chair over chairperson Schofield's signature block. This is the letter referred to above in which the reasons for dismissal were set out. The Applicant also says in his affidavit that after the motion he overheard discussion of the fact that a press release had already been prepared. Although counsel for the Board argued that there was no evidence as to when these documents had been prepared, in the absence of any evidence from the Board on that point, I will infer that they were prepared sometime before the meeting took place, at Mr. Schofield's direction and pending the Board's decision on dismissal.

[114] Clearly there was a degree of prejudment by Mr. Schofield. The question is whether it crosses the line into disqualifying bias.

[115] In my view, it does. The strong language and conclusions in the Schofield report itself, the fact that without even hearing from the Applicant, Mr. Schofield was prepared to present recommendations as to what the Board should do, the fact that he wanted and anticipated dismissal as the outcome and so had a letter of dismissal and press release ready, all indicate a mind closed to any option other than dismissal. These are indications that Mr. Schofield had firmly made up his mind. There is no evidence that suggests that he was capable of being persuaded that dismissal was not necessary.

[116] In my view, therefore, the Board acted correctly in not having Mr. Schofield participate in the decision to dismiss.

[117] The next issue is the effect of Mr. Schofield's presence by teleconference during the discussion about dismissal and his participation at the beginning of the discussion as well as his provision of the prepared letter of dismissal and press release. The Applicant argued that the dismissal decision should be quashed because of Mr. Schofield's involvement.

[118] Having considered all the circumstances, I have decided that Mr. Schofield's involvement does not taint the proceedings so as to require that the decision be quashed.

[119] First, I would distinguish this case from those such as *The Queen v. Huggins*, [1895] 1 Q.B. 563 and *International Union of Mine, Mill and Smelter Workers v. United Steel Workers of America, Local 2952*, (1964), 48 W.W.R. 15 (B.C.C.A.) cited by the Applicant. Those cases involved independent adjudicative tribunals. The same standards should not apply to the Board, which is an employer deciding whether to dismiss an employee.

[120] The mere presence of Mr. Schofield by teleconference during the in camera dismissal discussions does not taint them. While it may have been preferable for the sake of appearance that he be excluded, the test for bias as set out in *McColl* simply requires in my view that the member of the Board who has already made up his mind not take part in making the decision because he has, in effect, foreclosed any opportunity for the Applicant to be heard by <u>him</u>.

[121] Counsel for the Applicant placed much reliance on *Kane v. Board of Governors of University of British Columbia*, [1980] 1 S.C.R. 1105. In that case, the Board of Governors was sitting on appeal from a decision made by the President. The President remained with the Board while it was deliberating and provided the Board with some factual information. It was held by the Supreme Court of Canada that this

breached the rule that an adjudicator not hear evidence or receive representations from one side behind the back of the other. The Court did not criticize the fact that the President was present during the discussions, a situation which was the result of his being both the decision maker appealed from and a member of the Board hearing the appeal.

[122] Although I think it proper to distinguish between an appellate body and the Board in this case, I note that in any event it was not the President's presence that was held to be objectionable in *Kane*, it was his contribution of further information in the absence of the other party.

[123] The Applicant asks me to find that this case is the same as *Kane* because Mr. Schofield participated in what Ms. Bisaro described as an "information-sharing type session". I am not so certain that it is the same. For one thing, Mr. Schofield was not a party to a dispute being decided by the Board. He had not made a decision that was under appeal to the Board. I think that the only problem would be if Mr. Schofield gave the Board further reasons for dismissal of the Applicant not included in his report and without giving the Applicant a chance to address that information. However, as I understand the evidence given by Ms. Bisaro on her cross-examination, the discussion between the Board and Mr. Schofield was about whether he should participate in the decision about dismissal. I do not know exactly what Ms. Bisaro meant by an "information-sharing type session" and I am not prepared to speculate about what she meant. I think the only reasonable way to interpret her answers is that any such session was in relation to whether Mr. Schofield should participate, and not, to use Ms. Bisaro's words, "anything relative to the three options which were considered".

[124] Nor do I think that the mere presence of Mr. Schofield means that the remaining five Board members were not free to make their own decision. There is no evidence that Mr. Schofield exerted that much influence over them.

[125] The members of the Board had both Mr. Schofield's report and the Applicant's response before the meeting. They spent some two and a half hours at the meeting discussing what to do. I cannot see any basis for concluding that Mr. Schofield was able to influence the five who voted in such way that they closed their minds to any outcome but dismissal or that they would have been influenced by the letter of dismissal or draft press release that had been prepared.

[126] Even if it can be said that the prepared dismissal letter and press release left the impression on the Applicant that his fate had been determined before the in camera meeting, the question is not whether there is an appearance of bias but whether, as stated

in *McColl*, the Applicant has established that the Board members who made the decision were not capable of being persuaded that dismissal was not necessary. In my view, he has not established that.

Conclusion

[127] In summary, I conclude that it cannot be said that the Applicant was unaware of the complaints against him or the Board's concerns about his performance as Superintendent. He was given the opportunity to address those complaints and concerns and he did so in a clear and comprehensive manner. In all the circumstances, and considering that the Board could dismiss him either with or without cause under his contract, I find that the procedure followed, while perhaps not perfect, was fair and in accordance with the duty as set out in *Nicholson, Knight* and *McColl*.

[128] The application is therefore dismissed. If counsel wish to speak to costs, they may do so by arranging a date for that purpose through the Courtroom Services' Supervisor.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT, this
5th day of May 2000

Counsel for the Applicant: Austin Marshall
Counsel for the Respondent: Adrian Wright

CV 08514

IN THE SUPREME COURT OF
THE NORTHWEST TERRITORIES

BETWEEN:

DR. KENNETH WOODLEY

Applicant

- and -

YELLOWKNIFE EDUCATION DISTRICT NO.1

Respondent

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