Olah v. Commissioner of NWT, 2007 NWTSC 100 Date: 2007 11 28
Docket: S-1-CV2007000074

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

OTTO OLAH

Applicant

-AND-

THE COMMISSIONER OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE FINANCIAL MANAGEMENT BOARD AND AS REPRESENTED BY CHARLES DENT, MINISTER OF HUMAN RESOURCES

Respondents

Application for judicial review of decision to demote Applicant from his employment position.

Heard at Yellowknife, NT on September 19, 2007

Reasons Filed: November 28, 2007

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

Counsel for the Applicant: Barrie Chivers

Counsel for the Respondents: Brad Patzer

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REASONS FOR JUDGMENT

[1] This is an application for judicial review of decisions made by a Deputy Minister and a Minister of the Government of the Northwest Territories ("GNWT"), demoting the Applicant from his position as Director of Investment and Economic Analysis in the Department of Industry, Tourism and Investment.

[2] The Applicant submits that the procedure resulting in his demotion was unfair. He also submits that demotion in the circumstances is unreasonable. He seeks an order quashing the decisions demoting him and re-instating him in his position as Director.

[3] The Respondents' position is that the procedure that resulted in the Applicant's demotion was fair with one exception and the unfairness resulting from that exception was cured. The Respondents say that demotion in the circumstances is not unreasonable and this Court should not intervene.

Background

[4] Because the Applicant's position is that there were several breaches of procedural fairness, it is necessary to review the background in some detail.

[5] The Applicant was hired by the GNWT on January 21, 1991 and until his demotion occupied the position of Director of Investment and Economic Analysis in the Department of Industry, Tourism and Investment (the "Department"). In this senior management position, the Applicant was in charge of a number of other employees.

[6] The Applicant performedwell throughoutthe course of his employment with the GNWT and was awarded performance salary increases on an annual basis. Prior to the events in question, he had no disciplinary record.

[7] Ms. Nowell was an employee who reported directly to the Applicant and was under his supervision and direction. She and the Applicant enjoyed a good working relationship until she returned to work after an absence, during which the Applicant discovered that a contract (the "Kirk Contract") she was in charge of was over budget and behind schedule. The Applicant told Ms. Nowell not to deal with the Kirk Contract, although she continued to do so.

[8] On September 17, 2004, the Applicant attended a meeting with the Assistant Deputy Minister ("ADM") of the Department and the Manager of Human Resources. They informed the Applicant that complaints had been received from five staff members. A summary of the complaints was providedto the Applicantand repeatedin a letter to him dated October 1, 2004 from the Assistant Deputy Minister. The identity of those making the complaints was not disclosed. Quotes from the complaints were set out in the letter, such as "He is a screamer; it is common for him to scream at you" and "He throws papers and swears at people".

[9] In the October 1 letter, the ADM acknowledged that there had been considerable pressure on the Applicant and his Division as well as staff shortages. The letter went on to say that the complaints must be taken very seriously and that the Applicant's behaviour was not acceptable. The letter also described it as fortunate that the complaints had been reported as they were, giving the Applicant the opportunity to take immediate action and thus avoid a formal complaint under the GNWT's Workplace Conflict Resolution Policy.

[10] On March 14, 2005, in another meeting with the ADM, the Applicant was told that more staff complaints had been received about the same issues discussed at the earlier meeting. The Applicant subsequently received a letter dated March 23, 2005 from the ADM, which expressed "concern that you do not appear to accept responsibility for your own behaviour, or for a perceived deterioration in the performance of the Investment and Economic Analysis Division. Rather, you appear to blame individuals on your staff when ultimately you are responsible for the performance of your staff".

[11] The letter advised the Applicant that he was to take the lead in resolving the issues raised in the complaints. He was also to prepare an action plan that would outline the steps he would take to address the identified problems. The issues were described as a high priority.

[12] The letter also indicated that there was a particular problem, separate albeit related, with Ms. Nowell and that a meeting would be convened involving both the Applicant and Ms. Nowell to clarify the latter's responsibilities. There is no evidence in the record as to whether the meeting with Ms. Nowell took place or what transpired if it did take place.

[13] The Applicant provided the ADM with his proposed action plan in April 2005, but was advised by the ADM that it failed to describe how the actions proposed would result in resolution of the issues. The ADM's letter did not say what, if any, steps would be taken as a result. The Applicant did not submit another action plan and there is no evidence of any further correspondence from the ADM on that issue.

[14] The Applicant had raised with the ADM his concerns about Ms. Nowell's dealings with the Kirk Contract. On July 11, 2005, he advised Ms. Nowell that he had requested and received direction from the ADM to remove her from her duties as the

management designate for that Contract. Ms. Nowell was upset by this and a marked deterioration in their working relationship ensued.

[15] In early October 2005, after discussion about the Applicant's plan to retire in 2008, the Applicant was advised by the ADM that there would be an investigationinto his working relationship with Ms. Nowell.

[16] Shortly thereafter, the Deputy Minister of the Department issued Terms of Reference for an investigation into the working relationship between Ms. Nowell and the Applicant, including how each of them had carried out their responsibilities. The Terms of Reference provided that the investigators were authorized to "investigate only the above complaint(s)," that is, the Nowell-Applicant working relationship and how each had carried out their responsibilities in that context, and submit a report. A separate report was to be submitted on any other issues arisingduring the investigation, including behaviours or practices contributing to an unhealthy workplace.

[17] The investigators interviewed and took statements from approximately 23 people, including the Applicant. They also obtained39 documents. The Applicantwas not provided with copies or particulars of the statements or the documents.

[18] On November 7, 2005, after the investigation had commenced,Ms. Nowell filed a formal complaint under the GNWT's Workplace Conflict Resolution Policy (the "Workplace Complaint"). The Workplace Complaint alleged that the Applicant's actions towards Ms. Nowell "have included overt bullying, abuse of authority and a specific incident where he threw papers at me". The Complaint indicated that this behaviour commenced before or in the fall of 2004. It also complained of the letter from the Applicant in which he withdrew Ms. Nowell's Kirk Contract management duties.

[19] The Applicant learned of the Workplace Complaint on November 28, 2005. A copy was provided to him and he was told it would be dealt with in the investigators' report. The Respondents' affidavit material indicates that the investigators obtained the consent of both Ms. Nowell and the Applicant to deal with the Workplace Complaint as part of the investigation ordered by the Deputy Minister.

[20] The Applicant responded to specific aspects of the Workplace Complaint and added that all issues related to his involvement had been dealt with in his interviews with the investigators.

[21] The investigators completed their report on or about January 13, 2006. They found that there was no evidence that the Applicant had abused his authority. They found on a balance of probabilities that he had bullied Ms. Nowell by shouting, shunning and throwing papers at her. They also concluded that the conduct and behaviour of both the Applicant and Ms. Nowell were moving in the direction of creating a "poisoned environment".

[22] The investigators also found that there was overwhelming evidence that the Applicant had shouted, shunned and thrown papers at other unnamedemployees over a long period of time.

[23] The Applicant received a copy of the investigation report but not the statements and documents referenced in the report. Along with the report he received a letter dated January 20, 2006 from the Deputy Minister advising that a meeting would be arranged to discuss what would happen next. In fact, however, no such meeting was arranged and the Applicant was not given any other opportunity to respond to the findings in the investigation report.

[24] Then, by letter dated March 31, 2006, the Applicant was advised by the Deputy Minister that he had fully accepted the findings of the investigation report and that the Applicant's behaviour had promoted a stressful, dysfunctional and poisoned work environment. The Deputy Minister indicated that he would meet with the Applicantto discuss the options to address this issue.

[25] That meeting took place on April 3, 2006. The Applicant was informed that he would not be allowed to continue to supervise GNWT employees, that he was permanently removed from his position as Director and that he should see the ADM regarding a new position. The Deputy Minister told him the decision was final.

[26] By letter dated April 4, 2006, the Deputy Minister stated to the Applicant, "I cannot condone your ongoing management style as reported in the investigation and as such, I am not prepared to allow you to supervise Industry, Tourism and Investment employees any longer. I have lost all confidence in your ability in this area". The

letter indicated that the Applicant would be demoted from his position as Director on the basis of misconduct and incompetence in the area of human resource management.

[27] Eventually, the Applicant was removed from the senior management category and assigned to a non-managerial position with a reduction in salary and benefits amounting to approximately $40,000.00 per year.

[28] The Applicant then initiated an appeal to the Minister responsible for the Public Service pursuant to s. 29(2) of the *Public Service Act*, R.S.N.W.T. 1988, c. P - 16. The letter of appeal from his then counsel requested copies of the statements and documents referred to in the investigation report. These were refused in a letter stating that the witness statements do not form part of the report and that the report already provided to the Applicant was a full and complete version of the documentupon which the Deputy Minister had based his decision.

[29] In May 2006, the Applicant's current solicitor filed an originating notice in this Court, seeking to quash the Deputy Minister's decision. The Applicantdid not take up a subsequent offer that the Deputy Minister would reconsider his decision after providing the Applicant with an opportunity to present his case. Instead the Applicant pursued his appeal to the Minister.

[30] By letter dated March 16, 2007, the Minister responsible for the Public Service dismissed the Applicant's appeal. The Applicant subsequently filed an originating notice seeking judicial review of the Minister's decision.

Statutory provisions

[31] The relevant provisions of the *Public Service Act* are as follows:

> 29.(1) Where an employee, in the opinion of the deputy head, is guilty of misconduct or incompetence, the deputy head may by notice in writing
>
> (a) suspend the employee for a period not exceeding 30 days;
>
> (b) reduce the employee's pay; or
>
> (c) demote the employee.

(2) An employee may, within 14 days after the day the employee receives a notice given under subsection (1), appeal the suspension, reduction of pay or demotion to the Minister.

(3) The Minister, on appeal, shall

(a) confirm the suspension, reduction of pay or demotion;

(b) revoke the suspension, reduction of pay or demotion as of the day it was imposed; or

(c) where the appeal is about a suspension, reduce the period of suspension.

(4) Repealed.

(5) A demotion under this section may be for a fixed period.

(6) The Minister may at any time reinstate a demoted employee.

Grounds of Judicial Review

[32] The Applicant seeks judicial review of the decisionsof both the DeputyMinister and the Minister. He argues that the Deputy Ministerhad a duty of proceduralfairness, which was breached. He also argues that on his appeal from the decisionof the Deputy Minister to the Minister, the Minister did not apply the correct standard of review and failed to find unfairness in the procedure that resulted in the Deputy Minister's decision. Finally, he submits that demotion is unreasonable in all the circumstances, particularly in light of mitigating factors.

[33] The Respondents take the position that any procedural unfairness in the process that led to the Deputy Minister's decision was cured by later proceedings and that the Court should not interfere in the decision made. The Respondents submit that the Applicant had a full hearing before the Minister and that the sanction of demotion is not unreasonable in all the circumstances.

Analysis

[34] Since, under s. 29 of the *Public Service Act*, the Deputy Minister and Minister acted in their capacity as statutory decision makers, the standard of review for and level of deference to be accorded to the decisions they made must be determined by means of the pragmatic and functional approach set out in *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982. The factors to be considered in making that determination are (i) the presence or absence of a privative clause or statutory right of appeal; (ii) the expertise of the decision maker relative to that of the reviewing court or body on the issue in question; (iii) the purpose of the legislation and the specific provision; (iv) the nature of the question, whether law or fact or mixed law and fact.

[35] I find, and I understand from the submissions of counsel that they are of the same view, that a balancing of the *Pushpanathan* factorsresults in a standard of review of reasonableness in relation to both the Minister's review of the Deputy Minister's decision on an appeal under s. 29 of the *Public Service Act* and this Court's review of the Minister's decision on a judicial review application. The decision to demote is largely fact based, it is a discretionary decision within the limits of statutory authority and any other rules that might apply. The decisions of the Deputy Minister and the Minister are not protected by a privative clause. Both the Deputy Minister and the Minister can be expected to have some expertise in the area of employee discipline; in the case of the Minister that expertise would be more extensive relative to that of a Court. Therefore, the decision to demote the Applicant as a factual matter should be reviewed on the standard of reasonableness.

[36] Having said that, however, the main ground of challenge to the decisions in this case is lack of procedural fairness. On the ground of proceduralfairness, the pragmatic and functional approach to the standard of review does not apply. The standard of review on the question of procedural fairness is correctness: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28; *McLeod v. AlbertaSecurities Commission*, [2006] A.J. No. 939 (leave to appeal denied: [2006] S.C.C.A. No. 380).

[37] Both parties agree that a duty of procedural fairness was owed to the Applicant by the Deputy Minister and the Minister, in that their decisions are administrative ones that affect his rights, privileges or interests. The next issue to be determined is the level of procedural fairness owed to the Applicant in the circumstances of this case. In my view, it is at least the level of fairness prescribed for cases of dismissal in *Knight v.*

Indian Head School Division No. 19, [1990] 3 W.W.R. 289 (S.C.C.): notice of the reasons for the employer's dissatisfaction with the Applicant's performance and affording him an opportunity to be heard. As indicated in *Knight*, one of the purposes of requiring the employer to act fairly is to enable the employee to try to change the employer's mind.

[38] The Respondents have not taken issue with the fact that the Deputy Ministerdid not accord the Applicant procedural fairness in that he accepted the findings of the investigators and imposed the demotion without giving the Applicant the opportunity to be heard. Although that would be enough to quash the Deputy Minister's decision, setting aside for the moment issues arising from the appeal to the Minister, the Respondents argue that this Court should decline to grant any discretionary relief because the Applicant did not proceed with a rehearing before the Deputy Minister even though one was offered to him. In a letter dated June 23, 2006 to the Applicant's counsel, after the appeal to the Minister had been filed, counsel for the Respondents acknowledged that the Applicant had not been given the opportunity to address the Deputy Minister before the April 4 demotion. The Deputy Minister was, according to the letter, prepared to revisit and reconsider his decision by providing the Applicant with an opportunity to present his case.

[39] It is clear that where the decision of a tribunal made within its powers is a nullity, for example for lack of procedural fairness, it may reconsider the matterafresh and render a valid decision: *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637 (B.C.S.C.) (leave to appeal refused 147 D.L.R. (3d) 645); *St. George's Lawn Tennis Club v. Halifax (Regional Municipality)*, [2007] N.S.J. No. 38 (S.C.). However, nothing compels an individual affected to seek or agree to a re-hearing. In this case, it is hardly surprising that the Applicant did not accept the invitation to make submissions to the Deputy Minister when the latter had already indicated that his decision was final. In these circumstances, the failure to go back before the Deputy Minister is not a ground on which to decline judicial review.

[40] The Respondents also submit that any defect in proceduralfairness was cured by the Applicant exercising his right to appeal to the Minister, in circumstances that amounted to a *de novo* hearing: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561. In my view, the success of that argument depends on whether the appeal to the Minister can be characterized as a *de novo* hearing.

[41] The Applicant's appeal to the Minister focused on two issues: first, lack of procedural fairness in the process that led to his demotion and second, the reasonableness of demotion in light of mitigating factors. The Applicant submits that the Minister erred in failing to find that there was a lack of procedural fairness, in failing to find that the demotion was unreasonable and in the standard of review that he used in considering the Deputy Minister's decision.

[42] As indicated above, allegations of procedural unfairness must be reviewed on a standard of correctness. In his letter of decision, the Minister found that the Deputy Minister "properly considered and applied principles of fairness in requiring an investigation and considering its outcome" and that "the Workplace Conflict Resolution Policy was applied appropriately". It is not clear from this whether the Minister considered and dismissed the issues of procedural fairness raised by the Applicant or whether he simply found that because there had been an investigation, the Applicant had been treated fairly. The basic question is, however, whether the Minister was correct in finding that the Applicant had been treated fairly.

[43] The grounds upon which the Applicant alleges a lack of procedural fairness are: (a) that he was given insufficient notice of the scope of the investigation; (b) the details of the allegations against him were not disclosed; (c) the Deputy Minister failed to follow the GNWT's discipline policy; (d) the Applicant was not informed that demotion was being contemplated or given an opportunity to respond to the reasons why it was contemplated; and (e) the Deputy Minister unreasonably delayed the initiation of an investigation and/or the imposition of discipline.

[44] I will deal first with ground (b), that the details of the allegations against the Applicant were not disclosed. The Applicant asked for, but was refused, copies of the witness statements (including the identities of the witnesses other than Ms. Nowell) and documents that were reviewed by the investigators. The Applicant says that he required the statements and documents in order to know the case he had to meet. The Respondents say that he had sufficient information to know the case he had to meet, that he was not entitled to the statements and documents and that under the Workplace Conflict Resolution Policy witnesses other than a complainant are given assurance that their identity will be kept confidential. Further, the Respondents say that confidentiality is essential in order to encourage employees to come forward with information in an investigation. The Respondents also point out that the Deputy

Minister and the Minister did not see the witness statements or the documents; they saw only the investigation report.

[45] Relevant to this issue is the minimal content of the duty of fairness referredto in *Knight* and also in *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, [1979] 1 S.C.R. 311, quoting from *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12: "The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. ... It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. ...".

[46] The extent to which the case must be disclosed will vary depending on the circumstances. The point is that the person affected must have a "fair" opportunity of answering the allegations. Generallyspeaking, the completedisclosure obligationsthat apply in the context of a trial do not apply when an employer is considering dismissal, or demotion, of an employee: *Masters v. Ontario*, [1994] O.J. No. 1135 (Ont. Div. Ct.). In that case, although witness statements were not provided to the individual who was the subject of complaint, he was given a detailed summary of the accusations made against him, from which the identities of his accusers were "readily apparent" (paragraph 106).

[47] The fact that the Deputy Minister and the Minister did not see the witness statements or the documents on which the investigators based their conclusions does not mean that that evidence need not be disclosed. The crucial point is that they acted on the conclusions drawn by the investigators which were in turn based on that evidence.

[48] Although the Respondents say that the problem with the Applicant was his management style or behaviour, it is a fair inference from the investigation report that at least some discrete incidents were described by witnesses. At the same time, much of the report is very subjective. For example, the witnesses interviewed, the Applicant and the investigators differed as to whether certain behaviour was best described as shouting or raising one's voice or speaking in an animated manner. Witnesses were

asked to rate behaviour such as shouting on a scale of 1 to 10, with 5 being a normal speaking voice. Some were asked to rate the action of throwingor slammingpapers on a desk on a scale of 1 to 10 with 5 being normal. Since that type of description is so subjective, details of what the witnesses said about general behaviour and specific incidents could be subject to different interpretations. In my view, fairness requires that the Applicant have that information to be able to address it fully.

[49] There is another reason why the content of the witness statements and documents as they relate to the allegations against the Applicant should have been disclosed to him. Although the Terms of Reference made it clear that the only complaint to be investigated was that of Ms. Nowell about the Applicant's working relationship with her, his working relationship with others was also investigated, apparently in an attempt to find corroboration for the allegations of Ms. Nowell. What might have been intended as corroboration became further grounds for discipline. The decisions of the Deputy Minister and the Minister make it clear that behaviour of the Applicant directed at employees other than Ms. Nowell was part, if not the major part, of the reason for his demotion.

[50] That the Applicant did not ask for the witness statements or documents during the investigation itself is not particularly surprising because the focus of that investigation according to its Terms of Reference was his working relationship with Ms. Nowell and her Workplace Complaint, not his behaviourgenerally. Even after the investigation concluded, the fact that the investigators did not provide a second report on "other human resource management issues" would have left the impression that the concern was the relationship with Ms. Nowell.

[51] There is also a troublesome issue arising from the timing of the incidents alleged. The staff complaints initially brought to the Applicant's attention arose from incidents in September 2004 or earlier. By March 2005, more concerns had surfaced, but the dates of the incidents leading to those concerns does not appear in the record before me. The allegations made by Ms. Nowell that were accepted by the investigators also seem to have arisen from incidents in August and the fall of 2004. The investigation report, dated January 2006, does refer to the Applicantbeing spoken to about his behaviour over the course of the past year, but is not specific about when the incidents described to the investigators by various witnesses were said to have happened or whether the occasions when the Applicant was spoken to are actually the meetings in September 2004 and March 2005. In my view, since the ongoing nature of

the behaviour was clearly a significant factor in the demotion, this is information that should have been disclosed to the Applicant.

[52] The purpose of disclosing details to the Applicant is to allow him to know and respond in a meaningful way to the allegations against him. On the other hand, the lack of detail in an allegation may also be significant in an assessment of the seriousness of the allegation (for example, in this case, the frequency of the behaviour complained of) or its credibility. The Applicant was deprived of the opportunity to address these matters because the contentof the witness statements and documentswas not disclosed. I should note here that although it is clear from the investigators' report that witnesses gave them information about the Applicant's behaviour, it is not at all clear what relevance the numerous documents had to this issue. Most of the documents, according to the report, related to the Kirk Contract.

[53] There may be valid reasons why an employer seeks to maintain the confidentiality of employees who participate in an investigation of another employee. If there is a real fear of retaliation against other employees, that might suffice to justify confidentiality: *In Re Fredericks and Board of Commissioners of Police of the Town of Essex* (1983), 2 D.L.R. (4th) 525 (Ont. H.C.) quoted in *Hill v. University College of Cape Breton*, [1991] N.S.J. No. 264 (S.C.).

[54] There is no indication in the Terms of Reference for the investigation that confidentiality was promised. The Workplace ConflictResolution Policy,on the other hand, does assure confidentiality to those, other than the complainant, who provide evidence. It was not submitted that there is any legal basis for allowing a general policy of confidentiality to trump procedural fairness. What is important is that a person complained of be able to know and respond in a meaningful way to the allegations against him or her. On the material before me, it is not possible for me to say whether providing the Applicant with the contentof the witness statements without also disclosing the identity of the witnesses would have been sufficient to allow him to respond fully. It would likely depend on whether he can identify any particular incident alleged in the absence of the identity of the participants.

[55] The Minister's decision on appeal does not indicate that the above issues were considered by him. Even if I consider the statement in his decision that, "In exercising his authority, I am satisfied that the Deputy Minister properly considered and applied principles of fairness in requiring an investigation and in considering its outcome" to

mean the Minister did consider that refusal to provide the Applicant with the contents of the witness statements and documents was proper, I must find he erred.

[56] It does not matter that further disclosure or the Applicant's response to same might not result in an outcome other than demotion. The Court is not to speculateas to what the result might have been had the procedure been fair: *Cardinal and Oswald v. Director of Kent Institution* (1985), 24 D.L.R. (4th) 44 (S.C.C.) at page 57.

[57] I find it convenient to deal next with grounds (a) and (d) together, those grounds being that the Applicant was given insufficient notice of the scope of the investigation and that he was not informed that demotion was being contemplated.

[58] Issues were raised about the Applicant's behaviour in September 2004, when five staff members complained about him in exit interviews. Further similar complaints had surfaced by March of 2005. The Applicant was told to come up with an action plan to address the problems. The plan he presented was considered unacceptable by the ADM, but at no point during any of this was the Applicanttold his position was in jeopardy. Neither the Applicant nor the ADM followed up on the action plan issue and in any event, by October 2005, the focus had shifted and the main issue became the Applicant's working relationship with Ms. Nowell. The Terms of Reference for the investigation made it clear that only that complaint was to be the subject of the investigators' report; anything else, including human resource issues, was to be the subject of a second report.

[59] The investigators found that while Ms. Nowell's specificallegations of bullying could not for the most part be corroborated, there was overwhelming evidence that the Applicant had shouted, shunned and thrown papers at employees over a long period of time. From this, they found that on a balance of probabilities Ms. Nowell'sallegations of bullying and throwing papers were substantiated. However,despite the referencein the investigation report to evidence about the Applicant's treatment of other employees, no second report was done as contemplated by the Terms of Reference.

[60] The Deputy Minister's letter of March 31, 2006, states that "the report conveys that moodiness, tantrums and shunning are pervasive behaviours on your part, that many staff have had to endure over a long period of time." It then ties this conclusion to the earlier staff complaints, saying that the Applicant did not address those complaints. The letter goes on to find that the Applicant's behaviour has promoted a

"stressful, dysfunctionaland poisonedwork environment". The DeputyMinister states that he finds particularly aggravating "the persistence and impact of your actions of harassment".

[61] The March 31 letter puts much emphasis on the Applicant's behaviour outside his working relationship with Ms. Nowell. This is even more clear in the letter of April 4, 2006, in which the Applicant is advised of the demotion. In that letter, the Deputy Minister states, "I cannot condone your ongoing managementstyle as reported in the investigation and as such, I am not prepared to allow you to supervise ... employees any longer. I have lost all confidence in your ability in this area". He goes on to describe the demotion as imposed, "on the basis of misconductand incompetence in the area of human resource management".

[62] In my view it is clear from the above that the Applicant's ongoing management style and his interactions with employees other than Ms. Nowell were a substantial, if not the main, part of the reason for the demotion. Yet, the Applicant was never told that matters other than his relationship with Ms. Nowell were being considered and might result in his demotion.

[63] It is true that upon receivingthe WorkplaceComplaint, the Applicantcould have determined from the Workplace Conflict Resolution Policy what action might result from a substantiated complaint. However, there was never any indication to him that any action might be contemplated as a result of his behaviour with other employees who had not filed Workplace Complaints and the focus of the investigation was on Ms. Nowell, not other employees. Had the investigators prepared a separate report dealing with the allegations that did not involve Ms. Nowell, the Applicant would at least at that point have been on notice that there were concerns not involving her that were being considered.

[64] I find that the failure to notify the Applicant at any stage prior to the demotion that his behaviour in relation to employees other than Ms. Nowell was the subject of the investigation and might result in disciplineincluding demotionis further ground for finding procedural unfairness.

[65] There is no indication from the Minister's reasons for confirming the demotion that he considered these issues of fairness, while at the same time it is clear from his letter of March 16, 2007 that the demotion was for conduct beyond the behaviour

involving Ms. Nowell: "misconduct and incompetence in the area of human resource management, and more specifically, for the inability to communicate effectively and professionally with subordinate employees; and the inability to recognize or correct unacceptable behaviour".

[66] The Applicant also alleges in ground (c) that the Minister erred in failing to find procedural unfairness in the Deputy Minister's failure to follow the GNWT's discipline policy. This ties in with the previous ground and can be dealt with briefly.

[67] There are two policies relevant to this case. One is the Workplace Conflict Resolution Policy, referred to above. The other is the January 2004 GNWT Policy on Performance Management, Employee Discipline (the "Discipline Policy").

[68] I concur with the observation made by counsel for the Applicant that the purpose of a policy in the employment discipline context is to give structure to the process of disciplining employees and provide assurance to employees that disciplinary treatment will be fair and consistent. Otherwise, why have a policy.

[69] The Discipline Policy provides that when an employee's performance or behaviour is unsatisfactory, corrective action must be taken. It also provides that corrective action will follow the process of progressive discipline when the situation is the result of inappropriate behaviour or unsatisfactory performance when the employee has the ability to perform at an acceptable level but chooses not to do so. Section 2 of the Policy states that it applies to all employees except those employed by the Northwest Territories Power Corporation. The Discipline Policy would, therefore, appear to apply to this case.

[70] The Discipline Policy provides that disciplinary demotions are not permanent and must be for a specific period of time: s. 4. Section 18 provides that a Deputy Head who feels an employee is guilty of misconduct may demote the employee temporarily and that demotion may be used as a last resort prior to dismissal.

[71] Although s. 29 of the *Public Service Act* does not require that a demotion be temporary only, the fact that the GNWT has a policy on demotion indicates that it has chosen to carry out its s. 29 powers in a certain way, according to a certain procedure. Barring unusual circumstances, fairness would require that that choice be maintained.

[72] Section 18 of the Discipline Policy also provides that discipline should be applied progressively except in the case of very serious conduct such as that listed in the Policy, none of which applies here. Under s. 26a, the progressive discipline process normally follows three steps: a written reprimand, a disciplinary suspensionor demotion, and then dismissal. In this case, the letters of October 1, 2004 and March 23, 2005, written to the Applicant about the general staff complaints, are similar to the sample letter of reprimand contained in the Policy except that they make no reference at all to the prospect of disciplinary action, nor were copies of the letters placed on the Applicant's personnel file, as required by s. 32 of the Policy. For whatever reason, it appears that the choice was made not to regard the general staff complaints as a disciplinary matter until after the investigation into the Applicant's relationship with Ms. Nowell.

[73] The Workplace Conflict Resolution Policy, on the other hand, provides that where a complaint is substantiated and a mediated solution is not possible,the possible outcomes under s. 14.1 of the Policy are transfer, demotion or both. There is no restriction on the length of demotion under this Policy.

[74] Although one could expect that the Applicantwould have been aware, on receipt of Ms. Nowell's complaint under the Workplace Conflict Resolution Policy, that a permanent demotion was a possibility, the Applicant would also have been entitled to expect that the rest of that Policy be followed. It appears, however, that there was no attempt at mediation, even though there were indications in the investigators' report that Ms. Nowell might have been content with an apology from the Applicant.

[75] I find that the failure to follow the two Policies did contribute to the unfairness which further taints the procedure followed. Not following the Policies, particularly the Discipline Policy, was unfair in the context of this case because of the change in focus of the allegations the Applicant was facing. To the extent that the entire sequence of events leading up to the decision to demote the Applicantcan be described as a disciplinary proceeding, it was not made clear what the subject of that proceeding was, the Applicant's relationship with Ms. Nowell, or with other employees, or both.

[76] The Applicant also argued that the Workplace Conflict Resolution Complaint was out of time, relying on section 11.5(d) of the Policy, which provides that one of

the "potential reasons why a matter may not be pursued" is that "an extensive delay or unreasonable delay (i.e. more than six months) has occurred". In my view, however, the wording of the section, by using the word "may" gives discretion to the designated authorities to refuse to pursue a complaint because of delay but it does not prescribe a limitation period that bars complaints because of the passage of time. I would not give effect to this argument.

[77] As to ground (e), unreasonable delay in the initiation of the investigation and imposition of discipline, it is not clear from the record whether all the incidents complained of occurred in 2004, before the investigation was ordered and long before the Deputy Minister made his decision. I do note that had the Deputy Minister not changed the focus from the unidentified staff complaints to the situation with Ms. Nowell there probably would not have been the delay there was in addressing these matters. However, I am not prepared to find the delay was unreasonable.

[78] Had the appeal to the Minister been a *de novo* hearing, in which all these issues were considered afresh, that might have cured or addressed all or some of the procedural unfairness. However, the reasons given by the Minister suggest that he did not treat it as a *de novo* hearing and did not review all the information before him and make his own assessment of it. In two instances, his letter suggests that he gave primary consideration to the fact that the Deputy Minister has the authority to demote employees: "I am satisfied Deputy Minister Vician properly exercised his designated authority in applying the demotion to Mr. Olah ..." and "Deputy Minister Vician has the authority to apply demotions, and properly exercised his authority". The authority of the Deputy Minister to impose demotions in appropriate circumstances was never, however, in issue. What was in issue was whether the Applicant had been treated fairly and, if he had, whether the demotion was reasonable in the circumstances.

[79] The Minister's letter also states that the Deputy Minister duly considered all relevant factors including the "additional mitigating factors outlined in Mr. Olah's submissions on appeal". However, there is no indicationat all in the DeputyMinister's letters that he did consider those factors. They were not presented to him by the Applicant since the Applicant was not given the chance to address the DeputyMinister before he made his decision. This, too, suggests that the Minister was not aware, or may not have fully appreciated, how events had unfolded prior to the Deputy Minister's decision.

[80] For the reasons stated above, to the extent that the Minister found that the procedure resulting in the Deputy Minister's decision was fair, I find that the Minister erred. I also find that the appeal did not cure the unfairness as I am not satisfied that it was a *de novo* hearing at which the issues were considered afresh.

[81] In the circumstances, I need not deal with the submission that demotion was not a reasonable sanction and this decision should not be taken as making any finding in that regard.

[82] As I have concluded that the procedure followed in this case was not fair to the Applicant, the demotion must be quashed and considered never to have been effective. Since the position from which the Applicant was demoted has since been staffed, I will follow the same course that was taken in *Wong v. College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia*, [2005] B.C.J. No. 2219 (B.C.C.A.). The Applicant should be reinstated in his position but need not be brought back into active service, pending the GNWT, should it decide to do so, pursuing its concerns about the Applicant's behaviour in the workplace in a procedurally fair manner.

[83] Costs normally follow the event but should counselwish to make submissionsto me on that issue they may provide the registry with their available dates for that purpose. Alternatively, they may file written submissions on costs within 30 days of the date these reasons are filed.

[84] V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT
this 28th day of November, 2007.

Counsel for the Applicant: Barrie Chivers

Counsel for the Respondents: Brad Patzer