

## The proper approach to the dismissal of public employees - Supreme Court of Canada makes new law

The Supreme Court of Canada's milestone decision in *Dunsmuir v. New Brunswick* (March 7, 2008) drew attention both for its comprehensive overhaul of the standard of judicial review and for the creation of new law in the area of public employment. In a single swoop the country's highest court reduced the three standards of judicial review (previously correctness, patently unreasonable, and reasonableness *simpliciter*) to two (correctness and reasonableness). The court also removed public office holders' automatic entitlement to procedural fairness when they are terminated. The decision represents a fundamental departure from the previous employment law. It could affect the rights of many public servants upon termination.

### *DUNSMUIR v. NEW BRUNSWICK*

*Dunsmuir* involved the dismissal of an employee of the Department of Justice for the Province of New Brunswick. The employee was a Legal Officer under contract who was later appointed to the Office of Clerk. He was therefore considered to have "dual status" as both a contractual employee and as a public office holder.

Dunsmuir was dismissed with four months' notice in August 2004. He grieved the dismissal on the basis that he was denied procedural fairness by not being allowed to know the reasons why he was dismissed, and by not being permitted to argue against those reasons. The grievance was referred to adjudication. The adjudicator applied a principle from the Supreme Court's 1990 decision in *Knight v. Indian Head School Division No. 19*, namely that the notice requirements in an employment contract are not enough to displace the public law duty of fairness when the employment is a public office. The adjudicator ruled the dismissal to be void "*ab initio* (*i.e.* from the start) and reinstated the employee. The province applied for judicial review of the decision, and the case wound its way up through the levels of court.

### AT THE SUPREME COURT OF CANADA

The main issue at the Supreme Court of Canada was whether the adjudicator was correct to find that the employee, as a public office holder, was automatically entitled to procedural fairness, regardless of the specific terms of his contract of employment.

The Court recognized that most public office holders have a contractual employment relationship, even though their positions may also be governed by legislation. In light of this, the court noted the distinction between office holders and contractual employees was inherently difficult to identify. The Supreme Court recognized that new law was required and revisited its decision in *Knight*, stating:

"The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, *it should not be followed.*" [Emphasis Added]

The Court stated that the crucial factor in determining whether the public employer is under a duty of fairness is the existence of an employment contract. Where a dismissed employee is under a contract, “the justifications for imposing a public law duty of fairness with respect to his or her dismissal lose much of their force.”

The Court’s rationale was heavily rooted in contract law. Procedural fairness was considered to be addressed where the terms of the employment contract were expressly agreed to by the employer and the employee. Where the contract is silent, for example with respect to termination, the common law supplies the necessary framework, stipulating that dismissal may only be for cause or on reasonable notice.

The Court warned that public authorities cannot “contract out” of any statutory obligations relating to their discretion as an employer. However where a dismissal decision is within the public authority’s powers, and is exercised in conformity with the employment contract, there is no compelling reason to impose an additional duty of fairness, the court reasoned.

After establishing this new legal regime in the public employment context, the Court gave this summary:

“Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law...The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute.”

In applying this new legal framework to *Dunsmuir*, the Court found that he was a contractual employee and therefore he could be dismissed in conformity with the usual rules of contract. The Court stated that it was unnecessary to consider any public law duty of fairness. It ruled that the adjudicator erred in applying the *Knight* decision and in reinstating the employee.

## **In our view**

The Supreme Court of Canada noted that the public law remedy of reinstatement, which is not available at common law for breach of an employment contract, may lead to unfairness. This is because a breach of procedural fairness invalidates the dismissal decision and the employee is therefore entitled to unpaid wages from the date of the dismissal to the date of the judgment. The Court recognized that the amount of unpaid wages will depend on the time it takes for a case to be resolved through the judicial process. Consequently the employee may end up recouping much more than was actually lost. By contrast, the private law/contract law remedy bases the proper length of notice on such factors as length of service, age, and even the conduct of the employer in dismissing the employee. In this respect the Court noted that “the private law offers a more principled and fair remedy.”

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