

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** Nova Scotia (Justice) v. Nova Scotia Government  
and General Employees Union, 2005 NSCA 88

**Date:** 20050530

**Docket:** CA 235410

**Registry:** Halifax

**Between:**

The Nova Scotia Department of Justice representing  
Her Majesty the Queen in Right of the Province of Nova Scotia  
Appellant

v.

Nova Scotia Government and General Employees Union  
Respondent

**Judge(s):** Cromwell, Oland and Fichaud, JJ.A.

**Appeal Heard:** May 30, 2005, in Halifax, Nova Scotia

**Written Judgment:** May 31, 2005

**Held:** Appeal is dismissed with costs fixed at \$1000 plus  
disbursements per reasons for judgment of Cromwell,  
J.A.; Oland and Fichaud, JJ.A. concurring.

**Counsel:** Dale Darling, for the appellant  
Gordon Forsyth, for the respondent

Reasons for judgment: (Orally)

[1] This is an appeal from the dismissal by Moir, J. of an application for an order in the nature *certiorari* to quash an award of William H. Kydd, Q.C. sitting as a sole adjudicator under a collective agreement pursuant to the *Corrections Act*.

[2] The background facts are set out in ¶ 3 - 5 of Moir, J.'s reasons:

[3] *Facts* - After having worked with the RCMP for a number of years, Mr. Munro joined the Department of Justice as a part-time corrections officer in 1994. Eventually, he worked full-time although he remained classified as a part-time worker. In August 2001, he became a full-time corrections officer. The Department terminated his services in December of that year.

[4] On 12 October 2001 the RCMP searched the home of Mr. Munro and his wife, Judith Munro. They found sixty-five marijuana plants growing in the basement of the Munro home. Both husband and wife were charged with cultivation of marijuana, possession for the purposes of trafficking, possession of marijuana and theft of electrical power. That same day, the police advised the Department of what had happened and Mr. Munro was suspended pending investigation. On 4 December 2001 the Deputy Minister terminated Mr. Munro's employment by letter and the letter gave the reasons quoted in paragraph one above.

As the letter suggests, the degree of Mr. Munro's culpability is in his knowledge of the presence of the plants in his home. The plants had been grown by his wife over his objection. Ms. Munro suffers from medical conditions that she tolerates better when under the affects of cannabis. Nevertheless, the Deputy Minister was of the view that Mr. Munro's knowledge was enough to make his conduct "incompatible with your employment at the Department of Justice".

[5] The Munros were never tried. One of the investigating officers turned out to have been dealing in drugs and the charges were stayed. Mr. Munro grieved his dismissal. The Learned Adjudicator accepted his evidence and that of his wife concerning Ms. Munro's cultivation of the sixty-five plants and Mr. Munro's opposition to her activity. The hearing lasted for six days. Arbitrator Kydd rendered a lengthy decision in which he articulated his key findings of fact:

...it was Mr. Munro's acquiescence to the grow operation in his home of a significant amount of marijuana that [was] the major conflict with his duties as a correctional officer.

The Union concedes that one of the factors that justify an Employer imposing discipline for off duty conduct, namely conduct that harms the Employer's reputation, is present and admitted in this case.

There are a number of strong mitigating factors which had to be weighed against the grievor's serious breach of trust as a corrections officer.

Mr. Munro had seven years of satisfactory performance as a corrections officer.... Mr. Munro's performance reviews were overwhelmingly positive.

One of the strongest mitigating factors is that Mr. Munro was involved in wrongdoing because of compassion for his wife. He could see that she believed that marijuana use was controlling her pain, and he acquiesced because he says he loved her and was not willing to leave her.

He expressed what I believe was sincere remorse for any injury done to the Employer's reputation. He said that he is relying on Mrs. Munro's promise [to refrain from smoking marijuana], and that if she brings marijuana in the house again he will leave her.

Another relevant mitigating factor that is usually considered is the economic hardship imposed by a termination. Mr. Munro has spent the better part of his working life to date in the law enforcement area, and the termination of his employment makes his prospects of obtaining a similar paying job somewhat bleak. Mrs. Munro's medical condition requires expensive medication and renders her unemployable, so that the Munros continue to face serious economic hardship.

In addition to contesting his conclusions, the Department of Justice takes exception to the Learned Adjudicator's findings on mitigation in reference to two subjects in particular. The Department argues that Adjudicator Kydd put too much emphasis on the evidence of Acting Sergeant Rose to the exclusion of other senior staff when the Learned Adjudicator made his findings concerning rehabilitation:

I also accept the Union's submission that there is a high potential for rehabilitation. This is apparently the only blemish in a successful career as a corrections officer. It was brought on by

circumstances that pressured Mr. Munro into making a bad decision. Those circumstances have now been removed. Acting Sargent Rose testified that in his opinion the Criminal Code charges that were made (and then stayed) against Mr. Munro would not have an effect on Mr. Munro's ability to control or otherwise deal with inmates. He said that it was a "given" that any new officer would be approached by inmates to bring in drugs, but that he was confident that in all of the years he worked in the Correction Centres no officers had succumbed, and that he didn't think that Mr. Munro would face any unusual pressure because of the publicity this case had received in the newspapers.

The Employer's concerns in the present case however go beyond harm to its reputation. There was evidence that contraband drugs are one of the most serious threats to the security of the Correctional Centre and the well-being of its staff and inmates. Inmates are constantly seeking new means of smuggling drugs into the Correctional Centre. Needless to say senior staff were very apprehensive about having Mr. Munro continue as a corrections officer after the publicity about the grow operation in his basement. Mr. Parsons, the Director of Correctional Facilities for the province, testified that in the circumstances the Employer felt that Mr. Munro's behaviour did not merit the progressive discipline approach as they considered that he would be a "walking target" for the inmate population in its efforts to get drugs. However after considering the particular facts in this case and in particular the evidence of Acting Sargent Rose, I believe Mr. Munro should be able to be successfully reinstated as a corrections officer, and so there is no need for termination on the grounds of incompatibility. There remains the question of deterrence which I believe can be satisfied with an appropriate lengthy period of suspension.

[3] The adjudicator, acting under the power conferred on him to "... substitute for the discharge ... any penalty that to [him] ... seems just and reasonable ... " (*Corrections Act*, Schedule "A" ss. 33(4)), set aside the discharge and substituted a one-year suspension without pay or benefits.

[4] Many of the issues raised before Moir, J. and in the notice of appeal were not pursued in written or oral argument in this Court. Two main points were argued: first, that the adjudicator failed to take into account the special features of the correctional setting and the employer's legitimate interests and second, that his

findings of mitigating circumstances were either unreasonable or patently unreasonable.

[5] In our view, neither of these points has any merit and the appeal should be dismissed. The adjudicator's detailed award makes it clear that he was keenly aware of the special features of the correctional setting and took into full account the employer's legitimate interests in the safety and security of the institution. It is also clear that each of the mitigating factors relied on by the adjudicator was supported by the record before him.

[6] We agree with Moir, J. that whether the appropriate standard of review is reasonableness simpliciter or patent unreasonableness, the appellant has failed to demonstrate any reviewable error on the part of the adjudicator. We conclude that Moir J did not err in dismissing the application for *certiorari* and the appeal is accordingly dismissed with costs fixed at \$1000 plus disbursements.

Cromwell, J.A.

Concurring:

Oland, J.A.

Fichaud, J.A.