Date: 19970530] Docket: CA 136047

NOVA SCOTIA COURT OF APPEAL

Cite as: D'Orsay v. Nova Scotia Confederation of University Faculty Associations, 1997 NSCA 113

Clarke, C.J.N.S.; Roscoe and Bateman, JJ.A.

BETWEEN:

JOHN D'ORSAY Appellant	Eric K. Slone for the Appellant
- and -	
NOVA SCOTIA CONFEDERATION OF UNIVERSITY FACULTY ASSOCIATIONS, a Society incorporated under the *Societies Act* Respondent	Jan E. McKenzie for the Respondent
	Appeal Heard: May 30, 1997
	Judgment Delivered: May 30, 1997

THE COURT: Appeal dismissed, without costs, from decision of Chambers judge concerning the interpretation of a contract, per oral reasons for judgment of Clarke, C.J.N.S.; Roscoe and Bateman, JJ.A. concurring.

C.A. No. 136047

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

JOHN D'ORSAY Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
NOVA SCOTIA CONFEDERATION OF UNIVERSITY FACULTY ASSOCIATIONS, a Society incorporated under the *Societies Act* Respondent	)	CLARKE, C.J.N.S. (Orally)

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.:

The issue in this appeal is whether Justice Hamilton erred in law in finding that the contract of employment between the parties did not entitle the appellant, upon the termination of his employment, to a paid Career Development Leave (sabbatical) or a payment in lieu thereof.

The underlying facts are not in dispute. Since 1985, the appellant, Mr. D'Orsay, was employed by the respondent as its Executive Director pursuant to a series of fixed term contracts. The respondent, Nova Scotia Confederation of University Faculty Associations (NSCUFA), is an organization which represents nine university faculty unions and associations in Nova Scotia.

As required by the contract, Mr. D'Orsay was given one year's notice of the termination of his employment. During that time it was well known to both parties that the respondent was likely to discontinue its operations which in fact it did. It ceased to exist.

Mr. D'Orsay contended that he was entitled to receive a Career Development Leave (sabbatical) of one year or its equivalent value in money. The contract provided the terms upon which a sabbatical could be granted. It was subject to the approval of the respondent. The appellant would be required to work with the respondent for one year after the sabbatical ended. There were various reporting requirements.

Although the contract was carefully drawn and extensive in its detail, it contained no provision with respect to entitlement or obligation in the event of the resignation or termination of the employment relationship. There was no evidence that the closure of the respondent was designed to deprive the appellant of his right to a

paid sabbatical.

Justice Hamilton concluded that to grant the relief sought by the appellant would require the Court to imply a term in the contract that was otherwise absent. She referred, with approval, to Cheshire, Fifoot and Furmston's **Law of Contract**, eleventh edition, at p. 138, quoting Lord Pearson in **Trollope and Colls Ltd. v. North West Metropolitan Regional Hospital Board,** [1973] 2 All ER 260 at p. 268:

> An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term *necessary* to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.

In accepting and applying that reasoning, Justice Hamilton declined to imply a term that would entitle the appellant to a paid sabbatical or payment in lieu on the termination of the contract. She dismissed the application.

On appeal the appellant contends the chambers judge erred in her interpretation of the contract by failing to arrive at a construction that would achieve the reasonable expectations of the parties.

After examining the record and considering the submissions of counsel, we have concluded that Justice Hamilton did not err.

In these circumstances only the parties would be capable of negotiating that which was not included in the contract, if in fact they would have included it at all. Considerable ingenuity would be required by the Court if it were to devise a formula in an attempt to resolve this dispute and then impose it on the parties. Such, in our view, would not be appropriate.

Having regard for the circumstances giving rise to the application, Justice Hamilton declined to award costs. We are likewise inclined. Accordingly, the appeal is dismissed without costs.

C.J.N.S.ENDFIELD

Concurred in:

Roscoe, J.A.

Bateman, J.A.