S.C.A. No. 02746
S.C.A. No. 02747

NOVA SCOTIA COURT OF APPEAL

Jones, Freeman and Pugsley, JJ.A.
Cite as: Northside-Victoria District School Board v. Yorke, 1993 NSCA 76

BETWEEN:

JOHN YORKE Appellant - and - THE NORTHSIDE-VICTORIA DISTRICT SCHOOL BOARD Respondent	)	Lorraine Lafferty and Marc Belliveau for the appellant Eric Durnford, Q.C., and Noella Martin for the respondent
AND THE NORTHSIDE-VICTORIA DISTRICT SCHOOL BOARD Appellant - and - JOHN YORKE Respondent	)	Eric Durnford, Q.C., and Noella Martin for the appellant Lorraine Lafferty and Marc Belliveau for the respondent
	)	Appeal Heard: March 11, 1993 Judgment Delivered: April 5, l993

THE COURT: Appeal dismissed from dismissal of ***certiorari*** application to quash reinstatement of discharged teacher; appeal allowed from dismissal of ***certiorari*** application to quash downgrading of teacher's contract from permanent to probationary; per reasons for judgment of Freeman, J.A.; Jones and Pugsley, JJ.A. concurring.

FREEMAN, J.A.:

A teacher was discharged by his school board and reinstated with a probationary contract by a board of appeal appointed by the Minister of Education. Separate applications in the nature of ***certiorari*** for judicial review of the reinstatement and the downgrading of his contract were dismissed by the Supreme Court of Nova Scotia in chambers. The appeals from those dismissals, one brought by the school board and the other by the teacher, were heard together.

The facts are not in dispute. The appellant, John Yorke, is acknowledged to be a competent high school science teacher, but he has been plagued by a problem with alcohol since 1980. He took a leave of absence at that time and has had a permanent contract with the respondent employer, the Northside-Victoria District School Board, since 1982. His problem resurfaced in 1987. In 1988-89 he was absent 29 days from his employment and in 1989-90 he was absent 36 days, three to four times the average number of absences by teachers. He was discharged at the end of the 1989-90 school year because the marks he submitted for his students were wildly inaccurate and had obviously been prepared while he was drunk.

Besides the provisions of his contract with the school board, the conditions of his employment are governed by the **Education Act,** R.S.N.S. 1989, c. 136, and a collective agreement between the Nova Scotia Teachers' Union and the Minister of Education. Article 37.01 of the collective agreement establishes an alcoholism and drug dependency rehabilitation program known as the Employee Assistance Program or EAP. This recognizes that alcoholism and drug dependency are treatable illnesses.

The EAP was invoked by the school board in 1987. Mr. Yorke was resistant to the counselling and treatment programs and on February 24, 1988, a "step 3" meeting was held following which he was to be subject to discharge for non-compliance. He was so advised in writing. He nevertheless continued

to be uncooperative. The employer showed forbearance despite a number of incidents. In March of 1989 Mr. Yorke participated in a 28-day program under the EAP. This proved beneficial and seemed to mark a change in attitude, but some absenteeism continued. There were no major incidents until March, 1990, when Mr. Yorke reported to the acting vice-principal of his high school that he was having trouble coping in the classroom because of personal pressures. He was having marital problems and his father was critically ill. At the urging of the vice-principal he had several sessions with a psychiatrist. At the end of the school year in June, 1990, he failed to show up at school as required for marking days and to submit his students' final grades. He sent in a set of marks so flawed they could have had serious results for his students if the errors had not been detected by other members of the teaching staff. As the result of a telephone conversation with him, the vice-principal concluded his absence was alcohol-related. This was not denied by Mr. Yorke.

The vice-principal and assistant superintendent met with Mr. Yorke later that week. He had been drinking heavily. They recommended to the school board that he be discharged. The board acted on this recommendation and he was informed of his discharge by letter dated July 4, 1990. He appealed.

Pursuant to identical provisions in the **Act** and in the collective agreement, the Minister of Education appointed Professor Thomas Cromwell as a board of appeal. Under S. 56 (15) of the **Act** and Article 20.12 of the agreement

> "The board of appeal shall have the powers of a commissioner appointed under the **Public Inquiries Act** and shall inquire into the suspension, discharge or termination of a contract and shall, after hearing the teacher and the employer, make an order confirming, varying or revoking the suspension or discharge or confirming or revoking the termination of contract."

Section 56 (16) and Article 20(13) contain a privative clause. The order made by a board of appeal is to be "final and binding upon the teacher and the employer."

Professor Cromwell described his process as follows:

> "A formal hearing lasting 2 1/2 days was held before me. Both the teacher and the employer were represented by counsel and were permitted to adduce evidence. Eight witnesses were heard and were subject to examination and cross-examination. In addition, 64 items of documentary evidence were presented and counsel assisted me with a half day of concluding submissions. Apart from some objection to the admissibility of specific items of evidence, there was no objection raised by either party to the process followed on the appeal and ample opportunity was provided to the parties so that I could hear fully from both the teacher and the employer.
>
> The main issue in this appeal is whether the Employer, having regard to the terms of the EAP and the teacher's conduct, had just cause for discharging the teacher."

It would appear that an appeal to a one person board of appeal appointed by the Minister may be conducted as a trial ***de novo***, which may not be a strictly accurate descriptive term in the circumstances because the school board was not sitting as a tribunal and the proceedings before it leading up to Mr. Yorke's discharge constituted an administrative rather than a judicial process. Professor Cromwell conducted the first actual adjudication of the matter.

While a board of appeal has jurisdiction to attempt to effect a settlement by agreement under s. 56(17) and Article 20(17), in my view Professor Cromwell quite properly limited his process to a judicial procedure: a formal hearing in the format of a trial ***de novo***. His powers as a commissioner appointed under the Public Inquiries Act authorized him to consider any relevant evidence, whether or not it was evidence which had been considered by the school board. Substantively, as he recognized, he was limited to determination of the same issue confronting the school board: whether just cause existed for dismissal. In my opinion, in the absence of patent unreasonableness, he was within his jurisdiction in arriving at his conclusion that just cause for dismissal did not exist, but that there were grounds for disciplinary action short of dismissal.

Section 20(12) and Article 56(15) entitled him to confirm, vary or revoke Mr. Yorke's discharge. The meanings of "confirm" and "revoke" create no difficulty. The meaning of "vary" is more problematical, unless it is confined to lengthening or shortening a period of suspension or substituting a suspension for a discharge.

It is difficult to conclude that remedies he was entitled to apply, sitting as a board of appeal and not as an arbitrator, were so broad that s. 20(12) and Article 56(15) must be interpreted as conveying jurisdiction to amend the provisions of the Act and the collective agreement. However in view of the vigorous arguments of the school board respecting the disciplinary powers of the board of appeal I shall return to this point.

JUST CAUSE

The appellant school board asserts: "there was cause for dismissal on three bases: absenteeism, the incidents of June 19, 1990, and failure to abide by the terms of the EAP." In my view it would not have been patently unreasonable on the part of Professor Cromwell to have concluded that just cause for dismissal existed on any of the three grounds or any combination of them. He came to a contrary conclusion, and the central issue in this appeal is whether that conclusion was patently unreasonable, that is, so unreasonable it went beyond mere error and deprived him of jurisdiction.

Professor Cromwell considered arbitral jurisprudence and in particular relied on **Re Raven Lumber and International Woodworkers of America** (1986), 23 L.A.C. (3d) 357 (Monroe) and **Re Brewers Warehousing Co. Ltd.** (1984), 16 L.A.C. (3d) 84 (MacDowell). He concluded that the test for whether just cause exists to dismiss an alcoholic employee consists of two aspects, job performance and future prospects. Conduct in itself justifying discharge is a threshold requirement for dismissing an employee suffering from alcoholism. The contract of employment may be terminated only where the employee will not be capable of satisfactory attendance in the future. It is only ongoing incapacity that goes to the root of the contract of employment and therefore justifies termination.

It was his opinion that "the recognition of alcoholism as a disease, however, means that alcoholism may be a significant mitigating factor for disciplinable misconduct in the workplace."

It is not necessary to endorse this as a correct statement of the law in order to conclude it is not so patently unreasonable as to deprive the board of appeal of jurisdiction. If alcoholism is considered as a treatable disease and the programs provided for under the EAP are considered appropriate treatment, alcoholism should cease to be a mitigating factor for further alcohol related absenteeism or misconduct once the EAP is invoked. Such incidents then would tend to demonstrate that available treatment was not being adhered to by the employee; Professor Cromwell appeared to accept this principle in assessing the marking incident. Absenteeism by a teacher is a serious matter, disruptive of the education of the students for whose benefit teachers are employed; the number of paid sick days banked under the provisions of the collective agreement is irrelevant if the absences are avoidable. I cannot agree with Professor Cromwell's conclusions on the absenteeism issue, but I am not prepared to hold those conclusions to be patently unreasonable. They are not tarnished by the kinds of error or impropriety identified in the jurisprudence as sources of patent unreasonableness.

Professor Cromwell found that "Mr. Yorke's job performance does not constitute just cause for dismissal. The threshold test is not met." However, he found that the marking incident in June, 1990 was "a dereliction of duty by Mr. Yorke that merits a serious disciplinary response."

He ordered that Mr. Yorke be reinstated on the following conditions:

> " 1. His reinstatement will be effective August 1, 1991 and will be without regaining seniority lost from the date of his discharge and without compensation.
>
> 2. His reinstatement will be on the basis of a probationary contract within the meaning of Article 20.01 (iii) of the collective agreement. Mr. Yorke will be subject to a probationary contract for two years and may earn back his permanent contract in the manner provided for in the Collective Agreement unless his employment is terminated pursuant to its provisions."

Mr. Yorke's employment was on such an insecure basis in June of 1990 that he might well have been discharged for an incident less serious than the marking fiasco. However, the board of appeal functions in the present case as an ***ad hoc*** statutory tribunal and its decision is protected by a privative clause. In **CAIMAW, Local 14 v. Paccar Canada Ltd. (1989)**, 62 D.L.R. (4th) 437 at p. 453 LaForest, J. stated:

> "Where, as here, an administrative tribunal is protected by a privative clause, this court has indicated that it will only review the decision of the board if that board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function."

He cited **Blanchard v. Control Data Canada Ltd.** (1984), 14 D.L.R. (4th) 289 at p. 302 in which Lamer, J. (as he then was) stated that the test for judicial review which the Supreme Court of Canada has applied and continues to apply is very severe:

> " . . . was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?"

Lamer, J. stated at p. 303:

> "Not only is the distinction between error of law and of fact superfluous in light of an unreasonable finding or conclusion, but the reference to error itself is as well. Indeed, though all errors do not lead to unreasonable findings, every unreasonable finding results from an error (whether of law, fact or a combination of the two,) which is unreasonable.
>
> "In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal."

In **Paccar**, LaForest, J. continued:

> "This restricted scope of review requires the courts to adopt a posture of deference to the decisions of the tribunal. Curial deference is more than just a fiction courts resort to when they are in agreement with the decision of the tribunal. Mere disagreement with the result arrived at by the tribunal does not make that result

> 'patently unreasonable'. The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result."

In **Planet Development Corp. and Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry in the United States and Canada, Local 740,** 1991, 123 N.R. 241 (S.C.C.) at p. 260 McLachlin J. referred to the "governing principle" explained by Dickson J. (as he then was) in **Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association** [1975], 1 S.C.R. 382 at p. 389:

> "A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry to answer a question not remitted to it . . . "

McLachlin J. stated the legal issue before her in the **Planet** case at pp. 262-3 as follows:

> "The question, then, is whether there are errors which establish that the Labour Board in this case was acting beyond its jurisdiction. Bad faith on the part of the Labour Board is not alleged, nor breach of the procedural rules of natural justice. Rather the attack is on the basis of the Labour Board's decision. First, it is submitted that the Board misconstrued the provisions of the Act. Second, it is suggested that there was no evidence capable of supporting the Board's conclusion that a transfer took place. . . "

The school board asserts that the board of appeal failed to consider evidence that Mr. Yorke entered into and immediately discharged himself from two treatment programs during the summer of 1991, thus failing to take a relevant matter into account. The relevance is obscured by the fact that at the material time Mr. Yorke had been discharged by the board. Even if the board of

appeal in fact ignored that evidence, I cannot conclude that it was patently unreasonable for it to have done so. The other alleged errors resolve themselves into matters of fact and law within the jurisdiction of the board of appeal, that is, matters about which the board of appeal can be right or wrong so long as it does not fall into patent unreasonableness.

Mr. Yorke had been clearly warned that he was subject to dismissal in the event of another alcohol related incident. He responded positively to the 28-day program from March, 1989, to June, 1990. On the face of it, the marking incident at that time justified dismissal, and the result of the board of appeal's decision appears questionable. However, it was not unreasonably arrived at. Despite continuing incidents of absenteeism, the board of appeal apparently was conscious of the analogy between that incident and the fresh outbreak of a physical malady which had been in remission because of treatment. That approach is not irrational; whether or not it is correct, it is not patently unreasonable. I would conclude that Professor Cromwell was within his jurisdiction in finding that the school board did not have just cause to dismiss Mr. Yorke. The Chambers judge committed no reversible error in dismissing the application for certiorari, and I would dismiss the school board's appeal.

PROBATIONARY CONTRACT

The second part of the remedy prescribed by Professor Cromwell, the substitution of a probationary contract for Mr. Yorke's permanent contract, in my view was clearly beyond Professor Cromwell's jurisdiction as a board of appeal under the **Education Act**.

The Chambers judge properly instructed himself that he had the power to sever this portion of the award, (see Brown & Beatty, **Canadian Labour Arbitration** (3rd ed.) at p. 1-38) but concluded it would not be proper for him to do so in light of the overall decision. He stated:

> "I have considered carefully the general thrust of the decision herein. I have concluded that Professor Cromwell carefully crafted a remedy which he undoubtedly considered a single package. He was obviously careful to maintain the integrity

> of the Employee Assistance Program; that required continued coercion of threatened job loss at an elevated level. He felt the misconduct of June, 1990, was very serious and had to be addressed by sanction. He intertwined those concerns in a single package remedy. I do not consider it possible to tear that package apart. Its component parts, in my view, cannot stand alone independently of one another and continue to address the problems in a satisfactory manner."

Under the **Act** and the collective agreement, a teacher commences work for a school board under a probationary contract. At the end of two years, if the teacher is still employed by the board, he or she must be offered a permanent contract, or tenure. There are no other criteria. A permanent contract is not related to merit or performance; it is acquired as a statutory right after two years of service. A permanent contract may be terminated by the school board on the expiry of a contract year only for just cause or a drop in enrollment, although a teacher may be discharged for just cause at any time. Termination of the contract or discharge gives rise to the right to a board of appeal. The permanent contract governs the employment relationship between the teacher and the school board as long as the teacher is an employee of the school board. There is no provision in the Act or the agreement for reversion back to a probationary contract to discipline poor performance. In the present appeal, the board of appeal specifically found that just cause for dismissal did not exist. Therefore the teacher was not properly discharged. The permanent contract must remain in effect between the teacher and the school board without interruption, but subject to a period of suspension involving loss of benefits including salary to discipline the teacher for the marking incident.

Under the Act and agreement, a probationary contract may be terminated for reasons not constituting just cause, and a probationary teacher so terminated does not have the right to a board of appeal.

By both statute and contract, Mr. Yorke, having served the school board for more than two years, had met the only criterion for entitlement to a permanent contract. Such a contract gave him the right not to have his contract terminated save for just cause or a drop in enrollment, and he had the right not to be discharged nor to have his contract terminated in the absence of a right to

appeal. In my view the board of appeal did not have jurisdiction to take away rights so important and so firmly entrenched in the statute and the collective agreement, particularly in the existing statutory and contractual context.

The school board has taken the contrary view on the appeal. It cites **Fraternite des Policiers de la Communaute Urbaine de Montreal Inc. v. Communaute Urbaine de Montreal and Rousseau** (1985), 60 N.R. 289 S.C.C. at p. 291 in support of its assertion that

> ". . . the Supreme Court of Canada ruled that where there is no express restriction on his jurisdiction, the arbitrator may impose any penalty he deems fair and reasonable, even where legislation restricts the disciplinary options of the employer."

In **Fraternite,** the agreement permitted an arbitrator to uphold, alter or quash an employer's decision, and the **Quebec Labour Code** permitted a court of arbitration to "confirm, amend or set aside" an employer's decision. The authorization of the present board of appeal for making an order "confirming, varying or revoking a suspension or discharge" imposes no greater restriction on the jurisdiction to impose discipline.

It may well be argued that the **Fraternite** case clothes an arbitrator varying a suspension or discharge with jurisdiction to impose terms or conditions having a probationary effect. That falls far short of abolishing a statutory right of appeal. On the facts of the present case it is not necessary to consider the effect of **Fraternite** on **Beckwith and Allen** v. **The Colchester-East Hants Amalgamated School Board** (1977), 23 N.S.R. (2d) 268. Mr. Justice Hart, then of the Trial Division of the Supreme Court of Nova Scotia, held:

> "In my opinion Judge Gunn, sitting as a Board of Appeal, had no further disciplinary powers than those possessed by the School Board. The teachers had entered into permanent contractual relations and those contracts could only be altered in accordance with the terms of the collective agreement or the legislation covering the employer-employee relationship."

I cannot agree that **Fraternite** is a basis upon which an arbitrator, and still less a board exercising an appellate jurisdiction, can substitute a

probationary contract as defined by s. 56(1)(c) of the Act and Article 20.01(iii) of the agreement for a permanent contract defined by s. 56(1)(b) and Article 20.01(ii). Both classes of contract are creations of the **Education Act**, adopted by the agreement, with their own meanings and purposes within their own statutory environments. One cannot be pulled out by the roots and transplanted into the environment of the other to serve a disciplinary purpose for which it was never intended. An attempt to do so is an attempt to amend both the collective agreement and the **Education Act**.

In **Liquor Commission (N.S.) v. N.S.G.E.U.** (1990), 97 N.S.R. (2d) 55 Chipman, J.A. stated at p. 57:

> "Where, however, the court's evaluation of the decision leads to the conclusion that rather than having interpreted the agreement, the arbitrator has amended it, added to it or overlooked material provisions in it, the threshold is reached. Conscious of these restraints, it is necessary to review the merits of the arbitrator's award."

The probationary contract cannot be used as part of the disciplinary arsenal of either the school board or the board of appeal without having the effect of amending the statute and the agreement. In making such an award the board of appeal committed an error as to its jurisdiction. The Chambers judge erred in refusing ***certiorari*** to quash that part of the award. The appeal is allowed with respect to the probationary contract and that part of the board of appeal's order is quashed.

With respect to both the Chambers judge and Professor Cromwell, I do not consider the probationary contract essential to the scheme of the board of appeal's disposition of the matter. Professor Cromwell made allowance for the exceptional circumstances behind Mr. Yorke's misconduct in June, 1990, and obviously intended that the probationary contract should free the school board to discharge him in the event of a further misstep. That is the position the board is already in with regard to any alcohol related incidents by Mr. Yorke following the reinstatement ordered by the board of appeal. The reinstatement merely returns Mr. Yorke to the classroom with the status he held at the time of his

purported dismissal. The finding that the school board lacked just cause to dismiss him at that time does not cleanse his slate. Mr. Yorke remains subject to Step 3 of the EAP with no further room for manoeuvring; he cannot hope to escape the consequences of further abuses of that program.

In the result, I would dismiss the appeal by the school board against reinstatement and allow the appeal by Mr. Yorke against reinstatement to a probationary rather than a permanent contract, but without costs in either appeal. An order will issue confirming the portion of the order of the board of appeal that Mr. Yorke be reinstated, and quashing the portion of the order that his reinstatement be to a probationary contract. The effect will be that Mr. Yorke will be reinstated with a permanent contract.

J.A.

Concurred in:

Jones, J.A.

Pugsley, J.A.