SUPREME COURT OF NOVA SCOTIA

Citation: Burke v. Cape Breton (Regional Municipality), 2011 NSSC 169

Date: 20110428
Docket: Syd. No. 346500
Registry: Sydney

Between:

Warren Burke

Applicant

v.

Cape Breton Regional Municipality and Deputy Chief Brent Denny

Respondents

Judge:	The Honourable Justice Patrick J. Murray
Heard:	April 11, 2011 in Sydney, Nova Scotia
Counsel:	Mr. Blair Mitchell, for the Applicant Mr. Eric Durnford, Q.C., for the Respondents

By the Court:

INTRODUCTION:

[1] Warren Burke (the Applicant) seeks an Order declaring the Respondent, Cape Breton Regional Municipality's 2009 - 2011 process for selecting firefighters has been conducted contrary to the principles of procedural fairness and contrary to contractual obligations of the Municipality.

[2] Included in the application is a request for a direction that the assessment of the applicant be completed in accordance with the terms applied to other candidates including his completion of a polygraph examination.

[3] Until that Application is heard, the applicant has filed a Notice of Motion requesting an Order enjoining the CBRM from proceeding further in the current process for hiring firefighters pending the determination of the Application. This is known as an Interlocutory Application to preserve the status quo pending determination on the merits of Mr. Burke's application.

[4] The Respondent, CBRM, has filed a notice of contest to the application and have also provided affidavits contesting the motion. The basis of their Notice of Contest and objection to the Interlocutory Application is that Mr. Burke was dishonest and as a result they were justified in eliminating him from the selection process. In fact they argue that he eliminated himself from this process, knowing that he was required to tell the truth.

Background:

[5] In 2007 according to his evidence Mr. Burke decided to turn his life around. In 2008 he responded to a job posting published by CBRM for a firefighter position. The job competition was rigid, highly structured and involved a number of phases. These phases included firefighting knowledge, firefighter skills assessment and certification, medical clearance, physical ability tests, education, personal and professional reference checks, a board interview and a polygraph test.

[6] Mr. Burke completed all of these phases and assessments to the end but was not hired following the 2009 process. According to Mr. Burke, he “responded to

all questions including questions concerning past unprescribed drug use". (See paragraph 15, Burke affidavit).

[7] According to Deputy Chief Denny who supervised the hiring of firefighters for the CBRM fire service, "Mr. Burke was not offered a firefighter position in 2009 because of his disclosure concerning illegal and non-prescribed prescription drug use".

[8] Prior to the 2009 polygraph examination there was extensive discussion and explanation between Mr. Burke and the polygrapher, CBRPS S/Sergeant MacCormick. Sergeant MacCormick explained how answers should be given in respect of drug use and ingestion. On the basis of this Mr. Burke reanswered questions on the 2009 prepolygraph booklet prior to taking the polygraph examination itself. Sergeant MacCormick later provided a report concerning that polygraph examination to Deputy Chief Denny. Subsequent meetings were also held between Mr. Denny and Mr. Burke whereby Mr. Denny explained the circumstances and according to his affidavit indicated that "people sometimes have things in their past and it does not necessarily preclude them from employment

with CBRM". He indicated as well the main concern is that applicants be honest when reporting their past.

[9] Although Mr. Burke was upset, he later contacted Mr. Denny for advice as to how he could apply for the position of firefighter in the future. According to Mr. Denny's affidavit, Mr. Burke needed to be honest in filling out the pre-employment polygraph booklet and he would need to make better life choices. There are certain discrepancies as to the extent of what was discussed between Mr. Denny and Mr. Burke. For example Deputy Chief Denny denies that he told Mr. Burke that the last unlawful use of drugs was the only matter that would be considered. He also denies he told Mr. Burke that the benchmark was two years since the last drug used. In fact Mr. Denny denies telling Mr. Burke about any benchmarks as they are "kept confidential".

[10] At a new round of job hiring in 2010 Mr. Burke reapplied and was required to undergo a similar process as in 2009 including the polygraph examination. This time the polygraph examination was scheduled for March of 2011. It had to initially be rescheduled due to the unavailability of the officer, Constable Ross, the polygrapher who was to perform the test on Mr. Burke in 2011.

[11] Mr. Burke filled out the 2011 pre-polygraph test. As a result of the answers to questions given on the pre-polygraph test, Constable Ross concluded that Mr. Burke was not being truthful when he compared those answers to the answers given in his 2009 booklet , as well as the answers contained in the report of the 2009 polygrapher, Mr. MacCormick. Constable Ross in his affidavit stated in paragraph 32:

> "32. I compared S/Sgt. MacCormack's 2009 Report with Burke's 2011 Booklet and I noted several discrepancies with respect to the frequency and nature of Burke's stated illegal substance use. Attached hereto as Exhibit "B" is the page from Burke's 2011 Booklet regarding his substance use."

Further in paragraph 36 and 37 Constable Ross stated:

> "36. Burke's self-reported answers provided enough information to conclude that he was not being truthful. Given that my duty, when conducting polygraph testing for job applicants, is truth verification, I concluded that my inquiry was compete without the need of conducting a polygraph test.
>
> 37. Another consequence of the significant discrepancies in Burke's answers is that I knew him to be lying. Therefore, as the Examiner, I could no longer administer a polygraph test in a neutral and objective manner."

[12] The crux of the matter than is that Mr. Burke never did get to complete the second polygraph examination which was required in order for his assessment for

2011 to be completed. In paragraphs 65, 67 and 70 of Deputy Chief Denny's affidavit he states:

> "65. As a result of Cst. Ross' report and my discussion with him, I telephoned Burke on March 15, 2011 and told him that there were some concerns with his Booklet. I asked him if he could meet with me in the morning. Burke agreed.
>
> 69. ...I also detailed each of the discrepancies and he tried to provide explanations. For example, with respect to his answer that he had never before used cocaine, he stated that he had been in a hurry when he filled out the Booklet. I told him that he should have taken more time in filling out the Booklet.
>
> 70. I explained that he had effectively removed himself from the job competition by being dishonest. I also reminded him of the advice that I had provided to him in 2009 regarding the importance of being honest."

[13] One of the key parts of the evidence is that Mr. Burke in his 2011 booklet failed to disclose that he had previously used the drug cocaine. In his 2009 booklet and in the pre-test he confirmed that he did use that drug, on five occasions.

[14] The CBRM, though Deputy Chief Denny maintain that the position of a firefighter is one of trust requiring complete honesty. There are circumstances which a firefighter encounters which require absolute integrity and honesty. They believe they are justified in having Mr. Burke removed from the hiring process.

[15] In the documentation provided as part of the hiring process for 2010, Exhibit D of Mr. Denny's affidavit states:

> "This questionnaire is to determine the integrity and suitability of the candidate for a position of trust as a firefighter. If it is determined that the applicant has not been honest at any stage of this process, they will be eliminated from competition."

[16] In the 2010 competition there were a total of 67 candidates. Mr. Burke, having worked his way through the process was one of 6 final candidates .The final step required him to complete a second polygraph examination in March of 2011.

[17] An additional piece of relevant evidence is that when Deputy Chief Denny realized that Constable Ross would not perform the second polygraph examination, he attempted to determine whether the polygraph examination could be completed by a polygrapher from the Halifax Regional Police Department.

[18] In paragraph 75 of Deputy Chief Denny's affidavit he states:

> "For information purposes, I called the Halifax Regional Police (the 'HRP") to enquire as to whether they would administer a polygraph test. Deputy Chief Chris McNeil informed me that a Polygraph Examiner with the HRP would only conduct a polygraph test at the request of a Polygraph Examiner from the Cape Breton Regional Police."

[19] Consequently Constable Denny states in paragraph 76 of his affidavit:

> "Given the conversation I had already had with Cst. Ross and Staff Sgt. MacCormack, I concluded that such a request would not be made."

[20] In a conversation with Constable MacCormack in 2011 Deputy Chief Denny informed him that the polygraph test had been cancelled.

[21] For his part Mr. Burke states he had nothing to gain and everything to lose by not being truthful on the 2011 pre-polygraph booklet. He states when completing the booklet, he was rushed. Because he hurried, he made a mistake when completing it. In fact he states that he attempted to correct the answer to the question regarding cocaine use. He states he "whited out" the answer "no" but incorrectly answered " no" again instead of "yes", which is what he says he intended.

[22] In paragraph 36 of his affidavit Mr. Burkes states in part:

> "...I participated fully, honestly and conscientiously in the entire application process and I have answered all questions related to this application as honestly and as completely as I can, any oversight that occurred so that I omitted the name of one drug that I had used occurred entirely as a result of a mistake, had previously been disclosed and occurred where I know of no motive – having made such

> earlier disclosure as I could have – that would operate for me to hide or make a conscious non-disclosure in 2009."

And further he states in part in paragraph 30:

> "...The Deputy informed me that he would attempt to arrange a further polygraph through Halifax Regional Police and have it administered by them. He indicated he was about to do so. I have never heard further as to this intention but by reason of 'Without Prejudice' correspondence referred to in paragraph 33 below, do not understand the municipality to be interested in pursuing same."

[23] The Court must assess whether or not there is a serious issue to be tried in this matter. It must also assess whether there is irreparable harm to the applicant and whether on the balance of convenience an interlocutory injunction should issue.

[24] An interlocutory injunction is a discretionary remedy. It is also an equitable remedy which the Court may grant when it finds it "just or convenient" to do so. It has been said that it is also an extraordinary remedy and should not be granted except in cases where it is clearly warranted.

ISSUE

[25] Should the Respondents be enjoined from hiring candidates for employment in the Cape Breton Regional Municipal Fire Service pending the determination of this proceeding or further order of this Court?

LAW AND ANALYSIS

[26] Both parties agree that the test to be applied is the well known and accepted test recited in **R. J. MacDonald Inc. v Canada (Attorney General)** 1994 1 SCR 311 SCC. The same test respecting the law and analysis necessary to justify the granting of an interlocutory injunction or stay of execution was resolved in **Manitoba (Attorney General) v Metropolitan Stores** MTS 1987 SCJ No. 6. The test can be summarized as follows:

1. Is there a serious question to be tried?
2. Will the Applicant suffer irreparable harm if the injunction is not granted?
3. What is the balance convenience?

(i) Serious Issue to Be Tried

[27] In determining whether there is a serious issue to be tried there are a number of considerations.

[28] First the Appellant argues that there was a unilateral contract formed, the so called “Contract A/Contract B” type resulting from the decision in **Ron Engineering & Construction (Eastern) Ltd.**, [1981] 1 S.C.R. 111, a tendering contract case. The basis for this argument is that the circumstances of Mr. Burke and the CBRM advanced well beyond the “expression of intent” stage. Given that Mr. Burke has been involved in the hiring process for 2 to 3 years this argument appears on the face to have merit.

[29] In **Ron Engineering** the court found a unilateral contract (contract A) on the basis of a tender submitted for a construction contract. The court ruled the contract arose automatically upon the tender for a specified period of time as it was irrevocable by the tenderer during that period. The corollary term was the parties obligation to enter into the construction contract (contract B.)

[30] Mr. Mitchell cited the following paragraph from the case of **Roback v University of British Columbia**, 2007 BCSC 334.Unlike the facts in **Roback**, here there was a clear job description and terms for what it is the person must do in order to be hired.

> "Unlike bidders in a formal tendering process, persons responding to a job posting by submitting a resume or application do not incur the same expenditures of time and money. What is even more stark in contrast between a tendering process and an advertisement for resumes for a potential position is the fact that there is no clear job description or terms for what it is that the person must do in order to be hired."

[31] In the unilateral contract situation (often referred to as the tendering process situation) the key is whether the parties intend to initiate contractual relations.

[32] Here there is no question that what a person in Mr. Burke's position needed to do to be hired, was clearly set out in much detail. He had advanced himself through the various phases of the competition to end up at the last stage, the polygraph test in 2011. The issue however of whether a unilateral contract was formed does not end there.

[33] At paragraph 20 of **Roback**, supra, Koenigsberg, J. stated:

> 20. "The plaintiff further pleads that a University policy relating to employment equity was, or should have been, incorporated into the

> advertisement. Based upon that policy, the plaintiff alleges "merit" (which the plaintiff equates to having attained a M.F.A. or a Ph.D. degree) was a criterion for the position and part of the alleged contract formed when a person applied for the position in response to the advertisement."
>
> Further in paragraphs 30 and 31, the learned trial judge stated:
>
> "30. Essentially, the plaintiff relies on what he terms an amazing similarity between the tender **process** cases and employment **hiring** cases. In my view, there are in fact no material similarities or even a superficial one. The superficial one is only that a potential employer invites potential candidates to apply for hire for a particular job.
>
> 31. While other material differences are apparent, the two cardinal ones, in my view, are the following: first, there is no promise to hire anyone, and second, there are no specific requirements which candidates have to meet."

[34] Was a promise made to Mr. Burke that he would be hired? He says in paragraph 17 of his affidavit he was "the next candidate to be hired in the process". Deputy Chief Denny says this was not the case. Quite apart from this the Court at trial must look to whether there is anything in "contractual documents" which suggest a promise to hire. Deputy Chief Denny says in his evidence he told Mr. Burke he would be "considered for employment". Here one cannot ignore the fact that Mr. Burke proceeded through the selection process to become 1 of 6 out of 67 applicants who originally applied. Had he been able to successfully complete the second polygraph, it is evident he would have been considered as one of the 6 to be

hired. This of course is subject to other considerations such as the approval required by the CAO as stated in CBRM's Human Resource Services Policy. The terms and conditions of employment were not set out as they would be part of the collective agreement and contained therein.

[35] At this stage the court should not decide difficult questions of law or resolve disputes in the evidence. Those as well as credibility findings are best left to be dealt with at trial.

[36] The Applicant submitted additional cases in support of their position that there is a unilateral contract. These include **Amdiss v University of Ottawa**, 2010 ONSC 4738 and **Lakeside Colony of Hutteran Brethern v Hofer** [1992] S.C.J. No. 87.

[37] In **Amdiss** it was clear there had been "acceptance" in writing in the form of an admission letter from the medical school.

[38] In **Lakeside Colony** there had as well been a finding of contract based on Mr. Hofer being a member of the colony and therefore subject to their by-laws and rules.

[39] In this case before me I find that the facts and circumstances suggest more than a mere expression of interest but less than a contractual obligation, even a unilateral one.

[40] Even if Mr. Burke had successfully completed the second polygraph there was no binding obligation on CBRM that he would be hired even if it may have been more difficult to justify not hiring him. What this case is about therefore is whether Mr. Burke received procedural fairness. At this stage the court must determine whether there is a serious question to be tried. In other words, the court must determine whether the application is frivolous or vexatious.

[41] In **Lakeside Colony**, Justice McLaughlin as she then was, stated (in dissent) what a court must do in circumstances similar to these at para 175:

> "As Gonthier J. points out, the content of the principles of natural justice is flexible and depends on the circumstances in which the question arises. It follows that the court reviewing the decision under review must be careful to ensure that it fully appreciates the

> institutional and factual matrix in which the decision arises. The ultimate question is whether the procedures adopted were fair in all the circumstances."

[42] The Appellant further argues that CBRM had a duty to Mr. Burke arising out of administrative law having regard to the statutory authority assigned to it under the Municipal Government Act and specifically under its human resource policy.

[43] CBRM responds by stating it owed no duty of fairness to Mr. Burke and in support of this cites the well known case of **Dunsmuir v New Brunswick,** 2008 SCC 9. CBRM argues that since **Dunsmuir** there is no duty of procedural fairness owed in these circumstances.

[44] In its brief CBRM at para 39 states:

> "Prior to the Supreme Court of Canada's decision in **Dunsmuir**, supra, CBRM acknowledges that the general duty of fairness required of public bodies applied equally when acting in their capacity as employers and to the hiring process in particular."

[45] Further in it's brief CBRM at paragraph 43 states:

> "Given that the Applicant is seeking a unionized position, the employment relationship would be governed by a contract, namely the collective agreement. Therefore the principles of contract law, not public law, should apply in the present situation."

[46] CBRM argues there that its decision to eliminate Burke from the job competition should not be reviewed for procedural fairness. They say "instead the principles of contract law should apply" (para 44 of brief).

[47] Applying this to the facts of this case, it seems logical the principles of contract law would only apply if Mr. Burke had a contract. **Dunsmuir** involved a dismissal of an employee. Mr. Burke is attempting to secure one. I am not persuaded that no duty of fairness was available to Mr. Burke because he would be a unionized employee under the contract of a collective agreement, if hired. The fairness he is seeking is in attempting to be hired and to be given a contract. With respect therefore, this argument misses the point. Mr. Burke has not been hired and therefore has no contract.

[48] CBRM also argues that there is no free-standing duty of fairness owed to Mr. Burke as there is no free-standing duty of fairness in employment hiring situations.

[49] In support of this the Respondent CBRM at para 55 of their brief refer to the **Powder Mountain** case:

> "In coming to this conclusion, the court cited the British Columbia Court of Appeal's discussion in **Powder Mountain Resorts v. British**

Columbia, 2001 BCCA 619, where the court confirmed the basic principle that there is no free-standing duty of fairness:

> "I also agree with Tysoe J. (Trial judge) that the plaintiffs' claim based on the cause of action must fail, generally for the Reasons given by him. The invitation for expressions of interest and the plaintiffs' response in June 1985 did not give rise to a contract of the sort referred to as a "Contract A" in **Ron Engineering**, supra. There was nothing approaching an invitation to tender, or a tender for work or materials of a certain scope, that could have given rise to a contract. In the absence of a contract, no free-standing enforceable duty of fairness arises.
> ....
> I think it unlikely that Contract A would include an implied term to negotiate in good faith. Canadian law has not generally recognized a duty to negotiate in good faith in commercial transactions. (Para. 116)(emphasis mine)"

[50] From the above quotation, the Respondent emphasises:

> "In the absence of a contract, no free-standing duty of fairness arises."

Further they place emphasis on the following passage:

> "Canadian law has not generally recognized a duty to negotiate in good faith in commercial transactions."

[51] There is further support for this position at para 43 of **Roback**:

> "There is no question that to impose a free-standing duty of fairness in an employment hiring situation like this one would be to create a new or novel cause of action. I will isolate as best I can those aspects of the plaintiff's claim which may fall within the legal classification of negligence of tort." (Emphasis added)

[52] Here there is no suggestion of bad faith on the part of the municipality but whether it can be considered a "commercial transaction" is questionable.

[53] In **Cardinal v Kent Institution**, [1985]S.C.J. No.78, LeDain J. discussed the duty of fairness in certain types of administrative decisions as follows:

> "This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interest of an individual."

[54] Turning now to whether there was a duty of fairness owed to Mr. Burke, the text, **Canadian Administrative Law** (Regimbald, 1st edition, page 228) states:

> "In Baker v Canada (Minister of Citizenship and Immigration), L'Heureux Dube, J. agreed and held that:
>
> > "'Rights, privileges or interests of an individual' is sufficient to trigger the application of the duty of fairness.'"

[55] In terms of understanding the "institutional and factual matrix" surrounding this decision by CBRM, they have first suggested it was Mr. Burke himself who removed himself from the job competition. Second it was the decision of the CBRM Police Service through Constable Ross, who in effect decided that the

second polygraph test could not be given. CBRM controlled the hiring process through Deputy Chief Denny. Ultimately they must accept it as their decision not to have Mr. Burke continue to be assessed, thereby eliminating him from the job competition.

[56] The Fire Service Hiring Procedure, 2010 is subject to the CBRM Human Resources Policy. Reference has been made to Section 31 (2) of the *Municipal Government Act* which states:

> "31(2) The chief administrative officer may
> ...
> (b)appoint, suspend and remove all employees of the municipality, with power to further delegate this authority;"

[57] It is expected that CBRM, being a body politic, ultimately answerable to it's citizens, will conduct it's affairs in a procedurally fair and non discriminatory fashion. They, themselves acknowledge this in their own policy and procedures for hiring. For example, the CBRM Human Resource Services policy states that:

> "All applicants to the Municipality received equal treatment..."

Also, the opening paragraph under recruitment and selection states:

> "The Cape Breton Regional Municipality is staffed by means of non-discriminatory selection and placement techniques. Employment is based on the applicant's qualifications and is consistent with the Municipality's philosophy of **merit** and **fairness**."

[58] The emphasis on merit and fairness is as stated, not only to be expected but of course employed in practice. The entire job hiring process was conducted on behalf of CBRM by Deputy Chief Denny. He informed Mr. Burke that:

> "I would not be reviewing his 2009 pre-employment polygraph booklet when I screened his 2011 pre-employment polygraph booklet"
>
> (See para 9 of Denny, April 7, 2011 affidavit)

He states in his affidavit he did not say what the polygrapher would do. For his part Mr. Denny shredded his booklet. By this statement Mr. Burke was entitled to assume that that meant CBRM and it's agents retained throughout the process. If not then perhaps he should have been told otherwise. In paragraph 20 of Mr. Burke's affidavit he states he informed Mr. Denny as follows:

> "I told the Deputy Chief that I was worried because there was no way I could remember precisely all the questions in the previous questionnaire. He told me not to worry about what you said in your first booklet just be honest with all your answers and answer to the best of your memory. We don't expect you to remember exact numbers as long as you tell the truth you'll be fine."

Mr Burke expressed concern that he would not remember the answers previously given. It appears from his evidence that a contributing factor was the fact that he re-answered the questions following the explanation give by Staff Sgt. MacCormick

which answers were different again from those he had previously given on the 2009 pre-polygraph pre-test .

[59] On the other hand CBRM argues Mr. Burke did not comply with the stated requirements in that he failed to be truthful. Procedurally however, it is arguable that he was treated differently in the 2011 pre-test when compared with the 2009 pre-test. In the latter S/Sergeant MacCormick explained in detail how he interpreted the questions to be answered by Mr. Burke. Further it is at least arguable he was treated differently in the 2011 process by reason of his 2009 booklet being reviewed and compared with his 2011 answers. Mr. Burke has not heard back from CBRM in terms of the second polygraph test as stated in paragraph 5 of his affidavit.

[60] Having concluded there was no contractual right, I must consider whether there exists a “privilege” or “interest” to be protected by a duty of procedural fairness. The facts do not suggest there was a privilege owed to Mr. Burke. This therefore leaves the question of whether Mr. Burke had an “interest” as an individual which give rise to such a duty. Referring again to the text on **Canadian Administrative Law** by Regimbald at page 238 the author states:

> "Before the 1980s, the implicit duty to comply with the principles of natural justice and correlative right to participate in the decisions of public bodies appeared to be limited to cases involving the exercise of powers that finally decided the rights of individuals. **However, since that time, case law has not only expanded the ambit of the duty of fairness to cover privileges and interests, it has also enlarged the range of covered action, so that it now includes more than final determinations.** Now activities such as suspensions, the refusal of discretionary benefits, investigations, public inquiries, referrals to hearings, and recommendations may be subject to a duty to act fairly." (Emphasis added)

[61] The duty of fairness may therefore apply to any administrative decision that could significantly influence an ultimate decision or expose the individual to some harm. (Canadian Administrative Law,Regimbald at page 239.) There is exposure here for Mr. Burke. A breach of a duty of fairness may result in his inability to have his assessment as a firefighter completed.

[62] Ultimately the Applicant will have to answer for the answers he gave in 2011. A breach of procedural fairness can render a decision void. A breach of procedural fairness therefore can render the decision to remove him from the job hiring process void.

[63] Without deciding at this stage whether there was in fact or in law a breach, I am persuaded that the facts in this case suggest that it is at least arguable that CBRM owed a duty of fairness to Mr. Burke. He says he made a mistake, CBRM says he was untruthful.

[64] It has been stated in **Noreco Inc. v Lazyworks Computer Inc.** [1994] N.S.J. No. 408 by Justice Saunders that the interlocutory injunction stage is not the time to decide conflicts of evidence or difficult questions of law. Whether there was a duty and if so, a breach of that duty is not for the Court to decide at this stage. This court must decide only whether there is an arguable case in respect of those matters.

[65] An attempt was made by CBRM to have Mr. Burke assessed by a second polygrapher. After that they ceased their efforts in this regard and now rest on their finding that Mr. Burke was dishonest. He should be given an opportunity to explain his position fully at a full hearing on the merits. He seeks the opportunity to "fairly make representations to the decision makers such as these before being terminated from the process". (Paragraph 5 of Burke affidavit). He states he made no attempt to mislead and therefore CBRM's conclusion as to his dishonesty is unreasonable.

Mr. Burke alleges in effect he is not been “heard” by CBRM as to his removal and therefore has not made representations regarding his removal.

[66] The Respondent has argued that a more stringent view of the merits should be applied to Mr. Burke and he should be held to a higher standard. The court has conducted what it considers to be a stringent review of the evidence and analysis at this interlocutory stage. It’s findings are based on that review. Beyond that the full merits of the case must and should be conducted at trial.

[67] For the foregoing reasons I find that Mr. Burke’s claim should not dismissed as frivolous or vexatious and therefore represents a serious issue to be tried. His allegations are at least arguable at this stage.

(ii) Irreparable Harm

[68] Often it is said that irreparable harm and balance of convenience are closely linked and ought to be considered together. As has been stated in the leading case of **American Cyanamid Company v. Ethicon Limited**, [1975] 1 All E.R. 504

(H.L.), generally speaking they are not to be employed as independent hurdles. As Justice Saunders stated in **Noreco**, citing Matthews, J.A. in **Gateway Realty**:

> "The tendancy is for the Court to apply a test which is likely to produce a just result."

[69] In the case of **Amdiss v the University of Ottawa** 2010 ONSC 4738, the Plaintiff received an offer an admission to medical school but was later denied admission due to her GPA dropping. The university's eligibility requirements were included in the general admission requirements but not in the letter of acceptance to the Plaintiff. The Court held that there was a serious issue to be tried on the basis of the contractual issues of offer and acceptance. The offer of admission contained in the letter was accepted by the applicant. The court also concluded that the plaintiff would suffer irreparable harm if denied admission to medical school, "considering the personal impact on her and her personal plans and expectations and the inadequacy of monetary damages".

[70] Here the Respondent, CBRM, argues that a Court will not force an employer to hire an applicant, especially one that has proven himself to be dishonest. They say, therefore there is nothing to be gained by "freezing" CBRM's hiring process. In paragraph 61 of their brief the Respondent states:

> "The only irreparable harm suffered by Burke is that which he brought on himself by his own dishonesty."

[71] The Defendant, Burke, argues his integrity and reputation are directly affected. He argues that his removal from the hiring process and his replacement with another candidate will forever seal his fate in terms of any chance he has to become a firefighter. At paragraphs 37 and 38 of his affidavit the applicant states:

> "37. I have grown up and lived in Sydney all my life; I know of no other realistic opportunity to qualify for a professional firefighting career elsewhere in the province and I wish to continue to make my home and live out my life in Sydney. There is no realistic prospect that I know of that having been terminated from this program that I could ever regain my qualifying status as of the time this polygraph was due to be administered. If hiring proceeds on the basis of my being excluded from the process, there is no realistic prospect of my being in a position to obtain the opportunity to undertake such a career. I have used the prospect of becoming a professional firefighter not only as a personal career objective but also as a means to correct my lifestyle and make proper choices for my future.
>
> 38. My exclusion from this program on this basis will tar my reputation and province no realistic opportunity to qualify elsewhere for this career."

[72] The Applicant cites the cases of **International Union of Marine Shipbuilding Workers of Canada, Local 1 v. International Brotherhood of Electrical Works, Local 625** , [2002] N.S.J. No. 188 and **Morrison v Morrison [2003]** N.S.J. No. 183 as authority for the proposition that loss of a business

livelihood and business reputation are recognized types of irreparable harm. Here they argue that the personal equivalent for Mr. Burke is the loss of his reputation. While loss of livelihood is affected it is more loss or potential loss of a career for Mr. Burke. There can be more to a career than the monetary benefits derived from it.

[73] In considering irreparable harm it is the nature of the harm and not the magnitude of the harm which the court must address. It is most commonly described as harm that cannot be compensated in monetary damages or harm which is difficult to quantify in monetary terms. (**Fulton Insurance Agency's Ltd.** v Purdy 1990 NSJ No. 361.)

[74] The question therefore is whether a potential loss of a career can be compensated in damages. In **Amdiss** the Court did not think a medical student's career could be compensated and found irreparable harm. Here compensation is made more difficult by the fact that Mr. Burke is not employed and may never be employed. He is seeking to be put back into the hiring process and to have his assessment completed. It is apparent that the removal from a program for

dishonesty will almost certainly effect the fate of Mr. Burke in the future and in that respect is irreparable.

[75] It is also irreparable in the sense that if he is passed over for this round of hiring that opportunity may be lost forever. He is attempting to preserve that opportunity for himself by this application. If he is successful at trial that opportunity may come again but if and when is most uncertain.

[76] As for his reputation Mr. Burke stands to be personally impacted. The question remains, how will the withholding of the interlocutory injunction result in irreparable harm? Will it make any difference at this stage? A person can suffer irreparable harm whether or not the interim relief is granted. Therefore it must be shown that irreparable harm would result to the applicant if the interim relief requested is not granted.

[77] The applicant argues remote vindication at the trial stage cannot be affective to address the harm done. Removal from the process now could result in harm which is not totally irreparable even if there is vindication at a later point. When and if hiring will occur in the future is questionable. All of these things depend on

future considerations such as his ranking with other candidates as well as the outcome of his assessment. Indeed it may come that he would never be hired by CBRM notwithstanding the completion of his assessment. To conclude, however, on that basis that he does not suffer irreparable harm, I believe is not taking into account the current situation. To suggest that he suffers no irreparable harm because a court would not force the Respondent to offer him employment is not a reason for concluding that he would not suffer irreparable harm.

[78] The court agrees that deference should be shown to CBRM in terms of their right to hire qualified candidates, so long as they do so according to law. They are in the best position to make that determination. The court is not being asked that however. At this point it is being asked to preserve the status quo ,in the pre- hiring stage so as to allow a proper evaluation of the circumstances and consideration of the applicant's plight. The amount of deference that should be granted to CBRM's hiring process is more aptly considered under the balance of convenience test. For the reasons stated however, I find there to be irreparable harm to the Applicant in these circumstances.

(iii) Balance of Convenience

[79] The more difficult question as presented by the facts of this case is what is the relevant impact upon the parties of granting or withholding the injunction . Often the question is asked which party would suffer the greater harm if the injunction is granted or if the injunction is refused. (**RJR MacDonald Tobacco and (Manitoba v Metropolitan Stores**, supra)

[80] I agree with the Respondent who states in their brief that the public interest must be weighed and is a definite factor to consider in determining balance of convenience. Clearly there is a public interest as the Respondent CBRM is a public body, a municipality. That alone suggests a public interest. There is little or no evidence in the Respondent's affidavits however regarding balance of convenience. Their brief, however, deals with it extensively. In paragraph 69 of the respondent's brief, CBRM's counsel Mr. Durnford argues:

> "The interests of CBRM, the general public and other candidates in the 2010/2011 job competition will also be compromised if you grant the Applicant's motion. An order enjoining the CBRM from hiring firefighters compromises its ability to operate and provide fire and emergency services to the public. Protection of the public and its property requires that firefighters be hired as and when needed. **A hiring freeze would jeopardize the CBRM's ability to provide essential services to the public.**"

[81] The applicant's brief suggests preserving the status quo citing **Hooper Homes Canada Limited**, 1991, NSJ No. 629 as follows:

> "Where factors appear evenly balanced it a counsel of prudence to take measures as are calculated to preserve the status quo."

[82] In paragraph 39 of the applicant's brief Mr. Burke states as follows:

> "Even should I be successful in this litigation, should the hiring process proceed, my position will have been filled and I see no reasonable prospect that I would displace –nor would it be desirable for me to displace –an incumbent in this position."

[83] The difficulty here is that matters may not be equal. The Respondents are attempting to hire skilled firefighters and they need to ensure a full complement for the safety it's citizens. Firefighting is an essential and emergency service. The applicant seeks to put a freeze on the hiring process of CBRM. These circumstances suggest an unequal balance in favour of the Respondent.

[84] In **Manitoba v Metropolitan Stores** at paragraph 103 Beetz, J. referring to Brown L.J. **in Smith v Inner London Education Authority** [1978] 1 All E.R. 411 stated (at page 422):

> "... where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and

> take into account the interests of the public in general to whom these duties are owed."

[85] Similar to the case suggesting a reluctance by the courts to become involved in academic hiring (**Amdiss v University of Ottawa**), there is a reluctance here for the court to become involved in the hiring process even if only by placing a freeze on the process.

[86] In paragraph 31 of the Respondents brief they refer to the **Noreco** decision and suggest that there should be "a healthy reticence" in allowing interlocutory injunctions." Paragraph 31 of their brief the Respondent states:

> "CBRM's position is that the extraordinary remedy of an interlocutory injunction is not necessary or appropriate in the present circumstances. As this court commented in *Noreco Inc. V. Laserworks Computer Services Inc*.
>
> > [The cases] suggest to me a health reticence in allowing interlocutory injunctions. It is, after all, an extraordinary remedy reserved to those cases where there is clear evidence of circumstances necessitating its imposition."

Against that reticence, what lies in the balance is a young man's career. It is not overstating to say that what lies in the balance is Mr. Burke's future.

[87] The circumstances are somewhat extraordinary in that both sides have a strong position regarding balance of convenience. In his text by entitled "Injunctions, Specific Performance", the author Robert J. Sharpe states that a court in these circumstances may be required to consider special factors as outlined in **American Cyanide**, supra, in reaching it's conclusion. A "detailed order" may be appropriate to address these factors in assessing the balance of convenience. In that text it is further suggested that where the balance of convenience lies may be "significantly affected by the extent to which each party would be incapable of being compensated in damages, in the event of his succeeding at trial". (Pages 408, 409 and at paragraph 2.530)

[88] Given the situation as it now stands, while it may be possible, it would be a difficult exercise to calculate Mr. Burke's compensation in terms of damages. In their brief, CBRM states at paragraph 65 that:

> "Burke has completed the application process but for the final act of being hired. It has been determine that Burke cannot be hired because he is dishonest."

[89] The evidence is that Mr. Burke has not completed the application process in that the second polygraph examination has not been completed for the 2011 hiring process. CBRM states there is good reason - he was dishonest. Placing a freeze on

the hiring process as requested by the Applicant does not properly take into account the public's interest in this matter or as well the other candidates which CBRM correctly points are waiting to be hired. Safety must be of the upmost concern. In terms of fire safety this tips the balance in favour of CBRM.

[90] In **Amdiss** although the Court decided there was a serious issue to tried and that irreparable harm would be caused to the applicant, the Court concluded that the balance of convenience clearly favoured the university. The university itself was in the best position to understand their own requirements and ultimately who should be admitted. It should be noted however that a key reason for the court's conclusion was that placing the student in the university while the litigation was ongoing left both parties in an untenable position. The same untenable position is not necessarily present between Mr. Burke and CBRM as he is not at the hiring stage but at the stage of needing to complete his assessment for hiring.

[91] In **Manitoba v Metropolitan Stores** at paragraph 77 the court referred to the case of **Vancouver General Hospital v Stoffman** 1985 23 DLR 4th 146. In the latter case fifteen physicians challenged the Minister of Health's regulation under the *Hospital's Act* terminating their services because they were over the age of 65

years. In a unanimous judgment the Court of Appeal issued an interlocutory injunction restraining the hospital from interfering from the doctor's privileges pending a determination of the issue. While the Court of Appeal did not specifically refer to public interest it expressed a concern for the safety of the patients of the respondent doctors, noting they were all in good health at the time.

[92] We have therefore at present a correlation between the requested freeze on hiring and the potential impact it would have on the safety of the municipality. The court agrees that the CBRM must not be left in a position of having less than a full complement to respond to the needs of the municipality, especially in regard to it's fire services. Can a balance be achieved to address that most important factor, along with the interests of Mr. Burke?

[93] Under s. 43 of *Judicature Act* the court has certain discretionary powers but those must be based on the application of sound legal principles in deciding what is "just or convenient". It would be inconvenient for the municipality to end up in a situation of having less than a full compliment. It would be just to provide Mr. Burke with some preservation of the opportunity which he says will be lost if the injunction were not granted.

[94] The safety of the community must be of the upmost concern. As well concern must be had for the remaining individuals involved in the hiring process. The issuance of an interlocutory injunction will impact most definitely and directly on some or all of those individuals. They are not parties to the proceeding but the court must take their situations into account, as best it can.

[95] In exercising the discretion afforded to me the court is prepared to issue an interlocutory injunction but not one that would result in a complete freeze of CBRM's hiring process. In an attempt to strike a fair balance between the competing interests and weighing the concepts of irreparable harm and balance of convenience together, I believe an injunction restricting the hiring process of the Respondent requiring it not to proceed with the hiring of a firefighter with respect to one of the positions to be filled would be a reasonable limitation.

[96] This substantially reduces the risk of the Respondent being short of a full complement. If additional services are required from time to time, it is open to the Respondent to submit same for consideration, pursuant to the undertaking filed by the Applicant, should the Respondent be successful at trial.

[97] At the conclusion of the April 11, 2011 hearing the indication was that the CBRM would proceed to fill 4 of the 5 positions, pending my decision in this matter. My decision then in effect extends the status quo as of that date.

[98] Finally I will review an appropriate order to be provided by the Applicant to this effect and hear the parties as to costs.

J.