

SUPREME COURT OF NOVA SCOTIA

Citation: *Book v. Tourism Nova Scotia*, 2016 NSSC 253

Date: 2016-09-26

Docket: Hfx No. 453012

Registry: Halifax

Between:

Robert Book

Applicant

v.

Tourism Nova Scotia

Respondent

Judge: The Honourable Justice James L. Chipman

Heard: September 7, 2016, in Halifax, Nova Scotia

Counsel: James P. Boudreau and William Russell, for the Applicant
Kevin A. Kindred, for the Respondent

By the Court:

Introduction

[1] By Notice of Application in Court filed June 30, 2016, Robert Book seeks damages against Tourism Nova Scotia (TNS) resulting from an alleged wrongful termination. By Notice of Contest filed July 26, TNS says the application should be dismissed because they offered Mr. Book severance as required by the terms of his employment.

[2] The parties appeared for a July 28 Motion for Directions and agreed to schedule the within preliminary question of law under *Civil Procedure Rule 12*. Accordingly, the within application is to determine the legal basis of TNS's obligations to Mr. Book on terminating his employment.

[3] Mr. Book submits that pursuant to the applicable legislation, the terms of the termination of his employment are governed by the common law. TNS disagrees, arguing that their legal obligations on terminating Mr. Book are as set out in the applicable legislation and accompanying regulations.

[4] There is a significant practical distinction in the two positions. If Mr. Book's arguments are accepted, he is arguably entitled to something in the range of 24 months' notice. If TNS's position prevails, Mr. Book's entitlement is restricted to 12 months' notice.

Determination of a preliminary question of law under Rule 12

[5] Rule 12.01 reads as follows:

- 12.01 (1) A party may, in limited circumstances, seek the determination of a question of law before the rest of the issues in a proceeding are determined, even though the parties disagree about facts relevant to the question.
- (2) A party may seek to have a question of law determined before the trial of an action or the hearing of an application, in accordance with this Rule.

[6] In *Mahoney v. Cumis Life Insurance Company*, 2011 NSCA 31, Justice Fichaud discussed Rule 12.02. In *Perrin v. Blake*, 2016 NSSC 88, Justice McDougall set out the process to assess a Rule 12 motion:

[13] From these requirements *Mahoney* articulated a three-step process to assess a motion under Rule 12 (at paras 18–20):

1. Identify the pure legal question to be determined;
2. Identify all the facts that are necessary to determine that question of pure law; and
3. Determine whether all those facts can be found without a trial or a hearing.

[7] I accept that the issue presented is a question of pure law. The relevant facts are either agreed to or admitted for the purposes of this motion. I am further satisfied that separating the question will reduce the duration of the main application in court. As such, the requirements pursuant to Rule 12.02 are met.

Facts

[8] Given the briefs and submissions of counsel, the below facts are not in dispute.

[9] In 2015 the Province introduced the *Tourism Nova Scotia Act*, 2015, c. 10, s. 1 (*TNS Act*). The *TNS Act* created TNS, a private sector-led organization mainly responsible for promoting tourism in Nova Scotia.

[10] The Applicant was designated as an employee of TNS on April 1, 2015, and received notice of termination on April 29, 2016. During this approximate 13 month period, Mr. Brook's employment conditions remained unchanged from the time before his designation, when he was a civil servant. For example, his salary and compensation, his access to sick leave and his accrual of vacation all continued on the same terms as applied before his designation.

[11] On termination, TNS offered Mr. Book 52 weeks' salary in lieu of notice on the basis that Mr. Book's conditions of employment were determined by the legislation and regulations applicable to provincial civil servants; i.e., the *Civil Service Act* R.S.N.S 1989, c.70, s. 25 (*CSA*) and the *General Civil Service Regulations* R.S.N.S. 1989, c. 70 (*Regulations*).

[12] TNS does not dispute that Mr. Book, in accordance with the *CSA*, is owed, at a minimum, 52 weeks' pay in lieu of notice.

Issue

[13] What were TNS's legal obligations on terminating Mr. Book's employment?

Discussion

[14] Mr. Book was transferred to TNS after approximately 27 years as a civil servant with the Province of Nova Scotia. There is no dispute that his service record with the Province accompanied him to his new employer. In the result, at the time of his termination, he had almost 28 years of service.

[15] Section 25 of the *CSA* allows the Province to lay off an employee or terminate their employment in accordance with the *Regulations*.

[16] Section 146 of the *Regulations* sets out the requirements when the Province seeks to either lay off or terminate an employee. Under this regulation, an employee is entitled to four weeks of pay for every year of service, up to a maximum of 52 weeks of pay in lieu of notice.

[17] Regulation 146(5) requires that an employee who receives an employment allowance must sign an agreement that releases their employer for all future claims for compensation.

[18] Mr. Book takes the position that he is no longer bound by the *CSA* and the *Regulations* due to the operation of the legislation giving birth to TNS.

[19] The parties agree that the key provisions of the *TNS Act* on this application are as follows:

23 (1) In this Section and Sections 24 to 27, "designated person" means an employee of the Province who was appointed in accordance with the *Civil Service Act* and is determined by the Minister to become an employee of the Corporation.

(2) The Minister may determine who becomes a designated person.

(3) Every designated person is an employee of the Corporation and ceases to be a person appointed in accordance with the *Civil Service Act*.

(4) The *Civil Service Act* and the regulations made pursuant to that Act and the *Civil Service Collective Bargaining Act* do not apply to a designated person.

(5) The continuity of employment of a designated person is not broken by the effect of this Section.

24 (1) Every designated person is employed by the Corporation on the same or equal terms and conditions of employment as those under which the employee was employed as an employee by Her Majesty in right of the Province until changed by collective agreement or contract of employment.

(2) Every designated person is deemed to have been employed with the Corporation for the same period of employment that the employee was credited with as an employee of the Province.

(3) The Corporation is bound by a collective agreement concluded pursuant to the *Civil Service Collective Bargaining Act* in relation to a designated person as if it were a party to the collective agreement as the employer and as if the collective agreement were concluded pursuant to the *Trade Union Act*.

(4) For greater certainty, the Corporation is a transferee for the purpose of Section 31 of the *Trade Union Act*.

(5) A designated person is entitled as an employee of the Corporation to all vacation leave accumulated, less any vacation arrears that accrued, while the designated person was an employee of the Province.

(6) Subject to any applicable collective agreement or contract of employment, each designated person who, before being designated, was covered by the Nova Scotia Public Service Long Term Disability Plan or was included in a bargaining unit whose collective agreement provided for long-term disability benefits under the Nova Scotia Public Service Long Term Disability Plan is deemed to continue to be a person to whom the Nova Scotia Public Service Long Term Disability Plan applies.

(7) The obligations and liabilities of Her Majesty in right of the Province in respect of designated persons are the obligations and liabilities of the Corporation, including all employee benefits and entitlements.

[20] Accordingly, s. 23 allows for certain provincial employees to be transferred to TNS by the Minister of Business. Section 23(3) provides that “every designated

person is an employee of the Corporation [TNS] and ceases to be a person appointed in accordance with the *Civil Service Act*". Further, s. 23(4) states that "The *Civil Service Act* and the regulations made pursuant to that Act and the *Civil Service Collective Bargaining Act* do not apply to a designated person."

[21] Given the facts, Mr. Book is clearly a designated person. Section 24(1) guarantees minimum protections for designated persons such as Mr. Book. Further, the *TNS Act* provides the basis for the employment relationship between designated employees (such as Mr. Book) and TNS:

- s. 23(5) states that the continuity of employment of a designated person is not affected;
- s. 24(2) directs that the period of employment will be deemed continuous;
- ss. 24(3) and (4) provide for the continuity of the collective bargaining relationship for designated employees who are unionized;
- s. 24(5) provides that vacation entitlements will be carried over;
- s. 24(6) provides for continued participation in the Nova Scotia Public Service Long Term Disability Plan;
- s. 24(7) transfers the Crown's employment-related obligations and liabilities to TNS;
- s. 26 establishes that on retirement, a designated employee will be entitled to a public service award on the same terms as a civil servant; and
- s. 27 establishes continuity of employment for the purposes of the *Public Service Superannuation Act*.

Positions of the Parties

Mr. Book

[22] The Applicant highlights s. 23 and correctly points out that the *CSA* no longer applies to him. Since this section determines that the *CSA* and *Regulations* cannot dictate the terms of employment, he says the common law must fill the void. Mr. Book acknowledges the existence of s. 24(1) and through his counsel states, "it somehow revokes all that and takes him back in time as if s. 23 does not

exist.” He goes on to question why s. 23 is drafted in the first place. He argues this is “sloppy by design” and having regard to statutory interpretation principles says that s. 23 should in effect trump s. 24(1). Given that there are no interim measures drafted to deal with Mr. Book’s notice entitlement on termination, he argues that the void must be filled by the application of the common law.

TNS

[23] The Respondent counters that there is no need to read in common law notice because the question is expressly dealt with. TNS argues that there is no requirement for an implied term when clear statutory provisions exist. While acknowledging there is no section or contract that specifically addresses notice, the Respondent points to the “interim” s. 24(1) which “fills the gap” until such time as it may be replaced by a negotiated term. The Respondent notes that s. 24(1) calls for employees such as Mr. Book to be treated “not greater and not lesser” than were they civil servants.

Analysis

[24] Determining the answer to this question of law requires analysis of the legislation. There is nothing ambiguous about s. 23(3) of the *TNS Act* as every TNS employee is an employee of TNS and ceases to be a person appointed in accordance with the CSA. Further, s. 23(4) confirms that the *CSA* and *Regulations* do not apply to a designated person (such as Mr. Book).

[25] Section 24(1) guarantees minimum protections under the *TNS Act* as every designated person is employed by TNS on the same or equal terms and conditions of employment as he or she had when with the Province.

[26] In his written submission, Mr. Book says at para. 37 “that s. 24 simply ensures that Mr. Book’s conditions of employment are at least equal to those under the *CSA*.” With respect, this is not what s. 24(1) says as it clearly states that designated employees employment conditions are the same or equal.

[27] The Applicant goes on to suggest that there exists an inconsistency in the legislation and accordingly the Court must turn to principles of statutory interpretation. Mr. Book’s brief states as follows:

39. However, there would appear to be an inconsistency with section 24(1), which states that a designated employee is employed with Tourism Nova Scotia on

the same terms as their employment with the Province. By extension, this arguably requires that the *CSA* and the *Regulations* continue to apply to designated employees, despite a clear statement to the contrary in the legislation in section 23 (4).

40. In order to resolve this inconsistency, we must turn to principles of statutory interpretation.

[28] The Applicant first suggests that there is a conflict or inconsistency in the *TNS Act* between s. 23, stating that the *CSA* and *Regulations* do not apply, and s. 24, which continues the terms and conditions of employment as before. To resolve this alleged conflict, he cites Professor Sullivan for the proposition that one provision should be “subordinate” to another, and concludes that s. 23(4) should be seen as “exhaustive” on this question.

[29] In my view the impugned legislation is not inconsistent or in conflict. Indeed, I am of the view that the Legislature intended each section to have a meaning which in the circumstances, does not conflict.

[30] In *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at pp. 337-338, the author identifies internal coherence as a presumption of statutory interpretation, stating that:

It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; ...

The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies; that each provision is capable of operating without coming into conflict with any other.

[31] When I consider the entirety of the legislation in context, I find that sections 23 and 24 of the *TNS Act* are coherent and do not internally conflict. Section 23 establishes that designated employees are no longer part of the civil service, and that the *CSA* and *Regulations* do not apply to them. This is consistent with the Legislature’s purpose in creating TNS as a Crown entity at arm’s length from the government. Section 24(1) then addresses the question of what the terms and conditions of designated employees are, now that they are excluded from the civil service. The employment terms and conditions are to continue unchanged until such time as they are replaced by a new contractual arrangement. This

incorporates by reference the old terms and conditions set out in the *CSA and Regulations*, which now apply not directly, but by virtue of s. 24(1).

[32] In the result, I see no reason to look beyond the plain and ordinary reading of the legislation. Accordingly, it is not necessary to consider the *Hansard* passages referenced by counsel. Having said this, when I review the passages it is obvious that there is nothing said which alters my interpretation.

[33] In all of the circumstances, it is my determination that the Respondent's legal obligations on terminating the Applicant's employment are as set out in the *Regulations*, by virtue of s. 24(1) of the *TNS Act*. Accordingly, Mr. Book is entitled to 12 months' notice.

[34] If the parties are unable to agree on costs, I will receive written submissions within 30 days of this decision.

Chipman, J.