Citation: Burchill v. Commissioner of the Yukon Territory
2002 YKCA 4

Date: 20020321
Docket: YU440
Registry: Whitehorse

COURT OF APPEAL FOR THE YUKON TERRITORY

BETWEEN:

FRANK BURCHILL

APPELLANT
(PLAINTIFF)

AND:

THE COMMISSIONER OF THE YUKON TERRITORY

RESPONDENT
(DEFENDANT)

Before: The Honourable Mr. Justice Hall
The Honourable Mr. Justice Mackenzie
The Honourable Madam Justice Saunders

The Appellant appearing on his own behalf

P. Gawn — Counsel for the Respondent

Place and Date of Hearing: Whitehorse, Yukon
November 19 and 20, 2001

Place and Date of Judgment: Vancouver, British Columbia
March 21, 2002

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Mackenzie

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] In August 1988 Mr. Burchill was dismissed from his employment with the Yukon Territory. He now appeals from the order dismissing his action for a declaration that he was not validly terminated from his employment, that he is entitled to remain in his position from which he was dismissed, and that he is entitled to the salary and benefits he would have earned over the ensuing period.

The Circumstances

[2] Mr. Burchill, a lawyer, was appointed to the position of Administrator of Corporate Affairs in the Consumer and Corporate Affairs Branch of the Department of Justice, Yukon Territory, in December 1986. In this capacity he filled certain legislative offices and fulfilled certain duties assigned by legislation to those offices.

[3] From the start, Mr. Burchill had a troubled relationship with his supervisor. As a new employee he was required to serve a six-month probationary period. On his first performance appraisal his supervisor was critical of Mr. Burchill's lack of consultation and extended his probationary period for a further four months. The second performance appraisal contained negative aspects, but his employment was confirmed and he became a permanent employee in October 1987.

[4] In June 1988 Mr. Burchill met with his supervisor concerning projects to be undertaken. Two of the tasks assigned to him became the subject of disputes that ultimately led to his dismissal: completion of an "acting pay" form for an employee and completion of a memorandum permitting his supervisor to assume his legislative authorities during his absence on vacation.

[5] Mr. Burchill completed the acting pay form but refused to sign it, indicating that his supervisor should do so. For this he received a written reprimand for failure to follow a direction. And contrary to his instruction to complete a memorandum permitting the supervisor to assume his legislative authorities during his vacation, Mr. Burchill purported to delegate his authority to three other individuals, saying he believed the relevant legislation gave him, alone, discretion to delegate signing authority. For this failure to follow instructions Mr. Burchill was suspended for two days. On the same day that he was suspended Mr. Burchill received a letter of expectation written by the Deputy Minister, explaining that he was required to follow the directions of his supervisor and advising him that he would be terminated if he failed to discharge his duties to the satisfaction of his supervisor.

[6] Also on the day that he received the suspension and the letter of expectation, his supervisor instructed Mr. Burchill to issue designations regarding the exercise of legislative authority during his absence on vacation. Some days later Mr. Burchill advised his supervisor that he had not done so, that he did not intend to do so and that he had referred the matter to the R.C.M.P. On August 16, 1988 Mr. Burchill was dismissed from his position, pursuant to s. 137 of the ***Public Service Act***, R.S.Y. 1986, c. 41.

[7] Mr. Burchill sought a hearing pursuant to s. 148 of the ***Public Service Act*** "to protect [his] right to submit an appeal to adjudication". The Public Service Commissioner responded that Mr. Burchill had no right to submit an appeal to adjudication in respect of his dismissal as he was not a member of the bargaining unit. Mr. Burchill then wrote again requesting a hearing in writing. The Deputy Minister responded on September 20, 1988 setting out the reasons for Mr. Burchill’s dismissal and inviting a response. Mr. Burchill did not respond. On October 24, 1988 the Deputy Minister confirmed Mr. Burchill's dismissal.

[8] Mr. Burchill did not rest with that response and persisted in attempting to appeal his dismissal to the Yukon Public Service Staff Relations Board. On April 20, 1990, the

Board issued a decision confirming its lack of jurisdiction. Mr. Burchill also pursued the Deputy Minister, alleging a criminal offence of intimidation, and laid complaints with various law societies in respect of the Deputy Minister and three employees of the Ministry who were qualified lawyers. Finally, nearly six years after his dismissal Mr. Burchill commenced this action seeking an order that his dismissal was void *ab initio*, reinstatement, and payment of lost wages and benefits.

The Trial Decision

[9] At trial the learned trial judge posed two questions: was the dismissal permitted under the ***Public Service Act***; and if so, was it effected in a manner that was fatally flawed procedurally? He answered both questions in the negative.

[10] On the basis for the termination the learned trial judge found that Mr. Burchill's insubordination and lack of professionalism were sufficient to support his termination under s. 137 of the ***Public Service Act***, saying:

> [42] After the confirmation of his appointment, the plaintiff's relationship with his employer deteriorated further. He indicated that he no longer had to "suck up" to his supervisor. He threatened to have his supervisor sent for "professional help." He suggested that a dispute with his supervisor would be "in the hands of the RCMP". The plaintiff took it upon himself to unilaterally challenge branch

policies and procedures rather than raising his concerns with his Director or Deputy Minister. His attitude was confrontational and rebellious, rather than constructive and professional. The plaintiff received a formal reprimand, followed by a two-day suspension. He received an extensive "letter of expectation" from the Deputy Minister. His suspension was confirmed by the Deputy Minister, who later dismissed him. The plaintiff was warned by the Deputy Minister that the continuation of his attitude towards his supervisor would result in his dismissal. Indeed, the plaintiff himself assessed his own precarious situation, stating that, "it will probably only be a matter of time until Mr. Byers finds some reason to terminate my employment."

[43] The plaintiff does not dispute the material facts leading to his dismissal. On the contrary, he candidly admits them. He attempts to justify his confrontational attitude on the grounds that orders given to him were unlawful. With respect, his excuses fall short. Even assuming there are legitimate legal questions surrounding the delegation of his statutory authority, it does not follow that the plaintiff's behaviour is excusable. He was to take direction from and consult with his superiors and he stubbornly refused to do so. When he differed with his superiors, the plaintiff's attitude was confrontational, provocative and insubordinate.

[44] The plaintiff's behaviour after his dismissal also demonstrates his inappropriate way of dealing with the issues related to his dismissal. He pursued his supervisor in the criminal courts for intimidation. He pursued complaints to various law societies with respect to the conduct of Branch lawyers. The defendant's evidence is that none of these complaints were substantiated and the plaintiff provides no evidence to the contrary. The plaintiff was hired as a professional, with impressive qualifications. He was appointed as such to a managerial position. His behaviour was not commensurate with either his qualifications or his responsibilities.

> [45] In light of the above, it is unnecessary to examine the legality of the orders disputed by the plaintiff. The problems outlined above are, in my opinion, sufficient to ground his termination under s. 137 of the *Public Service Act*. ...
>
> ...
>
> [49] In conclusion, the plaintiff's insubordination and lack of professionalism justified his termination. He was properly dismissed for cause under subsections 137(a) and (c) of the *Public Service Act.*

[11] On the issue of procedural fairness the learned trial judge found that the requirements of procedural fairness had been satisfied and that by failing to apply for judicial review Mr. Burchill was taken to accept the decisions that he had no further appeal. The learned trial judge referred to ***Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police*** (1975), 61 D.L.R. (3d) 36 (S.C.C.) in the context of the sequence of events up to and including the Deputy Minister's letter of September 20, 1998 inviting a response, and said:

> [54] The plaintiff complains that the case put forward by Mr. Byers was somehow lacking in precision, or did not disclose all material facts or documents. He further argues that this prevented him from making reply submissions. This explanation is simply implausible. The plaintiff was well aware of the problems his employer had with his conduct and performance. These were summarized - and backed up by correspondence and the plaintiff's job description - by Mr. Byers in his letter to the

plaintiff. The plaintiff made no efforts after receiving this letter to obtain further information from the defendant. He simply sat and waited. When his dismissal was confirmed by Mr. Byers, the plaintiff promptly applied for an appeal to adjudication.

[55] It appears to me that the plaintiff did not attempt in good faith to resolve the matter with Mr. Byers. This interpretation of events is consistent with his statement on August 30th that he was applying for a hearing under s. 148 solely to preserve his right to appeal to adjudication. He thought - mistakenly, as it turned out - that he could take his case to adjudication once Mr. Byers confirmed his dismissal. In my view, Mr. Byers afforded the plaintiff adequate opportunity to bring forth his case, and thereby satisfied the procedural requirements mandated by the *Public Service Act*.

[56] The plaintiff submits that, whatever the procedural rights mandated by statute, the common law imposes procedural requirements in addition to any such rights. While procedural rights at common law and under statute may co-exist, the common law rights become irrelevant where the statute sets out a scheme which meets the common law "procedural fairness" requirements. *Knight* v. *Indian Head School Division* (1990), 30 C.C.E.L. 237 (SCC). Only where the statutory scheme falls short of the common law requirements need the court examine whether the statute preserves or overrides common law rights.

[57] The procedural requirements with respect to the dismissal of a holder of a public office are well established. The employee must be given reasons for the termination and an opportunity to respond thereto. There is no requirement for an oral hearing, nor for an elaborate appeal process. The Supreme Court of Canada has held that this requirement applies both to employees serving at pleasure and to those dismissible only for cause. *Nicholson, supra*. The common law requirement represents a minimum standard of communication and fair dealing. The rationale for this standard is explained by England & Christie in *Employment Law in*

Canada (Toronto: Butterworths, 1998), cited in the plaintiff's authorities, as follows (at 17.116):

> The purpose of the duty in such cases is to ensure that the employer has the fullest information possible from the employee in order to improve the quality of its decision whether or not to dismiss; it is not to establish a full-scale judicial review of the correctness of the decision. Therefore, the full trappings of natural justice need not be present. For example, in Knight, the duty was held to be satisfied because the employee had been told in pre-dismissal negotiations over the possible renewal of his contract the reasons why the Board was displeased with him and he had the chance to make submissions at that time on those concerns.

[58] In *Knight, supra*, L'Heureux-Dube J., for the majority, emphasized the need for flexibility in the following passage (at 268):

> Since I accept the trial Judge's finding of facts that "everything that had to be said had been said" (at [53 Sask. R.] p. 283), the requirement of the formal giving of reasons and the holding of a hearing would achieve no more, in my respectful view, than to impose upon the appellant board a purely procedural requirement, against the above-stated principles of flexibility of administrative procedure.

[59] The statutory scheme provides for both notice and hearing. I find that it satisfies the common law rules of procedural fairness. The plaintiff was made acutely aware of the concerns about his performance. He predicted his dismissal and, by his own conduct, virtually assured it. He was given the opportunity to respond and made a conscious choice not to do so. I find that both the statutory provisions and the common law principles have been satisfied.

[60] The plaintiff further argues that he had statutory appeals which were denied him. The plaintiff first applied to the Public Service

> Commissioner, Mr. Besier, for adjudication. He later applied for an appeal to the Yukon Public Service Staff Relations Board. In each case, the plaintiff was told he had no right to an appeal, beyond the hearing by the Deputy Minister provided for in s. 148 of the *Public Service Act*. It is important to note that the plaintiff did not seek review of these decisions. He could have applied for judicial review of the Public Service Staff Relations Board's finding that it had no jurisdiction. The plaintiff could have sought a review of Mr. Besier's finding that the plaintiff had no right to adjudication. He could have applied for certiorari with respect to Mr. Byers' confirmation of his dismissal. It is not now open to the plaintiff to challenge these decisions. Having failed to take the appropriate steps, he must be taken to have accepted the decisions to the effect that he had no further appeals. *Schweneke* v. *Ontario* (2000), 47 O.R. (3d) 97 (C.A.).
>
> ...
>
> [64] In conclusion, the plaintiff's procedural rights, by both statute and common law, have not been violated. It follows that his dismissal was valid and his claim cannot stand.

[12] Lastly, the learned trial judge held that in any event he would deny Mr. Burchill's claim on the basis of the six year delay in commencing the action and the twelve year delay in bringing the matter to trial, saying:

> [66] The plaintiff brings this proceeding by way of an action for a declaration and an accompanying claim for monetary relief. He relies upon the *Limitations of Actions Act*, R.S.Y. 1986, c. 104, which by paragraph (h) of subsection 2(1) provides for a six-year limitation period for "actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specially dealt

with". The plaintiff claims that, because the statute provides for a six-year limitation period for equitable relief and the declaratory action is a form of equitable relief, it is not open to the court to bar a remedy within that limitation period. I cannot agree.

[67] It is well established that a declaratory judgment is discretionary and that the court can deny relief where appropriate. One of the primary grounds for denial of relief is undue delay by the party bringing the action. The Supreme Court of Canada dealt with the issues of discretion and delay in *P.P.G. Industries Canada Ltd*. v. *Canada (A.G.)*, [1976] 2 S.C.R. 739, per Laskin C.J., as follows:

> There is another ground upon which I think this appeal should be allowed and it is that certiorari or its modern equivalent, the motion to quash, is a discretionary remedy and as much so where the Crown moves to quash as where a private person does so...On this issue, the Attorney General should be in no different position from any other applicant who seeks to quash an adjudication or a decision...
>
> In my opinion, discretionary bars are as applicable to the Attorney General on motions to quash as they admittedly are on motions by him for prohibitions or in actions for declaratory orders. The present case is an eminently proper one for the exercise of discretion to refuse the relief sought by the Attorney General. Foremost among the factors which persuade me to this view is the unexplained two year delay in moving against the Anti-dumping Tribunal's decision.

...

[69] By s. 50 of the *Limitations of Actions Act*, the provisions of the *Act* shall not "be construed to interfere with any rule of equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act." Thus, the equitable rules which require relief such as that claimed by the

> plaintiff to be brought promptly are expressly preserved by the *Act*.
>
> ...
>
> [71] More than twelve years have now passed since the plaintiff's dismissal. In my opinion, the delay of six years is, by itself, sufficient to deny the plaintiff's claim. It would be contrary to both common sense and justice to hold that the plaintiff could wait until six years after his dismissal and then challenge that dismissal in this court, seeking reinstatement and recovery of the intervening years of lost income.
>
> [72] The plaintiff does not sue for wrongful dismissal. His remedies depend entirely on a finding by this court that the actions of the defendant were illegal. The declaration itself means little. It is the legal result which flows from the declaration that is important. Absent a declaration that the plaintiff's dismissal was invalid, the remainder of the relief he claims must also fail.

[13] Addressing the claim for reinstatement in the context of the delay he held:

> [73] Had I found that the plaintiff was entitled to a remedy, however, I would not have ordered his reinstatement. Clearly, it would be as inappropriate as it is impossible to reinstate the plaintiff at this stage. *Hewat* v. *Ontario* (1998), 35 C.C.E.L. (2d) 32 (Ont. C.A.). The courts have long been extremely reluctant to order an employee's reinstatement. All the more so when the dispute has taken on the acerbic quality this one has. Apart from the bitter relationships, the obvious impracticality of reinstating someone to a position - in which the person has served for less than two years - twelve years after the departure, militates against granting such an order.

Grounds of Appeal

[14] Mr. Burchill raises twelve issues on appeal. His submissions may be organized into three larger issues:

1. did the trial judge err in finding grounds for dismissal?

2. did the trial judge err in finding there was no procedural flaw fatal to the dismissal? and

3. did the trial judge err in finding that the delay and the manner of proceeding disentitled Mr. Burchill to a remedy?

Discussion

1. Grounds for Dismissal

[15] Mr. Burchill makes two submissions on the record. He contends that the trial judge erred in finding that the employer's stated reasons for dismissing him were grounds for dismissal and in finding that his other actions both provided grounds for dismissal and supported the reasons for dismissal. He also seeks to raise a third issue on the grounds of dismissal, issue estoppel. In order to argue issue estoppel he applies to amend his statement of claim to plead it and to adduce fresh evidence in support.

[16] The essence of the employer's complaints of Mr. Burchill’s behaviour is that he was insubordinate in refusing to obey a lawful order. Insubordination that is neither trifling nor fleeting has long been recognized as providing grounds for dismissal, see for example ***Candy v. C.H.E. Pharmacy Inc.*** (1997), 27 C.C.E.L. (2d) 301 (B.C.C.A.) and ***Stein v. British Columbia*** (1992), 65 B.C.L.R. (2d) 181 (C.A.). The questions are whether the actions complained of by the employer occurred, and if so, whether they amounted to insubordination such that the employer was entitled to bring the employment relationship to an end without notice.

[17] In this case there is no disagreement on the occurrence of the events complained of: Mr. Burchill agrees that he deliberately declined to fill out the forms, to write the memorandum and to issue the designations assigning his legislative duties, in his absence, as directed. He says in defence that the orders were not lawful because he held statutory offices that were not under the direction of any person, and that he was obliged not to act under the dictation of another person, relying upon ***Spackman v. The Plumpstead District Board of Works*** (1885), 10 A. C. 229 (H.L.).

[18] The trial judge concluded, as to Mr. Burchill's conduct:

> [46] The plaintiff seems to believe that he had an unfettered discretion with respect to the delegation of signing authority. That is clearly not the case. It was not open to him to decide unilaterally to add to the workload of junior staff within the unit. It was not open to him to insist that someone outside of his office be appointed to the unit in order to take on additional duties. Such a scenario is inconsistent with the realities of a government bureaucracy governed by a collective agreement. The plaintiff could have brought his proposals to his superior; instead, he presented them as *fait accompli*.
>
> [47] Rather than taking a cooperative approach, the plaintiff dealt with situations in an adversarial and provocative manner. It would appear that the differences in substance between the plaintiff and Mr. Dornian with respect to the delegation of authority were not insurmountable. Both agreed that Dorothy Jack was an appropriate person to exercise the plaintiff's authority in his absence. I find that the situation escalated as it did as a result of the plaintiff's intransigence and insubordination.
>
> [48] The plaintiff himself seems to have recognized that his claim cannot rest on the allegation that the orders he disobeyed were not lawful. In his closing arguments, the plaintiff put the matter in the following way:
>
> > The issue of whether or not there was cause to dismiss the Plaintiff is a very small part of this case. This case is mostly about natural justice and procedural fairness.
>
> [49] In conclusion, the plaintiff's insubordination and lack of professionalism justified his termination. He was properly dismissed for cause under subsections 137(a) and (c) of the *Public Service Act.*

[19] These conclusions are amply supported by the evidence. I conclude that the learned trial judge was not in error, indeed

was correct, in these conclusions. And in particular, I agree that the instructions given by Mr. Burchill's supervisor concerning coverage of his statutory duties while absent from work were not illegal directions on a matter in which he had unfettered discretion. As such they did not engage the principles discussed in ***Spackman v. Plumpstead,*** *supra*.

[20] Just as there is no disagreement on the occurrence of the events which precipitated the dismissal, there is no disagreement that other events of Mr. Burchill's employment were accurately described by the trial judge. Mr. Burchill contends, however, that other events were not relevant to his dismissal.

[21] In considering whether there was cause for dismissal, the judge was required to consider all of the evidence of Mr. Burchill's conduct. It was relevant to consideration of the issue of cause that the specific complaints occurred after Mr. Burchill’s probationary period was extended for the reason that his performance was not satisfactory to his supervisor, that upon passing the extended probationary term Mr. Burchill considered he could reduce his co-operation with his supervisor, and that subsequent to his dismissal he reported his supervisor to the R.C.M.P. and the Yukon Law Society, and three co-workers to the Law Society. All of these events help

to clarify the quality of Mr. Burchill's behaviour which precipitated his dismissal and the degree to which his entire conduct fractured the employment relationship.

[22] I turn now to issue estoppel. During the pre-trial proceedings several paragraphs of Mr. Burchill's statement of claim were struck. These included paragraphs which set out facts supporting the present claim of issue estoppel which were struck as "argumentative, prolix, embarrassing and evidentiary". The order striking the paragraphs gave Mr. Burchill seven days to amend the statement of claim. Although he subsequently amended his statement of claim on other issues, Mr. Burchill did not include the facts supporting a claim of issue estoppel. Consequently the evidence at trial did not address issue estoppel and the trial judge made no findings of fact on issue estoppel.

[23] When this appeal first convened, it was adjourned to provide an opportunity for further submissions on issue estoppel in light of the pending decision of the Supreme Court of Canada in ***Danyluk v. Ainsworth Technologies Inc.*** (2001), 201 D.L.R. (4th) 193 (S.C.C.).

[24] Mr. Burchill now contends that his employer is estopped from asserting cause for dismissal in court proceedings because the Board of Referees assessing his claim for

employment insurance held that he was not at fault. He seeks to amend his statement of claim and to adduce fresh evidence to found this argument.

[25] I would not allow Mr. Burchill's application to amend his statement of claim to plead issue estoppel.

[26] Establishment of issue estoppel requires that the earlier decision was a final judicial decision, concerning the same issue, involving the same parties, and that it is appropriate to apply issue estoppel in the circumstances of the case: ***Danyluk***, *supra*. Even accepting that the Board of Referees concluded, for the purposes of Mr. Burchill's claim for employment insurance benefits, that Mr. Burchill was not at fault in losing his employment, there is no indication in the decision that the evidence before the trial judge on the issue of cause was placed before the Board of Referees. It is common ground that the employer was not present at the employment insurance entitlement hearing and provided only limited information leading up to the hearing.

[27] In considering a similar circumstance in ***Minott v. O'Shanter*** (1999), 168 D.L.R. (4th) 270 (Ont.C.A.) Mr. Justice Laskin stated, most aptly in my view, at pp. 284-5:

> Although O'Shanter could have taken part in the oral hearing before the Board of Referees, it declined to

> do so. In such cases, whether a person is a party for the purpose of issue estoppel depends on its degree of participation. Because O'Shanter did not actively participate in the hearing before the Board of Referees, I conclude that it was not a party for the purpose of issue estoppel.

[28] I have come to the same conclusion in this case. To found a claim of issue estoppel in the face of limited participation of the employer in this benefit administration scheme is to promote greater employer participation in such hearings, potentially turning those administrative proceedings into full-blown hearings on allegations of cause contrary to sensible public policy. Considering the purpose of the employment insurance scheme and the fact that the employer had no interest in the outcome of those proceedings, I would not find that the minimal involvement of the employer at the Board of Referees hearing in this case satisfied the requirement for issue estoppel that the earlier hearing engaged the same parties as are now before the courts.

[29] Further, I conclude that the hearing before the Board of Referees did not address the same issues before this Court.

[30] The Board of Referees stated two narrow conclusions:

> ... We find that the instructions of the appellant’s supervisor were neither lawful nor reasonable and the appellants refusal to comply with

> them cannot be construed as misconduct within the meaning of the Act.
>
> As to the second allegation for dismissal, that of failing to provide legal advice to fellow managers, there is not a shred of evidence before us to indicate that the appellant did as alleged.

[31] In contrast, the trial canvassed the entire employment history and concluded with a finding that Mr. Burchill displayed an attitude that was "confrontational, provocative and insubordinate" and constituted cause for dismissal. The answers above to the questions apparently before the Board of Referees do not resolve the issue in this proceeding.

[32] As I consider the materials sought to be placed before this Court do not support a successful claim of issue estoppel, I would dismiss the applications to amend the statement of claim and to adduce fresh evidence.

[33] In any case, I would decline to open the pleadings at this late date. The effect of the decision of the Board of Referees was a matter that Mr. Burchill should have raised at trial. Although paragraphs of the statement of claim were struck because of their form, with leave to amend, Mr. Burchill did not amend his pleadings to raise the issue. The result was an eleven day trial that concluded with a fully reasoned decision on cause, the issue now said to be estopped.

In these circumstances, re-opening the pleadings as Mr. Burchill seeks to do, is not, in my view, in the interests of the administration of justice.

2. Procedural Fairness

[34] Mr. Burchill contends that the respondent's process was so procedurally flawed that his dismissal should be declared of no effect and he should be reinstated. The procedural flaws, he contends, comprised what I characterize as failure to follow the statutory scheme and denial of natural justice.

a) Failure to follow the statutory scheme

[35] In alleging a fatal failure to follow the statutory scheme submissions, Mr. Burchill contends that the employer failed to comply with s. 139 of the ***Public Service Act***, deficiently conducted the investigation contemplated by s. 150 of the ***Act*** and denied him his right of appeal.

[36] Mr. Burchill's employment was governed by the ***Public Service Act***:

> 137. A deputy head may suspend or dismiss an employee
> (a) for misconduct, neglect of duties or refusal or neglect to obey a lawful order,
> (b) where the employee is incapable of performing his duties,
> (c) where the employee is unsatisfactory in performing his duties, or...

...

148. Where, of his own motion, a deputy head suspends or dismisses an employee, the employee may, by notice in writing within ten working days from the date of receipt of the notification to him of the deputy head's decision, request a hearing by the deputy head.

149. Where the employee does not request a hearing within the time mentioned in section 148, the decision of the deputy head shall be final and binding and the employee shall not be entitled to submit his appeal to adjudication.

150. Where the employee requests a hearing pursuant to section 148, the deputy head shall investigate the matter and give the employee an opportunity to make representations orally or in writing either personally or by counsel or agent or where the employee has so authorized, an official of the employee's bargaining agent.

151. Where the deputy head conducts a hearing pursuant to section 150, the deputy head may confirm, modify or revoke his earlier decision and he shall notify the employee and the public service commissioner in writing of his final decision in the matter within ten working days from the date of the hearing.

152. (1) An employee may, within ten working days of the receipt of the final decision of the deputy head, appeal the decision to an adjudicator appointed pursuant to *the Public Service Staff Relations Act*.

(2) An employee who appeals pursuant to subsection (1) shall notify the deputy head in writing.

(3) Subsection (1) does not apply to an employee who is not a member of a bargaining unit under the *Public Service Staff Relations Act*.

[37] Mr. Burchill contends that s. 139 also applies. Section 139 of the ***Act*** is one of several sections that apply to suspension of an employee:

> 138. A unit head or officer to whom the authority has been delegated by the deputy head may suspend an employee for any of the reasons mentioned in section 137 and may, in conjunction with the suspension, recommend the dismissal of the employee to the deputy head.
>
> 139 A unit head or officer who suspends an employee pursuant to section 138 shall forthwith notify the employee and the deputy head in writing of the suspension, the effective date of the suspension, the reasons for the suspension and whether any recommendation has been made for dismissal of the employee.
>
> 140. An employee who has been suspended pursuant to section 138 may appeal the suspension to the deputy head by written notice not later than ten working days from the date of receipt of the notice of suspension.
>
> ...
>
> 143. Where the deputy head receives an appeal pursuant to section 140, he shall, within ten working days from the date of receiving the appeal, investigate the matter and give the employee an opportunity to make representations orally or in writing either personally or by counsel or agent or where the employee has so authorized, an official of the employee's bargaining agent.
>
> ...
>
> 145. The deputy head shall, within ten working days of carrying out an appeal hearing pursuant to section 143, notify the employee and the public service commissioner in writing of his decision.

[38] In my view, s. 139 is not applicable to this case. When Mr. Burchill was suspended he was notified of his rights under s. 139. His subsequent appeal was under s. 139 because that section applied to suspensions such as he had received. But when Mr. Burchill was dismissed, s. 139 did not apply. He was dismissed by the deputy head within the meaning of s. 137, and hence was entitled to engage the provisions that applied to a dismissal by a deputy head, ss. 148-152. I conclude that there was no procedural error in failing to afford Mr. Burchill rights under s. 139.

[39] Mr. Burchill next contends that the investigation contemplated under s. 150 of the ***Act*** was not completed as required because the Deputy Minister did not obtain information about Mr. Burchill’s work history from certain employees who, contends Mr. Burchill, had relevant information to provide.

[40] Although the learned trial judge did not expressly deal with this argument, it is apparent from the reasons for judgment that Mr. Burchill did not really dispute the relevant factual matters, and that the Deputy Minister was in receipt of information, including letters from Mr. Burchill, which provided a solid foundation for dismissal. This conclusion is amply supported by the evidence and Mr. Burchill's own

submissions before this court. Any shortcomings in the investigation contemplated by s. 150, were, in my view, insubstantial given the information already possessed by the Deputy Minister, and had no effect upon the validity of the dismissal.

[41] Next Mr. Burchill says he was denied a right to appeal his dismissal to the Public Service Commission. He contends that he was entitled to grieve his dismissal under s. 77 of the ***Public Service Staff Relations Act***, R.S.Y. 1986, c. 142, Policy Directive POL 1/8 under the ***Public Service Act*** and ss. 171–179 of the ***Public Service Commission Regulations***, C.O. 1976/165. The trial judge did not deal expressly with this argument.

[42] On my reading of s. 152 of the ***Public Service Act***, *supra,* an appeal to an adjudicator from a dismissal is not available as of right to an employee who is not a member of a bargaining unit. Mr. Burchill was not a member of a bargaining unit, *ergo* he was not entitled to appeal his decision to an adjudicator under s. 152.

[43] The interaction of the ***Public Service Staff Relations Act***, the ***Public Service Act*** and their Regulations is complex and I will not set out here all of the provisions referred to by Mr. Burchill, for their net effect is that ss. 148-152 of

the ***Public Service Act*** are the sections governing Mr. Burchill's rights upon his dismissal. And, I conclude, those rights were not expanded by Policy Directive POL 1/8 referred to by Mr. Burchill.

[44] I have addressed the substance of Mr. Burchill's argument, notwithstanding Mr. Burchill did not pursue these procedural issues through judicial review, commencing this action instead nearly six years after the fact of his dismissal. The trial judge held that in his failure to pursue judicial review, Mr. Burchill must be taken to have accepted the decision that he had no further appeal. I agree with that conclusion.

b) Denial of Natural Justice

[45] Mr. Burchill contends that the trial judge erred in failing to recognize and provide a remedy for a denial of natural justice which nullified the dismissal. In particular he contends that evidence was heard behind his back, that he was not provided with particulars and that the decision maker was biased.

[46] On the contention that the Deputy Minister breached the rules of natural justice by receiving information not made known to him, and in not providing him with particulars, the

learned trial judge held, in a conclusion amply supported by the evidence and with which I would not interfere:

> [59] The statutory scheme provides for both notice and hearing. I find that it satisfies the common law rules of procedural fairness. The plaintiff was made acutely aware of the concerns about his performance. He predicted his dismissal and, by his own conduct, virtually assured it. He was given the opportunity to respond and made a conscious choice not to do so. I find that both the statutory provisions and the common law principles have been satisfied.

[47] Mr. Burchill further contends that the Deputy Minister was biased and his decision on review to uphold the dismissal was therefore invalid. On this the trial judge said:

> [62] As for the plaintiff's claims of bias, it would clearly have been preferable, from the employee's standpoint, to receive a hearing before an independent tribunal. That is what will occur in the case of an employee covered by a collective agreement. However, the statute did not provide for such a process for the plaintiff. Nor do the requirements of procedural fairness demand it. Even if procedural fairness did so require, the statute must, in this case, govern. The *Public Service Act* sets out the process for appealing the decision to terminate. It provided that such appeal would be to Mr. Byers, who had made the decision to dismiss him. If the *Act* gave no jurisdiction to anyone else to hear the appeal, the common law cannot "read in" such jurisdiction.
>
> [63] In any event, the case law does not suggest that the original decision-maker cannot be the one to hear the employee's response, even though an alternative procedure might well be preferable. In both *Nicholson, supra,* and *Knight, supra*, it was the same board which had decided to terminate the plaintiff that was to give the plaintiff a hearing.

> It is unlikely that an employer will approach a review of an employee's prior or pending dismissal without any predisposition as to the result. The best that can be hoped for is that the employer listens to the employee's side and remains open to the possibility that an erroneous decision has been made. The only way this result is likely to be modified is by vesting jurisdiction in an independent tribunal - an undertaking which this Court cannot pursue of its own volition, even though such a procedure would be preferable.

[48] As the trial judge observed, the statute governing Mr. Burchill’s employment required the Deputy Minister to review the dismissal. It is not the role of the courts to create a new extra-statutory review in the face of a statutory requirement dictating the identity of the reviewer. Nor does the common law require that a person facing dismissal receive an impartial review by the employer. Mr. Burchill’s entitlement to a review derived from the administrative law framework created by the legislation under which Mr. Burchill worked.

[49] In this case the Deputy Minister fulfilled his statutory duties, having provided the requisite opportunity for Mr. Burchill to make representations, an opportunity which Mr. Burchill did not utilize. Again I note that Mr. Burchill's behaviour, canvassed in the trial process, confirmed the existence of cause for dismissal.

[50] For these reasons I would not accede to Mr. Burchill's submissions that the procedure followed by the employer was fatally flawed.

3. Delay

[51] On the conclusions above it is not necessary to address the issue of delay. Conversely, on my conclusion on the issue of delay, it would not have been necessary to address the two issues above. In my considered view, given the nature of the dispute in this case, it is best to address all issues.

[52] Mr. Burchill contends that the trial judge erred in holding that the passage of time was a sufficient basis on which to deny a remedy.

[53] I agree that the passage of time in this case, nearly six years before even an action was started and twelve years to the date of trial, renders the remedies of reinstatement and back pay inappropriate in the circumstances. Further, the delays, combined with the failure of Mr. Burchill to avail himself of judicial review, make it undesirable to entertain, now, a declaration that the dismissal was without adequate foundation or was invalid because of procedural deficiencies. In other words, I agree with the trial judge that this is an appropriate case in which to apply the doctrine of *laches.*

[54] Mr. Burchill contends that s. 2(1)(h) of ***Limitations of Actions Act***, R.S.Y. 1986, c. 104 prohibits consideration of the doctrine of *laches* because he was within the six year limitation period for commencement of an action for a declaration.

[55] Section 2(1)(h) provides:

> 2.(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:
> ...
> (h) actions grounded on accident, mistake or other equitable ground or relief not hereinbefore specially dealt with, within six years from the discovery of the cause of action.

[56] Mr. Burchill's submission overlooks s. 50 of the ***Act***.

> 50. Nothing in this Act shall be construed to interfere with any rule of equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act.

[57] The learned trial judge addressed the application of s. 50, saying:

> [69] By s. 50 of the *Limitations of Actions Act*, the provisions of the *Act* shall not "be construed to interfere with any rule of equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act." Thus, the equitable rules which require relief such as that claimed by the

> plaintiff to be brought promptly are expressly preserved by the *Act*.

[58] I agree. While s. 2(1)(h) gives a six year period within which to commence an action founded on equitable principles, it does not erase the application of equitable defences, those being expressly preserved by s. 50. I would decline, therefore, to grant a declaration. And as the other relief relies upon the claim for a declaration, I would decline the other relief sought.

Conclusion

[59] It follows from these reasons that I would dismiss the appeal, with costs to the successful party.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Hall"

I AGREE:

"The Honourable Mr. Justice Mackenzie"