

Dunsmuir v. New Brunswick: Standards of Review and Employment Contracts

By David Corry

Cases Considered:

[*Dunsmuir v. New Brunswick*, 2008 SCC 9](#)

Dunsmuir was employed by the Province of New Brunswick as an office holder “at pleasure”. His probationary period was extended twice and the employer reprimanded him three times during the course of employment. Finally, a formal letter of reprimand was sent to Dunsmuir warning him that failure to improve his performance would result in further disciplinary action up to and including dismissal. The employer concluded that Dunsmuir was not right for the job, and a formal letter of termination was delivered to Dunsmuir’s lawyer the next day. A grievance was denied and then referred to adjudication under New Brunswick’s *Public Service Labour Relations Act* (“PSLRA”), R.S.N.B. 1973, c. P 25. A preliminary issue of statutory interpretation arose as to whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to determine the reasons underlying the province’s decision to terminate. Ultimately, the adjudicator made no finding as to whether the discharge was or was not for cause. As Dunsmuir’s employment was hybrid in character, the adjudicator held that he was entitled to and did not receive procedural fairness in the employer’s decision to terminate his employment. He declared that the termination was *void ab initio* and ordered Dunsmuir reinstated as of the date of dismissal, adding that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

On judicial review, the Court of Queen’s Bench of New Brunswick applied the correctness standard and quashed the adjudicator’s preliminary decision, concluding that the adjudicator did not have jurisdiction to inquire into the reasons for the termination, and that his authority was limited to determining whether the notice period was reasonable. On the merits, the Court found that Dunsmuir had received procedural fairness by virtue of the grievance hearing before the adjudicator. Applying a reasonableness *simpliciter* standard, the Court quashed the reinstatement, but upheld the adjudicator’s provisional award of eight months’ notice.

The New Brunswick Court of Appeal held that the proper standard of review was reasonableness *simpliciter*, not correctness, and that the adjudicator’s decision was unreasonable. It found that where the employer elects to dismiss with notice or pay in lieu of notice, s. 97(2.1) of the *PSLRA*

does not apply and the employee may only grieve the length of the notice period. It agreed with the reviewing judge that Dunsmuir's right to procedural fairness had not been breached.

The Supreme Court of Canada unanimously dismissed the appeal. A majority of the Court held that despite its clear, stable constitutional foundations, the system of judicial review in Canada has proven to be difficult to implement. The Court found it necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. Notwithstanding the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, any actual difference between them in terms of their operation was said to be illusory. According to a majority of the Court, there ought to be only two standards of review: correctness and reasonableness. When applying the correctness standard in respect of jurisdictional and some other questions of law, a reviewing court will not show deference to the decision maker's reasoning process. Rather, it will rather undertake its own analysis of the question and decide whether it agrees with the determination of the decision maker. If not, the court will substitute its own view and provide the correct answer. In contrast, a court conducting a review for reasonableness inquires into the qualities that make a decision reasonable. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It is a deferential standard which requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

The Court noted that an exhaustive analysis is not required in every case to determine the proper standard of review. The existence of a privative clause is a strong indication of review pursuant to the reasonableness standard, since it is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. It is not, however, determinative. Where the question is one of fact, discretion or policy, or where the legal issue is intertwined with and cannot be readily separated from the factual issue, deference will usually apply automatically. Deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. While deference may also be warranted where an administrative decision maker has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context, a question of law that is of central importance to the legal system as a whole and outside the specialized area of expertise of the administrative decision maker will always attract a correctness standard. So will a true question of *vires*, a question regarding the jurisdictional lines between two or more competing specialized tribunals, and a constitutional question regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*.

The Court held that the standard of reasonableness applied on the issue of statutory interpretation in this case. Here, the adjudicator's interpretation of the law was unreasonable and his decision

did not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

On the merits, Dunsmuir was not entitled to procedural fairness. The Court held that where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. Where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness. The principles expressed in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that Knight ignored the important effect of a contract of employment, the Court said that it should not be followed.

In the case at bar, Dunsmuir was a contractual employee in addition to being a public office holder. Section 20 of the *Civil Service Act*, S.N.B. 1984, c. C 5.1, s. 20, provided that as a civil servant he could only be dismissed in accordance with the ordinary rules of contract. To consider a public law duty of fairness issue where such a duty exists falls squarely within the adjudicator's task to resolve a grievance. Where, as here, the relationship is contractual, it was unnecessary to consider any public law duty of procedural fairness. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of Dunsmuir, the Court held that the adjudicator erred and his decision was therefore correctly struck down on review.

This decision is important for two reasons. Firstly, it recognizes the need to simplify the standards of review. Recent cases from the SCC and Courts of Appeal have resulted in different standards and applications arising from similar facts. The law is confusing and unpredictable. The SCC has prudently noted that there are only two standards of review in practice: reasonableness and correctness. Furthermore, the majority decision provides pragmatic guidelines to the application of the two standards. Secondly, the SCC correctly recognizes the primacy of the employment contract over the duty of procedural fairness. Here the parties contracted to terminate employment upon notice or pay in lieu. The employer complied with the contract. Under the circumstances, the SCC properly held that there was no added public law duty of fairness.

For another opinion on Dunsmuir, see [Alice Woolley's blog on this site](#).