



EMPLOYMENT LAW CONFERENCE-2005

PROCEDURAL FAIRNESS IN THE EMPLOYMENT LAW CONTEXT-2004

These materials were prepared by Catherine Keri of Boughton Peterson Yang Anderson Law Corporation, and Loryl D. Russell of LD Russell & Co., both of Vancouver, B.C. for Continuing Legal Education, April 2005.

© Catherine Keri and Loryl D. Russell

The Continuing Legal Education Society of British Columbia

300 - 845 Cambie Street, Vancouver, BC V6B 5T2 Telephone 604.669.3544 Tollfree 1.800.663.0437 Fax 604.669.9260 www.cle.bc.ca

PROCEDURAL FAIRNESS IN THE EMPLOYMENT LAW CONTEXT-2004

I.	Introduction	1
II.	Application of Procedural Fairness in Termination of Employees Other than Statutory Office Holders	1
III.	Denial of Procedural Fairness May Warrant Wallace Damages	2
IV.	Procedural Fairness in Cases of Termination for Cause	5
V.	Is Procedural Fairness Required in the Private Sector	6

I. Introduction

The duty of procedural fairness in termination of employees applies solely to employees who hold public office, doesn't it?

Recently, Canadian courts have been called upon to both define and expand the duty of procedural fairness imposed upon employers when terminating employees, whether those employers are in the private or public sectors. The result? Our learned judges are resisting the application of the tested principle of procedural fairness to the private sector, while struggling to import fairness generally into employment relationships, in keeping with the Supreme Court of Canada's analysis in *Wallace*.

Even before the landmark decision in *Wallace*, Canadian courts had begun articulating rules about when a duty of fairness applied to employees. These pronouncements were based upon administrative law principles governing the duty of procedural fairness. Today, the lines between procedural fairness and fairness generally (as illustrated in *Wallace*) have been blurred. Management and employee side employment lawyers alike are drawing artificial lines in the sand delineating when the duty of fairness arises, what level of fairness applies and what factors Canadian courts will rely upon to decide whether increased notice periods apply.

II. Application of Procedural Fairness in Termination of Employees Other than Statutory Office Holders

The Supreme Court of Canada's decision in *Knight v. Indian Head School Division No. 19*¹ is the seminal case on the duty of procedural fairness where such a duty is not mandated by statute or contract:

The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual and (iii) the effect of that decision on the individual's rights."

[1990] 1 S.C.R. 653.

2 *Ibid.* at 669.

The Supreme Court of Canada in *Knight* set out that where these three elements exist, a general duty to act fairly on public decision making bodies exists. It stated that the issue of when the duty of fairness arises and how far it extends depends upon what type of employment relationship exists:

(i) the master and servant relationship, where there is no duty to act fairly when deciding to terminate the employment; (ii) the office held at pleasure, where no duty to act fairly exists, since the employer can decide to terminate the employment for no other reason than his displeasure; and (iii) the office from which one cannot be removed except for cause, where there exists a duty to act fairly on the part of the employer. These categories are creations of the common law.'

Madam Justice L'Heureux-Dube indicated in *Knight* that notwithstanding the above passage, administrative law has evolved in recent years so as to make procedural fairness an essential requirement of an administrative decision to terminate in either of the last two classes of employment."

In *Knight*, the SCC noted that the duty to act fairly does not depend on doctrines of employment law, but stems from the fact that the employer is a public body whose powers are derived from statute and that those powers must be exercised according to the rules of administrative law.

Since *Knight*, courts and even labour arbitrators are prepared to award damages for breaches of procedural fairness.'

III. Denial of Procedural Fairness May Warrant Wallace Damages

Since the *Knight* decision, Canadian courts have upheld the view that a duty of procedural fairness and certainly fairness generally, apply when terminating the employment of a public sector employee whose position contains even some aspects of an office holder.

A much discussed decision on procedural fairness is the recent decision of the B.C. Supreme Court in *Reglin v. (Town) et al.*⁶ The judgment in *Reglin* succinctly recounts how procedural fairness has been applied to the public sector by Canadian courts since *Knight* and what constitutes an office holder in this regard.

Mr. Reglin was terminated by the City of Creston without cause, from his position as the Director of Financial Services, in March of 2002. He had been with the City for approximately five years and had held his position as Director of Financial Services for less than one year.

The termination was a result of what seemed to be interpersonal conflicts between Mr. Reglin and the town administrator (Mr. Reglin's superior), Mr. Hutchinson. Initially, the City had sided with Mr. Reglin and had considered terminating the employment of Mr. Hutchinson, but after providing Mr. Hutchinson an opportunity to be heard on the matter, a decision to terminate Mr. Reglin's employment was made. Mr. Reglin was not given a hearing on the matter.

The Court noted that both employees and employers have a right to terminate an employment contract at any time, but in some cases employees are entitled to procedural fairness in the termination as was the case when Creston terminated Mr. Reglin's employment.

Even though Mr. Reglin had been provided four months' severance pay and even though he quickly (within four months) obtained employment with the City of Quesnel for more pay than he had

3 *Ibid.* at 670-71.

4 *Ibid.* at 672.

5 *O.P.S.É. U v. Seneca College of Applied Arts and Technology*, November 1, 2004, (Ont. Div. Ct.).

6 2004 BCSC 790.

11.1.3

received from Creston, the Court awarded an additional four months' severance to compensate for the lack of procedural fairness. The Court's reasons make *Reglin* an important new case on the issue of the consequences of a denial of procedural fairness.

The B.C. court reviewed numerous cases on procedural fairness and pulled from them guidelines on when a seemingly non-office holder will be considered to be an officer such that a duty of fairness applies on termination.

The Court noted the following cases' as examples:

- *Hughes v. Moncton (City)* (1990),⁸ where the position of city staff solicitor, characterized as "middle management" attracted a duty of procedural fairness so that the terminated employee ought to have been provided reasons for termination and a hearing;
- *Gerrard v. Sackville (Town)* (1992),⁹ where the manager of industrial and commercial development for the town attracted a duty of procedural fairness, due in part to the fact that he supervised staff and in part because in terminating him, the town was exercising a statutory duty;
- *Collins v. Whistler (Municipality)* (1993),¹⁰ where a firefighter/inspector attracted a duty of procedural fairness because the fire code adopted under the regulations of the *Fire Service Act* applied to the municipality's by-law and the firefighter/inspector position allowed Collins to administer that bylaw. Also, the relationship was one of more than master and servant.
- *Anderson v. Twin Rivers School Division No. 65*,¹¹ where four positions of school board officials attracted the duty of procedural fairness because all of the employment contracts referred to the employees as "an executive officer of the Board" and because they were held responsible and accountable to the Superintendent and the Board. The Court also relied on the fact that the power to employ all four came from the *School Act*.

The Court noted that for procedural fairness to apply, the employees' position must have involved an element of management as well as be endowed with a "statutory flavour."¹²

Relying upon the above cases, the Court in *Reglin* found that Mr. Reglin was an officer such that Creston's Council owed him a duty of fairness.

The Court then considered—having found that a duty of procedural fairness applied—what level of fairness Mr. Reglin was entitled to and specifically, whether Mr. Reglin was owed the right to a hearing. As an employee at pleasure, which Mr. Reglin was, a minimal amount of fairness was due to him. However, the Court in *Reglin* determined that the right to a hearing before termination was not at odds with the fact that Mr. Reglin held an office at pleasure. He was entitled to a hearing and the City failed to provide it.

The novel aspect of this case was the Court's enunciation that the failure to provide a hearing was analogous to the actions censured in the *Wallace-type* cases and thus, *Wallace* damages of an additional four months were awarded.

Therein lies the rub—the SCC in *Wallace* determined that where an employer conducted a termination in "bad faith," the employee may be entitled to an increased notice period as damages. *Reglin*

7 *Reglin v. Creston (Town) et. al.*, 2004 BCSC 790 at paras. 26-39.

8 111 N.B.R. (2d) 184 (Q.B.), on other grounds (1991), 118 N.B.R. (2d) 306 (C.A.).

9 (1992), 89 D.L.R. (4th) 145 (N.B.C.A.).

10 10 Admin. L.R. (2d) 79 (B.C.S.C.).

11 (1994), 19 Alta. L.R. (3d) 408 (Q.B.).

12 *Reglin, supra*, note 7 at para. 26.

interpreted *Wallace* to include a failure to accord procedural fairness as bad faith. The question of whether this was a fair interpretation of *Wallace* by the Court in *Reglin* is *moot-Reglin* is good law in B.C.

In *Wallace*, the SCC stated that:

When termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.¹³

The obligation of good faith dealing did not reward an employee for hurt feelings or for terminations that did not have an element of conscious bad faith:

The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. In order to illustrate possible breaches of this obligation, I refer now to some examples of the conduct over which the courts expressed their disapproval in the cases cited above."

The crux of *Wallace* was that increased damages will be awarded if an employee can show that an employer acted unfairly and/or in bad faith:

... establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. In these situations, compensation does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was effected by the employer."

In *Reglin*, the element of conscious bad faith was missing. The Town of Creston did not engage in conscious bad faith conduct. Instead, they investigated a matter and made a determination, which upon reading the judgment, seems to have been made in good faith. Yet, *Wallace* was applied.

The decision in *Reglin* has not assisted lawyers in determining for their clients when "middle managers" or non-officer holders will be deemed to attract the duty of procedural fairness. Indeed, some of the cases relied upon in *Reglin* to support the Court's conclusion that procedural fairness had been denied, have been relied upon by other judges to come to the opposite conclusion. For example, in *Gismondi v. The Corporation of Toronto (City)*,¹⁶ the Ontario Court of Appeal dismissed a cross-appeal by a City employee that he held an office to which a special duty of fairness attached.

In *Gismondi*, the terminated employee was a City Engineer. Mr. Gismondi was a middle manager with a large budget who managed a large number of employees. He was hired by City Council. Similar facts certainly came into play in *Gerrard v. Sackville, supra* (relied upon by the *Reglin* Judge) where a middle manager position (manager of industrial and commercial development) was found to attract the duty of fairness.

13 *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 95.

14 *Ibid.* at para. 98.

15 *Ibid.* para. 103.

16 (2003), 226 D.L.R. (4th) 334.

In *Gismondi*, the Court relied upon the fact that a city by-law allowed the Chief Administrative Officer to appoint and dismiss employees and that Council had an unfettered discretion to dismiss him. The Court stated that the position of City Engineer did not have a statutory flavour."

The *RegLin* decision has not assisted lawyers in determining when and whether *Wallace* damages will be awarded for honest mistakes. Nor has the judgment left clear guidelines for determining when an employee will be deemed to be an office holder rather than be viewed as merely in a master servant relationship that does not attract procedural fairness.

IV. Procedural Fairness in Cases of Termination for Cause

One of the most confusing areas of the law of procedural fairness is whether a deemed office holder will be entitled to procedural fairness where that person is terminated for cause. There seems to be no consensus by the courts in this regard.

In the decision of *Hanis v. Teevan* (1998), 162 D.L.R. (4th) 414 (Ont. C.A.), the employee was the director of a computer laboratory for an Ontario University. The employee was terminated summarily because of his continued use of the university's computer for his personal gain, allegedly without the consent or knowledge of the University. The Court held that although the University had just cause to terminate the employee, the denial of procedural fairness rendered the dismissal wrongful and the employee suffered damages and was entitled to recover from the University. The Court of Appeal awarded damages that amounted to an 18-month notice period. The Court of Appeal in *Hanis* concluded that the claimant held an office as opposed to being an employee in a master and servant relationship.

The Court of Appeal in its reasoning held that it was not convinced the employee would not have been able to persuade the University that he had not committed any wrongful act had he been given the opportunity to present his case prior to dismissal.

In a more recent decision of the Alberta Court of Queen's Bench however, the Court came to quite a different conclusion. In *Youth Criminal Defence Office v. Legal Aid Society of Alberta*,¹⁸ the applicant, Brian Holtby, applied for an order quashing the decision of the Board of Directors of the Legal Aid Society to terminate his employment as Senior Counsel of the Youth Criminal Defence Office, in part, based upon a breach of the duty of fairness. Mr. Holtby had been terminated for insubordination.

In this recent decision, the Court accepted that Holtby was in a position of considerable responsibility in which the public had an interest but decided that he was not an office holder. It based its determination upon such factors as the very tenuous link between his position and any statute, the extent to which he was subject to Board control, and the absence of government representation on the Board.

Most interesting was the Court's statement that even if he were an office holder, the duty of fairness that would be applicable to the situation was not breached. The Court relied upon *Knight* for the proposition that the purpose of a duty to act fairly is to enable the employee to try to change the employer's mind about the dismissal. In the case before it, the Court concluded that Holtby would not have been able to change the Board's mind. It found that any duty in this case to provide an opportunity to be heard would have been minimal and was met by the Board in the circumstances, by having provided Holtby opportunities to respond and be heard, prior to his termination. In other words, the Court seemed to say that the Board had satisfied its duty of fairness (if one had existed),

¹⁷ *Ibid.* at paras. 50-53.

¹⁸ 2004 ABQB 782.

prior to the termination. Lawyers are left with a perplexing problem. How does an employer know, at the time of termination, whether the employee would be able to convince it that the termination was not warranted? It seems a difficult test to meet and one that can only be assessed after termination.

The above two cases demonstrate that the duty of procedural fairness may apply in cases of termination for cause, if the court finds that such fairness "may" have resulted in a different decision being made by the employer. From the perspective of employer's counsel, when terminating an employee who may or may not be an office holder, the lesson appears to be that it is better to err on the side of caution and provide the employee notice of the allegations and an opportunity to be heard so that there is no question that the employee has had the chance to attempt to change the employer's mind. From the employee's counsel's perspective, when an employee is being terminated whose position has a "statutory flavour" and management responsibilities, you should plead a failure to accord procedural fairness since you may increase your client's damages, even where cause for termination was alleged.

V. Is Procedural Fairness Required in the Private Sector

The strict administrative law principle of procedural fairness does not apply to a master and servant relationship in the private sector.

The Manitoba Court of Appeal has put it succinctly when determining that a manager of Canada Safeway Ltd. was not owed a duty of procedural fairness upon being terminated for cause." In *Middelkoop*, the terminated employee argued that he was entitled to be heard both on cause and on consequence before dismissal. The judgment of the Court of Appeal was delivered by Twaddle J.A.: and in referring to master and servant relationships, he stated:

The weight of authority overwhelmingly supports the view that, in terminating a contract of employment within the first classification,[master and servant] a commercial employer owes the employee no duty of procedural fairness ... Also supportive of the proposition that an employer is not bound to act fairly in dismissing an employee is the rule that an employer can justify a summary dismissal by reliance on grounds different from those given, even if they were not known at the time of the dismissal."

In 2001, *Middelkoop* was cited with approval by the Manitoba Court of Appeal in *Kapitany v. Thomson Canada Ltd. (e.o.b. Winnipeg Free Press)*.¹⁹ In that case, Kapitany, the assistant manager of building services, was in essence terminated for poor performance. The Court of Appeal, in reversing the trial judge's award of damages additional to reasonable notice stated:

I can see no basis for increasing the notice period by a further eight months, or at all. The learned trial judge refers in his reasons for decision to two factors: a failure on the part of the employer to give Kapitany advance warning of deficiencies in his performance, and a failure to provide an opportunity to reconsider the termination of his employment.

It must be observed that there is no duty on a private sector employer to accord procedural fairness in employment relationships or to entertain the request of an employee for reconsideration."

¹⁹ *Middelkoop (Trustee of) v. Canada Safeway*, 2000 MBCA 62.

²⁰ *Ibid.* at paras. 25 and 29.

²¹ 2001 MBCA 167.

²² *Ibid.* at paras. 17 and 18.

Notwithstanding what is enunciated as trite law-that procedural fairness does not apply in the private sector-there are cases which give us pause for thought.

In *Brazeau v. International Brotherhood of Electrical Workers*, Mr. Brazeau, a 70-year-old 34 year employee, was terminated for cause, for sexual harassment. The trial judge determined that Mr. Brazeau had not been properly warned about his behaviour and thus was wrongfully dismissed. The union appealed the decision.

In agreeing with the lower court judge, the Court of Appeal reiterated that what constitutes a warning may vary with the circumstances, but it should indicate the nature of the impugned conduct and its wrongfulness and it should include a statement that disciplinary consequences may be expected to follow if the impugned conduct continues."

While not requiring a right to be heard on the matter, the Court of Appeal did impose a duty to act fairly upon the employer in a sexual harassment case where it appeared the impugned conduct did occur. Does this necessarily import procedural fairness into the private sector? The answer is clearly no-not in the technical sense. There does, however, seem to be some confusion. Lawyers and judges do conflate a general duty to act fairly with the principle of procedural fairness. It may just be a matter of semantics, but in its dissenting opinion in *Wallace*, judges of the Supreme Court of Canada relied upon two cases where the words "procedural fairness" were used to invoke a general duty of fairness. The Court stated:

... Similarly, Gomery J. of the Quebec Superior Court in *Bernardin v. Alitalia Air Lines* (1993), 50 C.C.E.L. 156, at 162-63, held that an employer terminating the employment relationship is under a duty to do so in a manner which will not cause the employee undue anxiety. Other courts have introduced a duty of *procedural fairness* in dismissal situations under the rubric of determining whether or not there is 'just cause' for summary dismissal: *Christie et al., supra*, at 416. Still other courts have held that where the employment contract contains express provisions conferring discretionary powers on the employer, such discretion must be exercised reasonably and in good faith; e.g., *Cohnstaedt v. University of Regina*, [1989] 1 S.C.R. 1011, at 1019; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.), at 764, leave to appeal refused, [1985] 2 S.C.R. ix; *Truckers Garage Inc. v. Krell* (1993), 3 C.C.E.L. (2d) 157 (Ont. C.A.), at 164. It has also been held that the employer owes to an employee a duty of *procedural fairness* which, *inter alia*, entitles the worker to be interviewed honestly and in a non-hostile fashion about her alleged deficiencies before dismissal can be invoked: *Doyle v. London Life Insurance Co.* (1985), 23 D.L.R. (4th) 443 (B.C.C.A.), leave to appeal refused, [1986] 1 S.C.R. x. See also: *Shiloff v. R.* (1994), 6 C.C.E.L. (2d) 177 (F.C.T.D.V^S) (emphasis added)

The confusion may be that the nub of procedural fairness is to provide an employee with notice of allegations and opportunity to be heard. The nub of a general duty to act fairly is to warn an employee of consequences of continued misconduct. The line between the two is a thin one, separate perhaps, but continuing to blur.

Certainly it is these authors' view that any elected or statutorily appointed body, is obligated to accord procedural fairness to senior management employees upon termination. The broader question of the general duty of fairness as exemplified by *Brazeau*." remains more elusive. However, it does appear to be the case that the courts will scrutinize with care the treatment accorded a long-term senior employee where cause for termination is alleged.

23 2004 BCCA 645.

24 *Ibid.* at para.

25 *Wallace, ibid.* at para. 141.

26 *Ibid.*