

# The Supreme Court Limits Procedural Fairness in the Context of Public Employment

JOËL MICHAUD



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The traditional position at common law was that public servants were literally “servants of the Crown” and could therefore be dismissed at will. Consequently, public office holders did not benefit from contractual rights protecting them from summary discharge, as did contractual employees. Given this relative insecurity, courts had held it to be desirable to impose minimal procedural requirements in order to ensure that public office holders were not deprived of their positions arbitrarily.

However, in *Dunsmuir v. New Brunswick* (“Dunsmuir”), the Supreme Court of Canada revisited earlier case law on the issue and decided to curb the right to procedural fairness of public office holders relating to the termination of their employment.

The Appellant in *Dunsmuir*, David Dunsmuir, had a “hybrid” employment status with the Government of New Brunswick that began in early 2002. He was employed on a contractual basis as a Legal Officer in the Department of Justice and was also the holder of office “at pleasure” in his capacity as Clerk of the Court of Queen’s Bench, a position to which he was appointed by Ministerial Order.

Following repeated concerns about Mr. Dunsmuir’s job performance, the employer terminated his employment with four months’ notice and removed him from his statutory office as Clerk of the Court of Queen’s Bench. Mr. Dunsmuir subsequently filed a grievance alleging that the employer breached its duty of procedural fairness in dismissing him by failing to inform him of the reasons for its dissatisfaction and by not giving him an opportunity to respond.

The grievance adjudicator found that the Appellant was entitled to procedural fairness under the applicable civil service legislation given that he was the holder of office “at pleasure”, and concluded that Mr. Dunsmuir had been denied procedural fairness because the employer failed to grant him a hearing before terminating his employment with pay in lieu of notice. The adjudicator ordered that the appellant be reinstated, but found the appropriate notice period to be eight months in the event that the reinstatement order was overturned on judicial review.

On judicial review, the Court of Queen’s Bench quashed the adjudicator’s order to reinstate Mr. Dunsmuir but upheld the adjudicator’s finding concerning the eight-month notice period, finding that that Mr. Dunsmuir had received procedural fairness by virtue of the grievance hearing before the adjudicator. The New Brunswick Court of Appeal maintained the reviewing court’s decision to set aside the reinstatement and concluded that the issue of procedural fairness did not arise since Mr. Dunsmuir’s employment was terminated with notice and he exercised his right to grieve.

The Supreme Court of Canada upheld the Court of Appeal’s decision, taking

2000, 10235 - 101 STREET  
EDMONTON, AB T5J 3G1  
PH: 780.423.3003

400 THE LOUGHEED BUILDING  
604 1 STREET SW  
CALGARY, AB T2P 1M7  
PH: 403.260.8500

201, 5120 - 49TH STREET  
YELLOWKNIFE, NT X1A 1P8  
PH: 867.920.4542

[www.fieldlaw.com](http://www.fieldlaw.com)

the view that it was time to reconsider the applicability of the procedural requirements in the context of public employment.

According to the Supreme Court, the distinction between public office holders and contractual employees, which formed the basis for extending procedural fairness rights to the public employment context, has become increasingly difficult to maintain both in principle and in practice. The difficulty in maintaining a clear distinction between both types of positions led to uncertainty as to whether procedural fairness attaches to particular positions. Furthermore, the distinction between public office holders and contractual employees has become complicated since public employment is for the most part now viewed as a regular contractual employment relationship. The Supreme Court has itself recognized in an earlier case that most civil servants are employed on a contractual basis as unionized or non-unionized employees, even though their position may be governed by statute and regulations. It is only certain officers, such as ministers of the Crown and "others who fulfill constitutionally defined state roles" who do not have a contractual relationship with the Crown, since the terms of their positions cannot be modified by agreement.

In the Court's view, where a public office holder is employed under a contract of employment, the justifications for imposing a public law duty of fairness with respect to his or her dismissal are less persuasive since "[i]f the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way". In other words, a public employer that dismisses a public office holder is merely exercising its private law rights as an employer. Accordingly, in Mr. Dunsmuir's case, the Court found that the Government of New Brunswick was acting no differently than any other employer when it sought to end his employment relationship with notice.

The Court further held that procedural requirements aimed at protecting office holders from arbitrary actions is unnecessary given that a public employer that terminates the employment of a public office holder in good faith and on reasonable notice cannot be deemed to be acting arbitrarily. A public employer must act in accordance with the same statutory and common law protections that surround private sector employment, such as human rights legislation, and must obviously act in accordance with any statutory restrictions on the exercise of its discretion. Where there may be bad faith and unfair dealing in the termination of an office holder's

employment, private law does provide protection by way of an extension of the notice period, a remedy that the Court deemed more principled and fair than a public law remedy. The Court affirmed that while reinstatement is not available in private law, a breach of a public duty of fairness should not be equated to reinstatement because it simply requires that the dismissal decision be retaken in accordance with the correct procedure, which leads to the same result in the end.

In conclusion, the Supreme Court's decision in Dunsmuir marks an important development in the law for public employers and employees. As a result of this decision, the dismissal of a public employee should generally be viewed as a "typical" employment law dispute. Thus, an additional public law duty of fairness will generally not arise when a public authority dismisses an employee pursuant to a contract of employment. Nevertheless, as observed by the Supreme Court, there may be occasions where a public law duty of fairness will still apply to the dismissal of a public office holder. The first situation is where a public employee is not, in fact, protected by a contract of employment, as is the case with judges, ministers of the Crown and other who "fulfill constitutionally defined state roles." It would also apply where the terms of appointment of some public office holders expressly provide for summary dismissal or are silent on the matter, in which case the office holders may be deemed to hold office "at pleasure". The second situation is where a duty of fairness flows from a statutory power governing the employment relationship. However, the determination of whether a particular statutory power will trigger procedural requirements will depend on the specific wording of the statute and will vary with the context.

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The Labour and Employment Group  
Edmonton 780-423-3003  
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