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Summerside Appeal Case Application For Non Suit Granted

In the Supreme Court on Tuesday, Mr. Judge Hazzard gave judgment granting non suit in the case of Alonzo Larkins v. Town of Summerside. The judgment follows: CANADA, PROVINCE OF PRINCE EDWARD ISLAND IN THE SUPREME COURT Alonzo Larkins, Plaintiff vs. Town of Summerside, Defendant Judgment of the Court Hazzard J. 15th Nov. 1927.

This is an application by the defendant, the Town of Summerside, to set aside the verdict found for the plaintiff herein on the trial of this action before Mr. Justice Arsenault and a Jury at the last June Term of this Honourable Court at Summerside in Prince County and instead thereof to have a non suit or a verdict entered for the defendant on the following grounds:

1st. That the plaintiff failed to prove any of the issues raised on his declaration herein. 2nd. That the plaintiff alleged in the first count his declaration a contract of hiring for a year, two from the tenth day of March, A. D. 1924, and wrongful dismissal by the defendant before the expiration of said year, and his evidence disclosed that the plaintiff was an officer of the defendant and liable to be dismissed at their pleasure.

3rd. The wrongful refusal by the learned trial Judge to direct the jury that the variance referred to in preceding ground entitled the defendant to a verdict on the first count, or in the alternative that the verdict should be set aside and a new trial had between the parties on the following ground:

1. That the said verdict is against the law and contrary to evidence and the Judge's charge and perverse. 2. That the damages assessed by the Jury by their verdict is excessive.

The Declaration in the suit contained two counts, one on a contract or hiring for one year in the capacity of First Assistant Engineer of Electric Light Plant in Summerside at the wages of twenty one dollars per week alleging that the defendant promised the plaintiff to retain him in said service in the capacity and on the terms aforesaid during the said year. That the plaintiff entered said service in the capacity and upon the terms aforesaid and so continued therein for a part of the said year and until the breach of the said promise herein after alleged, and was always ready and willing to continue in said service during the remainder of the said year whereof the defendant always had notice. Yet the defendant before the expiration of the said year dismissed the plaintiff from said service and refused to retain the plaintiff therein for the remainder of said year whereby the plaintiff was deprived of the wages and profits which he should have derived from being retained in such service and remained a long time unemployed.

2. The plaintiff also sues the defendant for money payable by the defendant to the plaintiff for work done and services to the plaintiff by him and rendered as the hired servant of and for the defendant and otherwise for the defendant and at his request and for wages due by the defendant to the plaintiff in respect thereof.

1. Defendant by its Attorney for a plea to the first count says that it did not promise as alleged. 2. And for a second plea to the first count says that the plaintiff was not always ready and willing to continue in said service as alleged.

3. For a plea to the second count, says it was never indebted as alleged.

4. And for a second plea to the said count says that before action it satisfied and discharged the plaintiff's claim by payment. Issue was joined on the above pleas.

The plaintiff as appears by the evidence was appointed to the said office by a Resolution of the Town Council of Summerside and notice thereof given to him in writing, and thereafter was duly sworn and entered upon the duties of the office, and continued therein for several months when he became ill and was unable to continue therein and was obliged to retire, rendering it necessary for the defendant to obtain the services of another person in his place and instead, \$10.50 per week being paid to him plaintiff, as a gratuity for a time, which the plaintiff duly accepted.

After a somewhat lengthy and heated period the plaintiff's health improved and plaintiff was desirous of being restored to his position but defendant refused to do so and plaintiff was discharged. Plaintiff now sues on a contract for a year certain and seeks to be paid for a full year at a wage of twenty one dollars per week. The Act of Incorporation of the Town of Summerside, 3 Ed. VII, Cap. 13, provides that the Council shall as soon as may be convenient after every annual election appoint places any of the said officers, and such other officers as may be deemed necessary according to the true intent and meaning of this Act and to define the duties of such officers and their respective terms of office which shall not be longer than one year unless they be re-appointed, and the Council may at any time remove any of the said officers and appoint others in their stead. The plaintiff claims that he was improperly discharged, that his hiring was for a year certain and that he is entitled to a full year's service at twenty one dollars per week and asks to be paid over and above the amount recovered the sum of \$696.00.

The provisions in the Act authorizing the Council to dismiss an officer or servant is the usual one and most necessary one under any circumstance for corporations to have, but especially so in a case such as the present. When a servant or officer who possesses special qualifications becomes unable from sickness or otherwise to discharge his duties, and it becomes necessary to employ another or others in his place, it is essential that power be given to terminate the appointment of the first employed. Upon the right of the Town Council to dismiss at pleasure under the provisions of the Act of Incorporation I have no doubt.

Of the various authorities bearing upon this question I would refer to the following, viz: Newby vs. Municipality of Brownlee, Saskatchewan Supreme Court (1916) 27 D. L. R. 509. This was an appeal from a judgment in favor of plaintiff in an action for wages and wrongful dismissal. The action was brought by the respondent to recover \$120 for two months' wages as constable and engineer, \$10 for care taking of a sick dog, and \$60 damages. The appellant claimed amongst other things that it had the right to dismiss respondent without notice and without cause. The Judge gave judgment in favor of the respondent for the sum of \$90.25 for wages and \$60 damages for wrongful dismissal. From this judgment appellant appealed, claiming it had the right at any time to dismiss respondent without notice and further that it dismissed him for cause.

The only question there to decide was that of dismissal. Had the appellant the right to dismiss the respondent without notice and without cause? The Section of the Statute under which he was appointed, read as follows: "All officers appointed by the Council shall hold office during the pleasure of the Council and in accordance with the terms expressed in the Resolution by which they are appointed."

The Resolution under which respondent was appointed was as follows: Moved by J. E. Sires "that Thomas Newby be appointed Constable and Engineer at a salary of \$60 per month to commence duties not later than June 8th, 1914." It was contended on the trial that this was followed by a contract of hiring in writing which provided that the respondent agreed to give or take 30 days notice in writing as to the termination of this contract. It was signed only by the respondent and not by the appellant and was objected to by Mrs. L. Sires on the ground that the appellant was not a party to it. In delivering judgment the learned Judge said: "Owing to the view I take of this Section it is immaterial whether the document is admissible or not as evidence against the appellant, as I do not think the Council has power to change the effect of this section."

I am of the opinion that the Section in question gives the power to the Council to dismiss its officers at any time without cause. The Section expressly says that they shall hold office during the pleasure of the Council and this to my mind can only mean that they may be dismissed at any time. Again he says: "I do not think the Council has any power to change the effect of this section."

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question has come up several times in Ontario under similar sections and the Courts have held that the officers of a Municipality can be dismissed at any time without notice and without cause, and especially referred to the cases in support of that view, viz: Wilson vs. York, 46 C. C. Q. B. 289; Vernon vs. Corporation of Smiths Falls, 21 Ont. R. 331, under a section similarly worded; Davis vs. City of Montreal, 27 C. S. C. R. 539; and after citing these and other authorities said: "I am of the opinion that the Council of the Villages had the right to dismiss the respondent without notice and without cause." The appeal was allowed accordingly.

In Vernon vs. The Corporation of Smiths Falls (1892) 21 Ont. Reports, an action for wrongful dismissal from his employment as Chief Constable of the Municipal Police, the plaintiff's term of office was during pleasure. Meredith J. in delivering the judgment said: "As to the defendants' unfettered right through their Council to exercise their pleasure without assigning any cause I refer in addition to the cases mentioned during the argument of the Municipal Corporation of Smiths Falls, L. R. 18 Eq. 28, cases collected in Short on Mandamus and several others." This case also established the same right to dismiss without notice and at pleasure.

See also Dillon on Corporations, 5th Ed. vol. 1, page 733, sect. 423. Upon the conclusion of the evidence on behalf of the plaintiff counsel for defendant asked for a non suit, but the learned trial Judge refused it, reserving to the defendant the right to move later to have a non suit entered.

On the authority of Metzner vs. Boulton, 9 Ex. 517, I hold that the first count does not cover or include any sum which might be payable on account of salary under the appointment to office which the evidence disclosed. The appointment, though in form for one year certain, was in effect an appointment at the pleasure of the defendant and the first count of the declaration which purports to set forth the substance and effect of the appointment fails to do so.

An appointment is not a contract. The defendants had an absolute power of dismissal under the Statute which they might exercise without assigning cause and without previous notice. There is no hardship under such a provision for every officer of such a corporation on accepting office is properly assumed to know the conditions attached to the appointment. It is a necessary provision in the case of municipal corporations to enable them to perform their duties to the public satisfaction.

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