

RE: THE MATTER OF AN APPEAL PURSUANT TO
S.45(1) OF THE REGIONAL HEALTH SERVICES ACT AND S.8(1) OF
THE PRACTITIONER STAFF APPEALS REGULATIONS WITH RESPECT TO
THE EFFECTIVE TERMINATION OF THE APPELLANT'S APPOINTMENT AND THE
EFFECTIVE REVOCATION OF THE APPELLANT'S PRIVILEGES BY VIRTUE OF THE
DECISION OF THE SASKATOON REGIONAL HEALTH AUTHORITY TO TERMINATE
THE APPELLANT'S EMPLOYMENT CONTRACT

BETWEEN:

DR. W. KIRK READY,

APPELLANT

AND:

THE SASKATOON REGIONAL HEALTH AUTHORITY,

RESPONDENT

DECISION OF THE PRACTITIONER STAFF APPEALS TRIBUNAL

Michelle J. Ouellette, Q.C. appeared and acted on behalf of the Appellant
Evert Van Olst appeared and acted on behalf of the Respondent

A. INTRODUCTION

[1] This appeal concerns whether *The Regional Health Services Act*, s.s.20002, c.R-8.2 (“Act”) grants the Practitioner Staff Appeals Tribunal jurisdiction to review an action taken by the Respondent, the Saskatoon Regional Health Authority, (“Authority”) pursuant to the contract (“Contract”) signed between the Respondent and the Appellant, Dr. Kirk Ready. In particular, the contract contains a term that states “This contract of employment may be terminated by either party on three months written notice to the other party, or immediately, without notice, for just cause”. In a letter to Dr. Ready, dated May 30th, 2011, the Respondent terminated Dr. Ready’s employment contract immediately with pay in lieu of notice equal to three months’ salary plus any vacation credits outstanding.

[2] Dr. Ready appeals the Contract’s termination on the grounds that the Respondent indirectly revoked his privileges and terminated his appointment to the Medical Staff and his access to publicly funded laboratory within which his privileges could be exercised, contrary to the process outlined in the Respondent’s Practitioner Staff Bylaws (“Bylaws”). Furthermore, the Appellant asserts that he was not provided the procedural fairness required by law for a decision of this nature.

[3] For reasons provided below, the Tribunal has decided it has clear jurisdiction to hear Dr. Ready’s appeal of the termination of the Contract. *The Regional Health Services Act*, s.45(1) allows for an appeal to the Tribunal in matters relating to “the termination of an appointment” and “the revoking of privileges”. The Tribunal finds that the effect of terminating the Contract was to revoke the Appellant’s privileges. During the Tribunal, the Appellant withdrew his request to be reinstated to his prior position as an anatomical pathologist with the Saskatoon Regional Health Authority. As a result, the Tribunal has decided that the appropriate remedy in this case is to quash the Respondent’s decision to end the Contract with the Appellant.

B. FACTUAL BACKGROUND

[4] Dr. Ready is an Anatomical Pathologist who was employed by the Respondent between June 2009 and May 2011. He conducted his practice in the City of Saskatoon, with an appointment to the Active Medical Staff in the Department of Laboratory Medicine and with privileges in the pathology laboratories in the Saskatoon Health Region (“SHR”).

[5] Dr. Ready has a distinguished academic and professional career. He received numerous scholarships while attending the College of Pharmacy and the College of Medicine at the University of Saskatchewan between 1977 and 1985. He also served as Medical Director of the Chinook Health Region Laboratory from 1997 to 2003, Chief of Laboratory Medicine at Royal Alexandra Hospital from 2004 to 2005, and Clinical Director Laboratory, Okanagan Health Service Area from 2006 to 2008.

[6] Dr. Ready is originally from Saskatoon and he continues to have extended family in the city.

[7] Dr. Ready had previously worked for the Respondent in 2006 pursuant to a short-term contract. That Contract for Services expressly provided for termination of the contract without reference to the Bylaws or any duty of procedural fairness:

“The parties agree that the termination of this Agreement, whether on expiry of its term, on the provision of notice or immediately, without notice for just cause, shall not require adherence to or the use of the discipline article of the current SRHA Medical-Dental Staff Bylaws and the Physician specifically acknowledges that recourse to the said discipline article is not required for the termination, in any manner, of this Agreement. Further, the Physician acknowledges and agrees that any decision to terminate this Agreement in any manner shall not obligate SRHA to engage in any process of hearing or other duty of fairness and the Physician agrees that his only remedy, if any, is restricted to an action for breach of contract.”

[8] In 2009, Dr. Ready was interviewed for the position of an Anatomical Pathologist with the Division of Anatomic Pathology, Department of Laboratory Medicine at the SHR. Prior to offering him the position, the Respondent conducted a detailed inquiry into Dr. Ready’s qualifications and credentials. During that process, it was noted that at his previous appointment in British Columbia, Dr. Ready had been responsible for a number of initiatives to improve quality assurance in the operation of the laboratory. The Respondent also learned that on one occasion, Dr. Ready disclosed his concerns about the Kelowna General Hospital Laboratory and the quality of the Estrogen Receptor testing for breast cancer to the public.

[9] In an interview with Dr. Ready prior to his appointment, the Respondent inquired about the media reports initiated by Dr. Ready concerning the Kelowna General Hospital Laboratory. At this interview, Dr. Poulin, Senior Medical Officer and Jean Morrison, CEO of the Authority, noted that Dr. Ready seemed anxious and stressed. Dr. Ready agreed with the recommendation from Dr. Poulin and Jean Morrison to seek professional assistance from the Physicians’ Support Program once he was a full member of the SMA. Dr. Ready also stated at the interview that he was looking forward to working without leadership responsibilities in his home-town, surrounded by extended family for support.

[10] Dr. Poulin and Jean Morrison recommended that the Respondent support Dr. Ready’s appointment, while recognizing the risk that Dr. Ready would “go public with problems he sees in our system.”

[11] The submission to the Board of the Authority in support of Dr. Ready’s appointment concluded that:

Dr. Ready will fill a much needed position in anatomic pathology at a time when workloads and wait times are increasing, particularly at St. Paul’s. His passion for quality is much needed and welcomed. His experience in blood banking is also being sought after by the Department.

[12] Following Dr. Poulin and Jean Morrison's recommendation, Dr. Ready was appointed to the Respondent's Practitioner Staff in June 2009 as a member of the Associate Medical Staff in the Department of Laboratory Medicine with full privileges in his Primary Department.

[13] In order to practice in the SHR, Dr. Ready was required to sign the Terms of Employment offered by the Respondent, dated May 28, 2009. The terms of the Contract expressly required him to adhere to the Bylaws and the relevant rules and regulations. Unlike the contract that Dr. Ready signed in 2006, the Contract did not attempt to exempt the Respondent from observing the Bylaws, rules or regulations or any duty of procedural fairness. The Contract also included a clause purporting to permit the either party to terminate the Contract on three months written notice ("Termination Clause"). The relevant provisions are as follows:

Service conditions

2. The pathologist will maintain membership in good standing under the SHR Practitioner Staff Bylaws and adhere to those bylaws and the rules and regulations enforced from time to time which impose obligations on the medical staff.

...

Term

This contract of employment may be terminated by either party on three months written notice to the other party, or immediately, without notice, for just cause.

Other Matters

As a condition of employment, the pathologist agrees to, at all times, maintain the required credentialing and privileged status with the SHR necessary to fulfill the functions of their position. Further, as a condition of employment, the pathologist shall maintain all required licensing and insurance requirements recognized for the specialty and as required by the SHR Practitioner Staff Bylaws

...

Hospital privileges will continue in force if the contract for service is terminated. The hospital privileges will lapse at the next renewal.

[14] In October 2009, Dr. Ready was appointed Director of the Residency Training Committee for the General Pathology Training Program for a period of three years.

[15] In September 2010, in accordance to the procedure outlined in the Bylaws, Dr. Ready was appointed as a member of the Active Medical Staff.

[16] During the course of his appointment, Dr. Ready raised several concerns about the operations of the Division of Anatomical Pathology including the troubling shortage of pathologists, the ineffective recruitment to relieve the shortage, the growing backlog of patients' pathology test interpretations, and the delay in diagnosis of time sensitive diseases such as cancer.

[17] As pathologists left the SHR and were not replaced, Dr. Ready formed the view that the General Pathology Residency Training Program was in danger of imminent failure. He sent an email to the Anatomical Pathology Operations Committee on May 18, 2010, expressing the following concerns:

- (a) That the General Pathology Residency Training Program was in imminent danger of failure due to deficiencies with the Division of Anatomical Pathology;
- (b) That when he took the position as Program Director, there were enough anatomical pathologists on staff to do a reasonable job of teaching residents, but that this was no longer the case.
- (c) In fact, he was unable to arrange training sites for some residents due to a shortage of pathologists at Royal University Hospital and Saskatoon City Hospital. More residents were being trained at St. Paul's Hospital that could be adequately accommodated;
- (d) That the decision to refer out pathology cases for reporting would limit the material available for resident training;
- (e) That the lack of pathologists could take more than a year to correct;
- (f) That, in the meantime, resident training would suffer and patients would suffer delays in turn-around-time; and,
- (g) That these deficiencies could result in Saskatchewan losing its only pathology resident training program.

[18] Dr. Ready resigned from his position as General Pathology Residency Program Director shortly thereafter on June 16, 2010, but remained a member of the Active Medical Staff.

[19] As a solution to the problems he observed the Respondent having in providing timely and quality pathology services, Dr. Ready proposed outsourcing certain functions to his newly incorporated corporation, Professional Pathology Consultants Inc. He also offered suggestions for "marketing" of new recruits. On December 3, 2010, Dr. Ready requested a meeting with Ms. Davies, the new CEO of the Authority in order to discuss the services his newly formed company could provide for the Authority. After the subsequent meeting with Ms. Davies, Dr. Ready states in a follow-up email to her that a number of the Saskatoon pathologists are looking for similar greater professional satisfaction and fulfillment.

[20] Dr. Ready became further concerned about the quality of pathology services offered by the Respondent when he learned that the Medical Director of the Department of Laboratory Medicine and Pathology was not a physician as required by *The Medical Laboratory Licensing Act* and *The Medical Licensing Regulations*. He felt strongly that the failure to have a qualified person in the position of Medical Director at the position would have a negative impact on the Authority's ability to recruit and retain pathologists and deal effectively with the backlog of patients' test results. Dr. Ready raised this issue with the Respondent and when he failed to receive a sufficient response, Dr. Ready raised the following concerns with the Saskatchewan Ministry of Health:

- (a) That there was no qualified person in authority in the SHR with an understanding of nature of the work and environment of Anatomical Pathology services;
- (b) That this lack of a qualified Medical Director may be, at least in part, responsible for the difficulties of the Anatomical Pathology Division;

- (c) That Saskatchewan Health has no relevant quality indicators for Anatomical Pathology, such as workload, turn-around-time or quality monitoring;
- (d) That the Division was often weeks off the standard for care in Anatomical Pathology turn-around-time, with resulting adverse biological and psychological impacts on patients;
- (e) That a publication in the Canadian Journal of Pathology put Saskatchewan at the bottom of all Canadian provinces for supply of laboratory physicians;
- (f) That several pathologists had recently left the Division and had not been replaced;
- (g) That the Department Head had failed to respond to his concerns regarding recruitment of replacement pathologists;
- (h) That in his anecdotal experience, tumours in Saskatchewan are larger at the time of biopsy or resection than they are in Alberta and B.C., an observation warranting epidemiologic investigation to refute or confirm;
- (i) That the resulting risks included:
 - (i) Further difficulties in recruiting and retaining pathologists;
 - (ii) Adverse patient care and patient outcomes; and,
 - (iii) Referring pathology cases out of province.

[21] The Ministry of Health referred the issue of the Medical Director's qualifications to the Ministry of Justice. The Ministry of Justice directed the Respondent to appoint a new Medical Director who was a properly qualified physician as required by the governing legislation.

[22] On or about April 27, 2011, Dr. Ready was invited to apply for the position of Medical Director, along with other members of the Department of Laboratory Medicine. Dr. Ready expressed his interest in helping to "improve service, quality and efficiency of laboratory services for not only Saskatoon, but also for the other regions in central and northern Saskatchewan". He was only willing, however, to take the position if an appropriate balance could be reached between responsibility, authority and compensation.

[23] In an email from Sandra Blevins, SHR Vice President, Clinical and Operations Support, dated Thursday, May 12th, 2011, to Dr. Ready, the Respondent's disinterest in contracting the lab services to a consulting firm was clearly outlined. Ms. Blevins further specified that the role of the new Medical Director would be to support current operations and management structure.

[24] On or about May 19, 2011, the Authority's error in appointing a Medical Director who lacked the qualifications required by legislation became public.

[25] On May 30, 2011, within days of the media coverage regarding the Authority's error, Dr. Ready was asked to attend a meeting with administrative representatives of the SHR. Ms. Blevins, Ms. Judy Archer, Lab Manager, Dr. John Krahn, Medical Director, Department of Pathology, Dr. Ready and his legal counsel, and legal counsel for SHR were in attendance. At that meeting, Dr. Ready was informed that his engagement with the Authority was being terminated effective immediately with three months' pay in lieu of notice as per the Termination Clause in the Contract. Dr. Ready was also given a letter dated May 30, 2011, which read in part:

The purpose of this letter is to confirm our discussions and confirm the termination of your employment with the Saskatoon Regional Health Authority (SRHA). As we discussed, it is the view of SRH that the employment agreement be terminated based on the best interest of both parties.

[26] In terminating Dr. Ready's appointment, the Respondent relied upon the process outlined in the Contract, which merely requires a notice period be satisfied. In this case, payment in lieu of notice was provided. As a result, Dr. Ready was not afforded the process outlined under the Bylaws. Under the Bylaws, the Respondent would have to provide reasons for the dismissal and Dr. Ready would be given the opportunity to address those reasons. In addition, the Respondent did not pursue dismissal with cause whereby Dr. Ready's skills, knowledge or competence in the field of pathology may have been called into question. Similarly, the Respondent did not have to clarify whether Dr. Ready's vocal concerns about the quality and availability of pathology services in the SHR played a role in his termination.

[27] Since Dr. Ready's termination, he has been unable to practice his specialty in Saskatoon. Pathologists in the SHR have no ability to practice except under a contract for services or employment with the Respondent. Despite the clause in the Contract assuring Dr. Ready that his privileges would remain in force in the event of termination of the contract, he has been unable to make use of his appointment or privileges.

[28] On or about July 20, 2011, Counsel for Dr. Ready received a letter from the Chairperson of the Board of the Authority indicating the Boards refusal to interfere with the decision to end Dr. Ready's employment with the Authority. The letter provides:

Dr. Ready's termination of employment was an administrative and employment decision taken by the appropriate individuals within the organization and was not a matter for the board of SRHA. It was not a matter that involved his privileges or appointment to the practitioner staff, but rather was the result of the employer's exercise of a contractual term of his employment that he agreed to.

Thus, the board declines to review the decision to terminate his employment.

C. ANALYSIS

Jurisdiction

[29] The Tribunal relies on the following statute to determine whether it has the jurisdiction to hear Dr. Ready's appeal.

Section 45(1) *The Regional Health Services Act*, provides that:

A person who is aggrieved by a decision of a regional health authority or an affiliate made in relation to the following matters may, in accordance with the regulations, appeal the decision to a tribunal established by the regulations:

(a) the appointment of the person to the practitioner staff or the reappointment, suspension or termination of appointment of the person;

- (b) the disciplining of the person as a member of the practitioner staff;
- (c) the granting of privileges to the person as a member of the practitioner staff, or the amending, suspending or revoking of privileges granted to the person.

[30] The termination of Dr. Ready's contract ended his appointment as a member of the Active Medical Staff. Furthermore, although Dr. Ready's privileges were not suspended with the termination of his contract, anatomical pathologists are not practitioners who are able to carry on an independent practice outside of their contract with the Authority. They cannot practice their specialty without access to laboratories and facilities provided by the SHR through employment contracts. As a result, the effect of the Respondent's decision to end the Appellant's Contract was to revoke his privileges.

[31] The Tribunal, therefore, finds that either s.45(1)(a) or (c) can be relied upon to grant the Tribunal jurisdiction to hear this appeal.

Main Appeal

[32] Dr. Ready's counsel in the Notice of Appeal document focuses on the fact that the termination of Dr. Ready's contract was made without any measure of procedural fairness in that, *inter alia*:

- i. he was not given notice of any complaint against him;
- ii. he was not given any opportunity to submit materials, make representations, or otherwise respond to concerns or allegations against him;
- iii. he was not given any opportunity to appear before an unbiased decision-maker;
- iv. he did not receive reasons for his termination or an opportunity to respond in accordance with the Bylaws;
- v. the Respondent circumvented its obligation to follow and apply the Bylaws in the case of Dr. Ready by giving him three months pay in lieu of notice under the contract and in doing so abused its statutory power delegated by the legislature; and
- vi. The Board has acquiesced in, and ratified, the decision of its administrative personnel; and has refused to review the decision or to hear submissions on behalf of Dr. Ready or otherwise grant him any measure of procedural fairness.

By terminating Dr. Ready's Contract, the Appellant argues that the Authority has invoked the most serious response to a discipline issue without affording him any of the procedural protections provided in the Bylaws.

[33] The Respondent contends that the express provisions in the Contract, not the Bylaws or any public law duty of fairness, govern the process upon a decision of either party to end the Contract. To this end, the Respondent asserts that it has complied with its contractual obligations to Dr. Ready.

[34] The Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 ("*Dunsmuir*"), provides clear direction on how the Tribunal is to proceed in this case. *Dunsmuir* rejected the long-standing understandings of the general duty of fairness owed by

public authorities to those employees who are either public officer holders or have been appointed to positions with a ‘strong statutory flavour.’ The court instead held that:

[81]...what matters is the nature of the employment relationship between the public employee and the public employer. 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.

Dunsmuir therefore establishes that Dr. Ready’s status as an employee of the Respondent no longer entitles him, as a right, to seek public law remedies upon termination. Rather, the Contract may govern thereby limiting Dr. Ready to private law remedies.

[35] *Dunsmuir* does not stand for the proposition, however, that the mere existence of a contract between a public employer and a public employee allows the parties to ignore any statutory obligations. In fact, *Bastarache and Lebel JJ* provide:

[113]...it is assumed that most public employment relationships are contractual. Where this is the case, disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment *and any applicable statutes and regulations*, without regard for whether the employee is an office holder. A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies. (*emphasis added*)

[36] Moreover, while *Dunsmuir* limits the application of additional public law duties of fairness to strict categories of employees of which Dr. Ready likely does not fall within, the court is clear that public employers cannot contract out of their statutory obligations unless given the authority to do so.

[106] Of course, a public authority must abide by any statutory restrictions on the exercise of its discretion as an employer, regardless of the terms of an employment contract, and failure to do so may give rise to a public law remedy. *A public authority cannot contract out of its statutory duties*. But 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. (*emphasis added*)

[37] The question before this Tribunal, therefore, is whether the Respondent had the power to contract out of the provisions of the Bylaws addressing the termination of persons appointed to the practitioner staff. A review of the *Act* and the Bylaws reveals no such power.

[38] Section 27(1) of the *Act* gives regional health authorities the responsibility to deliver health services within their region. Section 29(4) gives them the power to hire employees to fulfill that duty. Section 43(1) requires regional health authorities to establish bylaws to deal

with, *inter alia*, terminating appointments, revoking privileges, and disciplining members of its practitioner staff:

Practitioner staff bylaws

43 Every regional health authority and every affiliate prescribed for the purposes of this section shall make bylaws governing the practitioner staff, including bylaws:

- (a) respecting the appointment, reappointment and termination of appointment of persons to the practitioner staff and the suspension of persons appointed to the practitioner staff;
- (a.1) respecting the disciplining of members of the practitioner staff;
- (a.2) respecting the granting of privileges to members of the practitioner staff, including the amending, suspending and revoking of privileges granted;

“Practitioner Staff” is defined in s.2(n):

(n) “practitioner staff” means those individuals who are qualified members of a prescribed health profession who are legally entitled to practise in Saskatchewan and who have been granted privileges by a regional health authority or an affiliate prescribed for the purposes of section 43:

- i) To provide health services at a facility operated by the regional health authority or affiliate; or
- ii) To refer patients to health services delivered by the regional health authority or affiliate;

[39] The Authority enacted the Bylaws pursuant to s.43 of the Act. In accordance with s.44, the Bylaws conform to the Model Practitioner Staff Bylaws developed by the Minister of Health. The introduction to the Bylaws notes that the purposes of the Model Practitioner Staff Bylaws include ensuring standard province-wide processes for appointments, privileging, and discipline. In order to fulfill these purposes, the Model Bylaws incorporate the following principles:

- (a) address the key elements of appointment, reappointment, privileging and discipline that all regional health authorities will be required to follow
- (b) balance the obligations of regional health authorities to address issues of risk management and patient safety while at the same time ensures that the principles of due process / procedural fairness are maintained.

[40] Section 2 of the Bylaws makes it clear that they are intended to govern the procedures for terminating appointments, revoking privileges, and disciplining members:

Purpose

2(1) These practitioner staff bylaws are developed and enacted in order to:

- (a) provide an administrative structure for the governance of the practitioner staff affairs within the regional health authority;
- (b) promote the provision of the quality health care services;
- (c) govern the procedures for the appointment, reappointment, suspension and termination of appointment of practitioners to the practitioner staff;
- (d) govern the procedures for the discipline of members of the practitioner staff;

(e) provide a means of granting of privileges to members of the practitioner staff, including the amendment, suspension or revocation thereof;

[41] As outlined, the Bylaws are prescribed by statute, and must be approved by the Minister of Health. They are mandatory and intended to be uniform throughout the province of Saskatchewan. Neither the *Act*, nor the Bylaws allow the respondent to treat practitioners employed under a contract differently than other practitioners. Dr. Ready's relationship with the Respondent could have been dealt with effectively under the framework provided by the Bylaws. The Respondent's reliance on the contractual Termination Clause was, therefore, in error.

[42] The model Bylaws were carefully prescribed in the interests of the public. It would be inconsistent with the stated intent of the *Act* to allow regional health authorities or their administrative staff to circumvent this entire statutory framework through contract. To do so, allows for the arbitrary termination of highly specialized physicians, potentially undermining the purpose and efficacy of the entire system.

D. CONCLUSIONS

[43] For the reasons described above, this Tribunal concludes that it has the jurisdiction to hear this appeal.

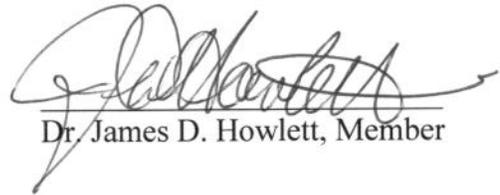
[44] The Tribunal further concludes that the Respondent was required to follow the procedure outlined in the Bylaws for terminating the Appellant from the medical staff. During Dr. Ready's cross-examination he was asked, "Would you hope there might be reinstatement to your position following this Tribunal?" Dr. Ready answered:

The short of the story is it would be untenable for me to go back into the same position. As long as the laboratory continues in its status quo doing the same things over and over again, it's never going to get further ahead, so it would be untenable for me to actually go and work as an employee for an organization in which the trust level between us is – you know, it's essentially nonexistent.

Counsel for the Appellant, therefore, amended her Notice of Appeal from asking that Dr. Ready be reinstated to asking the Tribunal to set aside the decision of the Board and that of its administrative and management staff to terminate Dr. Ready's contract. As such, the Tribunal sets aside the decision of the Board and that of its administrative and management staff to terminate Dr. Ready's employment contract and, in effect, revoke his privileges and terminate his appointment.

Practitioners Staff Appeals Tribunal

Dated at Yorkton, Saskatchewan, this 3 day of August, 2012



Dr. James D. Howlett, Member

Dated at Herbert, Saskatchewan, this ____ day of August, 2012



Dr. Suresh Kasset, Member

Mr. Darin C. Chow, Q.C. was chairman of the Tribunal proceedings, but did not participate in the decision.