

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20210309**

**Docket: A-182-17**

**Citation: 2021 FCA 50**

**CORAM: NADON J.A.  
NEAR J.A.  
MACTAVISH J.A.**

**BETWEEN:**

**WHITE BEAR FIRST NATION**

**Appellant**

**and**

**MURRAY BIRD**

**Respondent**

Heard by online video conference hosted by the Registry on March 3, 2021.

Judgment delivered at Ottawa, Ontario, on March 9, 2021.

**REASONS FOR JUDGMENT BY:**

**MACTAVISH J.A.**

**CONCURRED IN BY:**

**NADON J.A.  
NEAR J.A.**

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**REASONS FOR JUDGMENT**

**MACTAVISH J.A.**

[1] After nearly 14 years of employment with the White Bear First Nation's on-reserve school, first as a teacher and latterly as the principal, Murray Bird's employment was summarily terminated, allegedly for cause. Mr. Bird filed a complaint of unjust dismissal in accordance with the provisions of the *Canada Labour Code*, R.S.C., 1985, c. L-2. Following a five-day hearing,

an adjudicator found that the White Bear First Nation had just cause to terminate Mr. Bird's employment, and that his complaint should be dismissed.

[2] Mr. Bird sought judicial review of the adjudicator's decision in the Federal Court. In a decision reported as 2017 FC 477, Justice Diner granted Mr. Bird's application, finding that the adjudicator had erred in failing to apply the correct legal test in assessing whether the employer had just cause to terminate his employment. According to Justice Diner, the adjudicator further erred in failing to consider the principle of progressive discipline, and whether the termination of Mr. Bird's employment was a proportionate response to his misconduct. Finally, Justice Diner found that Mr. Bird had been denied an opportunity to respond to the complaints that had been made against him prior to his termination, in contravention of the terms of his employment contract and the White Bear Education Complex Procedures Manual (the Manual).

[3] Insofar as this last issue is concerned, the Manual provides that:

Where a complaint is made to the [White Bear First Nation Education] Board respecting the competency or the character of the teacher and/or staff member, the Board shall not terminate the employment of a teacher and/or staff member unless it has communicated the complaint to the teacher and/or staff member, and given the teacher and/or staff member an opportunity to appear before the board to answer the complaint. Further action will be determined by the teacher/staff member's job description.

[4] The Manual, including the above provision, was incorporated into Mr. Bird's employment contract, obligating the White Bear First Nation Education Board to observe the "Due Process" provision reproduced above.

[5] The adjudicator noted that in this case, the Education Board had refused to act on the complaints against Mr. Bird, and had passed the entire matter on to the Chief and Council for resolution. According to the adjudicator, this meant that Mr. Bird's avenue of redress was with the Chief and Council. The adjudicator then went on to consider the appeal process that was available to employees after their employment had been terminated, finding that Mr. Bird had failed to avail himself of that process. The adjudicator never addressed the employer's failure to afford Mr. Bird the opportunity to address the allegations against him prior to the decision being made to terminate his employment.

[6] Justice Diner reviewed the above circumstances, concluding that the adjudicator had failed to meaningfully consider whether Mr. Bird's procedural rights had been respected in this case. This was a finding that was clearly open to Justice Diner on the record before him.

[7] The White Bear First Nation did not challenge Justice Diner's finding that Mr. Bird's procedural rights had not been respected prior to the termination of his employment in its memorandum of fact and law, and it only addressed this finding at the hearing in response to questions from the Court. Counsel for the First Nation conceded before us that Mr. Bird had been given no opportunity to appear before either the Education Board or the Chief and Council of the White Bear First Nation to address the allegations against him prior to his employment being terminated. Counsel further acknowledged that "in a perfect world they should have".

[8] The termination of employment has frequently been referred to as "capital punishment" in the labour and employment context, reflecting the grave consequences that such sanctions

have for individuals. It is thus important that the procedural rights of employees be respected before such a serious sanction is imposed on them. This is especially so where, as here, we are dealing with a senior employee with 14 years of service and an otherwise clean employment record.

[9] In my view, the failure of the White Bear First Nation to follow the process set out in its own personnel manual and in Mr. Bird's employment contract prior to terminating his employment provided a sufficient basis upon which Justice Diner could set aside the adjudicator's decision. While it is thus unnecessary to deal with Justice Diner's remaining findings in any detail, I would simply note that I am in agreement with those findings, substantially for the reasons cited by Justice Diner. I would therefore dismiss the appeal, with costs.

"Anne L. Mactavish"

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J.A.

"I agree.  
M. Nadon J.A."

"I agree.  
D. G. Near J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-182-17

**STYLE OF CAUSE:** WHITE BEAR FIRST NATION v.  
MURRAY BIRD

**PLACE OF HEARING:** BY ONLINE VIDEO  
CONFERENCE

**DATE OF HEARING:** MARCH 3, 2021

**REASONS FOR JUDGMENT BY:** MACTAVISH J.A.

**CONCURRED IN BY:** NADON J.A.  
NEAR J.A.

**DATED:** MARCH 9, 2021

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