1939

* May 1.
* Oct. 30.

PHILIAS MANTHA (PLAINTIFF) ..... APPELLANT;

AND

THE CITY OF MONTREAL (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Municipal law—By-law—Superannuation and pension—Employee applying for—Refusal by civic committee after report by medical officers—Employee not informed of such report before decision rendered—

* PRESENT:—Duff C.J. and Rinfret, Cannon, Kerwin and Hudson JJ.

Whether Superior Court has jurisdiction to reverse such decision—Art. 50 C.C.P.—Right of employee to pension.

The appellant, having served as a member of the fire brigade of the city of Montreal for a period of eighteen consecutive years, presented to the chief of the brigade, on the 23rd of July, 1931, his resignation on grounds of ill health and made a request for a medical examination, in order to obtain during his lifetime the pension provided by a by-law of that city. The examination was made by two medical officers on the 27th of July, 1931, who reported immediately to the city that the appellant was still fit to perform his duties. But the appellant was not informed, for months after, that his application had been rejected. In the meantime he had been required by his superior officers to return his fireman's equipment and thenceforward was in every way treated as not in the city's employment. The by-law, upon which the appellant based his claim, contains in section 2 the cases where an employee would be entitled to a pension; and section 11 provides that it "devolve upon the Board of Commissioners (later called Executive Committee) to decide, in each case, whether any civic employee is eligible for superannuation and pension." The appellant brought his action only in February, 1936, and in his statements of claim, did not allege such a decision in his favour, nor did he allege facts precluding the respondent city from relying upon section eleven; but he contented himself with alleging that the pension to which he had acquired a right had been unjustly and illegally refused by the city respondent and that he had fulfilled all the conditions entitling him to it. The respondent city denied such allegations, set up the report of the doctors and alleged generally that the appellant had not brought himself within the conditions giving him a right to superannuation and pension. It also raised, at the trial, the ground that the Superior Court had no authority under article 50 C.C.P. to review the decision of the Executive Committee. The trial judge, holding that he had such authority under the provisions of that article, proceeded to make himself an independent examination of the facts touching the state of the appellant's health in July, 1931, and finally granted the appellant's claim for pension. The appellate court reversed that judgment on the grounds that the Executive Committee, in the exercise of the discretion conferred upon it by section 11, had the right to find that the appellant was not eligible for pension, that the Court could not substitute its opinion for that of the Committee and that, on the evidence, the decision of the Committee could not be declared to be arbitrary, unjust and illegal.

Held, reversing the judgment of the appellate court and restoring the judgment of the trial judge, but in both cases on different grounds, that the appellant's claim for a pension and other benefit provided by the by-law should be maintained.

Held, also, reversing the judgment of the trial judge as to that ground, that article 50 C.C.P. has not the application given to it by him. Such article is primarily concerned with jurisdiction; but such jurisdiction must be exercised "in such manner and form as by law provided." Where parties have agreed, as in the present case, that their rights shall rest upon the condition that a given individual or body shall be satisfied that a certain state of facts exists, article 50 C.C.P. does not enable the Superior Court to make a new contract between the parties and to declare their rights without regard to the

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contract and by reference solely to the trial court's own view of the facts. In this case a decision by the Committee favourable or unfavourable to an applicant is not susceptible of review upon the merits by any court.

Held, also, reversing the judgment of the appellate court, that the city respondent should not be permitted to set up the decision of its Executive Committee in answer to the appellant's claim. The appellant, not having been informed of the nature of the report of the doctors until long after the decision of the Executive Committee, was given no opportunity of answering that report, before the Executive Committee had reached its decision; and, in these circumstances, it should be held that no inquiry of the character contemplated by section 11 of the by-law had taken place. Moreover, in the existing circumstances of the case, section 11 of the by-law would not afford, at the present time, appropriate machinery for working out the rights of the parties, mainly on the ground that evidence, to which the Committee might have resorted eight years ago, would probably be no longer available.

Held, further, that the finding of the trial judge, that the appellant had established the facts necessary to entitle him to superannuation and pension, under the by-law, should not be set aside.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, L. Cousineau J., and dismissing the appellant's action.

The appellant obtained judgment in the Superior Court against the city respondent, condemning it to pay him an annual pension equivalent to a fifth of his annual salary at the time of his resignation as a member of the fire brigade of that city, namely, $416, to pay him the arrears accruing up to the date of the action with interest amounting to $2,085.20 and ordering the city to deliver him a paid-up certificate or policy of $1,000, entitling his heirs to payment of that amount upon his death.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

Gustave Monette K.C. for appellant.
Claude Choquette for respondent.

The judgment of the Chief Justice and of Rinfret, Kerwin and Hudson JJ. was delivered by

THE CHIEF JUSTICE—The appellant's claim is based upon the enactments of by-law 506 amended by by-law 625 and section 38, cap. 112 of statutes of 1921. In so far as pertinent they are these:

2. When a permanent employee of the city shall become unable to perform his duties by reason of a chronic or incurable disease or of permanent infirmity contracted as a result or on account of the discharge of his municipal duties, he shall be superannuated and he shall then be entitled during his lifetime to an annual pension equal to one-fifth of the annual salary he was receiving at the time of his superannuation, if he has been in the city's employ for less than 10 years. If he has been in the city's employ for 10 years or more, he shall be entitled to the pension provided for in section 1 of this by-law.

11. It shall devolve upon the Board of Commissioners to decide, in each case, whether any civic employee is eligible for superannuation and pension.

By the statute of 1921 the Executive Committee succeeded to the functions of the Commissioners.

I agree with the majority of the Court of King's Bench that primarily the appellant's right to superannuation and a pension must rest upon the decision of the Board of Commissioners under section 11. I think it is reasonable to treat the provisions of sections 2 and 11 as terms of the engagements between the respondent corporation and its employees so long as the by-law is in force. It was entirely within the powers of the corporation to require as one of those terms that the right to superannuation and pension should not arise until there had been a decision under section 11 and that, I think, is the proper interpretation of the by-law.

On the other hand, it was the duty of the Executive Committee upon application by the appellant for superannuation on the ground of ill health to entertain his application and, after due consideration, to decide whether eligibility was established.

With great respect for the dissenting judges in the Court of King's Bench I do not think a decision by the Committee favourable or unfavourable to an applicant in the execution of their duties, after a proper consideration of the applicant's claim, is susceptible of review upon the merits by any court. The right of the retired officer is a right resting upon the by-law and the by-law accords him a pension when and only when he has received a favourable decision from the Executive Committee.

That, however, does not necessarily conclude the matter. If the Executive Committee refuses to entertain the application, or if they give a decision without having afforded the applicant a fair opportunity of supporting his claim, then, since the Corporation is responsible for the acts of its

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administrative organ, it may by the fault of that body be precluded from setting up this condition and the court may be in a position to enter upon an examination of the merits of the claim.

The evidence in the present case is rather meagre. The appellant presented to the Chief of the Fire Brigade on the 23rd of July, 1931, his resignation on grounds of ill health and requested a medical examination. The examination having been made by the two medical officers of the Fire Brigade, Dr. Lafleur and Dr. Morrison, they reported that the appellant was still fit to perform his duties as fireman.

At the trial the appellant said that it was not until some time in the year 1932 that he received a communication by letter from the President of the Executive Committee advising him that his application had been refused on the report of the medical officers that he was still fit for service. It was not until February, 1936, that proceedings were taken.

The appellant did not in his declaration state facts constituting a right of action against the Corporation. He did not allege a decision by the Executive Committee in his favour, nor did he allege facts precluding the defendant Corporation from relying upon section 11 of the by-law. He contented himself with alleging that the pension to which he had acquired the right had been unjustly and illegally refused by the defendant corporation; and that he had fulfilled all the conditions entitling him to it.

The facts upon which in his declaration he bases his claim are that at the date of his application he was, by reason of various ailments contracted in the performance of his duties, incapable of performing them.

The defendant corporation denied the allegations of the declaration and set up the report of the doctors and alleged generally that the plaintiff had not brought himself within the conditions giving him a right to superannuation and pension.

Except for this general allegation in the defence and the general allegation in the declaration mentioned above, the pleadings contain no reference to the conditions embodied in section 11 of the by-law or to the proceedings of the Executive Committee.

I have no doubt that the declaration was demurrable since a decision by the Committee favourable to him (or facts precluding the defendant Corporation from relying upon the condition embodied in section 11) was one of the constitutive elements of his cause of action.

It is clear, however, that at the trial both parties departed from the pleadings. The appellant in examination in chief gave evidence which, with that of the medical officers and the Chief of the Fire Department, made it quite clear that all parties understood that the appellant was applying for superannuation and a pension under the by-law, and an examination and report by the medical officers on the state of his health. He said that in 1932, the year following his application, he received, after repeated enquiries on the subject, a letter from the chairman of the Committee notifying him that his application had been rejected because the medical officers had reported him fit for duty.

On this evidence counsel for the defendant corporation based an argument at the trial (as appears by the judgment of the trial judge) that the action should be dismissed because the Superior Court had no authority to review the decision of the Executive Committee.

The learned trial judge rejected this contention, but the Court of King's Bench gave effect to it and on that ground allowed the appeal and dismissed the action.

It is convenient here to transcribe the relative *considérants* in both judgments. The trial judge says:

Le troisième point soulevé par la défense, toujours à l'argument seulement, est le défaut d'autorité de la Cour Supérieure pour reviser une décision du Comité Exécutif.

Considérant que l'article 50 du Code de Procédure Civile donne à la Cour Supérieure cette autorité, surtout dans une cause comme celle-ci, où il nous est démontré, par toute la preuve entendue, qu'il y a eu abus de pouvoir, soit volontairement, soit involontairement par ignorance des faits, et qu'une injustice grave a été commise.

Car considérant que le fait pour deux médecins de la cité de Montréal, qui connaissaient les maladies du demandeur depuis plusieurs années, de n'avoir pas examiné le demandeur minutieusement, et pour ces différentes maladies surtout, constitue "a palpable and manifest wrong", et que le fait, pour la cité, d'avoir accepté la résignation du demandeur pour cause de santé, car elle ne pouvait l'accepter qu'avec les raisons données, et de lui avoir subséquemment refusé sa pension, constitute un abus de pouvoir.

D'ailleurs la défenderesse, par ses actions ou par celles de ses employés, a acquiescé dans l'acceptation, d'abord en requérant le demandeur de remettre aux quartiers chefs, ses uniformes et ses bottes, qu'il en avait reçus, et en ne l'avisant pas que sa résignation n'avait pas été acceptée.

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Si, en effet, la cité avait refusé la résignation du demandeur, elle aurait dû l'en avertir pour qu'il puisse, soit reprendre son travail ou donner sa résignation pour d'autres causes. Elle n'a rien fait;

Considérant donc que le demandeur a établi, hors de toute doute, qu'il souffre depuis au moins 1928, de rhumatisme, de lumbago, de troubles de gorge et d'oreilles, et de fistules, et qu'il est dans les conditions requises par le règlement, et partant "incapable de remplir ses fonctions à raison de maladies chronique ou incurable", maladies qui ont été causées par le fait ou à l'occasion de l'exercice de ses fonctions.

In the judgment of the Court of King's Bench the following appears:

Considering that by the terms of the by-laws in force at the time when the respondent tendered his resignation—*which was accepted subject to medical report*—it devolved upon the Executive Committee of the city of Montreal to determine whether the respondent was eligible or not for the said pension;

Considering that the respondent, by his action as brought, does not pretend that the said Executive Committee failed to exercise the discretion so conferred upon it, but on the contrary the respondent expressly alleges that the Executive Committee unjustly and illegally rejected his claim;

Considering that, in accordance with the requirements of the by-laws relating to the matter, the respondent was examined by the medical officers of the fire brigade shortly after the date of his resignation and found to be still fit for service;

Considering that in virtue of the said by-laws governing such pension, a claim only arises in the event of the employee claiming it becoming unfit for further service, and the decision thereon is vested in the Executive Committee;

Considering that there was ground upon which the Executive Committee, in the exercise of the discretion so conferred upon it (while not bound to do so under the then existing by-laws), could, however, find that the respondent was not eligible for such pension as not coming within the terms of the by-law; and this court cannot substitute any opinion that it might form for that of the said Executive Committee, nor, in the light of the evidence, can it declare the decision of the said Executive Committee to be arbitrary, unjust and illegal (*Harvey* v. *Montreal* (1); *Montreal* v. *Diamond* (2)).

Considering that there is error in the judgment of the Superior Court in granting the said pension;

Considering, further, that as to the insurance policy claimed by the respondent, while he is entitled to the same under the provisions of the resolution of the city council dated the eighteenth day of January, one thousand eight hundred and seventy-five (1875), he is not entitled, in the alternative, to the sum of one thousand dollars ($1,000) in cash, and that there is error in the judgment of the Superior Court in this respect.

The judgment of the learned trial judge shews plainly enough, I think, that he misdirected himself. He was under the impression that his duty was to enter upon an independent examination of the facts touching the state

(1) (1934) Q.R. 72 S.C. 12. (2) (1934) Q.R. 57 K.B. 430.

of the appellant's health in July, 1931, and that, having concluded he was in the state of health contemplated by section 2 of the by-law (that is to say, unfit to discharge his duties) he was entitled to disregard any decision of the Executive Committee under section 11 or the absence of any such decision. He finds there was an abuse of power " soit volontairement ou involontairement par ignorance des faits et qu'une injustice grave a été commise ". But this finding is based solely upon his conclusion respecting issues of fact which, by the terms of the by-law, the Executive Committee is to pass upon. He does not put his conclusion upon any illegality in the proceedings of the Committee or any refusal to consider the application or any want of judicial temper or any partiality in the conduct of the inquiry, although he does find unfairness and injustice in the conduct of the doctors.

Article 50 of the Code of Civil Procedure is primarily concerned with jurisdiction; the jurisdiction, however, is by the express words of the article to be exercised " in such manner and form as by law provided." Where parties have agreed that their rights shall rest upon the condition that a given individual or body shall be satisfied that a certain state of facts exists, article 50 does not enable the Superior Court to make a new contract between the parties and to declare their rights without regard to the contract and by reference solely to the court's own view of the facts. I am satisfied that the judgment of the trial judge cannot be sustained, therefore, on the grounds on which he bases it.

On the other hand, after some hesitation, I have come to the conclusion that the judgment of the Court of King's Bench cannot be maintained.

The respondent corporation having at the trial taken its stand upon the decision of the Executive Committee (disclosed in the evidence of the appellant) and the Court of King's Bench having treated it, as Mr. Justice Bond says, " as established " against the appellant

> that the Executive Committee did in fact act in the matter and rejected his claim basing themselves upon the medical report received from the medical officers of the brigade, to the effect that the respondent at the time of his resignation was still fit for service,

I think we must consider whether, on the evidence on which the Court of King's Bench proceeded, the decision of the Executive Committee can be accepted as final. The

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evidence bearing on this point is chiefly that of the appellant. And, as appears from the judgment of Bond J. it is upon this evidence that the Court of King's Bench acted. The statement in the formal judgment of the Court in the second paragraph quoted above must be founded on the appellant's evidence since the appellant in his declaration makes no reference to the action of the Executive Committee, but only to the "illegal and unjust" refusal of his pension by the defendant Corporation.

From the evidence of the appellant we are entitled to conclude (he was not contradicted or cross-examined on these points) that, after the medical examination (July 27th), he was not informed for months that his application had been rejected or that the doctors had found him fit for duty, although they appear to have reported immediately. In the meantime he was required by his superior officers to return his fireman's equipment and thenceforward he was in every way treated as not in the Corporation's employment.

It is clear, as already observed, that everybody understood he was applying for superannuation under the by-law on the ground of incapacity by reason of ill health and the officials of the Corporation must have realized, if they gave the matter the slightest attention, that it was their duty at once to inform him that his application for superannuation had been rejected. In giving effect to the application as a simple resignation and keeping him in ignorance of the report of the doctors that he was fit for duty and of the decision of the Executive Committee, they were either deceiving him deliberately or acting with gross inattention to their plain duty.

One thing is plain: the appellant not having been informed of the nature of the report of the doctors was given no opportunity of answering that report before the Executive Committee had reached their decision.

It is obvious, of course, that in these circumstances there was no inquiry of the character contemplated by section 11. The duty of an administrative body charged with an inquiry into facts the results of which is to affect the civil rights of parties has been stated many times. It will be sufficient

to refer to the language of Lord Loreburn in *Board of Education* v. *Rice* (1):

> I need not add that * * * they must act in good faith and fairly listen to both sides. * * * They can obtain information in any way they think best always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their view.

These words seem to be apt for the present purpose. The Court of King's Bench has overlooked the significance of the fact, not as I understand it disputed, that the appellant had no knowledge of the report of the medical officers until long after the decision of the Committee had been given and no opportunity to answer it. I repeat, in these circumstances, the respondent Corporation cannot be permitted to set up that decision in answer to the appellant's claim.

Is the Corporation also precluded from relying on the condition embodied in section 11 itself?

Section 11 contemplates an examination by the Committee of the facts touching the state of the applicant's health at the time of the application for the purpose of determining whether or not the applicant is in such a state of health as to be unable to perform his duties. If the inquiry results in a negative answer, then, in the ordinary course, the employee will not be superannuated but will continue to exercise his functions. As pointed out above the appellant by reason of the manner in which his application was dealt with was, in effect, dismissed from his employment although, according to the medical report and the decision of the Executive, he was not unfit to perform his duties. He was forced to commence an action to establish his status.

Section 11 in the existing circumstances affords no appropriate machinery for working out the rights of the parties. It does not appear that the Committee has any power to examine witnesses upon oath; and evidence to which the Committee might have resorted eight years ago would, probably, be no longer available.

Section 11, having in this particular case and chiefly by reason of the conduct of the defendant Corporation, and its officials and its administrative body, the Executive Committee, become abortive, the case appears to be one for the application of the principle of *Cameron* v. *Cuddy*

(1) [1911] A.C. 179 at 182.

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(1) as stated by Lord Shaw at page 656. The rule is a practical one for effectuating justice where the machinery set up by the instrument defining the rights of the parties has become inoperative. The rule is well within the spirit of article 50 of the Code of Civil Procedure and the law of Quebec is not less efficacious for meting out justice in such a case than the law of England or Scotland.

There still remains the issue raised by the contention of the Corporation that the plaintiff has failed to establish the facts necessary to entitle him to superannuation under section 2 of the by-law. I think there was some evidence as to the fistula, and I am not prepared to say that the finding on that point should be set aside. Then, the learned trial judge had before him the appellant, of whose credibility he appears to have had no doubt, and whose credibility, indeed, does not appear to have been seriously impugned; and he was in a specially advantageous position to weigh the value of the appellant's statements with regard to his ailments and symptoms, and on the whole I should not feel justified in reversing his finding that the conditions of section 2 of the by-law obtained at the relevant time.

In the result, the appeal is allowed and the judgment of the trial judge restored. In view of all the circumstances the appellant should have his costs throughout.

CANNON J.—The appeal should be allowed and the judgment of the trial judge restored with costs throughout.

Appeal allowed with costs.

Solicitors for appellant: *Campbell, Kerry & Bruneau.*

Solicitors for respondent: *St.-Pierre, Parent, Damphousse, Ménard & Choquette.*

(1) [1914] A.C. 651.