1957

*June 17, 18
**Oct. 1

CHESLEY SAMSON (*Suppliant*) .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

AND

THE ATTORNEY GENERAL OF NEWFOUNDLAND ..... INTERVENANT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Crown—Wages of Crown employees—Special provisions in Terms of Union of Newfoundland with Canada.*

The Terms of Union of Newfoundland with Canada contained the following provision: "39. (1) Employees of the Government of Newfoundland in the services taken over by Canada pursuant to these Terms will be offered employment in these services or in similar Canadian services under the terms and conditions from time to time governing employment in those services, but without reduction in salary or loss of pension rights acquired by reason of service in Newfoundland."

The suppliant had been employed as a carpenter at Gander airport and upon the union becoming effective he was offered and accepted similar employment at the same airport by the Canadian Government and was paid at the rate prevailing there. By his petition of right, filed in October 1952, he claimed to be entitled to the difference between the wages paid to him and those paid to carpenters at other Canadian airports, which were higher than those paid at Gander.

*Held:* The petition must be dismissed. The suppliant had accepted the terms offered him and had no claim in contract, which was all that was set up by the petition of right.

APPEAL from a judgment of Thorson P., of the Exchequer Court of Canada (1), dismissing a petition of right. Appeal dismissed.

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Nolan JJ.
**Nolan J. died before the delivery of judgment.

(1) [1957] Ex. C.R. 336.

*Edward B. Jolliffe, Q.C.*, for the suppliant, appellant.

*John A. Barron, Q.C.*, for the intervenant.

*W. R. Jackett, Q.C.*, and *D. S. Maxwell*, for the respondent.

THE CHIEF JUSTICE:—The President of the Exchequer Court ordered and adjudged (1) that the appellant was not entitled to the relief sought by his petition of right and that Her Majesty the Queen recover her costs from him, but that there be no costs for or against the intervenant, the Attorney General of Newfoundland. The petition of right prayed that the appellant recover from Her Majesty:

(a) The said sum of $3,468.10;
(b) His costs of this Action;
(c) Such further or other relief as to this Honourable Court may seem meet.

It was stated by counsel for the appellant that the sum claimed should be $2,998.13. No verbal testimony was introduced at the trial of the petition, as there was an admission of facts filed, together with copies of certain orders in council and of certain Treasury Board minutes and schedules. In the view I take of the matter it is unnecessary to refer in detail to these orders in council, or minutes, or to the precise manner in which the sum of $2,998.13 is arrived at.

By no. 1 of the Terms of Union of Newfoundland with Canada the former was to form part of Canada and be a Province thereof on, from and after the coming into force of the Terms. By no. 50 they were agreed to, subject to being approved by the Parliament of Canada and the Government of Newfoundland and were to come into force immediately before the expiration of the 31st day of March, 1949, if His Majesty had theretofore given his assent to an Act of the Parliament of the United Kingdom of Great Britain and Northern Ireland confirming the Terms. They were approved by the Government of Newfoundland and by the Canadian Parliament by 1949, c. 1, and the *British North America Act*, 1949 (Imp.), c. 22, confirmed the Terms of Union.

Prior to March 31, 1949, the appellant was employed as a carpenter at Gander airport in Newfoundland. Among the services taken over by Canada from Newfoundland,

(1) [1957] Ex. C.R. 336.

1957

SAMSON v. THE QUEEN AND ATTY. GEN. OF NFLD.

Kerwin C.J.

pursuant to no. 31 of the Terms of Union, was "(*d*) civil aviation, including Gander Airport". By para. 1 of the petition of right it is alleged:

> Since the first day of April, 1949, Your Suppliant has been continuously employed as a First Class Carpenter at the said Gander Airport by the Department of Transport (Air Services Branch) a Department of the Government of Canada.

This was admitted by the statement of defence and by para. 2 of the admissions of facts it was agreed that:

> On or about the 1st day of April, 1949, the Suppliant was offered by and accepted employment with the Respondent as a carpenter effective April 1, 1949 . . .

The petition of right was filed in October 1952, and it was alleged that there was a deficiency in the wages or salary paid the appellant from April 1, 1949, to June 30, 1952. For a certain part of this period it is claimed that he did not receive the same wages as were being paid to carpenters employed by Her Majesty at airports located at Winnipeg, Malton and Dorval, and that for a certain time he worked a 60-hour week without extra pay for overtime, while at certain other airports carpenters had a standard work week of 44 hours, with overtime pay for any time in excess of 48 hours. The terms and conditions governing the employment of carpenters differ at Canadian airports and for part of the time the rate at Mont Joli, Seven Islands and Gore Bay was less than that at Gander. In the presentation of his case the suppliant chose the terms and conditions at Dorval airport as those to which he was entitled, because it was suggested that those two airports were comparable, and it is by a comparison of what he received from April 1, 1949, to June 30, 1952, with what was being paid at Dorval, both with respect to the hourly wage and the allowance for overtime, that he computed the total amount claimed.

As a basis for his claim he relies upon no. 39(1) of the Terms of Union:

> 39. (1) Employees of the Government of Newfoundland in the services taken over by Canada pursuant to these Terms will be offered employment in these services or in similar Canadian services under the terms and conditions from time to time governing employment in those services, but without reduction in salary or loss of pension rights acquired by reason of service in Newfoundland.

If he is wrong in his construction of this provision his claim fails. I agree with the President of the Exchequer Court that this does not mean that when the appellant was

offered and accepted employment as a carpenter at Gander airport he was entitled to employment there under the terms and conditions from time to time governing the employment of carpenters at Dorval airport, or any other Canadian airport. Since he was offered and accepted employment at Gander it is subject to the terms and conditions governing employment there. If he had been offered employment in a Canadian service similar to Gander it would be under the terms and conditions from time to time governing employment in such similar Canadian service. Again I agree with the President, "those services" is not referable only to "similar Canadian services", but must be read disjunctively as referable either to the services taken over or to the "similar Canadian services".

The appellant accepted the terms offered him and he has no claim in contract or otherwise. That the "further or other relief" claim in the petition of right does not include a claim for damages is made quite evident from a perusal of the entire petition of right and from the admissions signed on behalf of the appellant and respondent. If such a claim had been advanced, the respondent would have been in a position to plead estoppel. It is unnecessary to consider any of the other points raised on behalf of the parties.

The appeal fails and must be dismissed with costs to be paid by the appellant to the respondent, but there will be no costs to or against the intervenant.

RAND J.:—The dispute here arises out of a claim by an employee of the former Newfoundland Government engaged as a carpenter at Gander airport. It purports to be based upon no. 39(1) of the terms of agreement under which Newfoundland entered the federal union of Canada. The clause reads:

> 39. (1) Employees of the Government of Newfoundland in the services taken over by Canada pursuant to these Terms will be offered employment in these services or in similar Canadian services under the terms and conditions from time to time governing employment in those services, but without reduction in salary or loss of pension rights acquired by reason of service in Newfoundland.

Mr. Jolliffe's argument proceeded on the footing that a contract had been entered into between the people individually and collectively of Newfoundland, represented by their negotiators, and the Government of Canada, from which a right arose in the appellant enforceable against the

1957

SAMSON v. THE QUEEN AND ATTY. GEN. OF NFLD.

Rand J.

Dominion Crown by legal proceedings. I am bound to say that I think this view of the terms and the Act of union wholly unfounded. The so-called contract was simply an agreement, a consensus, on the terms on which the union would be acceptable to the two communities.

The action of the Imperial Parliament took the form of a statutory confirmation of the agreement and a declaration that, notwithstanding anything in the *British North America Acts*, 1867-1946, it should have the force of law. The Act was to be cited as the *British North America Act*, 1949 and with it the *British North America Acts* were to be cited with the addition "1867-1949". The terms thus became the statutory provisions of the union. The question, then, is one of interpretation of the provision, both of its factual content and of the nature of the right or obligation created, whether individual or governmental only.

I find it unnecessary to examine the latter feature; I will assume that a personal right was vested in the appellant and that a specific obligation towards him on the part of the Dominion Crown was created. That obligation I interpret to be that the Government will offer employment to him and others similarly placed, on the terms mentioned; and that if he accepts the offer, the resulting employment will embody those terms. What the language of the clause means generally is that the former employees will be retained in their employment if they elect to continue in it and that they will have certain benefits secured to them. This in turn presupposes generally that the public work or undertaking will continue as before.

The employment of the appellant was so continued and that it was intended to comply in its contractual terms with no. 39 has not been seriously challenged. There is a constitutional obligation on the Government of Canada to observe, for example, the declaration that the wages of such an employee shall not be less than those obtaining at the time of union and that pension rights will be allowed as provided; it is to be assumed that the Government will respect that obligation; and, in the circumstances, the Crown cannot be heard to say that the offer to the appellant proposed other terms which were accepted, an act involving a waiver of the provision. That a waiver could be made by an individual employee expressly and with proper con-

sideration effecting a new arrangement outside the statute can be conceded, but nothing of that sort took place. What, then, do the particulars, as applicable to the appellant, mean?

The language must be interpreted in the light of the situation at the time the terms were accepted. The Terms of Union by no. 31 set out in detail certain works and services in Newfoundland which would be transferred to Canada. They include "(*d*) civil avation, including Gander Airport". The property of the airfield is transferred to Canada by no. 33. Number 36 speaks of the "works, property, or services taken over by Canada". When, then, no. 39(1) speaks of "services taken over by Canada pursuant to these Terms" what are described are the actual services theretofore carried on in Newfoundland; when taken over they would be included in any general and national service of the same class. But that, for the purposes of interpreting no. 39, would not mean that continued employment in an existing Newfoundland service could take place only in one confined exclusively to that Province, that is, of a nature of which there was nothing of the same kind or under an administering department in Canada, and that the continued employment at the Gander airport was, as argued by Mr. Jolliffe, an employment "in similar Canadian services".

Here the appellant did continue his work in the existing and continued service in Newfoundland, and the provision of no. 39(1) was so far respected. Nor is there any complaint that the wages have been reduced or the pension rights not recognized. The complaint is that the appellant has not been paid wages equal to those in similar airfields in other parts of Canada.

The employment was to be "under the terms and conditions from time to time governing employment in those services". This means, in the case before us, national terms and conditions applicable to work at Gander. There are terms and conditions prescribed generally for the Dominion-wide air services, and for carpenters they provide for what is known as the "prevailing rate" of remuneration, meaning the rate which carpenters, working generally in the district or community of the employee, are paid.

1957

SAMSON v. THE QUEEN AND ATTY. GEN. OF NFLD.

Rand J.

It is not contended that the "prevailing rate" in Newfoundland has not been applied; it is urged that the appellant was given employment not in the service in which he was already employed, not in "those services", but in a similar Canadian service, the air service of Canada as it included Newfoundland. The point of the argument eludes me, but, accepting the contention, the result would not be affected. To be in a service under the national Government, whether national in scope or confined to one Province, means to be subject to the terms and conditions governing it as the national Government makes them; and the "prevailing rate" is as determinative of the appellant's right in the one case as in the other.

The final objection arises out of the administration of the employment. The *Civil Service Act* was extended to Newfoundland as of the date of the union. It is by a regulation of the Civil Service Commission that the "prevailing rate" measure was applied. The actual finding of that rate in the case of the appellant was not ascertained by the Commission itself. By regulation the Commission provided that the finding of such a fact by a governmental department, approved by order in council, would be accepted as proof of the fact. Mr. Jolliffe challenges this as a delegation beyond the authority of the Commission to make.

I cannot accept this argument. A distinction must be made between prescribing the standard of remuneration and determining a fact for the purpose of applying it. The Commission having set the former can, in any case, ascertain the fact by any reasonable means available to it, and the most obvious would be a department in a position, by reason of its services, to do so. But that the appellant is not receiving the prevailing rate is not claimed and the question of delegation is irrelevant. What is sought is a rate equal to that being paid at another airport in another Province. Each airport is subject to the same standard and that its application at Gander may result in the wages being less than at other airports has no bearing on the issue.

I would dismiss the appeal with costs. There will be no costs for or against the intervenant.

LOCKE J.:—This is an appeal from a judgment of the Exchequer Court (1), delivered by the President, by which the petition of right of the present appellant was dismissed.

The suppliant was, prior to the union of Newfoundland with Canada on April 1, 1949, employed as a carpenter at Gander airport in Newfoundland and being paid at the rate of 82¢ per hour. On that date Canada took over the airport from the colony and has since then operated it. On the same date the suppliant was offered and accepted employment with the respondent as a carpenter in the Public Service of Canada at the hourly rate of 86½¢ and continued in such employment until June 1952, being paid at the hourly rate for carpenters prevailing at the airport from time to time throughout this period. These rates were substantially increased during the term of the employment of the suppliant, the rate paid between August 1, 1951, and June 30, 1952, being $1.30 per hour. Payment was also made for overtime worked throughout the period at rates offered to and accepted by the appellant.

No evidence was tendered at the trial, the case being tried on written admissions of fact, and there is nothing therein to indicate or suggest that he did not accept the offer of employment made to him without demur or qualification, or that he, at any time between April 1, 1949, and June 30, 1952, expressed dissatisfaction with his rate of pay or indicated that it was not accepted by him in full payment for his services.

The agreement between Newfoundland and Canada dated December 11, 1948, which defined the terms of union of that colony and the Dominion of Canada, became effective on April 1, 1949. Number 39(1) of the Terms of Union provides:

> Employees of the Government of Newfoundland in the services taken over by Canada pursuant to these Terms will be offered employment in these services or in similar Canadian services under the terms and conditions from time to time governing employment in those services, but without reduction in salary or loss of pension rights acquired by reason of service in Newfoundland.

Under the terms of no. 33 the Newfoundland airport at Gander became the property of Canada.

(1) [1957] Ex. C.R. 336.

1957

SAMSON v. THE QUEEN AND ATTY. GEN. OF NFLD.

Locke J.

By c. 1 of the statutes of Canada for 1949 the agreement was approved. It was also confirmed by an amendment to the *British North America Act* (12-13 Geo. VI (Imp.), c. 22). By that amendment it was declared that the agreement should have the force of law notwithstanding anything in the *British North America Acts,* 1867 to 1946.

It was admitted that between April 1, 1949, and June 30, 1952, higher hourly rates of pay were paid to carpenters by the Crown at various airports in Canada than those paid to and accepted by the suppliant. These rates varied at different Canadian airports.

The petition of right asserted that:

> . . . by reason of the fact that he has not been paid wages or salary in accordance with the wage rates and the work-week from time to time governing employment in the Department of Transport (Air Services Branch), contrary to Subsection (1) of Section 39 of the said Terms of Union, there is due and owing to him, in respect of the period from the first day of April, 1949, to the thirtieth day of June, 1952, the sum of $3,468.10.

This amount was apparently arrived at by calculating the difference between the hourly rates paid to carpenters during the period at Gander and at the Dorval airport in Quebec. The concluding paragraph of the petition read:

> Your Suppliant pleads the British North America Act, 1949, and the Statutes of Canada 1949, Chapter 1, and the Terms of Union of Newfoundland with Canada, thereto attached, and in particular Sections 31 and 39 of the said Terms of Union.

The statement of defence asserted that the petition did not allege facts giving rise to any liability for which Her Majesty is bound, or claim relief for which a petition of right will lie, and submitted that this question of law should be determined before the trial of the issues of fact. Alternatively, it was alleged that the suppliant had been paid all the compensation which could by law be paid to him and that the Crown had complied with the terms of the article.

The question of law raised by what is, in effect, a demurrer should first be considered.

The claim, as pleaded, is for a sum of money alleged to be due to the suppliant as wages and is not a claim for damages. The only contract directly made between the suppliant and the Crown was that constituted by the offer of employment at an hourly wage rate made on April 1,

1949, and his acceptance of that offer and by his subsequent acceptance over a period of more than two years of wages at the hourly rate offered to and paid to him without demur.

The factum filed on behalf of the appellant, however, contends that the agreement between Newfoundland and Canada was made on behalf of the people of Newfoundland, including the suppliant, by their elected representatives, so that in effect the suppliant was a party to it and may bring an action to enforce the covenants of the Dominion. This argument, while mentioned before us, was pressed rather faintly, and with good reason, in my opinion, as I think it to be wholly untenable. The agreement, as its terms disclosed, was made between the political entity known as Newfoundland and the Dominion of Canada. The suppliant was a stranger to the contract.

It was, however, suggested upon the authority of the judgment of the Judicial Committee in *Wigg et al. v. Attorney General for the Irish Free State* (1), that the suppliant had a right of action under the agreement. In my opinion, this case has no application to the present. As is pointed out in the judgment of the Lord Chancellor at p. 679, following the treaty between the United Kingdom and the Irish Free State, by a series of enactments its provisions became part of the municipal law of the Free State and the right of the civil servants in question to receive compensation from the Free State was expressly declared. There is nothing of this nature in the present case.

The manner in which the suppliant's claim was pleaded is of importance in view of the nature of the defence filed. Judging by the argument advanced in the appellant's factum, the suppliant's claim was based on contract and to such a claim the defence as filed was sufficient. On the argument before us it was, however, urged for the suppliant that there was what was referred to as a "constitutional duty" imposed on Canada by no. 39(1). By this, no doubt, it was intended to assert that there was a statutory duty cast upon the Crown to pay wages at a higher rate than those paid to the suppliant. If there were such a duty, the remedy for a breach would be in damages and no such claim was advanced by the petition.

(1) [1927] A.C. 674.

1957

SAMSON v. THE QUEEN AND ATTY. GEN. OF NFLD.

Locke J.

Had the claim been framed as a claim for damages, I would assume that the Crown would have pleaded by way of defence that the suppliant was estopped by his conduct from asserting it. It can scarcely be seriously suggested that, after accepting the offer of employment on April 1, 1949, and continuing in the employ of the Crown, accepting the wages offered without objection, the suppliant could thereafter be heard to assert that he was entitled to something further by way of damages. Had he on April 1, 1949, refused the employment at the hourly rate of $86\frac{1}{2}¢$ and insisted on the rate being paid at Dorval or elsewhere, no doubt the result would have been that he would not have been employed. Having led his employers to believe by his conduct that the wages tendered were accepted as full payment for his services, he would be estopped from advancing an inconsistent claim.

On the argument before us it was contended for the respondent that, if the suppliant had any such right as was asserted, he had waived his right to enforce it. The point, however, was not open since waiver was not pleaded.

If the claim were to be now considered as a claim for damages for breach of a statutory duty or for a declaration of right upon the pleadings as they stand, the Crown would be deprived of its right to rely upon an estoppel by conduct and, alternatively, upon waiver, since neither was pleaded.

In my opinion, the objection that no cause of action is disclosed by the petition of right is well taken and the action accordingly should fail.

It was, no doubt, for the reason that the learned President was informed that this was regarded as a test case that he considered the claim upon its merits. On this aspect of the matter, I respectfully agree with the interpretation which has been placed on no. 39(1) in the reasons for judgment delivered at the trial.

In view of my conclusion upon the first question, it is unnecessary for me to consider the further contention that legal proceedings do not lie against the Crown to enforce payment of the remuneration of a servant.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—I agree with the reasons and conclusion of the learned President (1) and would accordingly dismiss the appeal with costs. I agree that there should be no order as to the costs of the intervenant.

*Appeal dismissed with costs.*

*Solicitors for the suppliant, appellant: Jolliffe, Lewis & Osler, Toronto.*

*Solicitor for the respondent: W. R. Jackett, Ottawa.*

*Solicitors for the intervenant: Barron & Lewis, St. John's.*