NOVA SCOTIA COURT OF APPEAL

Citation: *Cosmetology Association of Nova Scotia v. Dominey,* 2005 NSCA 100

Date: 20050624
Docket: CA 225604
Registry: Halifax

Between:

Cosmetology Association of Nova Scotia

Appellant

v.

Heather Dominey

Respondent

Judges:	Roscoe, Saunders and Oland, JJ.A.
Appeal Heard:	November 19, 2004 at Halifax, Nova Scotia
Held:	Leave to appeal granted and appeal allowed with costs in the amount of $1,000. plus disbursements as per reasons for judgment of Oland, J.A.; Roscoe and Saunders, JJ.A. concurring.
Counsel:	David Richey, for the appellant Derek Land, for the respondent

Reasons for Judgment:

[1] The Cosmetology Association of Nova Scotia seeks leave to appeal, and if granted, appeals against the dismissal by Justice Arthur J. LeBlanc of the Supreme Court of Nova Scotia of its application pursuant to *Civil Procedure Rule* 20.01 for production of certain documents.

Background

[2] Heather Dominey started working for the Association as an administrative assistant in January 1994. She was injured in a motor vehicle accident in June 2003. That October the Association terminated her employment.

[3] Ms. Dominey's statement of claim alleged that as a result of serious soft tissue injuries suffered in the accident and her ongoing recovery efforts she has been unable to work since the accident. Alleging that she had enjoyed "an unblemished record of service" and her employment had been terminated without just cause, Ms. Dominey claimed *inter alia* general damages for wrongful dismissal in lieu of notice. Her statement of claim reads in part:

> The Plaintiff . . . says that by terminating her employment without just cause, the Defendant breached her employment contract and the common law, and that she has suffered financial hardship as a result.
>
> The Plaintiff . . . says that the Defendant's conduct in terminating her employment without just cause, and particularly the conduct of its Executive Director, Carter, was high-handed, malicious, and amounted to bad faith, and that the damages suffered by the Plaintiff were aggravated as a result.

In addition to general damages, she sought special, aggravated and punitive damages.

[4] The Association filed a defence stating that Ms. Dominey's employment was terminated by reason of her failure to return to work and her inability to offer

any assurance or undertaking of a return in the future. It claimed that Ms. Dominey failed to provide medical information necessary to allow the Association to plan for her absence and return to work, and she had been given notice. The Association also alleged that her employment was terminated for cause, the employment contract had been frustrated, and any financial hardship suffered resulted from her motor vehicle injuries and failure to mitigate damages.

[5] In the course of the litigation, the Association applied for an order for production of the following:

1. Medical records for the five years prior to the date of termination to the present;
2. Family physician's file for the same period;
3. Records of all specialists consulted during that period;
4. Copies of all records held by the Section B insurer; and
5. Prescription medication printouts from any pharmacy Ms. Dominey attended from June 2001 to the present.

[6] The Chambers judge concluded that these documents pertaining to Ms. Dominey's medical history were not relevant in determining whether her termination was wrongful. His decision dismissing the application is reported as 2004 NSSC 116.

Standard of Review

[7] This being an appeal taken from an interlocutory decision of a Chambers judge, this court will not interfere unless wrong principles of law have been applied or a patent injustice would result or unless the Chambers judge made a palpable and overriding error with respect to his findings of fact: *Exco Corp. v. Nova Scotia Savings & Loan Co.* (1983), 59 N.S.R. (2d) 331 (NSSC-TD)

Issues

[8] According to the grounds of appeal, the Chambers judge erred in law by:

1. failing to order production by Ms. Dominey of all documents in her possession, custody or control relating to every matter in question in the proceeding;
2. by applying the wrong test for relevance by concluding “But the mere fact that something is stated in a Statement of Claim does not make it the issue in the action.”; and
3. by failing to consider all issues raised by the pleadings as defining the matters in question in the proceeding in relation to which Ms. Dominey must disclose documents.

[9] The essence of the Association’s argument is that the Chambers judge erred in law when he concluded that the documents for which production was sought had no practical relevance to any matter in issue.

Analysis

[10] I begin by observing that in rendering his decision the Chambers judge identified the correct principles of law. He set out *Rule* 20.01(1) which reads in part:

> (1) Unless the court otherwise orders, a party to a proceeding shall . . . serve on the opposing party a list in Form 20.01A of the documents that are or have been in his possession, custody or control relating to every matter in question in the proceeding . . .

He recognized that its wording is to be liberally and broadly interpreted. See *McCarthy v. Board of Governors of Acadia University* (1976), 22 N.S.R. (2d) 381 (NSSC-TD) and *Dowling v. Securicor Canada Ltd.* (2003), 221 N.S.R. (2d) 79 (C.A.). The Chambers judge also noted that if a document has a "semblance of relevancy,” it is to be produced. See *Eastern Canadian Coal Gas Venture Ltd. v. Cape Breton Development Corp.* (1995), 141 N.S.R. (2d) 180 (C.A.). He was careful to point out that there is no component of “cost benefit analysis” in the “semblance of relevancy” test.

[11] The Chambers judge then stated:

> 18 The applicant argues that the Court should order disclosure of the requested documents, on the basis that the respondent has claimed that she had an "unblemished" work record. . . .
>
> 19 The applicant also maintains that the respondent claims that, as a result of her injuries and her ongoing recovery efforts, she has been unable to return to work since the accident. But that is not the issue in the action. The issue is whether the respondent was terminated from her employment because her insurer did not provide the information demanded by the applicant within the time required. The applicant's position appears to be that because the respondent said in her Statement of Claim that her injury and ongoing recovery efforts have prevented her from returning to work, the applicant is entitled to know the extent of her injuries, the state of her recovery and her readiness to return to work. But the mere fact that something is stated in a Statement of Claim does not make it the issue in the action.
>
> . . .
>
> 23 Apart from her injuries – which are a known fact to the parties – the plaintiff's medical history is not relevant to determine whether her termination was wrongful. (Emphasis added)

[12] The Association submits that the Chambers judge's error is found in this passage. It maintains that the documents it sought could be relevant to the assessment of the allegations in Ms. Dominey's statement of claim regarding her record of service, financial hardship, and mitigation.

[13] In § 19 of his decision, the Chambers judge speaks of "the issue in the action." The transcript shows that he quickly took the position that this proceeding had one issue. In his submissions to the judge, counsel for the Association argued that Ms. Dominey had placed her medical history in issue by alleging that she had an unblemished work history. According to the Association, she had missed a fair amount of time for medical reasons and had been accommodated medically at work with modifications to her duties and her work station. Counsel's exchange with the Chambers judge continued:

> THE COURT: But this lady was terminated. This lady was terminated because, at least based on the pleadings and it's not denied in the defence, not because she couldn't do the work but because she didn't produce the medical records that your

> client wanted within the time specified. That's what I understand is the basis of the dismissal.
>
> . . .
>
> MR. RICHEY: What the defendant was seeking, My Lord, was medical information that would allow the defendant to plan for her return to work. To plan for her absence if she was not going to return to work. And the employer, a staff of three in her absence, you know, all trying to take on her responsibilities was left in a position of having to replace her. And her position was terminated because she did not come to work. Now why she did not come to work, My Lord, is the issue.
>
> THE COURT: No. The thing is, is that she was terminated, as I understand it, at least based on the statement of claim, she was terminated because you did not -, your client did not receive the requested medical information within the time specified. And they took steps given the failure to provide that, I understand, that was the triggering event, the issue that caused the letter of termination to be issued.

[14] The Chambers judge did not accept the Association's further submissions that it was necessary to determine what was placed in issue, initially by Ms. Dominey in her statement of claim and subsequently by the Association in its defence, in order to ascertain the relevance of the information sought.

[15] While the Chambers judge instructed himself as to the proper test, I am respectfully of the view that he made a palpable and overriding error in finding that the pleadings before him raised but one issue and that the pleadings did not justify disclosure of records relevant to the litigation. By attempting to isolate "the" issue, he failed to give careful consideration to the entirety of the pleadings before him and the several issues that they raised.

[16] Ms. Dominey's action for wrongful dismissal alleged an unblemished record. Ms. Dominey claims that her injuries from the accident are the reason she could not return to work. According to her statement of claim, the Association's actions caused financial hardship, its conduct aggravated the damages suffered by her, and she is entitled to aggravated or punitive damages. In order to respond to and to test these allegations, the Association must have any information relating to those issues. That would include the documents sought by the Association

pertaining to her medical history, as they have the requisite "semblance of relevance."

[17] It may be that if the statement of claim had been worded differently or was clearly limited to a wrongful dismissal claim, such disclosure would neither have been sought nor found to be sufficiently relevant. For example, it is not apparent whether the damages allegedly aggravated by the Association's conduct relate to the motor vehicle accident or the termination of her employment or both. However in any event, such allegations would require an assessment of the degree, if any, of the aggravation. In such circumstances, disclosure is appropriate where *Rule* 20.01(1) calling for disclosure of documents "relating to every matter in question in the proceeding" is to be liberally and broadly interpreted.

[18] I would grant leave and allow this appeal against the decision of the Chambers judge. The respondent shall pay the appellant costs of $1,000. plus disbursements.

Oland, J.A.

Concurred in:

Roscoe, J.A.

Saunders, J.A.