NOVA SCOTIA COURT OF APPEAL
Citation: *Cormier v. Graham*, 2015 NSCA 17

Date: 20150223
Docket: CA 435725
Registry: Halifax

Between:

Shawn Cormier

Applicant

v.

Stephanie Graham, the Attorney General of Nova Scotia and the Nova Scotia Human Rights Commission

Respondents

Judge:	The Honourable Justice Joel E. Fichaud
Motion Heard:	February 19, 2015, in Halifax, Nova Scotia, in Chambers
Held:	Motion to extend time to file notice of appeal denied, without costs
Counsel:	The Applicant Mr. Shawn Cormier on his own behalf Ann E. Smith, Q.C. for the Respondent the Nova Scotia Human Rights Commission The Respondent Stephanie Graham not appearing The Respondent Attorney General of Nova Scotia not appearing

Reasons for judgment:

[1] Mr. Cormier moves for an extension of time to file a notice of appeal from a decision of a Human Rights Board of Inquiry.

[2] I take the facts from the Board's Decision.

[3] Mr. Cormier owned an unincorporated hairstyling business, Shear Logic Hairstyling. The Respondent Ms. Graham completed a cosmetology course in 2007, and then decided to pursue a career as a hairstylist. To qualify, she needed an apprenticeship. In early March, 2007, she began to apprentice with Mr. Cormier. She worked there until Mr. Cormier fired her on June 7, 2007.

[4] During her three months at Mr. Cormier's salon, according to the Board's findings, Mr. Cormier subjected Ms. Graham to ongoing sexual harassment. The Board accepted Ms. Graham's credibility and evidence, while rejecting Mr. Cormier's credibility and denials. I needn't recite all the details. The Board's Decision found that Mr. Cormier treated Ms. Graham with "anger, total disrespect and humiliation", that "[h]is abhorrent actions …occurred with great regularity", that he "wished to commence an intimate relationship with Ms. Graham shortly after her employment", and then "his infatuation soon became an obsession". When she rebuffed him, according to the Board, he called her a "stupid bitch" and fired her.

[5] On June 25, 2007, Ms. Cormier filed a complaint with the Human Rights Commission. On May 23, 2012, the Board of Inquiry was appointed. On June 9, 2014, the Board conducted its hearing. Ms. Graham and Mr. Cormier were the only witnesses.

[6] On December 15, 2014, the Board issued its Decision (File #: 51000-30-H07-1273). The Board determined that Mr. Cormier had discriminated against Ms. Graham contrary to ss. 5(1)(d), (m) and (n) and sexually harassed her contrary to s. 5(2) of the *Human Rights Act*, R.S.N.S. 1989, c. 214, as amended. The Board ordered Mr. Cormier to pay Ms. Graham damages of $11,400 "for denigration of the Complainant's dignity, self-respect and psychological and emotional harm he inflicted", plus pre-judgment interest.

[7] Section 36(1) of the *Human Rights Act* permits an appeal:

> **36 (1)** Any party to a hearing before a board of inquiry may appeal from the decision or order of the board to the Nova Scotia Court of Appeal on a question of law in accordance with the rules of court.

[8] Under *Civil Procedure Rule* 90.13, Mr. Cormier's notice of appeal should have been filed within 25 days of the Board's Decision, that interval being calculated in accordance with Rule 90.13(2). Mr. Cormier missed the time limit. Instead, on January 29, 2015, he filed a motion to extend the time for his notice of appeal. After some delays to accommodate service and schedules, I heard that motion on February 19, 2015.

[9] At the hearing of the motion, Mr. Cormier spoke on his own behalf. Counsel for the Human Rights Commission filed a brief and appeared to oppose the extension. Ms. Graham sent a letter stating that she opposed the extension, but that she would not be appearing at the hearing. The Attorney General did not appear.

[10] Mr. Cormier's motion is under Rule 90.37(12)(h):

> **90.37** (12) A judge of the Court of Appeal hearing a motion, in addition to any other powers, may order any of the following:
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> …
>
> (h) that any time prescribed by this Rule 90 be extended or abridged before or after the expiration thereof.

[11] In *Bellefontaine v. Schneiderman*, 2006 NSCA 96, Justice Bateman stated the "three-part test" for an extension:

> [3] A three-part test is generally applied by this Court on an application to extend the time for filing a notice of appeal, requiring that the applicant demonstrate (**Jollymore Estate Re** (2000), 196 N.S.R. (2d) 177 (C.A. in Chambers) at para 22):
>
> (1) the applicant had a bona fide intention to appeal when the right to appeal existed;
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> (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
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> (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that

> there is a strong case for error at trial and real grounds justifying appellate interference.
>
> [4] Where justice requires that the application be granted, the judge may allow an extension even if the three part test is not strictly met. [citation omitted]

[12] The three-part test has "morphed into being more properly considered as guidelines or factors which a Chambers judge should consider in determining the ultimate question as to whether or not justice requires that an extension of time be granted": *Farrell v. Casavant*, 2010 NSCA 71 (Chambers), para. 17; *Deveau v. Fawson Estate*, 2013 NSCA 54 (Chambers), para. 15, and authorities there cited; *Tupper v. Nova Scotia Barristers' Society*, 2014 NSCA 90, para. 22 (motion for leave to appeal under consideration by the Supreme Court of Canada).

[13] Mr. Cormier's affidavit says that he intended to appeal within the prescribed interval, that he was ill with pneumonia at the time, and that he understood he had 30 days, not 25, to appeal. He attempted to file his notice of appeal only a few days after the deadline passed.

[14] The Commission's brief says:

> Applying the relevant principles [to] the case at hand, the Commission accepts both: 1) that Mr. Cormier had a *bona fide* intention to appeal when the right to appeal existed, and 2) that he has a reasonable excuse for the delay in not having launched the appeal within the prescribed time (namely, Mr. Cormier's health issues along with his mistaken, but apparently honest belief, of a 30 day versus 25 day appeal period).
>
> Nevertheless, the Commission submits that the Court should not exercise its discretion to extend, primarily because Mr. Cormier's grounds for appeal do not suggest a strong case for error from the decision under appeal.

The Commission's counsel repeated that position at the chambers hearing.

[15] I accept Mr. Cormier's position on his intention to appeal and reasons for not appealing within the prescribed period.

[16] It remains to assess his proposed grounds of appeal, and the "ultimate question as to whether or not justice requires that an extension of time be granted". The conclusive merit of an appeal is for a panel of judges who have been equipped with a record. Without an Appeal Book, a chambers judge's merits assessment of the tribunal's record would be guesswork. Nor is it for a single chambers judge to rule on debatable legal issues. If an applicant's ground raises an arguable issue,

that would turn either on the contents of the yet unprepared record or on a debatable legal issue, then justice entitles the applicant to have that ground heard by a panel of the Court.

[17] At the chambers hearing, I asked Mr. Cormier at some length to explain why the Board's decision should be overturned. He expressed two basic complaints.

[18] His principal concern was that the Board erred by believing Ms. Graham, and disbelieving him. Mr. Cormier said, of Ms. Graham's testimony to the Board - "Everything that came out of her mouth was untrue".

[19] With respect, this submission can't be sculpted into an arguable ground of appeal. The Board's findings of fact were based squarely on an assessment of credibility. "Assessments of credibility are quintessentially questions of fact": *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, para. 38, per McLachlin, C.J.C. for the Court. Under appellate authority that confines the Court of Appeal's authority to a "question of law", such as s. 36(1) of the *Human Rights Act*, the Court cannot wade into the waters of credibility: *Fadelle v. Nova Scotia College of Pharmacists*, 2013 NSCA 26, paras. 12-17. Mr. Cormier's proposed challenge to the Board's assessment of credibility cannot succeed. If I granted the extension, then some months from now this Court's panel would dismiss the ground of appeal anyway.

[20] Mr. Cormier's other concern is troubling – *i.e.* the Commission's delay in processing Ms. Graham's complaint. Ms. Graham filed her complaint on June 25, 2007. The Board of Inquiry was appointed on May 23, 2012, heard the matter on June 9, 2014 and issued a Decision on December 15, 2014. The Board's Decision concluded with the following:

> 107. … This matter took some seven years to reach the Board of Inquiry stage. There is no justifiable excuse for this inordinately long delay. The facts in this case were straightforward. A multitude of witnesses was unnecessary. There were only two witnesses, the Complainant and the Respondent. It was a two-day hearing. It would have been a one-day hearing, but for some preliminary motions counsel raised.

The Board's Decision (paras. 105, 108) expressed optimism that a recent change of leadership at the Human Rights Commission would mean that "ridiculously long delays at the Commission are now in the past".

[21] In *Nova Scotia Construction Safety Association v. Nova Scotia (Human Rights Commission)*, 2006 NSCA 63, the Commission appointed a Board of Inquiry five and one-half years after the filing of the complaint, and the Board's Decision was issued three years later still. Justice Saunders, with Justices Cromwell and Hamilton concurring, declined to overturn the Board's ruling as an abuse of process. The Court relied on *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, that I will discuss below. But Justice Saunders continued:

> [66] … I would accept counsel for the Commission's invitation to respond critically to that which occurred here and in counsel's words "send a strong message" that the calendar of months and years by which this complaint "progressed" ought not to be repeated.
>
> [67] My observations are intended to be instructive and may serve as guidelines in processing future complaints under the **Act**. …
>
> [69] It is inconceivable to me that four years, or even three years (using the measure of April 9, 1998) should pass before a board of inquiry could be established to proceed with this complaint. I cannot fathom why it would take the Commission four years (or three at best) to decide whether Ms. Davison's complaint ought to be referred to a board of inquiry. There is nothing in this case to even remotely justify such an extended time line.
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> …
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> [73] In order for matters under the **Act** to be dealt with fairly and expeditiously, those involved must use best efforts to ensure that proceedings taken under the statute are effective and timely.
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> …
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> [76] Recognizing the well known principle that a key objective of human rights legislation is to be remedial, the process for inquiring into and exposing acts of discrimination must be expeditious in order to be effective. …

[22] Justice Saunders wrote this in 2006, at the invitation of the Commission's counsel to "send a strong message". Apparently the message mouldered on the Commission's shelf during the currency of Ms. Graham's complaint, filed in June, 2007.

[23] If the delay gave any arguable basis to challenge the Board's ruling, then I would extend Mr. Cormier's time for filing a notice of appeal. But there is no such basis here.

[24] In *Blencoe, supra*, faced with such a delay in a human rights proceeding, Justice Bastarache for the majority said:

> 101. … delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period. [citations omitted] In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.
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> 102. … Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died, or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy [citations omitted]. …
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> 115. …Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process.

[25] In Mr. Cormier's case, the Board of Inquiry's Decision considered *Blencoe*'s principles, then said:

> 58. The party alleging delay constituting an abuse of process has the onus of establishing actual prejudice and the burden remains with the party alleging unfairness caused by the delay [citation omitted]. I find the Respondent, Shawn Cormier, failed to discharge this onus and I subsequently [*sic* "consequently"?] refuse the Respondent's request to stay this Board of Inquiry because of delay. …
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> 60. The Respondent did not present any evidence to show that the delay had caused him any psychological harm, or as discussed in *Blencoe supra*, stigma to his reputation. …
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> 62. Certainly, there was no evidence presented that would indicate the Complainant delayed the process of the investigation or the referral of the matter to a Board of Inquiry.

[26] The Supreme Court of Canada has established the legal principles that bind this Court. The Board's ruling on the delay issue hinged on the Board's factual finding that the delay had caused Mr. Cormier no prejudice, harm or stigma. Section 36(1) of the *Human Rights Act* does not authorize this Court to overturn the Board's findings of fact. Consequently Mr. Cormier has no arguable ground of appeal based on the delay.

Conclusion

[27] I would dismiss Mr. Cormier's motion for an extension of time to file his notice of appeal, without costs.

Fichaud, J.A.