

NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission* , 2006 NSCA 63

Date: 20060519

Docket: C.A. No. 252604

Registry: Halifax

Between:

The Nova Scotia Construction Safety Association,
Bruce Collins and Michael Kelly

Appellants

v.

The Nova Scotia Human Rights Commission
and Karen Davison

Respondents

Judge: The Honourable Justice Jamie W. S. Saunders

Appeal Heard: January 30, 2006

Subject: **Human Rights Act**, R.S., c. 214, s. 1 as amended. Gender and sexual harassment. Standard of review. Unreasonable delay in prosecuting and deciding human rights' complaints. Fundamental justice. What constitutes sexual harassment. Proof that sexualized behaviour is unwelcome. Similar fact evidence. Credibility. What constitutes retaliation. Assessment of damages. Award of exemplary damages. Purpose and scope of human rights' inquiries - legislative reform.

Summary: The respondent Ms. Davison claimed that the appellants had violated her human rights by repeated acts of gender and sexual harassment, as well as subsequent retaliatory action when she

brought her complaint to the attention of the authorities. The appellants denied every allegation and vigorously defended the complaint before the Board of Inquiry (BOI). The appellants appealed claiming that the BOI had seriously erred in a variety of respects such that the decision and the damages assessed against them ought to be set aside.

Held: Appeal dismissed in all but one respect. The BOI exceeded its jurisdiction in awarding exemplary damages of \$7,000.00. That particular sum was set aside.

Applying a pragmatic and functional analysis, different aspects of the BOI's decision were subject to different standards of review. Where the nature of the question was a strict matter of law, or statutory interpretation, the question was reviewed on a standard of correctness. On findings of fact and factual inferences a standard of reasonableness was applied. On questions of mixed fact and law greater deference was paid if the question was fact-intensive and less deference if it was law-intensive.

The delay in this case both in prosecuting the complaint and in deciding the matter was alarming and unsatisfactory. However it did not compromise the fairness of the proceedings, nor amount to an abuse of process. Guidelines proposed to ensure that future BOI's pursuant to the **Act** are conducted expeditiously so as to achieve the salutary benefit of public scrutiny, enlightenment and appropriate redress in the face of proved violations.

In this case the BOI carefully assessed the evidence and applied proper legal principles in deciding the various issues raised by the complaint. Based on the evidence presented, it could not be said that any of the BOI's findings were unreasonable.

Although the BOI did err in law in her treatment of similar fact evidence, the mistake was not of such a kind as would affect the result, or warrant this Court's intervention.

Retaliation was clearly established on the record and those findings could not be disturbed.

The BOI's assessment of \$13,000.00 for general damages was not excessive, inordinately high or unsupported by the evidence. There was no "double counting" in the Board's calculations. Neither was it inappropriate to impose separate awards for each separate violation of the **Act**.

There is no authority under the **Act** to award exemplary damages for discriminatory acts in Nova Scotia. The Board had no jurisdiction to award \$7,000.00 in exemplary damages and that aspect of the BOI's order is set aside. Should this Court's interpretation not conform to the Legislature's current intentions, then such revision can be easily cured by amending the statute after full public debate by this Province's lawmakers.

Finally, whether the human rights complaint *process* is the appropriate forum to consider serious physiological, psychological or psychiatric injuries, is a question better left to another case, perhaps another forum and another day.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 43 pages.