

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** New Scotland Soccer Academy v. Nova Scotia (Labour Standards Tribunal), 2010 NSCA 43

**Date:** 20100517

**Docket:** CA 319984

**Registry:** Halifax

**Between:**

Kathy Baker, carrying on business under  
the firm name and style of New Scotland  
Soccer Academy

Appellant

v.

The Labour Standards Tribunal and  
Attorney General of Nova Scotia and  
Frederico Luis Otto Krause

Respondents

**Judges:** Bateman, Saunders, and Farrar, JJ.A.

**Appeal Heard:** May 11, 2010, in Halifax, Nova Scotia

**Held:** Appeal allowed per reasons of Farrar, J.A., Bateman and  
Saunders, JJ.A. concurring.

**Counsel:** Kathy Baker, the appellant, in person  
Dale Darling, for the respondent, Attorney General of Nova  
Scotia (not appearing)  
The Labour Standards Tribunal (not appearing)  
Frederico Luis Otto Krause, the respondent (not appearing)

**Reasons for judgment:**

[1] The appellant raises a number of issues in this appeal. However, the only issue for determination is whether the Labour Standards Tribunal committed an error in law or jurisdiction when, by a decision dated October 29, 2009, it required the appellant to post a bond in the amount of \$6,026. I will explain why it is the only issue for determination in more detail later.

**FACTS**

[2] The appellant, Kathy Baker operates New Scotland Soccer Academy (“NSSA”).

[3] The NSSA entered into a contract with Frederico Krause, a citizen of Argentina, for the position of head coach.

[4] It is clear that the parties had a falling out and Mr. Krause made a complaint to the Labour Standards Tribunal. He alleged he had been wrongfully dismissed and sought damages from NSSA. The complaint is dated May 28, 2008. By decision dated July 27, 2009, a Labour Standards Officer found in favour of Mr. Krause, awarding him \$6,026.

[5] By appeal dated August 5, 2009, the NSSA appealed the decision of the Labour Standards Officer alleging, *inter alia*, that the Officer was without jurisdiction to hear the complaint. The appellant raises the same issue on this appeal. I will explain why the jurisdictional issue cannot be determined by this Court on this appeal.

[6] NSSA’s appeal to the Tribunal has not yet been heard, therefore, the Tribunal has not made a determination as to whether the Officer had jurisdiction to entertain the complaint. Until such time as the Tribunal decides that issue, there is nothing to appeal. Indeed the Tribunal may agree with NSSA’s argument and allow its appeal. That is a matter for the Tribunal to decide, not this Court. The Tribunal has decided that NSSA must provide a bond and that narrow issue is properly before this Court.

[7] The facts germane to the requirement for the bond arose in or around October 28, 2009, when Bill Grant, Director of Labour Standards, was provided with correspondence between Mr. Krause and Ms. Baker. The correspondence related to settlement discussions Mr. Krause and Ms. Baker were having with respect to resolving Mr. Krause's complaint. In that correspondence, Ms. Baker makes reference to the precarious financial situation of NSSA.

[8] As a result of receiving this correspondence, Mr. Grant made an application to the Tribunal, *ex parte*, without notice to Ms. Baker, requesting that NSSA be required to furnish security as prescribed in s. 84(1) of the **Labour Standards Code**, R.S.N.S. 1989, c. 246. Section 84(1) of the **Labour Standards Code** gives the Tribunal the discretion to require an employer to furnish a bond prior to proceeding with an appeal. In support of the application, Mr. Grant swore a Statutory Declaration, attaching the correspondence received from Mr. Krause as evidence in support of granting an order for the bond.

[9] The Tribunal, based on the Statutory Declaration provided by Mr. Grant, ordered NSSA to provide a bond.

[10] Until NSSA provides the bond, the Tribunal will not hear its appeal.

[11] NSSA appeals from the decision of the Tribunal requiring it to post a bond.

## **ISSUES**

[12] As previously stated, the only issue to be determined is whether the Labour Standards Tribunal erred in law or jurisdiction in ordering the bond. To make it abundantly clear, the appellant has raised a number of grounds in the notice of appeal relating to the jurisdiction of the Tribunal to hear the appeal from the Labour Standards Officer. This is not an appeal from the decision of the Labour Standards Officer or the Director of Labour Standards. No appeal lies to this Court from either of those parties. The jurisdiction of the Labour Standards Officer to decide the complaint is still a live issue before the Tribunal.

## **DECISION**

### **1. Standard of Review:**

[13] NSSA appealed to this Court pursuant to s. 20(2) of the **Labour Standards Code**. It provides as follows:

2) Any party to an order or decision of the Tribunal may, within thirty days of the mailing of the order or decision, appeal to the Nova Scotia Court of Appeal on a question of law or jurisdiction.

[14] Section 20(5) of the **Code** further provides:

(5) The Nova Scotia Court of Appeal shall hear and determine the question or questions of law arising thereon and remit the matter to the Tribunal, with the opinion of the Court thereon.

[15] The issue on this appeal is one of procedural fairness, as such a standard of review analysis is not triggered. The Tribunal is not entitled to any deference on the assessment of its procedural fairness, the standard of review is correctness. (**Homburg Canada Inc. v. Nova Scotia (Utility and Review Board)** 2010 NSCA 24, ¶ 66; **Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.**, 2010 NSCA 19, ¶ 30-33).

## 2. Grounds of Appeal

[16] Ms. Baker appeared on her own behalf and presented oral argument with respect to her grounds of appeal. In her very able argument she set out in a clear and concise manner the basis upon which she felt the appeal should be allowed.

[17] She made the very astute and insightful point that the Tribunal, in intervening at the time it did, thwarted any attempt to settle this matter. After the Tribunal granted the order for a bond, she made no further attempts at settlement for fear of the use that would be made of the settlement negotiations. She said that the actions of the Tribunal caused this matter to remain unresolved, which is contrary to its objective.

[18] However, the crux of her argument before us is that she was not given notice of the application brought by the Director asking the Tribunal to order NSSA to post a bond and, as a result, she was deprived of an opportunity to participate in that hearing.

[19] She argues that the Tribunal's decision was based on inadmissible evidence; that is, correspondence she clearly intended to be privileged between her and Mr. Krause. She asserts that she was denied the opportunity to present argument concerning the admissibility of this evidence to the Tribunal.

[20] I agree with the appellant. The appeal should be allowed. I am not deciding the issue of whether the correspondence is admissible, but rather, whether the appellant should have been given the opportunity to present argument on that point to the Tribunal and on any other matter relevant to the issuance of the bond.

[21] It is apparent that on hearing the application of Mr. Grant, the Tribunal was receiving evidence, by way of a sworn Statutory Declaration, and was considering that evidence for the purposes of making its decision.

[22] After a review of that evidence, it concluded at ¶ 7:

The Tribunal finds from the information provided in the Statutory Declaration sworn to on October 28, 2009, by the Director of Labour Standards, that due to the Respondent facing possible bankruptcy, the Tribunal finds the Respondent may not be able to honor its obligations should the decision of the Labour Standards Tribunal be in the Complainant's favour.

[23] Section 17 of the **Labour Standards Code** establishes the Labour Standards Tribunal and outlines its powers and authorities. Of particular note are s. 17(8) and (9) which provide the following:

(8) The Tribunal may receive and accept any evidence and information on oath, affidavit or otherwise as in its discretion it deems fit and proper, whether admissible as evidence in a court of law or not.

(9) The Tribunal shall determine its own procedure, but shall in every case give an opportunity to all interested parties to present evidence and make representation.

(my emphasis)

[24] Section 22 of the **Code** provides as follows:

22 In any proceeding before the Tribunal with respect to any matter arising under Section 21, including any matter arising under Section 81, the parties shall be

- (a) the Director, who shall have the carriage of the matter;
- (b) the person alleged by the Director to have failed to comply with this Act;
- (c) the complainant, if any, and
- (d) any other person specified by the Tribunal upon such notice as the Tribunal may determine, provided that at the hearing he is given an opportunity to be heard against his joinder as a party.

(my emphasis)

[25] NSSA is alleged by the Director to have failed to comply with the act and would fall within the definition in s. 22(b). The question, therefore, becomes whether the application by the Director to require NSSA to provide a bond is a “matter arising under Section 21”.

[26] Section 84(1) of the **Code** provides:

84 (1) Before proceeding to deal with an appeal by an employer under subsection (5) of Section 21, the Tribunal may require an employer to furnish, and where the Tribunal so requires the employer shall furnish, to the Tribunal security in the form of a bond with one or more sureties acceptable to the Tribunal in such amount and subject to such conditions as may be prescribed by regulations.

(my emphasis)

[27] The appeal by NSSA to the Labour Standards Tribunal was taken pursuant to s. 21(5) of the **Code**. It is appealing an order of the Director issued pursuant to s. 21(3) of the **Code**. The bond was ordered, specifically, pursuant to s. 84 of the **Code**, which incorporates by reference s. 21(5).

[28] An application to consider requiring a bond for an employer appeal to the Tribunal is clearly “a matter arising under s. 21”, which triggers a requirement to join the parties required by s. 22. Those parties would be the Director, the employer, the complainant (if any) and any other relevant person.

[29] The requirement to provide a bond is an extraordinary remedy, especially where failure to do so precludes a party from proceeding with its appeal. The wording in s. 84(1) permitting the Tribunal to order a bond is discretionary. In any decision to grant such a remedy the Tribunal is required to exercise its discretion judicially. By this, I mean it has to take into account the interests of all parties and decide the issue in a fair and impartial manner. It cannot do so by simply hearing one party to the proceeding.

[30] Section 17(9) and s. 22 are mandatory and require that, in circumstances such as this, NSSA should have received notice and been permitted to present evidence and argument as to why a bond should not be required. It is only after hearing all interested parties that the Tribunal would be in a position to exercise its discretion, taking into account the interests of all concerned.

[31] Section 17(9) specifies “in every case”. This provision read in light of s. 22 means that in every case where the Tribunal is hearing evidence by affidavit or otherwise, and making a decision that affects a party, all interested parties “shall” be given an opportunity to be heard.

[32] To hold otherwise would be to allow the Tribunal to grant a remedy which requires a party to a proceeding to either post a bond pending the determination of the appeal or lose its right of appeal, without ever hearing from that party. Obviously this would be patently unjust.

[33] The Tribunal proceeded with the application in the appellant’s absence, contrary to s. 17(9) and s. 22 of the **Code**. In so doing, it erred in law by ignoring the provisions of the **Code** when considering the fact situation before it. The Tribunal’s acceptance of the evidence, absent representations from the appellant as to its admissibility, amounted to an error of law.

[34] I would allow the appeal and set aside the order of the Labour Standards Tribunal of October 29th ordering that the appellant post a bond. The matter is remitted to the Tribunal to proceed in accordance with this decision.

[35] The appellant requested that if we were to remit the matter to the Tribunal we direct that a newly constituted panel be appointed to hear her appeal. Once again, she ably made her point that she has reason to be apprehensive as to whether

she would get an impartial hearing before the same Tribunal. I agree. NSSA's appeal and any matters arising in the appeal will be before a reconstituted panel, not including any of the members of the original panel.

### 3. Costs

[36] The appellant sought costs on this appeal. She outlined in considerable detail the time, energy, and expenses that she has incurred dealing with the fallout from Mr. Krause's complaint. In total, she has incurred \$4,955 in disbursements alone. This does not take into account the time she has had to take away from her business and family.

[37] It is unusual to award costs in a Tribunal appeal. Rule 90.51 of the **Civil Procedure Rules** provides:

**90.51** No costs may be ordered paid by or to a party in a tribunal appeal unless the Court of Appeal orders otherwise.

[38] Although it is tempting to do so, I would not deviate from the general rule in this case. Our analysis and relief is restricted to the single issue of NSSA's obligation to post the bond, and does not address the broader aspects of Ms. Baker's intended appeal to the Tribunal on the merits, since that appeal has not yet taken place (see [6], *supra*). Further, there is no one before us at this stage to challenge Ms. Baker's claim to costs and disbursements. Accordingly, there will be no order for costs, today. However, my disinclination to award costs is without prejudice to Ms. Baker's right to seek costs of this appearance, should further proceedings in matter case cause her to be before this Court again.

Farrar, J.A.

Concurred in:

Bateman, J.A.

Saunders, J.A.