

NOVA SCOTIA COURT OF APPEAL

Citation: *Whalley v. Cape Breton (Regional Municipality)*, 2020 NSCA 51

Date: 20200723

Docket: CA 483733

Registry: Halifax

Between:

John Whalley

Appellant

v.

Cape Breton Regional Municipality

Respondent

Judge: The Honourable Justice Cindy A. Bourgeois

Review Heard: February 11, 2020, in Halifax, Nova Scotia

Subject: Review pursuant to *Civil Procedure Rule* 90.38

Summary: On September 12, 2019, a chambers judge heard a Registrar's motion to dismiss an appeal brought by Mr. Whalley. Mr. Whalley had failed to perfect his appeal and his counsel, who had been given notice of the motion, failed to appear or file anything in response. The chambers judge dismissed the appeal.

Mr. Whalley filed a Notice of Motion to the Chief Justice for leave to review the chambers judge's order of dismissal. Leave was granted and the review heard by a panel.

Issues: Should the order dismissing Mr. Whalley's appeal be set aside?

Result: The review is dismissed, and the chambers judge's order of dismissal confirmed.

Mr. Whalley failed to demonstrate the dismissal of the appeal would amount to an injustice. He did not establish that the appeal had merit, notably in light of the record and the thorough reasons of the trial judge. Further, the explanation for the persistent failures of his counsel to move the appeal forward contrary to the *Nova Scotia Civil Procedure Rules* and directions of court staff was inadequate.

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 11 pages.

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Judges: Beveridge, Farrar and Bourgeois JJ.A.

Review Heard: February 11, 2020, in Halifax, Nova Scotia

Held: Review dismissed with costs, per reasons for judgment of Bourgeois J.A.; Beveridge and Farrar JJ.A. concurring

Counsel: Colin Bryson, QC, for the appellant
Carolyn Nearing, for the respondent

Reasons for judgment:

[1] On September 12, 2019, Justice Carole A. Beaton heard a Registrar's motion to dismiss an appeal brought by John Whalley. Mr. Whalley had failed to perfect his appeal, triggering the Registrar's motion pursuant to *Nova Scotia Civil Procedure Rule* 90.43(3). Mr. Whalley's counsel, Mr. Blair Mitchell, had been provided with notice of the motion but failed to attend on the scheduled date, or file anything in response. Justice Beaton granted the motion, and the appeal was dismissed.

[2] On September 30, 2019, Mr. Whalley filed a Notice of Motion to the Chief Justice under Rule 90.38 for leave to review an order of a judge. That motion was supported by an affidavit of Mr. Mitchell, sworn the same day. By order issued October 23, 2019, Chief Justice Wood granted leave to review Justice Beaton's order dismissing the appeal. A panel subsequently heard the review on February 11, 2020.

[3] For the reasons to follow, I would dismiss the review and confirm Justice Beaton's order of dismissal.

Background

[4] To place the considerations in this review in better context, it is helpful to begin with an outline of the decision Mr. Whalley sought to appeal.

[5] Mr. Whalley had been the Economic Development Manager for the Cape Breton Regional Municipality ("CBRM") for 18 years. In May 2015, Mr. Whalley was advised by the CBRM's Chief Administrative Officer that his duties on the Port of Sydney file were being re-assigned. Mr. Whalley resigned from his position the same day.

[6] Mr. Whalley brought an action against the CBRM in which he alleged constructive dismissal. He submitted the re-assignment of the Port of Sydney file constituted a unilateral and fundamental breach of his employment contract. Further, Mr. Whalley sought severance in accordance with the terms of a formal written employment contract he asserted governed the employment relationship, but which could no longer be located.

[7] In response to the claim, the CBRM said Mr. Whalley was not constructively dismissed but chose to quit his employment. Further, it denied that

it had fundamentally altered an essential term of Mr. Whalley's employment contract and disputed the existence of a formal written contract.

[8] The matter came for trial before the Honourable Justice Patrick J. Murray and was heard over five days. Mr. Whalley's action against the CBRM was dismissed, with the trial judge issuing written reasons on December 17, 2018 (2018 NSSC 325). In his reasons, the trial judge made the following key findings:

- Mr. Whalley's terms of employment were governed by a letter of hire signed in March 1997 and job description, not by a written employment contract as he alleged;
- There was no express or implied term of employment that required Mr. Whalley to work on any particular economic development file, including the Port of Sydney file;
- Mr. Whalley's duties were broad in scope, with the Port of Sydney file, while historically an important one, not being a fundamental aspect of his position. As such, the removal of the file from Mr. Whalley's duties did not constitute a breach of his employment contract;
- Mr. Whalley's reaction to the change of duties—submitting his resignation—was not reasonable; and
- If the parties were unable to agree on costs, written submissions were to be provided.

[9] Mr. Whalley filed a Notice of Appeal on December 31, 2018 and set out the following grounds of appeal:

- (1) The Learned Trial Judge erred in law and in mixed law and fact in deciding that the evidence did not establish that the Appellant's contract of employment did not include a term providing for the payment for fixed damages in the event of termination of employment;
- (2) The Learned Trial Judge erred in law in deciding that the Appellant had not been constructively dismissed from employment.
- (3) Such other grounds as may appear and this Honourable Court may see fit to entertain.

[10] On April 3, 2019, a Motion for Date and Directions was heard. Mr. Whalley's counsel filed a Certificate of Readiness and a supporting affidavit. The Certificate represented that the appeal book could be filed by May 31, 2019. In his affidavit, Mr. Mitchell said:

4. No order in this proceeding has yet to be taken out.
5. A draft form of order for consent as to form has been circulated but it is not satisfactory to the Respondent.

[11] The chambers judge set the appeal down for hearing on November 14, 2019 and established a number of filing dates. The chambers judge directed the Appeal Book be filed on or before June 17, 2019, Mr. Whalley's factum to be filed on or before July 19, 2019, and the CBRM's factum to be filed on or before August 23, 2019.

[12] On June 13, 2019, Mr. Mitchell wrote to the Registrar seeking an extension of the filing date for the Appeal Book from June 17th to June 21st. Mr. Mitchell advised that "the book is assembled subject to one missing exhibit and the impact on printing and numbering". The Registrar granted the request and confirmed via email to Mr. Mitchell that the Appeal Book was to be filed on or before June 21, 2019.

[13] The Appeal Book was not filed on June 21st. Without seeking a further filing extension or permission from the Registrar, the Appeal Book was filed on July 3, 2019. The Appeal Book was not provided to counsel for the CBRM until August 15, 2019. The Appeal Book did not contain a copy of the order under appeal.

[14] Mr. Whalley failed to file a factum on July 19, 2019 as directed by the chambers judge. His counsel did not seek an extension of time, or provide the Registrar or CBRM with any explanation as to why this deadline could not be met.

[15] Upon receipt of the Appeal Book, counsel for the CBRM wrote to the Registrar on August 19th with concerns regarding meeting the deadline for filing its factum. Counsel said the August 23rd date would be impossible to meet because the Appeal Book had only just been received and a factum from the appellant, Mr. Whalley, had not been provided.

[16] The Registrar wrote to Counsel on August 20, 2019:

I have Mr. Mozvik, Q.C.'s, faxed letter of August 19, 2019, in the above-noted matter. This letter brings to my attention the fact that the appellant has not filed its factum. The appellant's factum was due to be filed July 19, 2019. As a result, Mr. Mozvik is requesting an extension for filing the respondent's factum, which is due on August 23, 2019.

The Court has received no communication whatsoever from Mr. Mitchell or his office with respect to the appellant's factum not being filed, nor has an extension been requested.

I direct that Mr. Mitchell communicate with Mr. Mozvik's office with respect to new filing deadlines for the facta. If counsel can agree on new filing deadlines that allow both facta to be filed with the Court before October 15, 2019 (allowing the Court a one month window before the appeal hearing), then you may write to me with these deadlines and request extensions.

If counsel cannot agree, or if I hear nothing from Mr. Mitchell by the end of day on August 23, 2019, I will make a motion to dismiss the appeal for failure to perfect in accordance with Civil Procedure Rule 90.43.

(Emphasis in original)

[17] The record shows that counsel did not advise the Registrar of an agreement regarding filing dates and requesting extensions, nor did she hear from Mr. Mitchell by August 23rd.

[18] Also on August 20, 2019, the absence of a copy of the order under appeal was raised with Mr. Mitchell. The Deputy Registrar wrote:

It is noted that the Appeal Book was filed on July 3, 2019. One of the most important required documents for the Appeal Book is the order. If you have a copy of the lower court order, please fax it as soon as possible to (902) 424-0646. If you have not obtained the lower court order, it is imperative that you request an order be issued immediately. The Court of Appeal has not received a copy of the order to date.

[19] On August 26, 2019, Mr. Mitchell replied to the Deputy Registrar by email. He advised the "final order" was still under consideration by the trial judge who had yet to make a costs determination.

[20] The Deputy Registrar replied:

Thank you for your response and email information regarding the lower court order. The Court of Appeal's requirement for an issued lower court order be filed remains the same. An order that is being appealed from must be received before the appeal hearing.

If you are not appealing costs, then I would suggest having a separate order drafted accordingly as it may take time to have the order issued. Once issued, it is your responsibility to immediately fax a copy to the Court of Appeal office, (902) 424-0646, and file 5 copies, one for each appeal book.

[21] Copied on the email exchange, the Registrar wrote to Mr. Mitchell, noting she had not heard from him in relation to her August 20th request:

I have your email to Ms. Brown of today's date.

I am not certain if you received my email of August 20. I have received no reply.

I am resending it to you. I will wait until end of day today to hear back from you about this.

(Emphasis in original)

[22] Mr. Mitchell did not respond to the Registrar. A Registrar's Motion to dismiss the appeal for failure to perfect was filed on August 27, 2019. The Notice advised the matter would be heard on Thursday, September 12, 2019 at 10:00 a.m., and was sent to counsel for both Mr. Whalley and the CBRM.

[23] The Registrar heard nothing further from either party. On September 12th, neither party appeared in relation to the motion to dismiss, nor had anything been filed in response. The motion was granted and the appeal was dismissed for failure to perfect.

Issue

[24] The sole issue before the Court on this review is whether the order dismissing Mr. Whalley's appeal should be set aside.

The Law

[25] A motion for leave to review an order of dismissal is governed by Rule 90.38(6), which provides:

90.38(6) The Chief Justice may do any of the following on a motion for leave to review:

- (a) dismiss the motion for leave to review;
- (b) set the motion down for hearing;
- (c) grant leave to review the order of the judge in chambers if the Chief Justice is satisfied that the judge acted without authority under the rules, or the order is inconsistent with an earlier decision of a judge in chambers or the Court of Appeal, or that a hearing by a panel is necessary to prevent an injustice.

[26] Mr. Whalley is not asserting the chambers judge acted without authority or contrary to an earlier decision. He says the review is necessary to prevent an injustice.

[27] The *Rules* do not provide guidance on how a review panel is to approach its task. However, in *R. v. Liberatore*, 2010 NSCA 33, Justice Saunders noted:

[9] In the absence of any wording in the **Rule** which might guide our present review, we think it appropriate that we ask ourselves the same question: should this Court's previous order be set aside so as to prevent an injustice thereby enabling Mr. Liberatore to proceed with his appeal?

[10] In answering that question one ought to identify and balance the various interests involved. Here that analysis would include an examination of the appellant's interests, and the Crown's interests, as well as the broader implications concerning the administration of justice as a whole.

[28] With respect to administration of justice considerations, Justice Saunders wrote:

[14] Besides the interests of the parties involved, one should also weigh the public interest by taking into account the administration of justice as a whole. Would respect for the administration of justice be diminished if Mr. Liberatore were permitted to go forward with his appeal? We cannot see that it would. The delay here is relatively short; had the appeal not been dismissed it would have been heard this May. Now, were we to set it down for hearing, dates are available in the months of September through December. We are not aware that rescheduling Mr. Liberatore's appeal would have any material impact on the cost, or this Court's ability to conduct a timely and full hearing.

[15] It is not for us, at this stage, to decide the merits of the appeal. Obviously that decision will be left to a panel of this Court ultimately assigned to hear it. We would not oblige Mr. Liberatore to persuade us that his appeal has a real chance for success. For today's purposes in conducting this review it is enough for us to observe that the appeal does not appear to be frivolous, vexatious or without merit.

[29] Both parties have cited *Liberatore* in support of their positions. In that case, the appellant had been found guilty of possessing and trafficking cocaine. His counsel filed an appeal shortly after the sentencing hearing. Despite having received a number of extensions, and warnings that the appeal was in jeopardy of being dismissed, the appellant's factum was not filed by the last provided deadline. The appeal was summarily dismissed with no further notice to the appellant or his counsel.

[30] Leave to review the dismissal was sought, and appellant's counsel provided evidence that he was overwhelmed by the pressure of his other professional commitments and family responsibilities. He said this resulted in his failure to file the factum. Counsel submitted the appellant should not be deprived of advancing what he described as a meritorious appeal. The Chief Justice granted leave, and the review was undertaken, including hearing from the appellant himself. The panel re-instated the appeal. The Crown did not oppose either the leave motion or the re-instatement of the appeal.

[31] The approach in *Liberatore* was also followed in *Crooks v. CIBC World Markets Inc*, 2018 NSCA 97. There, a chambers judge, in response to a respondent's motion, dismissed the appeal due to the appellants' failure to file their factum. Although the appellants' counsel appeared at the scheduled hearing, she did not file anything in response to the motion.

[32] In support of the motion for leave, the appellants filed affidavits indicating they were unaware of their counsel's inaction on the appeal. Notably, counsel, as well as others, filed affidavits in which her serious mental health challenges were outlined. This information provided an explanation for counsel's failures to meet the deadlines imposed by the Court and was not known by the chambers judge at the time of dismissal. Leave was granted and the dismissal set aside on review.

Position of the Parties

[33] Before undertaking my analysis, it will be useful to review the evidence submitted by the parties on the review, as well as their positions.

[34] With respect to evidence on the review, the Review Record included an affidavit of Mr. Mitchell sworn September 30, 2019 and an affidavit of Tony W. Mozvik, Q.C., counsel for CBRM, sworn October 21, 2019. Mr. Whalley did not provide an affidavit.

[35] In his affidavit, Mr. Mitchell asserts:

- Following release of the trial decision, the parties could not reach agreement on costs and submissions were made to the trial judge;
- The Appeal Book did not contain a final order because he was waiting for the costs decision to be rendered by the trial judge;

- He did not request from the Registrar an extension for filing the Appeal Book because he thought it would not be accepted for filing until such time as the final order, including the issue of costs, was issued;
- He did not file the appellant's factum by July 19, 2019 because in his judgment, issues raised in his submissions on costs were also relevant to his intended submissions on the grounds of appeal, so the trial judge's costs decision was required to effectively prepare the factum;
- He now recognizes he should have kept the Registrar apprised of why filing deadlines were not being met;
- He now recognizes he should have responded to the Registrar's emails of August 20th and August 26th;
- Upon receipt of the Registrar's motion to dismiss, he mis-diarized the hearing date as September 18th; and
- He fully intended to appear on the Registrar's motion and to take that opportunity to request extensions to the outstanding filing dates.

[36] In his written submissions, Mr. Whalley adds:

44. ... Relative to the *Liberatore* and *Crooks* cases, Mr. Mitchell's failures to comply with the filing deadlines were minor, resulting in at worst, a short delay in the hearing of the Appeal.

And:

The underlying problem was not Mr. Mitchell's fault, as the Appeal could not proceed without the costs decision of the trial judge.

[37] He further acknowledges that "as of the date of the leave motion, the Order for the dismissal of the Appellant's claim had not been taken out, but was being worked on". There is nothing in the record before us to suggest the order under appeal has yet to be taken out.

[38] In his affidavit, Mr. Mozvik sets out the procedural history of the matter and attaches a complete copy of email communications between himself, Mr. Mitchell, and various court personnel. He confirms that following receipt of the trial decision, an order was never taken out, and states:

- To his knowledge, Mr. Whalley or his counsel did not seek to have the trial judge issue an order arising from the December 2018 decision;

- Between December 2018 and August 2019, Mr. Whalley or his counsel did not file a motion to settle the form of the order or contact the lower court seeking an order to be issued; and
- Between December 2018 and September 2019, he recalls only one email exchange between himself and Mr. Mitchell respecting the form of the order.

[39] In its submissions before this Court, the CBRM argues the review should be dismissed based on the following:

- Neither Mr. Mitchell nor Mr. Whalley have provided any type of reasonable excuse for the persistent failures to perfect the appeal in this matter. This alone distinguishes the present case from the situations in *Liberatore* and *Crooks*;
- In particular, Mr. Mitchell’s assertion that a final order on costs was necessary to move the appeal along is unsupportable. CBRM says in its written submissions on the review:
 33. Much has been offered about the need to wait for a costs decision from Justice Murray to file the Appellant’s factum. Respectfully, there is no connection between the grounds of appeal and the costs decision of Justice Murray. The appellant did not list costs in the filed Notice of Appeal as an appealable issue. It appears, on the record at least, he was not interested in this issue at the time of filing.
- Finally, given the grounds of appeal “were vague and weak” with “no apparent errors on the face of the decision”, the appeal was without merit and its dismissal did not result in an injustice.

Analysis

[40] I agree with the submissions made by the CBRM, although ultimately it is the last point that I find to be dispositive of the review. That being said, I would add the matter before us is clearly distinguishable from that in *Liberatore* in a number of ways. There, the appellant’s liberty interests were at stake; the Court had heard directly from Mr. Liberatore on the review; counsel explained his workload and family commitments had been overwhelming; and the Crown did not challenge the appellant’s argument that the dismissal resulted in an injustice.

[41] The circumstances in *Crooks* are also distinct. There, not only did counsel provide detailed evidence to explain the circumstances preventing her from perfecting the appeal, the appellants themselves provided evidence as to their lack of knowledge of her mishandling of the appeal, and the resulting prejudice if the dismissal were maintained. Further, there was no question that the appeal had merit, as leave to appeal had been earlier granted pursuant to the *Class Proceedings Act*, S.N.S. 2007, c. 28.

[42] In my view, Mr. Mitchell has not provided the type of explanation this Court would expect for what the record demonstrates is a series of persistent failures to follow established procedure and direction. The *Rules* are clear and the directions he received were pointed.

[43] With respect, I do not accept Mr. Mitchell's explanation that he required the costs decision and resulting order to finalize his factum on the merits of the appeal. At the hearing, the panel questioned counsel for Mr. Whalley how the issue of costs related to the grounds of appeal as set out in the Notice of Appeal. The response—that the costs submissions framed this as a “public interest” appeal—does not have a connection to the grounds upon which Mr. Whalley seeks to challenge the trial judge's December 2018 decision.

[44] The order that was relevant to the grounds of appeal and missing from the Appeal Book, was not sought by Mr. Mitchell in a timely fashion. From the record before us, it is unclear whether it has yet to be issued. I am satisfied the appeal was unperfected not only due to the lack of a factum, but also due to the absence of a completed Appeal Book.

[45] I return to what, in my view, is ultimately why the appeal should not be reinstated. As noted in *Liberatore*, a panel on review should not require an appellant to establish the appeal has a “real chance for success”. However, a panel should be satisfied the appeal “does not appear to be frivolous, vexatious or without merit”.

[46] If Mr. Whalley's appeal had merit, then his interests would most certainly be impacted by the dismissal. However, having reviewed the general allegations of error contained in the Notice of Appeal, and the thorough written reasons of the trial judge, I am of the view Mr. Whalley has failed to show the appeal has merit.

[47] The first ground of appeal is based on the trial judge's factual conclusion, available on the evidence before him, that the terms of employment were not as alleged by Mr. Whalley. The second ground simply contains a vague allegation

the trial judge erred in law in reaching his conclusion constructive dismissal had not been established. Upon questioning by the Court, counsel for Mr. Whalley was unable to provide further detail to the allegations of error in the Notice of Appeal, or the trial judge's reasons.

[48] In oral argument, counsel for Mr. Whalley acknowledges, properly in my view, the dismissal of an appeal without merit would not give rise to an injustice. This is such a case. The CBRM should not be put through the time and expense of responding to such an appeal, nor does the proper administration of justice support it being heard.

Disposition

[49] For the reasons above, I would dismiss the motion to review the chambers judge's decision. The appeal is dismissed. I would award costs to the CBRM in the amount of \$3,000.00 for both the leave motion and this hearing, inclusive of disbursements.

Bourgeois J.A.

Concurred in:

Beveridge J.A.

Farrar J.A.