

NOVA SCOTIA COURT OF APPEAL

Citation: *Siscoe v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2020
NSCA 81

Date: 20201208

Docket: CA 494071

Registry: Halifax

Between:

Jed Siscoe

Appellant

v.

Nova Scotia Workers' Compensation Appeals Tribunal,
Workers' Compensation Board of Nova Scotia,
Attorney General of Nova Scotia and Eel Lake Oyster Farm Limited

Respondents

Judge: Derrick, J.A.

Motion Heard: December 2, 2020, in Halifax, Nova Scotia, in Chambers

Held: Motion granted

Counsel: Jed Siscoe, appellant in person
Alexander C. W. MacIntosh, for the respondent Workers'
Compensation Appeals Tribunal
Paula M. Arab, Q.C., for the respondent Workers'
Compensation Board
Katie Roebathan, for the respondent Eel Lake Oyster Farm
Limited
Caroline McInnes, Registrar
Edward A. Gores, Q.C., for the respondent Attorney General
of Nova Scotia (not participating)

Decision:

Introduction

[1] On December 2, 2020, I heard a Registrar's motion to dismiss Mr. Siscoe's appeal pursuant to s. 90.43(3) and (4) of the *Civil Procedure Rules*. The Registrar's memorandum, filed in support of the motion, noted that Mr. Siscoe has not advanced his appeal beyond filing his Notice of Application for Leave to Appeal. At the end of the Chambers hearing, I reserved my decision.

[2] I felt considerable sympathy for Mr. Siscoe as he explained the challenges he has been confronting and the reasons why he has not moved his appeal along. However, sympathy is not a factor in my determination. As I explained to Mr. Siscoe, a Registrar's motion for dismissal is determined on the basis of legal principles. Applying those principles causes me to conclude the Registrar's motion should be granted and Mr. Siscoe's appeal dismissed. I will explain why I have reached this conclusion.

Background

[3] Mr. Siscoe was employed by Eel Lake Oyster Farm Limited in approximately 2011. In October 2017 he made a Workers' Compensation (WCB) claim for a work-related back injury he said occurred when he was pulling an oyster grow cage into a boat. He told the WCB something malfunctioned, and he was launched across the back of the boat. Eel Lake contested his claim.

[4] Mr. Siscoe was not exactly sure when the accident occurred, either 2012 or 2013.

[5] In January 2018, Mr. Siscoe's claim was rejected by a WCB case manager. An appeal by Mr. Siscoe of this decision was denied in May 2018. Mr. Siscoe appealed to the Workers' Compensation Appeals Tribunal (WCAT).

[6] In a decision dated October 4, 2019, WCAT found it was more likely than not that Mr. Siscoe's accident occurred in June or July 2012. As a result, the Tribunal concluded Mr. Siscoe's claim was filed too late. The decision noted that s. 83(6) of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, does not permit the payment of a claim made more than five years after the accident. WCAT also found that even if the accident had occurred in 2013, which Mr. Siscoe had thought

was possible, there was “insufficient evidence to reasonably infer that [he] suffered a personal injury by accident arising out of and in the course of his employment”. This finding was based on medical evidence that did not support a back injury having occurred in 2013.

[7] Mr. Siscoe filed a Notice of Application for Leave to Appeal (Workers’ Compensation) on November 20, 2019. The Registrar of the Nova Scotia Court of Appeal sent him a standard letter dated November 29, 2019 setting out the next steps he had to take in order to have his appeal heard. The letter indicated he had to file a motion for date and directions (to get a hearing date for his appeal). The date to have the motion heard was no later than “March 18, 2019”. This date was an obvious transcription error and should have been March 18, 2020. The Registrar advised Mr. Siscoe if he did not have his date-getting motion dealt with by the deadline, she was required to make a motion to have the appeal dismissed for non-compliance with the rules of court (the *Civil Procedure Rules*).

[8] Mr. Siscoe did not bring a motion for date and directions by March 18, 2020. On October 29, 2020, the Registrar filed a motion to dismiss his appeal.

[9] The Registrar’s memorandum of October 28, 2020 set out the background of Mr. Siscoe’s appeal. This background included a description of the contents of the November 29 letter I mentioned earlier. The memorandum also provided details about subsequent contact with Mr. Siscoe.

[10] In February 2020, Mr. Siscoe contacted the Registrar for information on how to ask the Court to pay for the transcript of his WCAT hearing. The Registrar explained what he needed to do and sent him some blank form documents to fill out. There was a further phone call on February 25, 2020 during which the Registrar explained to Mr. Siscoe what he needed to include in the affidavit for his motion and where he could get it sworn.

[11] The Registrar did not hear from Mr. Siscoe again.

Civil Procedure Rules 90.43(3) and (4)

[12] The Registrar’s motion was brought because Mr. Siscoe has not taken the steps required by the *Civil Procedure Rules* (“CPR”) to perfect his appeal. CPR 90.43 defines what is meant by a "perfected appeal". It is an appeal where the appellant has complied with specified requirements that include “applying for a

date and directions...” and “filing a certificate of readiness”. An appellant who has not taken these steps has not perfected his appeal.

[13] The Rules relied on by the Registrar for her motion, *CPR* 90.43(3) and (4), state the following:

In an appeal not perfected before 80 days from the date of the filing of the notice of appeal, or before any other time ordered by a judge, the registrar must make a motion to a judge for an order to dismiss the appeal on five days notice to the parties.

A judge, on motion of a party or the registrar, may direct perfection of an appeal, set the appeal down for a hearing, or, on five days notice to the parties, dismiss the appeal.

[14] As I mentioned previously, the Registrar told Mr. Siscoe in her letter of November 29, 2019 there was a deadline for him to have a motion for date and directions filed and heard. In the event this did not happen, she would be required to bring a motion to dismiss his appeal.

[15] Mr. Siscoe has not filed a motion for date and directions nor a certificate of readiness. A certificate of readiness is a document in which the appellant must certify a number of things, including that he will be able to file the appeal book by a specified date. (*CPR* 90.26)

The Hearing of the Motion

[16] The Registrar’s motion was attended by the Registrar, Mr. Siscoe, and legal counsel for WCAT, WCB, and Eel Lake Oyster Farm Ltd. Only Eel Lake took a position on the motion, in support.

[17] Mr. Siscoe explained that although he had not abandoned his appeal and wanted to proceed, he found the process of advancing it overwhelming. He described dealing with multiple health issues on a daily basis. He has not worked since his employment with Eel Lake and has very limited means. He struggles with the paper demands of the appeal process, noting that he only has a Grade 9 education.

[18] Mr. Siscoe emphasized that he has tried reaching out to numerous agencies to get help with his circumstances. It was very apparent listening to him that he is trying to cope with the challenges presented by poverty, chronic health problems, and a limited education. He candidly acknowledged that he would need help to get

his appeal off the ground. He said: “It is so far beyond me to file an appeal book, I can’t even comprehend that”.

[19] Mr. Siscoe described his failed Workers’ Compensation claim as having “consumed” him. It is plainly a source of anguish for him and one of many stressors in his life. Only a heart of stone would feel no sympathy for Mr. Siscoe.

The Legal Principles that Apply to a Registrar’s Motion to Dismiss

[20] In *An Jager v. Jager*, 2019 NSCA 9, Justice Bourgeois explained the factors to be considered on a Registrar's motion to dismiss an appeal:

19 Rule 90.43(3) places an obligation on the Registrar to monitor appeals filed with the Court and act when they have not been perfected. When a motion to dismiss is brought, 90.43(4) provides a chambers judge with the discretion to provide further directions to move a stalled appeal towards conclusion, or grant dismissal.

20 In *Islam v. Sevgur*, 2011 NSCA 114, Justice Saunders summarized the principles governing a chambers judge's discretion to dismiss for failure to perfect the appeal. He wrote:

[36] The approach I take in such matters is this. Once the Registrar shows that the rules for perfecting an appeal have been breached, and that proper notice of her intended motion has been given, the defaulting appellant must satisfy me, on a balance of probabilities, that the Registrar's motions ought to be denied. To make the case I would expect the appellant to produce evidence that it would not be in the interests of justice to dismiss the appeal for non-compliance. While in no way intended to constitute a complete list, some of the factors I would consider important are the following:

- (i) whether there is a good reason for the appellant's default, sufficient to excuse the failure.
- (ii) whether the grounds of appeal raise legitimate, arguable issues.
- (iii) whether the appeal is taken in good faith and not to delay or deny the respondent's success at trial.
- (iv) whether the appellant has the willingness and ability to comply with future deadlines and requirements under the **Rules**.
- (v) prejudice to the appellant if the Registrar's motion to dismiss the appeal were granted.

(vi) prejudice to the respondent if the Registrar's motion to dismiss were denied.

(vii) the Court's finite time and resources, coupled with the deleterious impact of delay on the public purse, which require that appeals be perfected and heard expeditiously.

(viii) whether there are any procedural or substantive impediments that prevent the appellant from resuscitating his stalled appeal.

[37] It seems to me that when considering a Registrar's motion to dismiss, a judge will wish to weigh and balance this assortment of factors, together with any other circumstances the judge may consider relevant in the exercise of his or her discretion.

21 As noted by Justice Saunders, the above factors do not constitute a finite list. Further, the unique circumstances of each appeal will make certain factors more or less relevant to the exercise of a chambers judge's discretion.

Applying the Legal Principles in Mr. Siscoe's Case

[21] I have applied the factors listed above from *Islam v. Sevgur* to Mr. Siscoe's case:

- (i) Mr. Siscoe's reasons for not advancing his appeal are due to his circumstances. This is not a case of Mr. Siscoe refusing to comply with the requirements for perfecting his appeal. As he said, he is simply overwhelmed by those requirements.
- (ii) My review of the WCAT decision leaves me in some doubt about whether Mr. Siscoe's appeal raises arguable issues. It is not obvious to me that it does.
- (iii) I believe Mr. Siscoe filed his appeal in good faith.
- (iv) I do not have confidence in Mr. Siscoe's ability to comply with future deadlines and requirements under the *Rules*. This is one of the most significant factors in this case.
- (v) There is obvious prejudice to an appellant when a Registrar's motion to dismiss an appeal is granted. The granting of the motion ends the appeal.

- (vi) There is prejudice to the other parties to the appeal if the Registrar's motion is denied and the appeal remains stalled and hanging over their heads indefinitely. The respondents to this appeal are entitled to finality.
- (vii) There is a public interest in the efficient use of the Court's resources and time. Appeals are to be perfected and heard in a timely way.
- (viii) There are no procedural or substantive impediments preventing Mr. Siscoe from advancing his appeal. The obstacles he has described, which I discussed earlier, are not what fall under this factor in the analysis.

[22] The most influential factor in my assessment of the Registrar's motion is Mr. Siscoe's inability to perfect his appeal. At the hearing of the motion Mr. Siscoe stated openly that the task of advancing his appeal is too much for him. He said he would need help to move his appeal forward and has been wholly unsuccessful in finding that help. Taking his appeal through the required steps is beyond him. He simply cannot do it, no matter how earnestly he wishes he could.

[23] I thank Mr. Siscoe for his honesty and openness in talking about his situation. It is not his fault that he lacks the financial and educational resources to move his appeal along. His circumstances disadvantage him. That said, the requirements of the *Civil Procedure Rules* have to be satisfied. They have not been satisfied because Mr. Siscoe does not have, and will not acquire, the ability to comply with them.

Disposition

[24] I find there is no basis for believing that Mr. Siscoe has the ability to comply with the Rules that govern appeals. As a result I am granting the Registrar's motion and dismissing Mr. Siscoe's appeal.

Derrick, J.A.