

NOVA SCOTIA COURT OF APPEAL

Citation: *Shupe v. Beaver Enviro Depot*, 2021 NSCA 46

Date: 20210610

Docket: CA 506198

Registry: Halifax

Between:

Christine Shupe

Appellant

v.

Beaver Enviro Depot, Wyatt D. Redmond, 2557617 Nova Scotia Ltd., Attorney
General of Nova Scotia, Nova Scotia Human Rights Commission, and Nova Scotia
Human Rights Commission Board of Inquiry

Respondents

Judge: Farrar, J.A.

Motion Heard: June 3, 2021, in Halifax, Nova Scotia in Chambers

Held: Motion granted without costs to any party

Counsel: Andrea MacNevin, for the appellant
Andrew Christofi, for the respondents Mr. Redmond and
2557617 Nova Scotia Ltd.
Kymberly Franklin, for the respondent NSHRC

Decision:

Background

[1] Christine Shupe is the complainant in a Human Rights Complaint (the Complaint) – Beaver Enviro Depot is the respondent. The complaint materials state Beaver Enviro Depot was Ms. Shupe’s employer and Wyatt Redmond is the owner of Beaver Enviro Depot. The materials allege Mr. Redmond discriminated against and sexually harassed Ms. Shupe . He is not personally named in the Complaint . It was subsequently discovered Beaver Enviro Depot is neither incorporated nor a registered business name . It does not exist . As it turns out, Ms. Shupe was actually employed by 2557617 Nova Scotia Ltd. of which Mr. Redmond is the sole director .

[2] On March 5, 2021, the Human Rights Commission asked Benjamin Perryman, who had been appointed to sit as a Board of Inquiry (the Board) on the Complaint, to amend the Complaint to add “in the correct legal name of the Respondent’s business”.

[3] On March 22, 2021, Mr. Perryman issued his decision . He found that he did not have the jurisdiction to amend the Complaint and, because the respondent was not a legal person against whom an order could be made, he considered he had no choice but to dismiss the Complaint and did so.

[4] Ms. Shupe now seeks to appeal the Board’s decision dismissing the Complaint.

[5] Section 36 of the *Human Rights Act*, R.S.N.S. 1989, c. 214, gives any party before the Board of Inquiry an appeal directly to this Court on a question of law. *Civil Procedure Rule* 90.13 requires that an appeal be filed within 25 clear days of the decision of the Board of Inquiry. Therefore, the deadline for filing Ms. Shupe’s appeal was April 26, 2021.

[6] On May 18, 2021, she filed a Notice of Motion asking this Court to extend the time for filing her appeal.

[7] In support of her motion, Andrea MacNevin, Ms. Shupe’s solicitor, has filed her own affidavit. In the affidavit, Ms. MacNevin deposes that she received

instructions from Ms. Shupe to file an appeal and that she had prepared the appeal documents and was ready to file on April 26, 2021.

[8] However, she misread a Practice Directive from the Supreme Court of Nova Scotia which, due to the third wave of COVID-19, advised the Supreme Court was entering into an essential services model and was suspending deadlines for filings under the *Civil Procedure Rules*. Ms. MacNevin, mistakenly, assumed the directive applied to filings in this Court and, in particular, to filing Notices of Appeal.

[9] On May 18, 2021, Ms. MacNevin realized her error and on May 19, 2021, she filed a Notice of Motion to extend the time for filing the appeal.

[10] The relevant portions of Ms. MacNevin's affidavit are reproduced here:

7. I hereby confirm that I received instructions from my client to file an appeal, and that my client has had a genuine intention to appeal since April 3rd, 2021.

8. The Appellant was not able to file her Notice of Appeal within the deadline provided in *Civil Procedure Rule* 90.13 or 91.05 for the following reasons.

9. The decision being appealed from was issued on March 22, 2021. Pursuant to the *Human Rights Act*, section 36, a party has twenty-five (25) clear business days to appeal from a decision of a Board of Inquiry. Therefore, the deadline for filing the Appellant's appeal was April 29, 2021. The appeal documents were prepared and ready to file on April 26, 2021.

10. Due to the COVID-19 pandemic entering into its third wave in Nova Scotia on or about April 21, 2021, a directive was issued on April 24, 2021, from the Supreme Court of Nova Scotia directing that the Halifax Law Courts were entering into the essential services model and suspending deadlines for filing under the Rules of Civil Procedure. The directive stated that the purpose of entering into the essential services model was to, "allow staff to focus on processing documents related to urgent and essential matters that are proceeding."

11. In error, I believed his directive to also apply to the Nova Scotia Court of Appeal filings, in particular to the deadline for filing a Notice of Appeal under Rule 90. Accordingly, while I had prepared the materials for filing, I did not submit them.

12. On Tuesday, May 18, 2021, I re-reviewed the practice directives from the Courts of Nova Scotia. It was at this time that I first realized my error, contacted the Registrar, and immediately began the process to prepare a Notice of Motion for an extension of the time to file.

[11] Attached to Ms. MacNevin's affidavit is a proposed Notice of Appeal, it raises two grounds of appeal as follows:

The grounds of appeal are

The Board of Inquiry erred in law by dismissing the Appellant's complaint under the *Human Rights Act*, RSNS 1989, c 214 without an inquiry into its merits, by:

- a. Holding that because the Board has no jurisdiction in the *Human Rights Act* to amend the complaint, the complaint must be dismissed; and
- b. Failing to consider ss. 33(d) and (e) of the *Human Rights Act* when holding that the Board of Inquiry lacked jurisdiction under the *Act* to name Wyatt D. Redmond and 2557617 Nova Scotia Ltd. as respondents to the proceeding.

[12] Although Mr. Redmond and 2557617 Nova Scotia Ltd. were not parties to the proceeding before the Board, they were named in and served with the Notice of Motion. They were represented by Andrew Christofi at the hearing of the Motion on June 3, 2021.

[13] With this backdrop, I will now turn to whether I should grant Ms. Shupe's request for an extension of time.

Analysis

[14] Rule 90.37(12) gives a judge of this Court the authority to extend the time to file a Notice of Appeal:

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:

...

(h) that any time prescribed by this Rule 90 be extended or abridged before or after the expiration thereof.

[15] In *Farrell v. Casavant*, 2010 NSCA 71, Beveridge, J.A., explained the test for granting an extension of time to appeal as, ultimately, a determination of whether it is in the interest of justice to grant the extension (¶17). In determining whether it is in the interest of justice, common factors to be considered are:

- the length of the delay;

- the reason for the delay;
- the presence or absence of prejudice;
- the apparent strength or merit in the proposed appeal; and
- the good faith intention of the appellant who exercises his or her right of appeal within the prescribed time period.

[16] The relative weight to be given to any of these factors may vary from case to case (*Farrell*, ¶17).

[17] I will now consider those factors:

- **Length of delay** – the length of delay between the expiration of the time for filing a Notice of Appeal – April 29, 2021, and the date of filing the Motion to extend the time – May 18, 2021, is relatively short and can be explained by Ms. MacNevin’s error.
- **The reason for delay** – I am satisfied that Ms. Shupe has established that she had a reasonable excuse for the delay. She gave instructions to her solicitor to file a Notice of Appeal and, as a result of her solicitor’s misapprehension of a directive from the Supreme Court of Nova Scotia, the appeal was not filed as it should have been.
- **The presence or absence of prejudice** – Mr. Christofi argues on behalf of Mr. Redmond and 2557617 Nova Scotia Ltd. that they would be prejudiced if an extension of time was granted. They say it would resurrect a Human Rights Complaint that had been dismissed. However, neither Mr. Redmond nor 2557617 Nova Scotia Ltd. were parties to the Complaint. At best, if the extension is granted and the appeal is successful, they may be added as parties in the future. That is the same position they would have been in if the appeal was filed in time. The short delay occasioned by the error has not caused them any prejudice.
- **The apparent strength or merit of the proposed appeal** – the proposed grounds of appeal allege that the Board of Inquiry erred in failing to consider s. 33(d) and (e). Section 33 in its entirety provides:

Parties to proceeding

33 The parties to a proceeding before a board of inquiry with respect to any complaint are

- (a) the Commission;
- (b) the person named in the complaint as the complainant;
- (c) any person named in the complaint and alleged to have been dealt with contrary to the provisions of this Act;
- (d) any person named in the complaint and alleged to have con-travened this Act; and
- (e) any other person specified by the board upon such notice as the board may determine and after the person has been given an opportunity to be heard against joinder as a party.

Ms. Shupe argues that the Board failed to consider s. 33(d) and (e), which would have allowed them to add either Mr. Redmond or 2557617 Nova Scotia Ltd. to the Complaint. In essence, he could have substituted them as respondents pursuant to those sections. I am satisfied that this raises at least an arguable issue, and one which has not been considered by this Court.

- **Good faith intention of the appellant** – I am satisfied that Ms. Shupe had a good faith intention to file an appeal prior to the expiration of the appeal period. I would note at this point that it is not appropriate practice for a solicitor to simply file her own affidavit on matters of substance on a motion such as the good faith intention of her client. Ms. Shupe did not swear and file an affidavit.

Ms. MacNevin deposed that she received instructions and had prepared the Notice of Appeal prior to the expiration of the appeal period. Ms. MacNevin does not indicate when she received those instructions, but I am prepared to accept her evidence that the Notice of Appeal was prepared on April 26, 2021, before the expiration of the appeal period, which evidenced Ms. Shupe's good faith intention to appeal. However, the failure to file an affidavit of the individual having direct knowledge, in this case Ms. Shupe, could be fatal on a motion such as this.

[18] Based on my consideration of the factors, I am satisfied that it is in the interest of justice to grant the extension of time to file the Notice of Appeal. I will extend the time do so until June 18, 2021.

[19] During the course of the hearing of this matter, Mr. Christofi indicated that his clients would like to be added as respondents to the appeal. They were not parties before the Board and would not otherwise be a party to this appeal. In light of this request, I will join Mr. Redmond and 2557617 Nova Scotia Ltd. as respondents pursuant to Rule 90.16(8), which provides:

90.16(8) A judge of the Court of Appeal may order that a person be joined as a respondent.

Conclusion

[20] The motion is granted and Ms. Shupe shall file her Notice of Appeal on or before June 18, 2021. Mr. Redmond and 2557617 Nova Scotia Ltd. shall be added as respondents to the appeal when it is filed.

[21] There shall be no costs awarded to any party on this motion.

Farrar, J.A.