NOVA SCOTIA COURT OF APPEAL
Citation: ***Green v. Nova Scotia (Human Rights Commission)***,
2011 NSCA 47

Date: 20110520
Docket: CA 333320
Registry: Halifax

Between:

C. Elizabeth Green

Appellant

v.

The Nova Scotia Human Rights Commission,
Mount Saint Vincent University and
The Attorney General of Nova Scotia

Respondent

Judges:	Oland, Fichaud and Beveridge, JJ.A.
Appeal Heard:	April 7, 2011, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Oland, J.A.; Fichaud and Beveridge, JJ.A. concurring.
Counsel:	Blair Mitchell, for the appellant Peter McLellan, Q.C. and Lisa Gallivan for the respondent, Mount Saint Vincent University Lisa Teryl for the respondent, Nova Scotia Human Rights Commission Edward A. Gores, Q.C. for the respondent, Attorney General of Nova Scotia, not appearing

Reasons for judgment:

[1] The appellant, Elizabeth Green, filed a complaint with the Nova Scotia Human Rights Commission which alleged that Mount Saint Vincent University had discriminated against her based on disability. The Commission dismissed her complaint, stating that it was "without merit." It declined to refer her complaint against the University to a board of inquiry.

[2] Ms. Green filed a motion for judicial review of the Commission's decision, on the basis of its failure to provide reasons and, alternatively, that it was unreasonable. Bryson, J. (as he then was) in Chambers rejected her arguments and dismissed her motion. Ms. Green appeals his decision reported as 2010 NSSC 242, and his order dated November 1, 2010.

BACKGROUND

[3] I will begin by first setting out the legislative context and then summarizing the facts and the decision of the Chambers judge.

[4] The appellant's complaint against the University was made pursuant to s. 5(1)(o) of the *Human Rights Act*, R.S.N.S. 1989, c. 214, as amended. It provides that no person shall discriminate against an individual on account of physical or mental disability.

[5] Complaints filed with the Commission do not automatically proceed to a public hearing before a board of inquiry. Section 32A of the *Act* provides that, at any time after the filing of a complaint, the Commission "may" appoint a board of inquiry. That this is a discretionary decision is also apparent from the *Board of Inquiry Regulations*, O.I.C. 91-1222, N.S. Reg. 221/91:

> The Nova Scotia Human Rights Commission may, at any stage after the filing of a complaint, request the Chief Judge of the Provincial Court to nominate a person or persons for appointment by the Commission to a Human Rights Board of Inquiry to inquire into the complaint if the Commission is satisfied that, having regard to all circumstances of the complaint, an inquiry thereinto is warranted. [Emphasis added]

[6] The Commission has the authority to dispose of complaints at a preliminary stage. Section 29(4)(b) of the *Act* provides:

> 29(4) The Commission or the Director may dismiss a complaint at any time if
>
> (a) the best interests of the individual or class of individuals on whose behalf the complaint was made will not be served by continuing with the complaint;
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> (b) the complaint is without merit;
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> (c) the complaint raises no significant issues of discrimination;
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> (d) the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding;
>
> (e) the complaint is made in bad faith or for improper motives or is frivolous or vexatious;
>
> (f) there is no reasonable likelihood that an investigation will reveal evidence of a contravention of this Act; or
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> (g) the complaint arises out of circumstances for which an exemption order has been made pursuant to Section 9. [Emphasis added]

[7] The Commission's decision which dismissed the appellant's complaint, and is the subject of this appeal, was made at this "screening" stage.

[8] The Chambers judge began his summary of the facts as follows:

> [2] Apparently Ms. Green has a form of dyslexia and attention deficit disorder which compromises her ability to respond adequately to examinations in a traditional setting. The problem is that what she knows and understands cannot be quickly conveyed by that means. Accordingly, she requires assistance when writing examinations in order to demonstrate what she has learned. It is common ground that Ms. Green has a disability which the University has an obligation to accommodate.
>
> [3] The record makes it clear that both Ms. Green and the University initially made diligent efforts to accommodate her disability, while at the same time meeting the academic requirements of the University. In the end, however, Ms. Green felt that the University had not met its legal obligations to fully

> accommodate her and so she filed a complaint with the Commission on November 30, 2007.

[9] According to her complaint, Ms. Green had chosen to attend the University "because of its stated desire to accommodate students with learning disabilities." Discussions about accommodation began in 2002 when she was a high school student and, after July 2004, continued on a regular basis. That September, the appellant was admitted into the University's Child and Youth Studies program. The University implemented certain accommodations for her.

[10] During Ms. Green's second year, further accommodations were developed with the assistance of her psychologist, Dr. Weaver. It was determined that having someone at exams/tests who not only understood her particular learning style but could also rephrase questions would help the appellant better understand the questions. With the approval of her professors, Carol Shirley, her counsellor at the University's student affairs office, proctored one midterm and an examination and her tutors supervised her other midterms.

[11] Ms. Green's complaint to the Commission focussed on the University's alleged failure to accommodate her disability during her two December 2006 examinations. It also claimed ongoing discrimination on the grounds of disability.

[12] The events surrounding those examinations commenced in late November 2006. The question was who could proctor the December 2006 examinations. Ms. Green wanted Carol Shirley, who was no longer employed by the University and who was then her private tutor. According to the University, the use of a private tutor as proctor was not acceptable because of the potential for conflicts of interest. It initially put forward Delinda Trudell, who had replaced Ms. Shirley as disability counsellor, and was familiar with Ms. Green and her disability. However, she had less experience working with students with such learning disabilities than Ms. Shirley. In the end, the University selected Theresa Emberly, another of its disability counsellors, who had proctored Ms. Green during one test and was experienced in proctoring students with disabilities.

[13] All this took place very rapidly during the two weeks immediately before the appellant's December examinations. Ms. Green wrote with Ms. Emberly as proctor. She received marks of D and F.

[14] The following month, Ms. Green filed an academic appeal of her marks based in part on the fact that her accommodations were changed very close to the date of her examinations. In February 2007 Ms. Trudell proctored her mid terms. Ms. Green's appeal of her December 2006 examinations was heard in March 2007. It was successful and she was given the opportunity to rewrite both examinations.

[15] In its April 11, 2007 neuropsychological and education evaluation of the appellant, the Weaver Clinic set out a number of recommendations. The accommodation plan the University developed included disability counsellor Delinda Trudell as proctor and, in case the appellant required any question to be rephrased or clarified, faculty members present at the exam. The examinations Ms. Green wrote in April 2007 were proctored by Ms. Trudell.

[16] Ms. Green did not rewrite her December 2006 examinations in June or July, 2007 in part because she was taking courses at another university and she had a summer job in Newfoundland. In late November 2007, she filed her complaint with the Commission, alleging discrimination by the University on the basis of her disability.

[17] The Chambers judge's decision set out the process which followed and the Commission's decision:

> [4] The Commission assigned an investigator to conduct an investigation. The investigation appears to have been thorough and was completed on January 27, 2009. The investigation report recommended that the complaint be referred by the Commission to a Board of Inquiry. The University was then given an opportunity to review and comment on the report. Ms. Green was given a further opportunity to comment on the University's reply.
>
> [5] The Commission was originally scheduled to make a decision in March of 2009, but deferred that decision until April in order to have an opportunity to consider the responses of the parties.
>
> [6] From the record, it is clear that the Commission had before it the report itself, the complaint of Ms. Green, the University's response to the report and Ms. Green's rejoinder to that response.
>
> [7] The Commission considered the foregoing materials at a meeting on April 16, 2009. The minutes from that meeting indicate the following:

> José Montes joined the meeting to answer questions from the Commissioners regarding the Complaint.
>
> A copy of the memorandum dated March 31, 2009 with supporting materials from José Montes were submitted prior to the meeting.
>
> José Montes gave an overview of the complaint and reported that the complainant, C. Elizabeth Green is alleging that she was discriminated against by the Respondent, Mount Saint Vincent University in the matter of provision of or access to services and facilities because of her mental disabilities.
>
> The Commissioners were reminded that this matter was before them at the March 19, 2009 Commission meeting, at which time the matter was deferred as additional information had been recently submitted.
>
> A lengthy discussion took place and after a thorough review of all the materials made available to the Commissioners, it was moved by Norbert Comeau and seconded by David Samson that the matter be referred to a Board of Inquiry. Motion defeated.
>
> It was moved by Narayana Swamy and seconded by Martha MacDonald that based on the evidence and information contained in the investigation report, the complaint is without merit and is dismissed. Motion carried. Nay, Norbert Comeau.
>
> After presenting the above referenced complaint, José Montes left the meeting.

[8] The Complaint was dismissed by the Commission on May 1, 2009. The relevant excerpt from the Commission's letter of decision says:

> We are writing to advise you that the above-named complaint was discussed at the meeting of the Commissioners of the Nova Scotia Human Rights Commission held on April 16, 2009.
>
> After a thorough review of the matter, the Commissioners decided that based on the evidence and the information contained in the investigation report, the complaint is without merit and is dismissed.....

[18] José Montes, who presented Ms. Green's complaint at the Commission's meeting, was the Human Rights Officer who had prepared the Investigation Report. It is undisputed that the Commission is not obliged to follow the recommendation in such reports. It did not do so in this instance.

[19] At the judicial review of the Commission's decision, the Chambers judge had to determine:

(1) Whether the appellant had received procedural fairness?
(2) Whether the Commission's decision dismissing her complaint was reasonable?

[20] It was and is undisputed that, in terms of disclosure and the opportunity to make submissions to the Commission, Ms. Green and the University had been treated in a procedurally fair manner. Each received the Investigation Report, each was given an opportunity to make submissions, and in March 2009 each explained its position or provided comments in writing. As is evident from the Minutes, consideration of this complaint was deferred from the Commission's March 2009 meeting until April 2009 so that the Commission could have all the submissions before it.

[21] The appellant argued that the duty of fairness requires the Commission to give reasons for its decision that her complaint was "without merit". The Chambers judge noted that the *Act* does not oblige the Commission to provide reasons for a decision declining to refer a matter to a Board of Inquiry. He then reviewed legal texts and cases concerning reasons in the human rights context such as *Hiscock v. Newfoundland and Labrador (Human Rights Commission)*, 2006 NLTD 172; *Spurrell v. Newfoundland (Human Rights Commission)*, 2003 NLSCTD 28, and *Coady v. Newfoundland and Labrador (Human Rights Commission)*, 2010 NLTD 21. He considered the jurisprudence relied upon by Ms. Green, including *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 (Q.L.), [1999] 2 S.C.R. 817; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at ¶ 47; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at ¶ 63; and *Johnstone v. Canada (Attorney General)*, 2007 FC 36, affirmed 2008 FCA 101.

[22] With regard to procedural fairness and the duty to provide reasons, the Chambers judge concluded:

> [23] The respondents argue here that the Commission did provide reasons, albeit brief. The Commission dismissed the applicant's complaint on the basis that it was without merit. There was no elaboration. What this means is that the Commission's decision is at risk of being held unreasonable if, on the basis of all the materials before it, the dismissal cannot be reasonably sustained. However, it does not mean that the failure of the Commission to give reasons - or elaborate on its brief reasons - itself constitutes procedural unfairness. This is especially so when like here, an applicant makes no request for reasons.
>
> [24] Although the Commission's terse decision lacked elaboration, the extensive materials before the Commission, coupled with Ms. Green's intimate involvement in the development of those materials, obviate any procedural unfairness and do not frustrate judicial review. It is a reasonable inference that the Commission preferred the argument of the University to that of Ms. Green and the recommendations in the report.

[23] The Chambers judge then considered whether the Commission's decision itself was reasonable. He observed that this case involved a Commission "screening" decision rather than a tribunal decision and, in exercising its discretion, the Commission was not required to follow the recommendation of its investigator. The judge referred to s. 29(4) (b) and 32A (1) of the *Act* and Regulation 221/91, and reviewed case law relating to the referral of a complaint to a board of inquiry. He stated:

> [36] An absence of reasons does not frustrate judicial review where the record allows the court to discern whether the decision was reasonable in all of the circumstances (*Hiscock, Gardner*). Deference extends to reasons <u>that could be offered</u> in support of the Commission's decision (*Dunsmuir* ¶48).
>
> . . .
>
> [40) . . . there was material before the Commission from which the Commission could conclude that the complaint regarding the 2006 examinations lacked merit (because there was evidence that adequate accommodation had been provided) and should not be advanced to the stage of an inquiry.
>
> ...

> [43] In the result, I am satisfied that the Court can infer a preference for the reasoning offered by the University. I am further satisfied that the Commission's decision not to refer Ms. Green's complaint to a Board of Inquiry, based on the materials in the report, was not an unreasonable outcome.

[24] Ms. Green appeals the Chambers judge's dismissal of her application for judicial review. She asks that her appeal be allowed, his decision be reversed, and this court order that her complaint be directed to a board of inquiry for adjudication.

ISSUE

[25] The issues on appeal are whether the Chambers judge erred in determining that:

(a) there was no duty to provide reasons; and

(b) the Commission's decision to dismiss her complaint was reasonable.

STANDARD OF REVIEW

[26] There is no dispute as to the standard of review when this court reviews a Supreme Court decision which judicially reviews an administrative board's decision. We will intervene only if there exists an error in law, a palpable and overriding error of fact, or if the decision results in an injustice: *Nova Scotia (Human Rights Commission) v. Halifax (Regional Municipality),* 2010 NSCA 8 at ¶ 13.

ANALYSIS
DUTY TO GIVE REASONS

[27] I will first consider the appellant's argument that there is a duty on the Commission to give reasons when exercising its discretion not to refer a complaint to a board of inquiry and that its decision stating that her complaint was "without merit" did not satisfy that duty. Ms. Green takes the position that, as s. 29(4) of the *Act* sets out six sub-categories where the Commission is entitled to dismiss a complaint, the Commission is obliged to turn its mind to these and, if a complaint is dismissed, to explain in its decision why one sub-category rather than another was

selected. She says that its dismissal of her complaint simply as "without merit", one of the s. 29(4) sub-categories, frustrates appellate review as the Commission failed to explain just why this was so.

[28] Ms. Green argues that, as set out in *Baker* at ¶ 43, the duty to give reasons arises "where the decision has important significance for the individual." She stresses the importance of the Commission's decision, which foreclosed the possibility that her complaint would be adjudicated before a board of inquiry, for her. Emphasis was placed on her having commenced discussions regarding accommodations with the University years prior to admission, her engagement of tutors and medical experts, and her dedication to her studies. According to the appellant, none of *Baker, Dunsmuir and Khosa* distinguish among the types of decisions to determine the existence of a duty to give reasons. She submits that the Chambers judge erred when he pointed out that those were not "screening" decisions as in this case and relied on that distinction.

[29] While Ms. Green accepts that not every dismissal pursuant to s. 29(4) will warrant reasons, she submits that they should be given in this case because of the particular factual background and the decision's importance to her. As to what will constitute sufficient reasons for a dismissal at the screening stage, she offers that these could vary from fulsome archival decisions to brief ones which follow a template.

[30] With respect, after considering the *Act*, the Commission's screening function and public policy role, and the rationale behind the provision of reasons in situations such as that which is the subject of this appeal, I am unable to accept the appellant's arguments.

[31] The Legislature entrusted the Commission, which has specialized expertise in the field of human rights, to screen complaints of alleged violations of such rights. It authorized it to dismiss a complaint at any time for any of the reasons set out in s. 29(4), including that it is "without merit".

[32] When a public hearing is held before a board of inquiry, s. 34A of the *Act* stipulates that a written decision shall be rendered within six months. In contrast, the *Act* does not contain any statutory requirement for reasons, beyond those in s. 29(4), in a screening decision. Nor does it set out a statutory right of appeal of those decisions. That the Legislature did not do so indicates that it made a deliberate policy choice, namely, that the Commission need not provide fuller reasons than those in s. 29(4) of the *Act* when declining to refer a complaint to a board of inquiry. *Hiscock*, *Spurrell* and *Coady* all drew and relied on this inference based on an examination of the statutory provisions in similar legislation. They decided that extensive reasons need not be given by the equivalent Commission in Newfoundland.

[33] While a board of inquiry must provide reasons, it is clear that the *Act* did not impose that burden on the Commission beyond citing the words of s. 29(4), when it decides whether or not to refer the complaint further. I add that the words "without merit" are not meaningless. They indicate that, having weighed the evidence before it, the Commission was of the view that the complaint did not warrant referral to a board of inquiry because there is no chance the complaint will succeed.

[34] Moreover, as the appellant has properly acknowledged, the decision of the Commission under appeal was made at the screening stage. It is an administrative decision.

[35] In *Bell v. Canada (Canadian Human Rights Commission); Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854, La Forest , J., writing for the majority, described the screening role of the Canadian Human Rights Commission as follows:

> [53] The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it. . . . [Emphasis added]

[36] See also *Johnstone* where Barnes J. at ¶ 12 described the central task of the Commission at the screening stage as the weighing of the sufficiency of the evidence to determine if a complaint should be referred to the next stage.

[37] Furthermore, in exercising its discretion at the screening stage, the Commission must take into account not only the precise party and party dispute before it, but also its public policy role. This aspect of its work can require it to consider factors such as administrative efficiency, and the avoidance of cases which bring forward similar allegations. See *Garnhum v. Canada (Canadian Human Rights Commission) (re Canada (Canadian Armed Forces))*, [1996] 120 F.T.R. 1, [1996] F.C.J. No. 1254 (Q.L.).

[38] As to the submissions relying on the duty to give reasons where the decision is one of important significance for the individual, these have been addressed in other appeals which raised the issue of a human rights commission's duty to give reasons. In *Gardner v. Canada (Attorney General)*, 2005 FCA 284, the investigator's report had recommended that the Canadian Human Rights Commission appoint a conciliator to attempt a settlement of the complaint of discrimination because of family status. The Commission departed from that recommendation, and dismissed the appellant's complaint because "having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted." This phrasing was taken almost *verbatim* from the legislative provision which set out when the Commission may dismiss a complaint.

[39] In appealing the dismissal of her application for judicial review of that decision, the appellant in *Gardner* argued that the Commission had a duty to give reasons. The Federal Court of Appeal responded:

> [27] . . . In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada held that:
>
> > [43] In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of

> appeal, or in other circumstances, some form of reasons should be required . . .
>
> [28] But the Court recognized that there were practical reasons for providing that "... any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient." (para. 40). The duty to give reasons is grounded in a person's interest in knowing why profoundly important decisions affecting them are made as they are (para. 43). If, as a result of an intimate involvement in the process leading to the decision, a person understands, or has the *means to understand* the reason for the decision, the duty to give reasons will vary accordingly" [Emphasis added]

See also *Spurrell* at ¶ 21 and 22.

[40] The absence of any legislative requirement for written or extensive reasons beyond those in s. 29(4) of the *Act*, the omission of any appeal process, the screening and administrative function performed by the Commission at this stage, and its inclusion of public policy considerations when it chooses, all support the Chambers judge's determination that the Commission is not obliged to give fuller reasons explaining its decision to dismiss a complaint.

[41] According to the record, the Commission considered all the material, including the submissions of the parties, relating to the appellant's complaint against the University. Its dismissal of her complaint as "without merit" falls within one of the subcategories in s. 29(4) where it may exercise its discretion to dismiss. Its decision revealed not only what the Commission decided, namely, dismissal of the complaint, but also why, namely, having assessed the evidence, the Commission did not consider it sufficient to warrant referral to a board of inquiry.

[42] As in *Gardner*, the appellant here was intimately involved in the process leading to the Commission decision not to refer her complaint to a board of inquiry. She had not only the Investigator's Report, but the University's response. By making written submission in respect to that response, the appellant effectively had the last word. As a result of her active participation, she was aware of all the arguments before the Commission and had the means to know why the Commission reached the decision it did.

[43] I can detect no error or injustice resulting from the Chambers judge's decision that there was no duty on the Commission to provide further reasons for its screening decision not to refer this complaint to a board of inquiry that would support appellate intervention. I would dismiss this ground of appeal.

UNREASONABLE DECISION

[44] My determination that the Commission did not need to provide more extensive reasons for its decision does not, of course, preclude me from reviewing its decision for reasonableness. This is precisely what Ms. Green argues in her second ground of appeal: the Commission's decision that her complaint is "without merit" is unreasonable.

[45] The appellant emphasizes that the matter of the proctoring of her two December 2006 examinations arose unexpectedly and just before she had to write them. She submits that the University's efforts to accommodate her disability did not extend to undue hardship, and its arguments regarding "academic integrity" came late in the process. She also argues that its concerns regarding proctors who were her tutors arose after tutors had acted as proctors with University approval, and could have been addressed by audio and video recording of their interactions with her during the examinations. According to the appellant, Ms. Emberly's acting as proctor for her December 2006 exams could not have been reasonable accommodation of her disability as that required proctoring by an individual familiar with her particular learning style, and that person lacked that familiarity.

[46] There was no dispute that Ms. Green has a disability, or the University has a duty to accommodate and bears the onus to demonstrate reasonable accommodation. All of the arguments made by the appellant on the appeal in regard to the particular accommodations required for her disability, the University's position and allegedly imperfect and/or untimely responses, were incorporated in her complaint, the Investigation Report, and her reply to the University's response to that Report. Similarly, the University had answered them in its response to the Investigation Report.

[47] The Commission had the Investigation Report, the appellant's complaint, and the written arguments of the parties before it. It was able to consider the positions of the parties and to appropriately draw inferences from the entire body of evidence to conclude that the complaint should not be referred to a board of inquiry.

[48] Having reviewed that material and considered the arguments put forward by the appellant and the University, it is my view that the Commission's decision to dismiss the complaint falls within the range of acceptable outcomes which are defensible in respect of the facts and the law. I would dismiss this ground of appeal.

DISPOSITION

[49] I would dismiss the appeal. There will be no award of costs.

Oland, J.A.

Concurred in:

Fichaud, J.A.

Beveridge, J.A.