NOVA SCOTIA COURT OF APPEAL
Citation: ***Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)***, 2008 NSCA 108

Date: 20081119
Docket: CA 290521
Registry: Halifax

Between:

Halifax Regional Municipality

Appellant

v.

Nova Scotia Human Rights Commission and Mary Harnish

Respondents

Judge(s):	MacDonald, C.J.N.S.; Hamilton & Fichaud, JJ.A.
Appeal Heard:	November 13, 2008, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Hamilton, J.A.; MacDonald, C.J.N.S. and Fichaud, J.A. concurring
Counsel:	Martin Ward, Q.C. & Sara Knight, for the appellant Jennifer Ross, R. Paul Thorne (Articled Clerk) and Cheryl Knockwood (Articled Clerk), for the respondent, Nova Scotia Human Rights Commission Mary Harnish, respondent, not present

Reasons for judgment:

[1] The appellant employer, the Halifax Regional Municipality ("HRM"), appeals the December 12, 2007 interlocutory decision of a Human Rights Board of Inquiry appointed to inquire into the complaint regarding Mary Harnish's allegation that she was discriminated against in the matter of employment because of her race and colour. It was indicated at the hearing of this appeal that the appeal was dismissed as being premature with reasons to follow. These are the reasons.

[2] Ms. Harnish has been employed by HRM since May 25, 2000, first with the Halifax Regional Police Department and subsequently with the Halifax Regional Municipality Department of Finance. There is no dispute the Halifax Regional Police Department is a department of HRM.

[3] Ms. Harnish filed a complaint under the **Human Rights Act**, R.S.N.S., 1989 c. 214, ("**HRA**") with the other respondent, the Nova Scotia Human Rights Commission ("Commission") dated May 18, 2005. The Commission investigated Ms. Harnish's allegations and referred the complaint to a board of inquiry.

[4] In the section of the complaint form for naming respondents, only the police department and HRM were named. In the narrative section of the complaint form, Ms. Harnish alleged that she has been subjected to racially discriminatory comments and incidents on a number of occasions and provided two examples in support of her allegations:

> 4. On October 18, 2002, a fellow employee, Mr. Jason Snow, dropped a large black toy spider onto Pam's (another co-worker) desk and Pam stated that it had been a long time since she had been around something so cute and fuzzy. At this point, Ms. Suzanne Briggs commented that wasn't the case, as Pam was always around me, and I was "big, black and fuzzy."
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> 5. On or about 10 October 2002 I overheard my supervisor, Mary-Jane Peterson, and a co-worker, Suzanne Briggs, talking while they were working near my desk. I was under the impression that the two of them were doing a Records check on an African-Canadian and then I overheard Ms. Briggs state "I am reminded of the old saying, that they all look alike." There was a brief pause, during which I believe Ms. Peterson said something too low to be heard, and then I heard Ms. Briggs saying, while laughing "I can't help it, it just does."

> 6. I spoke with another employee in the area, Ms. Lee-Anne Adams-Gardner, to confirm that she had heard the statement as well, and she stated that she had. I immediately approached my supervisor to complain about this comment, but to this date, I do not believe that sufficient action has taken place.
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> 7. These sorts of comments are examples of the ongoing and ever-present atmosphere at the Respondent's location.

[5] The Board of Inquiry was appointed and on October 29, 2007 HRM received from Ms. Harnish's counsel a letter describing seven additional examples of alleged discrimination that Ms. Harnish would testify to in the proceedings before the Board and which had earlier been provided to HRM in connection with a mediation session in March, 2007.

[6] HRM requested a pre-hearing determination of several preliminary issues including (1) whether the co-workers named in the narrative of the complaint form were parties to the proceedings before the Board pursuant to s. 33(d) of the **HRA** and (2) whether the scope of the proceedings before the Board permitted Ms. Harnish's testimony about the seven additional examples referred to in ¶ 5 above.

[7] The Board found that the individual co-workers were not parties and that the scope of the proceedings permitted evidence of the seven additional examples. HRM appeals these two findings. It argued that the Board erred in coming to these conclusions.

[8] The Commission raised a preliminary argument. Relying on the principle of administrative law that absent special circumstances, interlocutory decisions of an administrative tribunal should not be challenged until the tribunal renders its final decision on the merits, the Commission argued that the appeal should be dismissed because it is premature. In support of this argument, it referred to a number of cases: **Sherman v. Canada (Customs and Revenue Agency)** 2006 F.C. 715 at ¶ 39; **Zündel v. Canada (Human Rights Commission)**, [2000], 4 F.C. 255 (FCA) at ¶ 10 - 13; **Szczecka v Canada (Minister of Employment & Immigration)** (1993), 116 D.L.R. (4th) 333 (F.C.A.) at ¶ 4, and **Canada (Customs and Revenue Agency) v. Sherman**, [2006] F.C.J. No. 232. Also see **Nova Scotia (Attorney General) v. Bishop**, [2006] N.S.J. No. 411 ¶ 3 and 4.

[9] In **Zündel** the Federal Court of Appeal states:

[10] Are the applications for judicial review premature? **As a general rule, absent jurisdictional issues, rulings made during the course of a tribunal's proceedings should not be challenged until the tribunal's proceedings have been completed. The rationale for this rule is that such applications for judicial review may ultimately be totally unnecessary: a complaining party may be successful in the end result, making the applications for judicial review of no value. Also, the unnecessary delays and expenses associated with such appeals can bring the administration of justice into disrepute.** For example, in the proceedings at issue in this appeal, the Tribunal made some 53 rulings. If each and every one of the rulings was challenged by way of judicial review, the hearing would be delayed for an unconscionably long period. As this Court held in *Anti-dumping Act (In re) and in re Danmar Shoe Co. Ltd.,* [1974] 1 F.C. 22 (C.A.), cited approvingly by this Court in *Canada v. Schnurer Estate*, [1997] 2 F.C. 545 (C.A.), "a right, vested in a party who is reluctant to have the tribunal finish its job, to have the Court review separately each position taken, or ruling made, by a tribunal in the course of a long hearing would, in effect, be a right vested in such a party to frustrate the work of the tribunal." [p. 34]

[11] This rule has been re-affirmed by many courts. Although her remarks were made in the context of criminal proceedings, I think McLachlin J.'s remarks in *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577 are apposite here:

. . . I would associate myself with the view that appeals from rulings on preliminary enquiries ought to be discouraged. While the law must afford a remedy where one is needed, the remedy should, in general, be accorded within the normal procedural context in which an issue arises, namely the trial. Such restraint will prevent a plethora of interlocutory appeals and the delays which inevitably flow from them. It will also permit a fuller view of the issue by the reviewing courts, which will have the benefit of a more complete picture of the evidence and the case. [p. 641]

[12] In *Szczecka v. Canada (Minister of Employment and Immigration)* (1993), 116 D.L.R. (4th) 333 (F.C.A.) Létourneau J.A. held:

. . . **unless there are special circumstances there should not be any appeal or immediate judicial review of an interlocutory judgment. Similarly, there will not be any basis for judicial review, especially immediate review, when at the end of the proceedings some other appropriate remedy exists. These rules have been applied in several court decisions specifically in order to avoid breaking up cases and the resulting delays and expenses which interfere with the sound administration of justice and ultimately bring it into disrepute**. [p. 335] See also *People First of Ontario v. Porter, Regional Coroner Niagara*

> (1992), 6 O.R. (3d) 289 (C.A.), at p. 292, “We entirely agree with the Divisional Court that it is undesirable to interrupt inquests with applications for judicial review. Whenever possible, it is best to let the inquest proceed to its resolution and then perhaps, if circumstances dictate, to take judicial proceedings.”
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> [13] Similarly, in *Howe v. Institute of Chartered Accountants of Ontario*, (1994), 19 O.R. (3d) 483 (C.A.), the Ontario Court of Appeal held that it was “trite law that the court will only interfere with a preliminary ruling made by an administrative tribunal where the tribunal never had jurisdiction or has irretrievably lost it.” [p. 490]
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> [14] Notwithstanding the general rule, counsel for Mr. Zündel argued that the two rulings made by the Tribunal constituted “special circumstances” that warranted immediate judicial review. He argued that the Tribunal's rulings were so significant that they went to the Tribunal's very jurisdiction.
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> [15] I disagree. The rulings at issue in these appeals are mere evidentiary rulings made during the course of a hearing. Such rulings are made constantly by trial courts and tribunals and if interlocutory appeals were allowed from such rulings, justice could be delayed indefinitely. Matters like bias and a tribunal's jurisdiction to determine constitutional questions or to make declaratory judgments have been held to go to the very jurisdiction of a tribunal and have therefore constituted special circumstances that warranted immediate judicial review of a tribunal's interlocutory decision. *Pfeiffer v. Canada (Superintendent of Bankruptcy)*, [1996] 3 F.C. 584 (T.D.). By contrast, rulings made by a coroner refusing to permit certain questions to be asked have been considered not to result in the loss of jurisdiction sufficient to warrant immediate judicial review of an interlocutory decision. *People First of Ontario v. Porter, Regional Coroner Niagara* (1992), 6 O.R. (3d) 289 (C.A.). Similarly, in *Doman v. British Columbia (Securities Commission)*, [1995] 10 W.W.R. 649 (B.C.S.C.), Huddart J. (as she then was) held that “[t]he fact that an evidentiary ruling may give rise to a breach of natural justice is not sufficient reason for a court to intervene in the hearing process." [p. 655] Huddart J. added:
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> > I find support for that conclusion in the policy of the appeal courts not to review a judge's ruling under the *Charter* made during the course of a trial. Substantive rights are at stake, the trial judge can be wrong, evidence may be inadmissible, the decision may be over-turned, a new trial may be required, but nothing should be allowed to interfere with the trial process, once it has begun. [p. 656]

[10] I agree with this principle. Applying it to the facts of this case indicates the appeal is premature. The Board’s ruling that evidence concerning the seven

additional alleged acts of discrimination could be introduced in the proceedings before it may be no more than an evidentiary ruling that should not be appealed on an interlocutory basis. Its ruling that the co-workers named in the narrative section of the complaint form were not parties does not amount to a special circumstance justifying divergence from the general rule that rulings made during the course of a tribunal proceeding should not be challenged until the tribunal's proceedings have been completed. It does not impact the merits of the final decision to be made.

[11] This principle of not appealing interlocutory decisions of administrative tribunals is particularly important where human rights are concerned. This is remedial quasi-constitutional legislation. It is important that human rights matters be dealt with expeditiously. In **Nova Scotia Construction Safety Association v. Nova Scotia (Human Rights Commission)**, [2006] N.S.J. No. 210, Justice Saunders states:

> [76] Recognizing the well known principle that a key objective of human rights legislation is to be remedial, the process for inquiring into and exposing acts of discrimination must be expeditious in order to be effective. Otherwise, the salutary benefit of public scrutiny, enlightenment and appropriate redress in the face of proved violations, is lost. An efficient and timely disposition of complaints is in the interest of both complainants and those whose behaviour is impugned. It is also in the public interest. People and businesses need to get on with their lives. Unlike fine wine, protracted human rights litigation does not improve with age.
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> [77] In this I find the observations of LeBel, J., although in dissent, in **Blencoe, supra**, especially apt:
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> > 140 Unnecessary delay in judicial and administrative proceedings has long been an enemy of a free and fair society. At some point, it is a foe that has plagued the life of almost all courts and administrative tribunals. It's a problem that must be brought under control if we are to maintain an effective system of justice, worthy of the confidence of Canadians. ...

[12] **Civil Procedure Rule** 62.27 provides:

> Unless otherwise ordered by the Court in its discretion, no costs shall be ordered paid by or to any party to a tribunal appeal.

[13] Considering this **Rule** and the interlocutory nature of this matter, I would dismiss the appeal as being premature without costs.

Hamilton, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.