SUPREME COURT OF NOVA SCOTIA

Citation: Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission), 2015 NSSC 118

Date: 20150415
Docket: Hfx No. 431171
Registry: Halifax

Between:

Halifax Regional Municipality, Halifax Regional Police, Don Spicer, and Caroline Blair-Smith

Applicants

v.

Nova Scotia Human Rights Commission and Robyn Atwell, and The Attorney General of Nova Scotia

Respondents

Decision on Costs

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	Written submissions only
Date of last written submissions:	February 3, 2015
Counsel:	Eric Durnford Q.C. and Hanaa Al Sharief, for the Applicants Jason T. Cooke, for the Nova Scotia Human Rights Commission

Moir J.:

Introduction

[1] The municipality and the individual applicants sought judicial review of the commission's referral to a board of inquiry of complaints formulated by the commission on the information of the individual respondent. Neither Ms. Atwell nor the province participated.

[2] The applicants alleged that the complaints formulated by the commission were ambiguous about who would be parties before the board, the complaint was deficient for not dismissing certain claims the commission seemed to find unwarranted as against various individuals, the complaint failed to make the scope of inquiry clear, and the complaint resulted from inconsistent decisions, at least as the commission's decisions were reported by the chairperson and commission counsel.

[3] Justice McDougall gave directions. He set a deadline of October 17, 2014 for the record. And these deadlines for briefs: municipality – November 21, commission – December 12, reply – January 9. He set January 28, 2015 for a hearing that was to be presided over by me.

[4] The municipality filed its brief on November 21. The commission filed a very short brief a couple days late. It conceded. The complaints against the parties other than the municipality were to be dismissed and the complaint against the municipality was to be restricted to "gender" and "race/colour".

[5] The commission and the applicants asked me to determine costs. The commission submits no costs should be ordered. The applicants submit for $10,000 plus disbursements.

Interlocutory Treatment of Complaint

[6] Robyn Atwell complained to the Human Rights Commission in June 2008. She amended the complaining document in March of 2009. She named the municipality, "and/or" the Halifax police, "and/or" Sgt. Richard Gilroy, "and/or" Sgt. James Butler, "and/or" Supt. Don Spicer, "and/or" Caroline Blair-Smith. The complaint covered a sixteen-year period starting in 1993.

[7] Sergeant Atwell alleged discrimination on the basis of her race and sex manifested in disrespectful behaviour, refusals to communicate with her, and other rude conduct. Her previous complaints and a mediation process led to harassing behaviour, which Sergeant Atwell attributes to her race and sex. Finally, she alleged she suffered retaliation after complaining more recently.

[8] I am not clear on what happened with Sergeant Atwell's information between 2009 and late 2013, when a human rights officer produced an investigation report and announced he was referring the information to the Human Rights Commission with a recommendation that the commission refer a discrimination complaint to a board of inquiry and dismiss the retaliation complaint.

[9] Six months later, the chairperson of the Human Rights Commission wrote to counsel for the respondents to advise that "the complaint as it relates to gender" was being referred to a Board of Inquiry. A couple weeks later, on May 6, 2014, the chairperson wrote to correct her earlier correspondence. Only "the complaint against Halifax Regional Municipality" would be referred to a board. This letter did not differentiate between the three kinds of complaints: racist discrimination, sexist discrimination, or retaliation.

[10] Counsel protested the long time taken to investigate and refer the allegations and the lack of clarity about dismissal as against the individual respondents and about dismissal of the retaliation complaint. Counsel also requested copies of the minutes of the commission's meeting and the materials considered by it.

[11] The commission did not respond to the protest or the request. Instead, the commission announced the appointment of a single member Board of Inquiry. The announcement indicated that the entire complaint was going to the board. The letter announcing the appointment was dated two months after the confusing letters about referral. Despite the two-month delay, it took the commission another month to deliver the letter announcing the appointment.

[12] By letters dated August 11, 2014 and August 13, 2014, Mr. Durnford for the municipality and some individuals and Ms. Buckle, now Her Honour Judge Buckle, for Sergeant Butler, now Staff Sergeant Butler, reiterated their clients' requirement for clarification. Mr. Durnford requested a new appointment referring not the entirety of Ms. Atwell's allegations, but which makes it clear that

- the only Respondent involved at the Proposed Board of Inquiry is Halifax Regional Municipality; and
- that portion of her complaint alleging retaliation against the complainant is not before the Board of Inquiry.

Similarly, Ms. Buckle, now Judge Buckle, wrote: "It is very important that my client understand the legal status of the complaint that was filed against him before this matter is set for hearing."

[13] Commission counsel, Ms. Lisa Teryl, responded to the August correspondence. She said that the commission referred the retaliation complaint and that the complaints against the individuals were not referred. She wrote of complaints being "closed", not dismissed. She enclosed a copy of the board's April motion but it did not say that the retaliation motion was closed or that the complaints against individuals were not referred.

[14] Member of boards of inquiry are appointed by the Chief Judge of the Provincial Court. Apparently, the parties have no input in that process and they do not see what information the commission provides to the court. It turns out that the commission referred Ms. Atwell's entire allegations to the Chief Judge on May 6, 2014 despite the advice of the chairperson on that same day. The Chief Judge appointed the Board of Inquiry on June 2, 2014 "to inquire into the complaint of Robyn Atwell, dated April 24, 2009 against Halifax Regional Municipality, and/or Halifax Regional Police Department and/or Richard Gilroy and/or James Butler …".

[15] So we see that, despite the chairperson's representations to counsel, the entire allegations were referred, and the individual respondents were not excluded. And, the Chief Judge appointed the Board of Inquiry to inquire into the entire

complaint including individual respondents. That was in May and June, 2014. The situation changed somewhat in September.

[16] A new referral was made in September because the sole member of the Board of Inquiry discovered he had a conflict. A new sole member was appointed "to inquire into the complaint of Robyn Atwell, dated April 24, 2009, against Halifax Regional Municipality, being the complaint to which the request relates." How the individual respondents are to be dealt with was not stated, except the appointment incorporated all of Sergeant Atwell's "complaint", which named everyone "and/or".

Pleadings

[17] The judicial review proceeding was started on September 10, 2014. The grounds allege procedural unfairness based on:

> (a) inappropriately using "and/or" in its drafting of the Complaint and in its request for the nomination of a person by the Chief Judge to be appointed by the Commission as a Board of Inquiry, thereby causing unreasonable uncertainty as to who are the proper Respondents to the Complaint or the proper Respondents in the proceeding to be conducted by the Board of Inquiry.
>
> (b) pursuant to s. 29(4) of the *Act*, not dismissing the complaint as against those Respondents to the Complaint where it concluded that a Board of Inquiry was not warranted as against them, and in particular, not dismissing the Complaint against the Halifax Regional Police, S/Sgt. James Butler, Sgt. Richard Gilroy, Superintendent Don Spicer and Caroline Blair-Smith.

> (c) failing to make clear its determination of the precise scope of the inquiry to be inquired into by the Board of Inquiry and the Respondents who will be required to respond thereto; and
>
> (d) not fulfilling its obligations under s. 2 of the *Act*, and otherwise, to ensure that the *Act* is effectively administered by rendering inconsistent decisions causing the Respondents unreasonable uncertainty as to precisely what ultimate decision the Commission made as to the scope of the inquiry to be conducted by the Board of Inquiry and as to those persons or entities required to respond thereto.

[18] The commission decided to participate and it pleaded (1) the limitation period in Rule 7.05(1) despite the contradictory reports it gave about what it had decided and (2) "the proper forum to hear the issues raised by the Applicant is the Board of Inquiry". The commission did not plead that it had provided procedural fairness, and, as I said, it conceded to the applicant when it filed a brief a few weeks before the hearing.

Submissions

[19] The submissions for the commission take a different view of the facts than I do.

[20] The commission argues that its last minute agreement to dismiss the complaints against individuals adds nothing to its earlier position that those claims had been closed. Which earlier position?

[21] While commission counsel had claimed that the complaints against individuals were "closed", the involvement of individuals, on an ambiguous "and/or" basis, appeared on the face of the commission's first referral and the resulting appointment and their involvement appeared, with the same ambiguity, as the "complaint" incorporated in both the first and the second appointment. Further, when the commission pleaded to the judicial review it said that the inclusion, or otherwise, of the individuals was for the Board of Inquiry to determine.

[22] Despite the facts that the commission did not plead it and did not argue it on the merits, the commission "disagrees with the characterization of the events as alleged led to procedural unfairness". On the contrary, "any procedural irregularities or clerical errors were corrected shortly after they were made". Until after the applicants sued, after the record was produced, after the applicants' brief was filed, and after the day for filing the commission's brief, the applicants had no way of knowing that the Board of Inquiry would never hear the complaints against the individual applicants and would never hear the retaliation complaint against anyone.

[23] In view of the facts that the complaint has been outstanding for seven years and the referral decision was made eight months before the concession, I do not find that "errors were corrected shortly after they were made".

[24] "Finally, the commission respectfully disagrees that there have been inconsistent decisions as alleged in the grounds of judicial review." "[L]etters provided by Commission staff or commissioners conveying decisions" … "are not considered decisions". That may be so, but for the issue of costs what the commission told the parties it had decided may be more important than the decision itself.

[25] On this point, the commission says that it "decided in April 2014 that the complaint would be referred based on race/colour and gender against HRM only." Respectfully, that is not what the motion said, that is not what the referral to the Chief Judge said, and that is not what the appointment said. Therefore, it does not follow that "The Commissioners approved a motion with the same result in December 2014." On the contrary, the chairperson failed to respond to counsel's correspondence in May, and the commission thereby caused needless expense.

[26] The applicants point out that human rights processes have to be conducted "in a manner that is entirely consistent with the principles of natural justice and

procedural fairness": *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, para. 105. No deference is owed when this court reviews an administrative decision for procedural fairness: *Bowater Mersey Paper Co. v. Communications, Energy and Paperworkers Union of Canada, Local 141*, 2010 NSCA 19 at paras. 30 – 32. With those points in mind, the applicants submit:

> It is axiomatic that a key element of the duty of procedural fairness, where an administrative body like the Commission is exercising discretion as to whether the inquiry warrants the filing of a complaint and controls the drafting of the complaint, is to ensure that the initial respondents named in a complaint (i) know who the ultimate respondents (those required to respond at the BOI stage) are, and (ii) the precise scope of the case they will have to meet.

[27] The applicants refer to judicial authorities disapproving of the symbol "and/or". Professor Driedger also disapproved. "There is no need for it, and it usually creates ambiguity": Elmer A. Driedger, Q.C., *The composition of legislation*, 2nd ed. Revised (1976, Ottawa, Minister of Supply and Services Canada), p. 130. Mr. Dick collected some colourful criticisms in his excellent book, Robert C. Dick, Q.C., *Legal Drafting*, (1972, Carswell), starting at p. 102 including Justice Pigeon's "un chose qui répugne au génie de la langue, aussi bien en anglais qu'en français".

[28] The applicants refer to many authorities that recognize the importance of being included in, or excluded from, a human rights complaint, especially one with

charges of racism and sexism. They also refer to authorities about issue estoppel that refer to the importance of finality and they draw an analogy to the finality of being excluded from a human rights complaint.

[29] In the applicants' view, the commission's motion did not refer the retaliation complaint. I am not sure it would be read that way, in light of the wording of the referral and the appointment.

[30] The applicants complain about the inconsistent statements made on behalf of the commission.

[31] In light of those considerations, the applicants submit that the commission's decisions were unfair because it formulated a complaint that was ambiguous as to who was a party and it made inconsistent statements about what the complaint meant. On that basis, they requested an order requiring the commission to refer a complaint against the municipality only on the bases of discrimination on sex and race only, dismiss the complaint against the individuals, and award costs of $2,000 plus disbursements.

[32] When the commission conceded on the first two of these, the applicants made further submissions on costs. Relying on *Dalhousie University v. Aylward*, 2001 NSSC 51 and *Tessier v. Nova Scotia (Human Rights Commission)*, 2014

NSSC 189, the applicants sought a substantial indemnity. Their actual expenses exceed $19,000 and they sought $10,000 plus $885.33 for disbursements.

[33] The Human Rights Commission relies on authorities as standing for the proposition that an award of costs against a tribunal is rare or exceptional. It cites *Business Watch International Inc. v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 79; *York Advertising Ltd. v. Ontario (Human Rights Commission)*, [2005] O.J. 5066 (Ont. Div. Ct.); *Court v. Alberta (Environmental Appeal Board)*, 2003 ABQB 912, and *St. Peters Estates Ltd. v. Prince Edward Island Land Use Commission*, [1991] P.E.I.J. No. 40. The Human Rights Commission also argues that it committed no procedural unfairness.

Disposition

[34] In my opinion, a decision-maker is excepted from the general practice on costs only when the decision-maker limits its participation to defending its jurisdiction. The principle that costs normally follow the event applies when a decision-maker fully participates in a judicial review and engages the merits of the case for review. The authorities relied on by the Human Rights Commission are consistent with this opinion.

[35] *Business Watch* notes at para. 3, "In these proceedings, the Commissioner confined himself to making submissions relative to the standard of review and jurisdictional issues." While the Divisional Court in *York Advertising* stated an unrestricted principle in para. 2, "… it is only in very rare circumstances that this Court should award costs against a statutory tribunal", its basis for ordering costs was "The Tribunal was fully engaged in the adversarial process, and was wholly unsuccessful on each issue argued" (para. 4). *Court* states the principle with a restriction at para. 13: "So costs are generally not awarded to or against an administrative decision-maker that, on judicial review of its decision, limits its submissions to issues of its jurisdiction and makes no submissions on the merits." And, at para. 15 "… the Board limited its submissions to issues of its jurisdiction and made no submissions on the merits." *St. Peters Estates Ltd*. says at para. 14: "costs will not be, and should not be, awarded against such a tribunal, by reason only of a loss of jurisdiction on its part" unless the tribunal was "capricious, arbitrary, lacking in good faith, or otherwise running contrary to the rules of natural justice".

[36] These cases do not suggest that the ordinary practice on costs is suspended for a decision-maker, such as the Human Rights Commission, who fully participates in a judicial review and goes beyond defending its jurisdiction. Our

Rule 7.08 requires a decision-maker who wishes to participate in a judicial review to file a notice of participation. The commission did so. Indeed, it was the only respondent who did so. Without that, there would have been no contest. Its grounds had nothing to do with jurisdiction.

[37] *Dalhousie University v. Aylward* is an example of a case in which substantial costs were awarded against an administrative decision-maker although jurisdiction was the only issue. The decision-maker, the same commission as in the present case, conceded at the last minute. Of the Human Rights Commission, Scanlan J., now Scanlan J.A., said at para. 19:

> Their decisions can have far reaching consequences for any party who chooses to file a complaint or who is forced to defend a complaint filed with the Commission. The Human Rights Commission must act carefully, taking into account the import of any decision they might make.

[38] *Tessier* does not support my opinion that immunity from costs of an administrative decision-maker is restricted to cases in which a tribunal does not fully participate, but only defends its jurisdiction. Justice LeBlanc, at paras. 11 and 18, applied the immunity across the board. He found exceptional circumstances, part of which are reflected in his comments at para. 16:

> Those individuals who file a complaint with the [Human Rights] Commission are entitled to expect that their matters will be conscientiously reviewed and

> investigated in accordance with the rules of procedural fairness and the Commission's own policies.

[39] The Human Rights Commission fully participated in this proceeding. It did not restrict itself to jurisdiction. Indeed, it pleaded a limitation period, and it pleaded that the Board of Inquiry, rather than this court, should determine who the parties were. Despite the fact that the notice for judicial review raised procedural unfairness as the only basis for intervention and despite conceding at the last minute, the commission argued against a finding of procedural unfairness in its costs submissions.

[40] On this basis alone, I apply Rule 77 – Costs. The judge has a broad discretion: Rule 77.02(1), and may order "one party pay costs to another": Rule 77.03(1), but "Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise": Rule 77.03(3). In light of the late concession, I would exercise my discretion by ordering the commission pay costs to the applicants.

[41] A few alternative thoughts about procedural unfairness. As I said before, the commission's submission on the facts differs from my assessment. I find that from 2008 or 2009 to April 2013 the applicants had allegations of racism and sexism hanging over their heads. I find that when the time finally came for them to find out whether the allegations would turn into formal complaints, the commission

produced documents that left that question ambiguous as regards the individual applicants. According to the commission's own notice of participation, the ambiguity was not to be resolved until the individual applicants faced the Board of Inquiry on charges of discriminatory racism and sexism.

[42] Ignoring for the moment my opinion that exemption from the ordinary practice on costs for an administrative decision-maker is only for cases of partial participation to defend jurisdiction, procedural unfairness is a well-established ground for costs: *Pink v. Davis*, 2011 NSSC 237, at para. 109.

[43] In *Pink v. Davis*, Justice Warner helpfully summarized the principles for establishing the content of the duty of fairness arising from *Canada (Attorney General) v. Mavi*, 2011 SCC 30: para. 67. It was the commission's role to investigate Sergeant Atwell's information, decide whether to advance a complaint, and, if so, frame the complaint. The framing of a human rights complaint should tell the respondent the charge they will face before the Board of Inquiry.

[44] In this case, the commission failed to decide whether or not individual applicants would face charges. The commission produced ambiguous referrals, which led to an ambiguous appointment. It refused reasonable requests to correct

its mistakes and even pleaded that it was for the Board of Inquiry to determine whether charges were against the individual applicants or just the municipality.

[45] The commission's behaviour suffered from two kinds of procedural unfairness, one in its own initiating process and the other in the process it initiated, the Board of Inquiry. Firstly, it ignored the applicants' attempts to get it to look at the serious mistakes it made. Secondly, it caused the individual applicants to face an inquiry into charges of racism and sexism without knowing whether or not they were charged.

[46] Again, I echo the statements of Justice Scanlan in *Aylward* and, revised to include respondents, those of Justice LeBlanc in *Tessier*. The unfairness of the commission had serious consequences for the individual applicants. It should pay the costs of the review.

[47] At what amount? Rule 77.06(3) applies Tariff C to judicial review, but that assumes a hearing. Tariff F applies when a case is settled except for costs, but it is driven by the monetary amount of a settlement.

[48] The tariffs allow me to assess an artificial "amount involved" based on "the complexity of the proceeding" and "the importance of the issues". The proceeding was not complex. Echoing the comments of Justice Scanlan in *Aylward*, and

extending those of Justice LeBlanc in *Tessier* to respondents, the interests of the individual respondents in knowing whether they were facing allegations of racism and sexism were profoundly important. Valuing those interests at $100,000 would produce an award of $5,000. However, I find that valuation distastefully artificial.

[49] "When this subjectivity exceeds a critical level, the tariff may be more distracting than useful": Justice Fichaud in *Armoyan v. Armoyan*, 2013 NSCA 136 at para. 18. Rule 77.08 permits "lump sum costs instead of tariff costs." When the critical level is exceeded, "…it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum", also para. 18 of *Armoyan*. That is the situation here.

[50] The purpose of costs is to provide a substantial, but partial, indemnity against what would ordinarily be charged by any competent lawyer: *Tessier*, para. 20. This reminds us of the distinction made in Ontario between solicitor and client costs and solicitor and their own client's costs.

[51] In my assessment, $10,000 provides a substantial but partial indemnity against what would ordinarily be charged by a competent lawyer for services of the kind required for the applicants on this judicial review.

Conclusion

[52] The commission will pay costs to the applicants in the amount of $10,000 plus disbursements of $885.33.

Moir J.