IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Roy v. Ponee*, 2008 NSSC 407

Date: 20080915
Docket: SH 297332A
Registry: Halifax

Between:

Mary Ann Roy

Appellant

and

Angela Ponee

Respondent

Judge: Justice M. Heather Robertson

Heard: September 15, 2008, in Halifax, Nova Scotia

Written Decision: February 16, 2009 **(Orally: September 15, 2008)**

Counsel: Mary Ann Roy, self-represented for the appellant
Barbara Darby, for the respondent

Robertson, J: (Orally)

[1] Ms. Mary Ann Roy the appellant, appeals the decision of Small Claims Court Adjudicator J. W. Stephen Johnston rendered May 20, 2008 on the following grounds:

> The Adjudicator accepted that the nail program had not been registered. The program was thus provided contrary to section 26 of the regulations made under the *Private Career Colleges Act.* The Adjudicator did not deal with the argument that the program was illegal in his final decision at all. In any event, we say that the Adjudicator made an error of law by not ordering the return of our money because the program was illegal.

[2] Ms. Roy is self-represented. The statutory grounds of appeal as set out in the *Small Claims Court Act* s. 32(1) are as follows:

> 32 (1) A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of
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> (a) jurisdictional error;
>
> (b) error of law; or
>
> (c) failure to follow the requirements of natural justice,
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> by filing with the prothonotary of the Supreme Court a notice of appeal.

[3] The grounds of appeal in the case are therefore error in law as articulated by Ms. Roy and possibly the failure to follow the requirements of natural justice which Ms. Roy did not specifically address.

Standard of Review

[4] This court is limited in the scope of its inquiry on a Small Claims Court appeal. As discussed by Justice LeBlanc in *MacIntyre v. Nichols,* [2004] NSSC 036:

> [23] I do not have jurisdiction to rehear the case and to make my own findings of fact. If the findings of fact of the adjudicator are reasonable on their face there is no basis on appeal to substitute for the decision of the adjudicator one I would

> prefer to make. It is evident that I did not have the opportunity to hear the evidence and make findings of reliability and credibility as did the adjudicator.

[5] I refer to the decision of Saunders, J. (as he then was), in *Brett Motors Leasing Ltd. v. Welsford,* [1999] N.S.J. No. 466 (S.C.). He stated at para. 14:

> 14 One should bear in mind that the jurisdiction of this Court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this Court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[6] So there has to be a clear error on the adjudicator's part before this Court will interfere.

[7] Ms. Roy relies on and cites the case of *Donald v. Canadian College of Acupuncture and Natural Medicine Ltd.,* 2008 NSSM 46 and upon the Provincial Statutes and Regulations in particular *Private Career Colleges Regulation Act.*

[8] The outline of proceedings as stated by the respondent in her factum provide a useful background:

> 1. The four claimants in the Small Claims action were students in a 250 hour course offered by Angela Ponee, Academy of Cosmetology ("the Respondent"). The course was a nail technician course. The course was started by the Claimants in February, 2006 and completed in or about July 2006.
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> 2. All four Claimants received their diplomas from the Respondent.

3. All four Claimants received their license as a nail technician from the Cosmetology Association of Nova Scotia, the governing body for the cosmetology industry in the province. Two Claimants received their license after rewriting the provincial examination. One Claimant received her license after her first writing of the provincial examination. The Appellant initially failed a portion of her provincial examination but was passed after an appeal to the Cosmetology Association (October Decision at paras. 10 and 11).

4. The Claimants filed their Small Claims action on February 7, 2007. The pleading was for breach of contract: "failure to fulfil contract, failure to teach us what we need to know for our provincial exam."

5. The Adjudicator stated that "the initial action claimed for loss of tuition and damages arising out of the failure to fulfill the contract that each of these individuals had with the [Respondent]" (October Decision at para. 3).

6. The Adjudicator stated that "the essence of these individuals' claims essentially arose out of their belief that they did not recive (sic) what they contracted for with respect to the admission to a nail technician course with the [Respondent]" (October Decision at para. 5).

7. The matter was heard on April 5, 2007; May 22, 2007; June 5, 2007; June 11, 2007; February 5, 2008; and March 11, 2008. There were over approximately 20 hours of hearing.

8. The final decision was rendered May 20, 2008. Paragraph references are to this decision unless otherwise noted.

Issues

[9] The issues before the court are:

1. Did the adjudicator err by "not dealing with the argument that the program was illegal in his final decision at all?"

2. Did the adjudicator err in law "by not ordering the return of the Appellant's money because the program was illegal?"

3. Was there a denial of natural justice?

Issue Number One:

[10] The adjudicator's decision of October 4, 2007 and his report of May 20, 2008, constitute his findings with respect to the operation of the statute - *Private Career Colleges Regulation Act.*

[11] He stated at para. 52 of his report:

> In my earlier decision, I commented extensively on this issue of tuition refunds and how I did not believe this was an instance of that nature. I continue to believe that to be the case in this instance.

[12] Accordingly, the respondent submits this issue was canvassed by the final decision of the adjudicator and I would agree with the respondent in that respect.

[13] In para. 24 of his October 4, 2007, decision he wrote:

> 24. I heard evidence from a number of sources, some of which conflicted in regards to the reasons why this course was not registered. I do find however that further to the legislation, the Academy of Cosmetology was in fact registered. Although there were some references suggesting only entry level courses need to be registered, there was evidence from Ms. Sharky indicating that she had not realized that the course was not registered and it appeared more of an oversight than anything else. I do not find that this issue has any significant effect on the pending non-suit action.

[14] I find myself in agreement with the adjudicator on this point. The adjudicator's authority to provide relief is governed by the *Small Claims Court Act:*

> Jurisdiction
>
> 9 A person may make a claim under this Act
>
> (a) seeking a monetary award in respect of a matter or thing arising under a contract or a tort where the claim does not exceed twenty-five thousand dollars inclusive of any claim for general damages but exclusive of interest;

> (b) notwithstanding subsection (1) of Section 5, for municipal rates and taxes, except those which constitute a lien on real property, where the claim does not exceed twenty-five thousand dollars exclusive of interest;
>
> (c) requesting the delivery to the person of specific personal property where the personal property does not have a value in excess of twenty-five thousand dollars; or
>
> (d) respecting a matter or thing authorized or directed by an Act of the Legislature to be determined pursuant to this Act. R.S., c. 430, s. 9; 1992, c. 16, s. 117; 1999 (2nd Sess.), c. 8, s. 16; 2002, c. 10, s. 38; 2005, c. 58, s. 1.

[15] We know that the adjudicator made very lengthy findings of fact which in my view provide a cogent and comprehensive explanation of his findings.

[16] He found among other facts:

(a) The appellant had entered into a contract with the respondent (para.10).

(b) The appellant had access to and/or received a copy of the syllabus for the program (para. 13).

(c) He found that the instructor, Raylene Tarbox, had all the appropriate qualifications from an academic perspective to teach the course (at para. 20). He accepted the evidence of Dana Sharky, Chair of the Provincial Examining and Licensing Committee for the Cosmetology Association of Nova Scotia, who testified that Ms. Tarbox was qualified.

(d) He found that the respondent made "arrangements for outside consultants to attend and provide additional training in the area of artificial nails" once complaints were received from the students.

(e) The adjudicator found that there was "nothing in the documentation that confirmed that responsibility" to provide students to practice on by the respondent (at para. 17). He found there was not enough evidence to indicate that the respondent was obliged to provide "real people" for practice either (at para. 17). There were no restrictions on students bringing in their own models (at para. 18).

(f) The adjudicator found that the respondent's director clearly responded to the concerns the students expressed and added additional nail technologists into the mix to offset the concerns the students had.

[17] The adjudicator made finds of credibility against the appellant after she wrote a letter in which she "demonstrates a desire to continue on with the Defendants (sic) school to further her education in aesthetics" (at para. 42).

[18] The adjudicator did not accept the appellant's characterization of the instructor as unqualified or the course useless.

[19] He found the respondent had substantially performed their obligation under the contract although acknowledged the course had certain failings.

[20] He found that the claimants all received their license with respect to being a nail technician as regulated by the Province of Nova Scotia (at para. 56).

[21] He found that the appellant wrote her provincial examination and while she failed a portion of the examination, she appealed the failure and was able to convince the Licensing Board of the Cosmetology Association of the Province of Nova Scotia that she was in fact successful (at para. 33). She satisfied the examining board "of her abilities, who then provided her with a pass and Certification of Nail Technician" (October decision at para. 10).

[22] Based on the adjudicator's extensive finds of fact and his addressing the issue of the contract made between the respondent and the appellant and also his consideration of the legislative scheme in relation to the contract entered into by the appellant, I can find no error in law and no failure to properly consider the role of the registrator of this programme under the legislative scheme.

Issue No. 2:

[23] Did the adjudicator err in law "by not ordering the return of the appellant's money because the program was illegal?

[24] I agree with the respondent that the adjudicator did not have jurisdiction to make a finding respecting the course offered by the respondent under the *Private Career Colleges Regulation Act.*

[25] The jurisdiction of the Small Claims Court is limited to a return of money or property pursuant to contract or tort, or a matter authorized by statute to be determined under the *Small Claims Court Act*.

[26] Only the Minister of Education may remedy a breach of the *Private Career Colleges Regulation Act:*

> 32 (1) The Minister may suspend or cancel a program or certificate of registration by giving written notice including the reasons for the decision and the effective date of suspension or cancellation to the operator of the private career college where, in the opinion of the Minister,
>
> ...
>
> (h) the operator has failed to comply with this Act or the regulations.

[27] There is no express authority under the *Private Career Colleges Regulation Act* for a student to seek a remedy in the Small Claims Court.

[28] There is no express authority in the *Private Career Colleges Regulation Act* for any student remedy besides mediation or access to the completion fund (s. 33), which are within the authority of the Minister of Finance.

[29] The *Act:*

> 18 (1) In the event of a dispute between a student and an operator and with the consent of the student or the operator, the Minister may appoint and pay for a mediator to assist the student and the operator in resolving the dispute and the decision of the mediator is final.
>
> (2) Any mediation conducted pursuant to this Section shall be conducted in accordance with the procedures prescribed in the regulations.

[30] There is ample evidence in my view that the Department of Education was made aware of the complaints of the appellant.

[31] The Department of Education did not choose to provide the appellant with a remedy either by appointing a mediator or by making a refund of tuition.

[32] Obviously the Department of Education confirmed the role of the cosmetology licensing authority to investigate and report any short comings with the programme subsequent to a complaint being made.

[33] The licensing authority did not find the programme wanting and this is evidence accepted by the adjudicator and a finding made by the adjudicator.

[34] The British Columbia case *Cohen v. Keeran (c.o.b. Counsellor Training Institute of Canada),* [2004] B.C.J. No. 121 addressed the issue of the limitations of the Small Claims Court in relation to the British Columbia *Private Post Secondary Education Act*. The facts are analogous on point.

[35] *Walker v. Scotia Career Academy Ltd.,* [1999] N.S.J. No. 232 is also relevant as it is very clear that the appellant completed not just two-thirds of the programme but in fact 100 percent of the programme and is ineligible for a rebate of tuition under the *Act*.

[36] The adjudicator's findings fly in the face of the appellant's assertion that the course was "useless" and "no good to me." Indeed, the failure to register clearly did not result in unqualified persons teaching this programme or in the appellant failing to graduate from the programme and succeed in gaining accreditation as a licensed nail technician.

[37] These are findings of fact by the adjudicator that I cannot interfere with and which are supported by the evidence that was before him and chronicled in such detail in his decision.

[38] I also find that *Donald v. Canadian College of Acupuncture and Natural Medicine Ltd., supra,* is distinguishable on its facts and does not assist the appellant in advancing her appeal.

[39] The appellant was found by the adjudicator to have received substantially the whole benefit under the contract and no fundamental breach was found.

[40] There is no reason for me to disturb this decision. It is in my view without error or failure on the grounds of denial of natural justice.

[41] His conclusions were sound and were reached after a full and fair vetting of the evidence before him.

[42] In the result, the appeal is dismissed.

Justice M. Heather Robertson