

SUPREME COURT OF NOVA SCOTIA

Citation: Brant v. Nova Scotia (Human Rights Commission), 2013 NSSC 56

Date: 201302015

Docket: Bwt. 398760

Registry: Bridgewater

Between:

Raymond James Brant

Applicant

v.

Nova Scotia Human Rights Commission and
Nova Scotia Power Inc.

Respondents

Judge: The Honourable Justice C. Richard Coughlan

Heard: December 18, 2012 at Bridgewater, Nova Scotia

Written Decision: February 15, 2013.

Counsel: Raymond James Brant, self represented Applicant
Lisa Teryl, for the Nova Scotia Human Rights
Commission
Rebekah L. Powell, and Daniel McMillan, Articled Clerk
for Nova Scotia Power, Inc.

[1] Raymond James Brant seeks judicial review of the decision of David W. Shannon, Director and CEO of the Nova Scotia Human Rights Commission (Commission) dismissing Mr. Brant's complaint against Nova Scotia Power Inc. (Nova Scotia Power).

[2] In October 2009, Raymond James Brant responded to an employment posting by Nova Scotia Power for three CADD specialists. Mr. Brant, a draftsman, was given a job interview. Mr. Brant was not successful in obtaining one of the positions. Mr. Brant who has a physical disability considered his disability was a factor in his not being hired.

[3] Mr. Brant completed an intake form with the Nova Scotia Human Rights Commission dated January 17, 2010 which was received by the Commission on January 19, 2010. By letter dated October 27, 2010 Mr. Brant was informed that the Human Rights Officer assigned to his case was unable to recommend the file be referred for a formal complaint. Mr. Brant requested a review of that decision. Krista Daley, then Director and CEO of the Commission by letter dated February 3, 2011 overturned the decision of the Human Rights Officer and returned Mr. Brant's file to the dispute resolution unit for further processing. Mr. Brant did not file a formal complaint pursuant to the *Human Rights Act*, R.S.N.S. 1989, c. 214 within 12 months of the action complained of as required by section 29 of the *Act*. Mr. Brant requested an extension to the time in which he could file a complaint. Nova Scotia Power filed an objection to the extension being granted. Mr. Brant was given the extension for an additional period of time to make a complaint and was notified of the decision by letter dated November 8, 2011.

[4] Mr. Brant then filed a formal complaint on November 16, 2011. A Resolution Conference was held February 21, 2012. Mr. Brant made submissions subsequent to the Resolution Conference. Nova Scotia Power provided the Commission with submissions following the Resolution Conference by letter dated February 22, 2012. The Human Rights Officer recommended to the Director and CEO of the Commission the complaint be dismissed as it raised no significant issue of discrimination. The parties were notified of the recommendation by letter dated February 27, 2008.

[5] By letter dated May 24, 2012, David W. Shannon, Director and CEO of the Commission notified the parties of his decision the complaint be dismissed as it raises no significant issues of discrimination.

[6] In the Notice for Judicial Review Mr. Brant sets out the grounds for the review which are attached to this judgment as an Appendix.

[7] When asked at the hearing what procedural errors were made by the Commission, Mr. Brant identified the following. The Commission failed to establish the qualifications of the candidates granted the positions for which he applied. In both his written and oral submissions Mr. Brant identified the failure to obtain the qualifications of the successful candidates as the main or specific reason for seeking Judicial Review.

[8] Other procedural errors identified by Mr. Brant were:

1. The failure of one of the members of the interview panel to attend the Resolution Conference conducted by the Commission and the Commission's failure to contact that person.
2. Nova Scotia Power made a submission after the resolution conference which Mr. Brant did not receive.
3. The Commission did not contact Nova Scotia Power for fifteen months from the date Mr. Brant completed a Commission Intake Form outlining his complaint.
4. The Commission did not complete an investigation report concerning Mr. Brant's complaint.
5. Mr. Brant also addressed the issue that his interview was a behavioural interview but does not say that was a procedural error.

[9] The questions for the court to address is whether Mr. Brant was denied procedural fairness in the Commissions's investigation of his complaint and

secondly, if Mr. Brant was accorded procedural fairness did the Commission's decision meet the appropriate standard of review.

Procedural Fairness

[10] When dealing with issues of procedural fairness a court must determine whether a requirement of procedural fairness applies, and if it does the court decides if there was a violation of the duty without deference. In addressing the issue, Fichaud, J.A., in giving the court's judgment in *Communications, Energy and Paperworker's Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.* 2010 NSCA 19 stated at paragraphs 30, 31 and 32:

30 The judge [para. 8] gave no deference to the arbitrator in the judge's assessment of procedural fairness. With that, I agree. I note parenthetically that deference is not withheld because of any standard of review analysis. The judge is not reviewing the tribunal's ultimate decision, to which a "standard of review" is accorded. Rather, the judge assesses the tribunal's process, a topic outside the typical standard of review analysis. In *Nova Scotia (Provincial Dental Board) v. Creager*, 2005 NSCA 9, this court said:

[24] Issues of procedural fairness do not involve any deferential standard of review: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74 per Arbour, J.; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paras. 100-103 per Binnie, J. for the majority and at para. 5, per Bastarache, J. dissenting. As stated by Justice Binnie in *C.U.P.E.*, at para. 102:

The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.

This point is also clear from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Justice L'Heureux-Dubé (paras. 55-62) considered "substantive" aspects of the tribunal's decision based on the standard of review determined from the functional and practical approach but (para. 43) considered procedural fairness without analyzing the standard of review.

[25] Procedural fairness analysis may involve a review of the statutory intent and the tribunal's functions assigned by that statute: eg. *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at paras. 21-31; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624 at paras. 31-32. But, once the court has determined that a requirement of procedural fairness applies, the court decides whether there was a violation without deference.

To the same effect: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74; *Nova Scotia v. N.N.M.*, para. 39; *Allstate Insurance Company v. Nova Scotia (Insurance Review Board)*, 2009 NSCA 75, para. 11.

31 From the same perspective, in *Kelly*, Justice Cromwell described the two step approach to procedural fairness analysis:

[19] The judge's concern was not that the Board improperly exercised its discretion or that any decision or ruling it made was in itself reviewable. Those are the kinds of matters that we typically think of as engaging the standard of judicial review. The standard of review is generally applied to the "end products" of the Board's deliberations, that is, to its rulings and decisions: see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at para 102. In this case, the judge was concerned that the process followed by the Board had resulted in unfairness -- in other words, that the Board had failed in its duty to act fairly. This concern goes to the content of the Board's duty of fairness, that is, to the manner in which its decision was made: *C.U.P.E.* at para. 102.

[20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty.

32 Though the reviewing judge does not conduct "standard of review" analysis for procedural fairness, the judge must still determine the content of the duty of fairness. That duty does not just replicate the courtroom model. The duty's content

is context specific and depends on various factors, including the tribunal's delegated room to manoeuvre that is contemplated by its governing statute, the nature of the tribunal's decision and the decision's importance to the parties: *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, at para. 21-31; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624, at para. 31-32; *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 79; *Moreau-Bérubé*, para. 74-75; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para. 21-28; *Kelly*, para. 21-33; *Creager*, para. 25, 100-107; *Nova Scotia v. N.N.M.*, para. 40-98 and authorities there cited.

[11] Mr. Brant says the Commission should have reviewed the qualifications of the successful candidates. He says it was necessary for the Commission to have the qualifications to make its decision. The job description produced by Nova Scotia Power sets out the following:

Skills, Capabilities and Experience:

Community college education with a diploma in Architectural, Civil, Mechanical or Electrical drafting technology or equivalent post secondary educational training. Three years skilled knowledge in Bentley's Computer Aided Design Drafting applications: Microstation V8 or newer, Elementary Electrical Diagrams and Iras/B for raster editing. Experience in substation design and layout of primary equipment and structures and electrical protection and control schematics. Knowledge in transmission line design and civil engineering technology would be an asset. You must be willing to participate in and successfully complete training packages related to CADD systems.

[12] In his application Mr. Brant stated he did not have three years skilled knowledge in Bentley's Computer Aided Design Drafting application. Mr. Brant says the job description produced by Nova Scotia Power is not the job description to which he responded but he did not produce any other job description.

[13] Mr. Brant's position was set out in a letter to Mr. Sean Hardy, the Human Rights Officer dealing with his claim dated February 22, 2012 when he stated:

... "There is a strong disagreement on the actual positions which were being considered in this competition. My position is that I applied because Nova Scotia Power was looking for people skilled in 3D Solid Modelling. I further state that in the requirements I read that Bentley was considered an asset. I have been made

aware on a previous occasion that the position of Nova Scotia Power was that these were all in the electrical field. At that time I was also provided information as to the requirements for this position. I do not question that these qualifications were one part of the three positions that were being offered. From my recollection when reading information on these positions you would click on the field which you wish to gain the qualifications on, electrical, physical or civil. I would also state that although the position for electrical may state that Bentley was a must, the field for physical lists Bentley as an asset. It would require an inquiry as to the actual positions and what fields were being considered in the competition I applied for.

In the discussion during the conference it became apparent that Nova Scotia Power also employs drafters in both the civil and physical disciplines. Nova Scotia Power's explanation was that people were first employed in the development of electrical schematics before they could be considered for the other disciplines. It is interesting that in their Interview Guide they pose the question, "If you had to choose a discipline between Electrical, Civil or Physical, what would be you (sic) preferences and why"? I was asked out of the three positions they were filling which was I most suited for, electrical, physical or civil. At the time I enquired what they meant by physical. They explained that this was what they considered to be structural/mechanical. I stated that this would be my strongest field. They all wholeheartedly agreed. It should also be made known that at the interview I expressed that electrical was my weakest."

[14] In a letter to Mr. Brant and Nova Scotia Power's counsel dated February 27, 2012 containing his recommendation, Mr. Brant's complaint be dismissed Mr. Hardy stated:

Summary of the response

...."The Respondent states that the decision not to hire the Complainant was based solely on his work experience, which they state was not a good fit for the position(s) applied for. Copies of the job posting (both the plain text document and a copy of the online posting) were provided, which detailed that the positions posted were electrical in nature, an area of expertise which they indicate the Respondent did not possess sufficient mastery of. The job posting also notes certain specific requirements for the position, specifically experience in both electrical design and in proficiency with specific software - which the Complainant did not possess, and the successful candidates did." ...

The Respondent notes that all questions asked of the Complainant during his interview were also asked of all other applicants, and provided a copy of the

interview matrix used for all applicants.

The Respondent provided examples of the work currently being done by the successful applicants, an intricate electrical schematic in support of their assertion that the positions were electrical in nature. They noted that each of the successful applicants had the relevant skills and the requisite experience and proficiencies, and that it was this, rather than the Complainant's disability, which determined who would be successful in the posting.

The Respondent indicated that the email the complainant received was a "form letter" email, one with only the names and addresses changed, and that each unsuccessful applicant received the same email.

Rationale for referring the complaint to the Director and CEO for a decision

The Respondent has successfully demonstrated, via the job posting (which was authenticated by one of its authors) that the position required both significant electrical experience and proficiency with specific electrical drafting software. The Complainant has acknowledged, both during the Resolution Conference held on February 20, 2012 and in his submissions to the Commission, that he had no proficiency in the relevant software, and that his electrical experience is limited. The Complainant asserts that the job posting referenced was not the one he applied for, but is unable to provide any evidence of this." ...

[15] Mr. Hardy did not review the qualifications of the successful candidates as based on his investigation he did consider it was necessary for him to do so - his determination Mr. Brant did not have the qualifications the position required.

[16] Mr. Brant raises the fact that the first Human Rights Officer assigned to his complaint, Rosemarie Cadogan recommended Mr. Brant's complaint be dismissed for failure to establish a *prima facie* case of discrimination. Mr. Brant requested a review of the decision. Upon review Krista Daley, the Director and CEO of the Commission overturned Ms. Cadogan's decision and returned Mr. Brant's file to the dispute resolution unit for further processing. Any errors regarding delay in processing Mr. Brant's complaint were addressed by granting Mr. Brant an extension of the time limit allowing him to file his complaint.

[17] Another alleged error is the failure of the Commission to contact a Ms. Fillmore who was one of the members of the panel which interviewed Mr. Brant. Considering the findings of Mr. Hardy, it is apparent why he did not consider it

necessary to contact Ms. Fillmore - his determination Mr. Brant did not have the qualifications the position required.

[18] Mr. Brant says the Commission did not complete an investigative report in connection with his complaint. Nova Scotia Power says the absence of an investigative report is not before the court as its absence was not set out in the Notice for Judicial Review. In any event, the above mentioned letter of Mr. Hardy dated February 27, 2012 reports Mr. Hardy's findings and recommendations following the resolution conference.

[19] Mr. Hardy's recommendation to Mr. Shannon, Director and CEO of the Commission is dated May 11, 2012. Mr. Brant says Mr. Shannon's decision to accept Mr. Hardy's recommendation was made on May 11, 2012 three minutes after Mr. Shannon received the request. In fact, there are a number of e-mails in the file which show the decision was not made on May 11. One e-mail dated May 13, 2012 from R. Ritchie Wheeler, Special Assistant to the Director and CEO to Mr. Brant provides:

"I wish to confirm that your file is now with Mr. Shannon's office for review of the recommendation of Mr. Sean Hardy that your complaint be dismissed pursuant to s. 29(4)(c) of the NS Human Rights Act. Unfortunately, due to scheduling issues the Director and CEO will not be able to conduct this review until next week.

Once this review is complete you will be notified of the outcome expeditiously."

[20] The decision of the Director and CEO is dated May 24, 2012. There is no evidence Mr. Shannon signed Mr. Hardy's memorandum on May 11, 2012 or made his decision that day.

[21] Counsel for the Commission addressed a procedural irregularity which occurred during the investigation of Mr. Brant's complaint. Subsequent to the resolution conference, Nova Scotia Power's counsel filed a submission to the Commission by letter dated February 22, 2012. Mr. Brant was not given a copy of the submission. Procedural fairness requires a complainant receive copies of any submission filed by the party which is the subject of a complaint so that the complainant has the ability to respond.

[22] Does this error by the Commission require Mr. Brant's complaint be referred back to the Commission for reconsideration? The issue of procedural errors was addressed in *Administrative Law in Canada, Fourth Edition* by Sara Blake where the author stated at page 23:

“To determine whether fair procedure has been followed, one must examine the entire proceeding. Although procedural irregularities at one stage may appear to have prejudiced a party's rights, they may diminish in significance if the party has been accorded a full and fair hearing at a later stage in the proceeding. A tribunal may cure its procedural defaults. In the end, the party may be seen not to have suffered any prejudice.”

and at page 214:

The question of procedural fairness is concerned with the manner in which the tribunal went about making the decision.” . . .

A court will interfere with a tribunal decision because of procedural errors committed by the tribunal only if those errors resulted in manifest unfairness to the right of a party to be heard. Minor procedural lapses that do not result in unfairness to the complaining party will not persuade a court to overturn the tribunal decision.” ...

[23] The failure to provide Mr. Brant with a copy of Nova Scotia Power's post resolution conference submission did not result in manifest unfairness to Mr. Brant's right to be heard. After receipt of the post resolution conference submission Mr. Hardy gave notice of his report and recommendation to the Director and CEO of the Commission to the parties. That report, Mr. Hardy's letter to Mr. Brant and Nova Scotia Power dated February 27, 2012, includes a summary of Nova Scotia Power's response to the complaint. Mr. Hardy's letter then provides the parties to the complaint an opportunity to make written submissions concerning the recommendation prior to the Director and CEO making a decision as follows:

“Your right to make written submissions to the Director and CEO

Prior to the Director and CEO making a decision, parties to the complaint have the right to provide written submissions regarding my recommendation. You are not obligated to do so, but if you choose to make written submissions, please forward them to our office for receipt no later than March 19, 2012. Per the

Commission's policy, submissions are restricted to five (5) single sided, letter-sized pages. Comments that are not legible will be returned without being considered.

I will then place the matter before the Director and CEO who will review the file, including your submissions on my recommendation. The Director and CEO is not bound by my recommendation and will come to a decision based upon a review of all the information provided. The Director and CEO may decide to dismiss the complaint pursuant to section 29(4)(c), to dismiss it pursuant to another subsection of section 29(4), to refer it back for further investigation, or to refer it to the Commissioners of the Human Rights Commission for a decision. I am also enclosing a copy of section 29 in full for ease of reference.”...

[24] Mr. Brant participated in the resolution conference. He was given an opportunity to respond to Mr. Hardy's recommendation. Mr. Brant responded to Mr. Hardy's recommendation by letter to David Shannon, Director and CEO dated March 5, 2012. In the circumstances of this complaint, the procedural error of not providing Mr. Brant with a copy of Nova Scotia Power's post resolution conference submission did not result in procedural unfairness to Mr. Brant.

[25] In the handling of his complaint I find Mr. Brant was treated with procedural fairness.

[26] Having determined Mr. Brant's complaint was treated with procedural fairness I turn to the issue of the decision to dismiss Mr. Brant's complaint.

[27] Recently, in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, the Supreme Court of Canada addressed the nature of the Commission's role in deciding whether to refer a complaint to a board of inquiry and the standard of review. In giving the court's judgment Cromwell, J. stated at paragraphs 20 and 23:

[20] The Act sets up a complete regime for the resolution of human rights complaints. Within this regime, the Commission performs a number of functions related to the enforcement and promotion of human rights. With regard to complaints, it acts as a kind of gatekeeper and administrator. Under s. 29 as it read at the relevant time, the Commission was required to “instruct the Director [of Human Rights] or some other officer to inquire into and endeavour to effect a settlement” of a complaint, provided that the complaint is in writing in the prescribed form or that the Commission “has reasonable grounds for believing

that a complaint exists”.

[23] What is important here is that a decision to refer a complaint to a board of inquiry is not a determination that the complaint is well founded or even within the purview of the Act. Those determinations may be made by the board of inquiry. In deciding to refer a complaint to a board of inquiry, the Commission’s function is one of screening and administration, not of adjudication.

[28] The court determined the standard of review for a decision whether to refer a complaint to the board of inquiry is reasonableness.

[29] The Commission had Mr. Brant’s complaint, the written and oral submissions of the parties. It was able to consider the position of the parties and conclude from the evidence the complaint should not be referred to a board of inquiry but dismissed.

[30] Having reviewed the material and heard the submissions of the parties, I find the decision to dismiss Mr. Brant’s complaint falls within the range of acceptable outcomes which are defensible in respect of the facts and law and therefore reasonable.

[31] The application is dismissed. If the parties are not able to agree I will hear them on the issue of costs.

Coughlan, J.