SUPREME COURT OF NOVA SCOTIA

Citation: *Bourque v. Morrison and Nova Scotia (Attorney General),* 2019 NSSC 291

Date: 20190924
Docket: Hfx No. 480860
Registry: Halifax

Between:

Basil Bourque

Plaintiff

v.

Gregory Angus Morrison and The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia

Defendants

DECISION

Judge:	The Honourable Justice Kevin Coady
Heard:	September 19, 2019 in Halifax, Nova Scotia
Written Decision:	September 24, 2019
Counsel:	John T. Rafferty, Q.C., Counsel for the Plaintiff Jeremy Smith, Counsel for the Defendants

By the Court:

Overview

[1] There are two applications before the Court. The Plaintiff is asking the Court to disallow the defence on the basis that it was filed outside of the prescribed limitation period. The Defendant is seeking summary judgment on the pleadings based on the same limitation issue. The facts germane to these applications are not materially in dispute. Affidavits were not subject to cross-examination;

[2] This is a subrogated action being brought on behalf of Mr. Bourque by the Workers' Compensation Board (WCB) pursuant to the Workers' Compensation Act. In such cases the WCB pursues a settlement for their worker and, if the settlement exceeds the benefits paid, any surplus goes to the worker.

[3] Essentially the Plaintiff missed the two-year limitation period. The facts of how that happened are clearly set forth in the affidavit of Ms. Sutherland who, at the time, was WCB's third-party adjuster. I feel it is fair comment to state that her omission was extremely inadvertent.

[4] I will address the Plaintiff's motion first.

[5] Limitation periods are in place for a purpose. While they are vigorously adhered to, they are not meant to be absolute bars. If legislators wanted absolute limitations, they would have so stated. Instead, they enacted s. 12 of the *Limitations of Actions Act* (LAA) which gives courts the discretion to strike a limitation defence and allow an action to proceed.

[6] In ***M(K) v. M(H),*** [1992] 3 S.C.R. 6, the Supreme Court of Canada considered the rationale behind limitation periods as "certainty, evidentiary and diligence rationales". In other words, there comes a time "when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations." The message is that Plaintiffs are expected to act diligently and not "sleep on their rights".

[7] The starting point in this analysis is s. 12 of the LAA which states:

> 12(3) Where a claim is brought without regard to the limitation period applicable to the claim, and an order has not been made under subsection (4), the court in which the claim is brought, upon application, may disallow a defence based on the limitation period and allow the claim to proceed if it appears to the court to be just having regard to the degree to which
>
> (a) the limitation period creates a hardship to the claimant or any person whom the claimant represents; and

(b) any decision of the court under this Section would create a hardship to the defendant or any person whom the defendant represents, or any other person.

[8] Section 12(5) provides a number of factors that a Court shall have regard to in making a determination under subsection 12(3). All factors must be considered as well as all circumstances of the case. Essentially, the Court must balance the prejudice to the parties.

[9] The first s. 12(5) factor is "the length and the reasons for the delay on the part of the claimant". The delay in this case is approximately nine weeks. The Defendants were not taken by surprise, as discussions occurred well before the two-year limitation. Further, the Defendants were provided with a copy of the action on the final day, notwithstanding it was a nullity.

[10] The second s. 12(5) factor is "any information or notice given by the Defendant to the claimant respecting the limitation period." In advance of the limitation date Ms. Sutherland advised the Defendants that she was putting together a settlement proposal but that an action would be commenced should they not settle by the limitation date. She, in fact, filed on that date but forgot the need for a Notice of Intended Action. It is quite reasonable to infer that the parties would have further discussed the limitation issue but for Mr. Langille's retirement and the misleading voice mail message.

[11] The third s. 12(5) factor is "the effect of the passage of time on (i) the ability of the Defendant to defend the claim, and (ii) the cogency of any evidence adduced by the claimant or Defendant." The delay herein is short and, on my review, the consequences are inconsequential and are of little, if any, prejudice to the Defendant. There is nothing to suggest the nine-week delay compromised the cogency of the evidence. The overall action is quite straightforward.

[12] The fourth s. 12(5) factor is "the conduct of the Defendant after the claim was discovered". While this might seem like putting a square peg in a round hole, I put Ms. Sutherland's efforts to communicate with Mr. Langille, and the circumstances around those efforts, as factors supporting disallowance of the defence.

[13] The fifth s. 12(5) factor is "the duration of any incapacity of the claimant arising after the date on which the claim was discovered." In this case Mr. Bourque suffered no incapacity.

[14] The sixth s. 12(5) factor is "the extent to which the claimant acted promptly and reasonable once the claimant knew whether or not the act or omission of the Defendant, to which the injury was attributable, might be capable at that time of giving rise to a claim." The Plaintiff responded to Ms. Sutherland's omission by re-booting the action immediately, thus limiting the delay to nine weeks. It is noteworthy that Mr. Bourque's spouse continuously phoned the WCB to discuss the claim. There was never any doubt that a claim was being formulated.

[15] The seventh s. 12(5) factor is "the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice the claimant may have received." It is quite obvious that Mr. Bourque was on top of things from the very beginning.

[16] The eighth s. 12(5) factor is "the strength of the claimant's case." The Plaintiff's claim is not frivolous and deserves to be resolved on the merits. The pleadings suggest there may be some contributory negligence in play. However, Mr. Bourque was hit by a vehicle while performing his employment duties. He has a defensible position on liability and his injuries are significant.

[17] The ninth s. 12(5) factor is "any alternative remedy or compensation available." If the Plaintiff fails on this application, he will not be able to recover any damages above the value of the benefits received from the WCB.

[18] Overall, the factors to be considered in assessing the degree of hardship significantly suggest that the degree of hardship analysis favors the disallowance of the limitation defence. If I were to find for the Defendants, Mr. Bourque would lose his claim for damages above his WCB benefits. The only loss that the Defendants will experience is the limitation defence.

Conclusion

[19] I find in favor of the Plaintiff and disallow the limitation defence.

[20] In light of this conclusion, the Defendants' motion for summary judgment is dismissed.

[21] If the parties cannot reach an agreement on costs, I will consider written submissions within 30 days of the date of this decision.