

Nova Scotia (Human Rights Commission) v. Sam's Place et al.

Date: [20000803]

Docket: [SH No. 163186]

1999

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

THE NOVA SCOTIA HUMAN RIGHTS COMMISSION
APPLICANT

- and -

SAM'S PLACE, SAMIR TOULANY, BASHIR
TOULANY and NABELLE TOULANY

RESPONDENTS

DECISION

HEARD: Before the Honourable Justice A. David MacAdam, at Halifax, Nova Scotia, on May 25 & June 15, 2000

DECISION: June 15, 2000

WRITTEN RELEASE

OF DECISION: August 3, 2000

COUNSEL: Chris Manning, counsel for the Applicant
Maureen Shebib & Julie Vandervoort, A/C, counsel for the Respondents

MacADAM, J.:

[1] The Nova Scotia Human Rights Commission, (herein the Commission), is seeking:

an order under Section 31(1) of the Nova Scotia Human Rights Act, R.S., c.214, requiring the Respondents to the Complaint under section 5(2) of the Nova Scotia Human Rights Act (Ann Derusha v. Sam's Place et al.) to provide a complete list, including full names, addresses and telephone numbers for all former and current female employees who have been employed with the Respondents at all their business establishments during the period July 1, 1995 to November 10, 1999.

[2] BACKGROUND

[3] Ms. Derusha alleged she has been discriminated against in respect to employment, by being subjected to sexual harassment, by the Respondents, contrary to Section 5(2) of the Human Rights Act (herein the Act). The Human Rights Officer assigned to investigate the complaint requested and has been refused a complete list of all female employees who had ceased to be employed with the Respondents during the period July 1, 1995 to July 1, 1998.

[4] The sections of the Act relevant on this application include:

Procedure on complaint

29 The Commission shall instruct the Director or some other officer to inquire into and endeavour to effect a settlement of any complaint of an alleged violation of this Act where

- (a) the person aggrieved makes a complaint in writing on a form prescribed by the Director; or
- (b) the Commission has reasonable grounds for believing that a complaint exists.

Power of investigator of complaint

30 The Director or officer acting under the authority of the Commission in the investigation of a complaint or other process under this Act may

- (a) require any person to furnish any information or records that may be necessary to further the investigation or process; and
- (b) enter at all reasonable times the premises to which a complaint or other process refers.

Application for order upon refusal

31 (1) Where any person refuses to furnish information or records or to permit entry to premises at reasonable times as authorized by Section 30, the Commission may apply on notice to a judge of the Trial Division of the Supreme Court for an order directing that information or records be furnished or entry permitted.

Order of judge

(2) The judge may make such order as he thinks just and the order may be enforced as any other order or judgment of the Supreme Court.

Board of inquiry

32A (1) The Commission may, at any stage after the filing of a complaint, appoint a board of inquiry to inquire into the complaint.

[5] Counsel for the Commission, in her pre-hearing submission, and concurred in by counsel for

the Respondent, outlines the policies and procedures followed on receipt of a complaint:

The legislation sets out broad parameters of duties and powers. The policies and procedures of the Nova Scotia Human Rights Commission, as outlined below, endeavour to ensure that those powers are exercised fairly and responsibly.

Once a complaint to the Commission is formalized in writing, a copy of the complaint is provided to the respondent. The complaint form is intended to give the respondent notice of the circumstances surrounding the allegations and a full opportunity to respond. The complainant may rebut the response; if so, a copy of the rebuttal is provided to the respondent.

Efforts are made to settle the complaint. If these efforts are unsuccessful, the Human Rights Officer prepares a Pre-Assessment Report, based on the complaint form, response, rebuttal, and any supporting documents submitted by the parties. This report is reviewed by the Assessment Team of the Human Rights Commission and the Assessment Team decides whether to discontinue the complaint or refer the matter to investigation. Parties are informed that any information or documents provided, with the possible and temporary exception of witness names, will be disclosed to the other party. If witness names have been withheld, those names will be disclosed to the respondent if and when a matter proceeds to a Board of Inquiry. If a witness statement has the potential of putting that witness at risk, the statement will be disclosed close to the time of the hearing but not so close as to prejudice the respondent's opportunity to respond.

If the Assessment Team decides to discontinue the complaint, the parties are notified of this decision and the complainant is notified of his or her right to request a review of the decision. If the complainant seeks a review, the respondent is notified and the parties receive a copy of the Pre-Assessment Report. The respondent is given an opportunity to submit additional submissions. These submissions are disclosed to the other party.

If the Assessment Team decision is to refer the matter to investigation, a Human Rights Officer investigates the complaint and, upon completion of the investigation, provides a draft summary of the investigation to all parties for their review, comments and corrections. All draft summaries provided to the parties are kept on file. The summary must provide a fair summary of the relevant evidence obtained and must inform the parties of the substance of the evidence. Every person interviewed by a Human Rights Officer is sent a copy of the interview report and is provided with an opportunity to correct any factual errors.

Settlement efforts are ongoing. If the matter does not settle, the Commissioners of the Human Rights Commission decide, based on all the information before them including the final Investigation Summary, whether to appoint a public Board of Inquiry to inquire into the complaint. The Commission, pursuant to s.32A(1) of the Human Rights Act, is the sole body authorized by statute to make the decision to appoint a Board of Inquiry. The person who serves as the Board of Inquiry is independent from the Commission and is appointed by the Chief Judge of the Provincial Court.

[6] Counsel for the Respondent, in reply, says . . . any investigation must satisfy two (2) conditions; namely: neutrality and fairness and this investigation does not meet that threshold test.

[7] The Commission's control of its own procedure

[8] The Commission, like with most administrative bodies, is entitled to control its own procedure, subject always to a requirement to ensure the rules of natural justice are recognized and applied at the appropriate stages of any proceeding. Counsel for the Commission, in her

written submission, refers to *Irvine v. Canada (Restrictive Trade Practices Commission)* (1987), 41 D.L.R. (4th) 429 (S.C.C.), in support of the proposition that when a witness is being interviewed in the first stage of an investigation pursuant to an administrative proceeding, if there are sufficient safeguards later in the process for all the parties involved, the investigator has the power to conduct the investigation as he or she sees fit.

[9] Counsel notes, Justice Estey, for the Court, in *Irvine*, supra, at p. 453 referred to *St. John v. Fraser*, [1935] S.C.R. 441, where, in a case involving an investigation under the Securities Fraud Prevention Act, the Court held the investigator was entitled to proceed with the investigation despite not affording the party being investigated an opportunity to cross-examine witnesses at the investigation stage. The Court stated that the investigation was an administrative function under the statute and while the investigator was bound to act fairly and impartially, that did not imply a right of cross-examination.

[10] Counsel also comments that Justice Estey in *Irvine*, supra, also referred to *Selvarajan v. Race Relations Board*, [1976] 1 All E.R.12 at p. 19, (C.A.), where Lord Denning held as a fundamental rule that if a person may be subjected to penalty, deprived of redress, or in some such way adversely affected by an investigation and report, then that person should be told the case against them and afforded a fair opportunity to answer it. Counsel observes that Lord Denning went on to state: The investigating body, is, however, the master of its own procedure. In her written submission, counsel adds that at p.24, the Court, in *Selvarajan*, supra, further concluded that as long as the investigating body conforms to the statute, it is left to that agency to decide how to best carry out the duties and functions that its governing statute requires.

[11] The applicant's written submission continues:

In Nova Scotia, two recent decisions have addressed the issue of the Commission's authority over its procedures: *Baker v. Nova Scotia Human Rights Commission* (11 August 1998) S.H. 147246 (N.S.S.C.); *Nova Scotia Human Rights Commission v. Ian MacDonald et al.* (18 November 1999) S.H. 158812 (N.S.S.C.)

In the first decision, Mr. Baker, a complainant, brought an application of mandamus to compel the Commission to appoint a Board of Inquiry into his Complaint. Stewart J. held that The Commission decides whether there is sufficient evidence to warrant the appointment of a Board of Inquiry. Stewart, J. also held that The Commission controls its procedure. *Baker*, supra, at pp.4-7.

In the second decision, issues were raised similar to those before the Court in the instant case. Mr. MacDonald, in the course of an investigation into a complaint, attempted to impose conditions and restrictions on the ability of the Human Rights Officer to gather information. Specifically, Mr. MacDonald, who was not a party to the Complaint, refused to be interviewed unless counsel acting for the Respondent in that Complaint were present during the interview.

The Commission made an application under s.31(1) of the Human Rights Act for an order requiring Mr. MacDonald to be interviewed without the Respondent's counsel present. This order was granted.

In his decision, Davison J. referred to the principles, repeatedly upheld by the Supreme Court of Canada, of interpreting human rights legislation as quasi-constitutional, and therefore in a broad and purposive manner. Davidson J. stated that ...in order to give a purposive approach to this type of legislation, we must be fair and liberal in construing the terms of the statute to ensure that the objectives of the statute are obtained. *Ian MacDonald*, supra, at p.9.

Davison J. also stated ...it is inconceivable to me that the legislature intended a witness to dictate the procedures the Commission must follow in searching for facts. The manner in which information is to be furnished under s.30(a) is for the Commission to decide. *ibid*, at p.15.

[12] Counsel's submission, and the authorities cited, reflect the limited role for the Courts at the investigative stage. Absent manifest bias or unfairness at this stage, it is for the investigator to determine the course of the investigation and to decide whether to recommend further proceedings in the nature of the laying of a complaint or charges.

[13] Although in the context of whether the commission failed to meet the standard of procedural fairness by not presenting to the board of inquiry all the relevant evidence available to it, the comments of Chipman, J.A. on behalf of the Nova Scotia Court of Appeal in *I.M.P. Group Ltd. v. Dillman* (1995) 24 C.H.R.R. D/329 at D/333 - 34, para. 46 (N.S.C.A.) are instructive as to the broad investigative powers of the Commission:

I agree with counsel for the Company that the Commission is a public body established to represent the interests of the state and the community. It has broad investigative powers under the Act. It may require any person to furnish information or records that may be necessary to further its investigation. It may enter premises to which a complainant refers at all reasonable times in furtherance of its investigations. It has the power to appoint a board of inquiry. Under the Act the Commission, the complainant and the person complained against are all parties to a hearing before the Board. The Commission has the function of enforcing the Act and it has the carriage of the proceedings. It has the power to compel the attendance of witnesses and the production of evidence.

[14] Procedural Fairness

[15] Counsel for the applicant, citing *Roy v. Nova Scotia (Human Rights Commission)* (1992), 20 C.H.R.R. D/203 at D/207 (N.S.T.D.) and *Baker v. Nova Scotia Human Rights Commission*, supra, acknowledges the Commission is making an administrative decision to which the requirements of procedural fairness apply, stating they are met when the administrative body gives the party under investigation the opportunity to see the investigator's report, to make submissions and to see the submissions of the complainant party.

[16] Counsel's brief, then continues:

A recent Federal Court decision examined an application for judicial review of a Canadian Human Rights Commission decision to dismiss a complaint. The Court, in its examination of issues of procedural fairness, stated that case law clearly established that the Commission must be master of its own procedure, with the mandate to weigh evidence in determining whether to proceed with a complaint. The Court added that the Supreme Court of Canada has held that determinations that are investigatory are not required to be made on a judicial or quasi-judicial basis, with all the formal rules of natural justice. Rather, it is sufficient to adhere to procedural fairness by informing the parties of the substance of the evidence obtained and giving the parties the opportunity to respond and make relevant representations: *Miller v. Canadian Human Rights Commission et al.* (1996), 112 F.T.R. 195 at 200-01 (F.C.T.D.).

[17] The respondent, in his written submission, comments that in *CBC v. Paul* (No. 3) 34 C.H.R.R.D./374, at para 60, Tremblay-Lamer, J., after adopting the requirements of neutrality and thoroughness for an investigation continues :

The role of the investigator is not prosecutorial. It is not meant to be a fishing expedition.

[18] His written submission continues:

In *Slatterly v. Canada (Human Rights Commission)* [1994] 2 F.C. 574 (T.D.) Ms. Slatterly sought judicial review of a decision of the Canadian Human Rights Commission (CHRC) after two (2)

complaints against the Department of National Defence were dismissed. Nayden J. of the Federal Court of Canada Trial Division examined the investigation stage of the Human Rights process and the role of an investigator. The Court stated at page 16,

In order for a fair basis to exist for the CHRC to evaluate whether a tribunal should be appointed pursuant to paragraph 44(3)(a) of the Act, I believe that the investigation conducted prior to this decision must satisfy at least 2 conditions: neutrality and fairness...

I note that investigators, the CHRC and reviewing Courts are essentially without legislative guidance regarding the conduct of investigations. Section 43 of the act empowers investigators with search and seizure abilities, but sets no minimum duties of investigation...

In determining the degree of thoroughness of investigation required to be in accordance with the rules of procedural fairness, one must be mindful of the interests that have been balanced; the complainant's and respondent's interests in procedural fairness and the CHRC's interest in maintaining a workable and administratively effective system.

It is submitted that there is no particular case directly on point relating to the present application of the commission. The caselaw is clear that a Human Rights investigation requires the duty of procedural fairness which will vary based upon the circumstances of each case. An investigative report is used as the determinative factor in whether or not an investigation turns into a Board of Inquiry. In *Laprise v. British Columbia Human Rights Commission* (1999) unreported B.C.S.C., Sinclair Prowse J. reaffirmed the need for procedural fairness and stated at page 9,

Moreover, included as an aspect of procedural fairness is the obligation of the Commission to ensure that the investigative report (which is the basis on which the decision to proceed or not is made) is fair and adequate. That is, that it is neutral and thorough in the sense that it is unbiased and that there is no crucial evidence overlooked or unreasonable omission made. (*Slatterly v. Canada Human Rights Commission supra*).

[19] Counsel for the applicant correctly notes that in each case the Court review of the investigative stage occurred as part of an application for judicial review and only after the investigative stage had been completed. Here as counsel observes, the investigative stage is only getting underway, adding the sought for information is required in order for the investigation to proceed.

[20] Counsel for the applicant, in her supplementary written submission, says:

. . . it is appropriate and necessary to examine the nature of the workplace environment in sexual harassment complaints. Mr. Arjun Aggarwal is one of Canada's foremost academics and writers on sexual harassment and the law. In his text, *Sexual Harassment in the Workplace*, he states:

It is a fact of life that, as a general rule, sexual encounters do not occur in public...Further it is well recognized that nowhere are evidentiary difficulties more likely than in sexual harassment cases. According to Professor Backhouse, a renowned authority on sexual harassment in Canada, resolution of evidentiary matters will always be critical in sexual harassment cases since corroborative witnesses are rarely available. (2nd ed. Toronto: Butterworths, 1992 at 138)

Mr. Aggarwal further states:

Evidence of the defendant's treatment of other female employees is relevant and more probative than prejudicial when introduced to show a pattern of behaviour. It is admissible as proof of intent or willfulness since the courts have recognized that the recurrence of similar acts incrementally reduces the possibility that the challenged conduct was the result of mistakes or inadvertence. Ibid. at 140.

[21] Notwithstanding the observations of Mr. Aggarwal, this investigation is as to whether there is evidence to support further proceedings in respect to this complaint. The identification of persons present, while and where the complainant worked, as well as later employees who may be privy to statements about this matter that the respondents may have made, is clearly relevant information for the investigator. It will then be for the investigator to assess what other persons, if any, should be contacted as part of the investigation.

[22] The respondent suggests the investigation is prosecutorial and a fishing expedition, rather than neutral. The submission continues:

Mr. Dawe can give no justification for requiring the Respondents to furnish lists of employees, other than to say that cases of sexual harassment can run right through businesses. He has no justification for that point and clearly the results of such a disclosure and examination would do nothing to clarify the specific allegation which is the subject of the investigation.

[23] There is nothing in the evidence presented on this application to support any suggestion the investigator is embarked on a fishing expedition, at least, other than as a fishing expedition that is to be expected as part of any investigation. If in time there is evidence the investigator has been less than neutral or exhibited unfairness, these are matters always open to judicial review.

[24] Nevertheless, and despite the language of Section 30 of the Act, the right to demand production of documents or information is not unlimited. Nowhere in the authorities referenced is it suggested the right is unfettered. There is a basic threshold of relevancy, or at least potential relevancy, that the applicant must establish. Counsel for the applicant acknowledged as much in her oral presentation. As has often been stated, evidence, including information leading to the discovery of evidence, may be relevant at the discovery stage of a proceeding not only if it by itself is relevant to a question in issue, but also where, although not itself directly relevant, it may lead to the uncovering of relevant information or evidence. Certainly, the request for information of employees, past and present, who worked at the respondents business premises where the complainant was employed meets this threshold of relevance.

[25] However, not clear, at least at present, is why the applicant now requires the full names, addresses and telephone numbers for all former and current female employees who have been employed with the Respondents at all their business establishments during the period July 1, 1995 to November 10, 1999. It may be that during the course of the investigation the names of these other employees will become relevant, however nothing in the presentation on this application establishes that these names and the other requested information is either relevant or reasonably likely to lead to the discovery of relevant information. The complaint by the complainant is the matter under investigation, not whether, in respect to previous employees the respondents conduct is subject to a complaint. It is the other employees at the location where the complainant was employed, both at the time she was employed, as well as subsequently, that may have relevant information as to the alleged sexual harassment under investigation.

[26] The application is only for the full names, addresses and telephone numbers for all former and current female employees . No reason for differentiating on the basis of gender was presented on this application. As such, this court is not prepared to make such a distinction in respect to the employees whose names, addresses and telephone numbers are to be produced. It will naturally be for the investigator to determine which persons are to be interviewed as part of the investigation. By not limiting production to only female persons the Court does not , directly or indirectly, seek to direct the course of the investigation. These are matters for the investigator, and, if appropriate in due course, judicial review. Additionally, by not requiring the production of employees prior to the period the Complainant worked or in respect to other business locations operated by the respondents, the court similarly is not directing the course of the investigation. The issue here is one of production, not the scope of the investigation in respect to the complaint. If these other names are learned by the investigator, during the course of the investigation, it will be for the investigator to decide whether to pursue interviews with these persons.

[27] Application allowed in part.