IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Clearwater Limited Partnership v. The Nova Scotia Human Rights Commission, and CAW-Canada v. The Nova Scotia Human Rights Commission 2004 NSSC 231

Date: 20041116
Docket: S.H. 206858 and 209022
Registry: Halifax

IN THE MATTER OF:	A Complaint under the *Human Rights Act* R.S.N.S., 1989, c. 214, as amended by 1991 c. 12, of Donna M. Ranson against Clearwater Limited Partnership and National Automobile, Aerospace and Agricultural Implement Workers' Union of Canada (CAW - Canada) dated June 28, 2002 and amended February 24, 2003 (the "Complaint").
AND IN THE MATTER OF:	The decision of the Nova Scotia Human Rights Commission to investigate the Complaint.
AND IN THE MATTER OF:	An Application by Clearwater Limited Partnership for an Order in the nature of *certiorari* to quash the decision of the Nova Scotia Human Rights Commission to investigate the Complaint and an Order to prohibit the Nova Scotia Human Rights Commission from investigating and/or otherwise processing the Complaint and, in the alternative, a Declaration that the Nova Scotia Human rights Commission fully indemnify and save harmless Clearwater Limited Partnership for any expenses incurred by it in defending the Complaint, and for damages and/or costs that may be awarded against it as a result of an investigation and/or any proceedings and orders arising therefrom in relation to the Complaint.

BETWEEN:

CLEARWATER LIMITED PARTNERSHIP, a body corporate

Applicant

- and -

THE NOVA SCOTIA HUMAN RIGHTS COMMISSION

Respondent

- AND -

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to investigate the Complaint and an Order to prohibit the Nova Scotia Human Rights Commission from investigating and/or otherwise processing the Complaint and, in the alternative, a Declaration that the Nova Scotia Human rights Commission fully indemnify and save harmless Clearwater Limited Partnership for any expenses incurred by it in defending the Complaint, and for damages and/or costs that may be awarded against it as a result of an investigation and/or any proceedings and orders arising therefrom in relation to the Complaint.

BETWEEN:

NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS' UNION OF CANADA (CAW-CANADA)

Applicant

- and -

THE NOVA SCOTIA HUMAN RIGHTS COMMISSION and DONNA RANSON

Respondent

Judge: The Honourable Chief Justice Kennedy

Heard: May 3, 2004, in Halifax, Nova Scotia

Decision on Costs: November 16, 2004

Counsel: Eric Durnford, Q.C., and Nancy Barteaux for the Applicant, Clearwater

Ron Pizzo for the applicant, National Automobile, Aerospace and Agricultural Implement Workers' Union of Canada CAW-CANADA

Noella Martin and Sean Foreman for the respondent, Nova Scotia Human Rights Commission

By the Court:

[1] On May 3, 2004, I was scheduled to hear a two day *certiorari* application brought by Clearwater Limited Partnership (Clearwater) and by the National Automobile, Aerospace and Agricultural Implement Workers' Union of Canada (the Union) seeking that I quash a decision of the Nova Scotia Human Rights Commission (the Commission) to investigate a complaint made to it by one Donna Ranson (Ranson) against both Clearwater and the Union and further seeking an order in the nature of prohibition to prevent the Commission from investigating the Ranson complaint.

[2] The application was scheduled to be heard on a Monday.

[3] On the Friday before, that being April 30, 2004, I was informed that because of an action taken by the Commission, the issue had become moot and that the applications would not be proceeding as planned, nevertheless, both of the applicants would be appearing seeking costs on a solicitor/client basis against the Commission.

[4] The costs hearing did proceed on May 3, 2004 and this is my finding on that issue.

[5] In order to understand the applicants unusual request for solicitor/client costs it is necessary to set out the considerable history of this matter:

[6] In August 1990, human rights complaints were filed by five female employees of Clearwater, who were members of the Union, against both Clearwater and the Union, alleging discrimination in employment, based on gender.

[7] The five complaints were sent by the Commission to a "Board of Inquiry" and on the day that the hearing was to commence, both Clearwater and the Union reached a settlement with the five female employees.

[8] A written agreement was drafted by counsel for Clearwater that was subsequently signed by both Clearwater and the Union and approved by the Commission at its meeting on April 29, 1994 (the Settlement Agreement).

[9] Clause 7 of the Settlement Agreement stated:

> 7. HRC agrees that in respect of existing, former or prospective employees of Clearwater in relation to any collective agreement between Clearwater and the Union or the Mini-Agreement dated April 26, 1990 between those parties, that it will not entertain any complaint(s) from any of them alleging discrimination on the basis of sex or gender in employment or prospective employment by Clearwater or the Union, up to the present time, nor will HRC support any such complaint.

[10] On April 25, 1994, counsel for the Commission, had written to counsel for both Clearwater and the Union to confirm his understanding of Clause 7 as being "to ensure that no female individual in regards to a similar type complaint as the complainants arising out of the 1990 and 1993 Collective Agreements will be entertained by the Commission".

[11] In June 1994, Ranson contacted the Commission and attempted to file a complaint against Clearwater and the Union based on sex discrimination in the workplace.

[12] On August 4, 1994, the Commission advised Ranson that she could not lodge such a complaint if it was based on facts that arose before the date of Settlement Agreement.

[13] Ranson wrote to the Commission on November 30, 1994, again attempting to file a complaint of sex discrimination against the applicants. In May 1995 the Commission again advised Ranson that the Commission would not proceed with her complaint because of the Settlement Agreement.

[14] On June 22, 1995, Ranson filed a complaint with the Office of the Ombudsman, complaining that the Commission would not accept or investigate her sex discrimination complaint. The Office of Ombudsman commenced its own investigation pursuant to its statutory mandate under the *Ombudsman Act*.

[15] On or about September 2001, the Office of the Ombudsman released its Report some six years after Ranson filed her complaint. The Ombudsman Report concluded that the Commission did not have the ability under the *Human Rights Act* to refuse to investigate Ranson's complaint.

[16] The Ombudsman recommended that the Commission entertain a new complaint or revive the former complaint from Ranson and adopt a policy prohibiting the Commission from entering into future settlement agreements that

deprive individuals who are not party to the agreement of their rights under the Act.

[17] On January 18, 2002, the Commission accepted the first recommendation in the Ombudsmans Report to entertain a new complaint from Ranson.

[18] As a result, on June 28, 2002, Ranson filed a new complaint with the Commission against Clearwater and the Union. Counsel for the Commission, notified counsel for Clearwater and the Union and provided them with copies of the Ranson complaint by letter dated July 12, 2002.

[19] Clearwater and the Union disputed the ability of the Commission to proceed with an investigation of the new Ranson complaint, as a result of alleged procedural delay resulting in abuse of process and because of Clause 7 of the Settlement Agreement. Both requested that the Commission not allow Ranson's complaint to proceed to investigation.

[20] By letters dated January 17, 2003 and January 20, 2003, respectively, Clearwater and the Union made written submissions to the Commission in that regard.

[21] On February 20, 2003, having reviewed the materials before them, the Commissioners decided that the Commission should allow the Ranson complaint to proceed to investigation.

[22] By letter also dated February 20, 2003, counsel for the Commission, advised counsel for Clearwater and the Union of the Commission's decision to allow the new Ranson complaint to proceed to investigation. In that letter, counsel also advised that Martin Shulze-Allen, Human Rights Officer, would be contacting them to commence the usual investigative procedure of obtaining their responses to the merits of the Ranson complaint.

[23] Counsel for Clearwater engaged in an exchange of correspondence with Shulze-Allen in his capacity as the officer assigned to investigate the Ranson complaint. In a letter dated May 1, 2003, counsel for Clearwater repeated a

request, that the Commission reconsider its decision to investigate the Ranson complaint.

[24] When the Commission persisted, Clearwater filed this *certiorari* application seeking that this Court quash the Commission's decision to investigate the complaint and seeking an order prohibiting the investigation.

[25] On October 17, 2003, the Union filed an almost identical application (S.H. 209022) against the Commission and Ranson (as respondents) seeking the same relief as Clearwater.

[26] Subsequently, on March 29, 2004, Clearwater served counsel for the Commission with an interlocutory application seeking an Order to require production of a record containing all materials in the Commission's files relating to Ranson and its contact with her since 1991. The application was set down for regular chambers on April 7, 2004.

[27] On April 7, 2004, Associate Chief Justice MacDonald, of this Court, heard Clearwater's application in chambers and granted the Order to produce the expanded record forthwith.

[28] Now, three days before the *certiorari*/prohibition hearing, the Commission has 'settled' with the complainant Ranson. By terms of the agreement, Ranson withdraws her complaint and releases the Commission from any liability. In turn the Commission will pay Ranson $20,000.00.

[29] The Commission's position is, that having assessed the potential cost of defending this application, it is determined that, in the circumstances, it was wiser to use its limited resources by reaching a settlement with Ranson.

[30] The applicants, although freed from responding to the Ranson complaint, now want solicitor/client costs on this application against the Commission.

[31] Clearwater, says - it settled the August, 1990, complaints in good faith, understanding that the "settlement agreement" freed it from potential claims such as Ranson's.

[32] Years later, in 2001, the Ombudsman tells the Commission that it should address the Ranson complaint and then, rather than settling with Ranson at that time, the Commission decides to proceed with an investigation and drag Clearwater into it.

[33] Clearwater points out that, after it spent $53,047.00 in legal fees as a result of that decision, the Commission does what it should have done in 2002, that is, settle with Ranson, and Clearwater is supposed to gratefully "eat" its legal fees and go away.

[34] The Commission claims to have settled in an effort to be fair to Ranson - now Clearwater says it wants fairness also.

[35] The Union joins Clearwater in the request for solicitor-client costs. It points out that it found out about the Ranson sexual discrimination complaint and that it has been named as a party only years after the complaint was first made.

[36] The Union suggests that, had the Commission informed it of the grievance in a timely manner, it could have been helpful in resolving the matter.

[37] The Union joins Clearwater in claiming that the Commission should have settled with Ranson upon the receipt of the Ombudsman's Report in September of 2001.

[38] Counsel for the Union estimated that it has run up legal costs of between $25,000 and $30,000 and the Union wants the Commission to be responsible for them.

[39] Counsel for the Commission responds that this matter has happened because all of the parties entered into the 1994 agreement that contained the unenforceable clause #7.

[40] The Commission, in retrospect, agrees that it should have accepted the complaint in June 1994, when it was first made, however, both Clearwater and the Union were parties to the agreement that drove the Commission's refusal at that time.

[41] We are "all in the same soup" says the Commission's counsel, describing the situation.

[42] The Commission says, that in deciding to investigate the Ranson complaint on the recommendation of the Ombudsman's office, it acted reasonably and responsibly and then when it settled the matter with Ranson for good and valid reasons, that its action was to the benefit of all concerned.

The Law

[43] The Supreme Court of Canada has spoken to the issue of solicitor and client costs in *Young v. Young* (1993) 108 D.L.R. (4th) 193 (S.C.C.) In which McLachlin, J. (as she then was) supports the principle that "Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties". (pg. 283, para. e)

[44] I have also been asked to consider Justice Scanlan's decision in *Dalhousie University v. Aylward* (2001 N.S.J. No. 129), a matter that also involved an

application for solicitor-client costs against the Human Rights Commission. In that case the Commission had not only acted beyond its statutory authority, but had then become an active participant in opposing the efforts of the applicant to redress that error.

[45] The Justice cites *Young v. Young* and then states that "I am not convinced that in the present case that the actions of the Commission were so egregious as to warrant costs to be awarded on a solicitor-client basis." (para. 13) He did however award party and party costs to the applicant in an amount described as "a real and substantial contribution to their actual costs ...". (para. 22)

[46] It is undeniable that the delay between the date of the original complaint and the eventual investigation put the applicants in a difficult position. They would have been more able to respond to the allegations had the process gone forward in 1994.

[47] It is also clear that, had the Commission reached a settlement with the complainant, Ranson, in 2001, when the Ombudsman's Report was released, that these applicants would have been saved very substantial legal fees.

[48] It is though, apparent on the evidence, that the reason that the Commission refused to investigate the Ranson complaint in 1994, was its reliance on the ill-conceived clause #7 of the agreement. An agreement to which both of the applicants were parties.

[49] I agree with counsel for the Commission that all of the parties share in the creation of the circumstances that led to this unfortunate situation.

[50] I do not find that the Commission acted improperly in accepting the new complaint after receiving the Ombudsman's Report. It was responding to a recommendation in that report, and although the decision to investigate at that late date was questionable and certainly put the applicant in a difficult position, it was not "reprehensible, scandalous or outrageous conduct".

[51] I do not find on the totality of the evidence that the Commission acted in any way that would justify the dramatic imposition of solicitor-client costs herein.

[52] I will hear from the parties, if necessary, on party and party costs.

Chief Justice Kennedy