

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Eye Catch Signs Ltd. v. Dobbin*, 2017 NSSC 110

**Date:** 20170424

**Docket:** Hfx. No. 453029

**Registry:** Halifax

**Between:**

Eye Catch Signs Ltd.

Appellant

v.

Blaise Dobbin

Respondent

**Decision**

**Judge:** The Honourable Justice Michael J. Wood

**Heard:** April 10, 2017, in Halifax, Nova Scotia

**Counsel:** Nathan Sutherland and Jason Edwards (Article Clerk), for the Appellant  
Blaise Dobbin (Respondent), Self-represented

**By the Court:**

[1] Blaise Dobbin was employed as a sales executive by Eye Catch Signs Limited (“Eye Catch”). His compensation included a base salary and a commission on sales to be calculated on paid invoices. Mr. Dobbin worked for Eye Catch from 2008 until May 22, 2015, when he resigned after giving prior notice of his intention to do so.

[2] After Mr. Dobbin’s departure invoices for sales which he had secured were paid and he felt this entitled him to commission under the terms of his employment contract. In January 2016 Mr. Dobbin started a proceeding in the Small Claims Court of Nova Scotia against Eye Catch seeking \$19,815.49 in unpaid commissions. Eye Catch disputed the claim and filed a defence and counterclaim. The counterclaim was based upon an allegation that Mr. Dobbin was negligent in failing to keep a customer quote “current” resulting in a loss to the company resulting from a change in the exchange rate between the Canadian and US dollar. He was also alleged to be negligent in having an invoice issued to that same customer for extra costs which was subsequently disputed and not paid.

[3] A hearing in the Small Claims Court of Nova Scotia was held on May 10, 2016, at which both parties presented evidence and made submissions. By decision dated June 21, 2016 the adjudicator, Augustus Richardson Q.C., awarded Mr. Dobbin the full amount of his commissions and dismissed the counterclaim.

[4] Eye Catch has appealed the Small Claims Court decision alleging that the adjudicator committed an error of law and failed to follow the requirements of natural justice. The essence of the appellant’s position is found in the following paragraphs from their appeal brief:

103. The Adjudicator erred in law by failing to consider the legal principles relevant to an analysis of whether the commissions were owed to Mr. Dobbin after his resignation, and relevant to the determination of ECS’ counterclaim. In addition, the Adjudicator failed to follow the requirements of natural justice by failing to sufficiently state his legal reasons or the legal foundation for his Decision.

104. ECS acknowledges that Small Claims Court decisions are often necessarily brief. However, they must set out in sufficient detail the Arbitrator’s reasons and factual findings. In order to be meaningful, and to enable the proper determination of an appeal, they must also expressly or by implication show that the relevant legal principles have been applied to the facts as found by the Adjudicator.

105. Here, the absence of any reference to certain relevant legal principles is fatal. It amounts to an error of law in relation to both the determination of Mr.

Dobbin's claim, and ECS' counterclaim. It also amounts to a failure to follow the requirements of natural justice.

[5] With respect to Mr. Dobbin's claim, counsel for Eye Catch argued that there was a general legal principle that commissions are not payable after termination of employment unless the contract contains an express term to that effect or the court can find one by necessary implication. Since the adjudicator did not go through such an analysis, Eye Catch says this is either an error of law or a failure to follow natural justice due to inadequacy of reasons.

[6] None of the cases relied upon by Eye Catch were circumstances where the contract specified that commissions were due on paid invoices and where the orders in issue were placed prior to termination of employment. For the most part they involved situations where the sale was not secured until after the employee's departure.

[7] The adjudicator's decision on Mr. Dobbin's claim for commissions is found in the following paragraphs from his decision:

[6] Mr Dobbin gave evidence that he testified was based on ECS sales information to establish that sales he had made prior to his departure, and which had been paid after May 22, 2015, produced commission equal to \$19,815.49.: Ex. Cla. That calculation was not really disputed by Mr Sullivan.

[7] In essence, then, Mr Sullivan did not dispute either the employment contract, or the fact that commissions were due on paid invoices. His objection to being required to pay or, in the alternative, his counterclaim, was based on

- a. His complaint that one or two sales contracts had not gone as contemplated and had ended up costing the company more than had been expected,
- b. That the loss of expected profit had contributed to the loss by ECS of its credit facilities with its bank, and
- c. Mr Dobbin had somehow ended up with sales invoice information (which had formed the basis of his claim).

[8] As is apparent, the adjudicator concluded that there was not much of a dispute about the calculation or entitlement to commissions on the part of Eye Catch, except to the extent that the counterclaim might reduce the amount. I see no reason why the adjudicator should be expected to engage in a legal analysis about entitlement to commissions post termination when that was apparently not the position being advanced by Eye Catch.

[9] Neither party was represented by legal counsel at the hearing, but that makes no difference. The adjudicator is required to decide the dispute within the parameters set out by the litigants. In this case the disagreement presented to the adjudicator seemed focused primarily on the counterclaim.

[10] A small claims proceeding differs from other courts because it tends to be somewhat less formal. This permits litigants to represent themselves and makes for efficient and less expensive hearings and appeals. The small claims court process balances fairness and efficiency against traditional legalistic procedures. This has been the subject of judicial comment on numerous occasions. For example in **Electec Engineering Inc. v. Costa**, 2015 NSSC 130, the court said:

15 Mr. MacDonald argued that the affidavit could be used to show that the adjudicator did not consider material evidence or misapprehended the evidence on critical points. I do not accept that proposition. The Small Claims Court was intentionally designed as a court which would not generate a record. In addition, the rules of evidence were somewhat relaxed. It was intended to be a less formal dispute resolution process. The distinctive nature of this court was described by Associate Chief Justice Michael MacDonald, as he then was, in **Whalen v. Towle** 2003 NSSC 259 as follows:

7 Furthermore, there is no record of the proceedings in Small Claims Court. As well, the appeal process is limited in that this Court, the Supreme Court of Nova Scotia, is the forum of last resort. In other words, in order to provide an efficient and inexpensive process, certain judicial safeguards are sacrificed. This is to ensure that matters involving small claims can be processed efficiently and fairly.

8 Therefore, the Small Claims Court regime represents a less than perfect regime, but it is a fundamentally fair one. Whether in the criminal vein or the civil vein, in Canada's justice system, we strive for justice that is fundamentally fair and we acknowledge that perfect justice is often unobtainable. This was succinctly pointed out, albeit, in the criminal context by Chief Justice McLachlin in the Supreme Court of Canada decision of **R. v. O'Connor**, [1995] S.C.J. No. 98. At paragraph 193 she states:

What constitutes a fair trial takes into account not only the perspective of the accused but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chemic as perfection in any other social agency. What the law demands is not perfect justice but fundamentally fair justice. [Emphasis added]

16 The lack of a formal record is accommodated to some extent by the requirement that the adjudicator issue a report in response to a notice of appeal.

**17** The design of the Small Claims Court process does not contemplate that the parties will attempt to create a record of evidence by filing affidavits setting out what they think the testimony at trial consisted of. That could invite contradictory affidavits and cross-examination on an appeal in order to determine what was or was not entered as evidence before the adjudicator.

**18** The lack of a recorded hearing and transcript may limit the appellate review that can be carried out, at least with respect to challenging findings of fact. To the extent that this might be seen as compromising the fairness of the appeal, it is simply a function of the statutory regime which established the Small Claims Court.

**19** In this case the decision of the adjudicator is thorough and outlines the findings made, the law which he applied and the analysis used to reach his conclusion on the appropriate notice. The report which he filed in response to the notice of appeal provides additional information to assist in appellate review. In some cases the adjudicator's decision and report might not be sufficient in terms of explaining how the decision was reached. That is certainly not the case here.

[11] Although there is no record of proceedings in a small claims hearing, a judge sitting on appeal has access to several sources of information that will assist in assessing the adjudicator's decision. This includes the pleadings filed with the Small Claims Court, any documentary exhibits entered at the hearing, the decision and the adjudicator's report filed pursuant to s. 32(4) of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430, which reads:

Upon receipt of a copy of the notice of appeal, the adjudicator shall, within thirty days, transmit to the prothonotary a summary report of the findings of law and fact made in the case on appeal, including the basis of any findings raised in the notice of appeal and any interpretation of documents made by the adjudicator, and a copy of any written reasons for decision.

[12] On the issue of whether commissions would be due on existing orders where the customer payment followed termination, Mr. Dobbin urged me to review the documents which he entered as exhibits at the small claims hearing. I did this and note an email dated April 27, 2015, from him to Mr. Sullivan, the principal of Eye Catch, dealing with transition issues relating to the end of his employment. It included the following question:

And just so there is no ambiguity or misunderstanding down the line can you just confirm what commissions will be paid to me going forward?:

- Everything that has been ordered through May 22nd?
- Only those orders that have been delivered and invoiced through May 22nd?

- Only those that have been paid through May 22nd?
- And please confirm that Humber College commission will be paid in full as there was some question raised on your part a couple of weeks ago on this one.

[13] Mr. Sullivan's response on April 28<sup>th</sup> included the following:

On the Commission front, I need you to keep selling so we will pay the commissions on what you get ordered

[14] In addition, in July 2015 Eye Catch sent an email to Mr. Dobbin summarizing invoices paid in June, after the end of his employment, for which he would receive commissions.

[15] I am satisfied that there was ample basis for the adjudicator's conclusion that the agreement between the parties contemplated payment of commissions for orders negotiated by Mr. Dobbin where customer payments were received post termination. The failure of the adjudicator to set out a legal analysis with respect to why the commissions were payable is not an error of law nor a breach of the duty of procedural fairness. The evidence that Eye Catch in fact paid commissions for monies received during the month of June and told Mr. Dobbin they would pay commissions on everything ordered prior to his resignation, no doubt assisted the adjudicator in reaching the conclusion that he did.

[16] The adjudicator's decision with respect to the counterclaim is found in the following paragraphs:

[8] None of this was in my view sufficient to ground either a defence or a counterclaim. Business contracts do not always prove to be as profitable as hoped. Decisions which in hindsight prove to have been mistaken are a common and ordinary product of normal business operations. And while Mr Dobbin may not have been right to hold or acquire the sales information that he did, there was no evidence and no suggestion that he used that information for any purpose other than to calculate the amount of commission to which he alleged he was entitled.

[9] On these facts I allow the claimant's claim and dismiss the counterclaim. While I can well sympathize with his concerns that ECS may not have been as profitable in 2014 or 2015 as he would have liked, the fact remains that if ESC was paid on the invoices listed in Ex. Cla then Mr Dobbin had a contractual right to be paid. The fact that he was no longer with the company does not by that alone disentitle him to the fruits of his labour—or his contractual rights—will he worked for ECS.

[17] Eye Catch's counterclaim alleged that Mr. Dobbin was negligent and as a result it suffered losses. The argument on appeal was that the adjudicator's decision does not contain any legal analysis, such as a determination of whether a duty of care existed or the standard of care breached. The appellant relies on the decision in **Cameron v. Morris**, 2006 NSSC 9, in support of its argument that the adjudicator's reasons concerning the counterclaim are insufficient. In that case the claim dealt with valuation of a motor vehicle and the parties presented competing appraisals. The adjudicator arrived at a valuation and referred to the appraisal evidence provided by the respondent but made no reference to the appraisal which had been presented by the claimant. The court said this failure justified setting aside the adjudicator's decision for the following reasons:

40 I am forced to conclude that the written reasons of the Chief Adjudicator do not address the contradiction in the evidence before him, thereby creating an obstacle to meaningful appellate review. While it is possible that this matter was addressed in the hearing, there is no record, and I cannot speculate as to what transpired. The valuation of the vehicle is clearly a key issue in the proceeding. I find that the failure to do the analysis, or to record it in the decision or summary, constitutes an error of law.

...

43 As Davison J. said in **Victor**, "where it cannot be established from the record the appropriateness of the findings, the danger exists that the findings are unreliable." n **Bingley v. Sable Offshore Energy Inc.** (2003), 211 N.S.R. (2d) 15 (S.C.) I said, "I must not hypothesize as to what occurred at trial" (para. 32). The reasons given by the adjudicator do not allow me to conclude Bas the respondent submits - that he weighed the evidence provided by the appellant with that of the respondent, and preferred the respondent's evidence. All that can be said with confidence is that the adjudicator relied on the appraisals supplied by the respondent.

[18] In this case the adjudicator's explanation for dismissing Eye Catch's counterclaim is sparse. Once he received the notice of appeal, the adjudicator was required to prepare his report under s. 32(4) of the *Act*. This permitted him to provide a more detailed description about why the counterclaim was dismissed. The adjudicator did not take advantage of that opportunity. His report simply referred to his earlier decision. The issue is whether the limited nature of that decision should result in a new hearing due to a lack of procedural fairness. In my view this should only happen in the clearest of cases because multiple hearings would be contrary to the underlying principle that claims are to be resolved through an efficient and inexpensive process.

[19] The documentary record before the adjudicator includes internal emails between Mr. Dobbin and other Eye Catch employees concerning the orders in question. There are also emails with the customers. Presumably witnesses testified at the hearing about these email exchanges. The adjudicator categorized the decisions made with respect to these orders as “a common and ordinary product of normal business operations”. He also noted that whether they appeared to be mistakes in hindsight is not the test. Through these comments the adjudicator is indicating that he did not believe Mr. Dobbin was negligent in any of the decisions made concerning these orders.

[20] In assessing the adequacy of a an adjudicator’s reasons, it is appropriate to consider the evidence and pleadings which were presented to him. In this case Eye Catch prepared a detailed counterclaim describing the alleged negligence. It alleged that Mr. Dobbin permitted an order to continue when it was stale dated in the sense that costs had increased. The second act of negligence was authorizing an invoice for extra costs which the customer subsequently denied agreeing to. Eye Catch also filed an exhibit binder containing a more detailed description of the counterclaim and attaching supporting documents. The adjudicator said these activities were not outside the common and ordinary operation of the Eye Catch business. This is essentially a question of fact and leads to the conclusion that Mr. Dobbin was not negligent. The evidentiary record indicates that the adjudicator had sufficient information to reach a decision with respect to this issue.

[21] I can understand why Eye Catch would like to see an expanded discussion explaining why the adjudicator came to his conclusion, however that is not always required within the framework of the small claims court regime. Assessing the adequacy of reasons is primarily a function of determining whether there is sufficient information to conduct an appellant review in the context of the record as it exists. I am satisfied that I have the information I need to decide this appeal. The appellant has not shown that there is any error in law in the adjudicator’s approach to the counterclaim nor that the reasons are so inadequate that they amount to a breach of procedural fairness requiring a new hearing.

[22] For the foregoing reasons I will dismiss the appeal.

Wood, J.