SUPREME COURT OF NOVA SCOTIA

Citation: *Reed v. Nova Scotia (Human Rights Commission)*, 2017 NSSC 85

Date: 2017-03-28
Docket: Hfx. No. 456782
Registry: Halifax

Between:

Warren Reed, Gerry Post, Ben Marson, Jeremy MacDonald, Kelly McKenna, Paul Vienneau

Applicants

v.

Nova Scotia Human Rights Commission

Respondent

Judge: The Honourable Justice Frank Edwards

Heard: March 1, 2017, in Halifax, Nova Scotia

Counsel: David T.S. Fraser, for the Applicants
Kymberly Franklin, for the Human Rights Commission
Edward Gores, Q.C. for the Attorney General of Nova Scotia

By the Court:

[1] This judicial review raises the issue of whether the Human Rights Commission (HRC) has the discretion to filter or screen complaints at the intake stage. Do Human Rights Officers (HRO's) have the authority to refuse to accept a complaint pursuant to section 29(1) of the ***Human Rights Act***? Section 29(1) reads:

> 29(1) The Commission shall inquire in to 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.

[2] The applicant, Mr. Reed, had made a complaint (July 27 and August 4, 2016 emails) alleging that the Province of Nova Scotia discriminates in the way it administers public health policies. Specifically, the complaint related to the alleged selective enforcement of regulations regarding access to washroom facilities thereby discriminating against persons who use wheelchairs. The complaint was not directed against individual establishments but against the government for what Mr. Reed said was a pattern of systemic discrimination in the enforcement of Food Safety Regulations.

[3] On August 3, 2016, the first HRO advised Mr. Reed she would not accept his complaint. She referred Mr. Reed to the Ombudsman as she deemed the complaint to relate to how a government department failed to enforce its regulations.

[4] A second HRO undertook a reconsideration of the decision of the first HRO. On September 14, 2016, the second HRO concurred with his colleague and advised Mr. Reed in part that "… we remain unable to accept your complaint." The second HRO then went on for two and a half pages to try to explain his decision.

[5] I agree with counsel for the applicant. Section 29(1) does not enable HRO's to screen or filter the complaints they receive. The section is mandatory – the Commission "shall inquire" into complaints made to it. It then has the discretion to dismiss the complaint but only on the basis of the reasons set out in Section 29(4) which reads:

> 29(4) The Commission or the Director may dismiss a complaint at any time if
>
> > (a) the best interests of the individual or class of individuals on whose behalf the complaint was made will not be served by continuing with the complaint;
> >
> > (b) the complaint is without merit;
> >
> > (c) the complaint raises no significant issues of discrimination;

> (d) the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding;
>
> (e) the complaint is made in bad faith or for improper motives or is frivolous or vexatious;
>
> (f) there is no reasonable likelihood that an investigation will reveal evidence of a contravention of this Act; or
>
> (g) the complaint arises out of circumstances for which an exemption order has been made pursuant to Section 9. R.S., c. 214, s. 29; 2007, c. 41, s. 6.

[6] There is no provision of the ***Act*** which allows an HRO to refuse to accept a complaint. In particular, s.29(1)(b) does not confer such discretion upon HRC employees. Section 29(1)(b) refers to a situation where the HRC on its own believes a complaint exists despite the fact that no one has actually filed a complaint. (See for example, ***Exxon Mobil Can. Ltd. v. Cynthia Carpenter and the HRC,*** 201 NSSC 445 at para 17 and 22.)

[7] If the legislature had deemed a screening provision appropriate or necessary, it could have said so. (See ***Therrien v. Canada (Attorney General)***, 2015 FC 1351 (CanLII) at para.11 for an example of such a screening provision, or ***Cooper v. Canada (HRC)*** 1996 3 SCR 854 which required that Parliament had to either implicitly or explicitly confer a specific power – in that case to determine questions of law – see para 54 p. 891. See also ***2193145 Ontario Inc o/a Boston Pizza v***

Registrar, Alcohol and Gaming, 2016 ONSC 3552 at para 36 and ***Lawson v. Accusearch***, 2007 F.C. 125 at para. 44.)

[8] Counsel for the Commission argues that the HRC would be overwhelmed if every inquiry had to be treated as a complaint. I am not impressed with that argument. Mr. Reed was not simply making an "inquiry", he was lodging a complaint. As such, he had the right to expect that his complaint would be "inquired into" [s.29(1)]. If the Commission or the Director ultimately decided to dismiss the complaint, then that dismissal must be on the basis of one of the reasons set out in s.29(4). It is simply not an option for the intake worker to decide not to accept a complaint.

[9] Counsel for the HRC referred to the "sheer volume" of inquiries. What that means and how it relates to Mr. Reed's complaint is somewhat puzzling. If there are statistics available to show that unless staff can refuse to accept complaints the Commission will be overwhelmed, those statistics should be shown to the appropriate legislative authority. They have no relevance in the context of this review.

[10] The recognized template for judicial reviews requires that the justice first determine the appropriate standard of review. In this case counsel for the

applicants urged the correctness standard because the issue is, in his opinion, really one of jurisdiction. Counsel for the Commission urges the reasonableness standard. I am not sure that the selection of a standard of review in this case is relevant. I am not reviewing a decision of the HRC. There is no question of deference here. I am really being asked a question of statutory interpretation. Does the ***Act*** allow the screening of complaints? I have answered that.

[11] For the sake of the purists, I will select the reasonableness standard. Accordingly, I find that the decisions of the first HRO and the second HRO were both unreasonable. The first decision was not justifiable, the second was neither justifiable, transparent, or (in some respects) intelligible. As the Supreme Court of Canada put it:

> "Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."
>
> *Canada (Canadian Human Rights Commission) v. Canada (A.G.) 2011 SCC 53 at para. 28.*

[12] In the first case, the HRO refused the complaint because, as she saw it, it related to the way a government agency enforced (or failed to enforce) its regulations. In her view, the complaint should therefore go to the Ombudsman.

With respect, the complaint alleged ***discriminatory*** enforcement (or non enforcement) of certain governmental regulations. It therefore fell squarely within the mandate of the HRC. Section 2(e) of the ***Human Rights Act*** reads:

> 2 The purpose of this *Act* is to
>
> > (e) recognize that the government, all public agencies and all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons; …

[13] Moreover, the second HRO's decision letter offers eloquent reasons why the first HRO was in error; (while stating the opposite – that she was correct??).

> "… it would appear HRO Powell was correct in referring you to the Office of the Ombudsman. Having said this, there is no reason why another government department could not carry out a simultaneous parallel investigation under their respective mandate(s).
>
> You are correct in stating the Government of Nova Scotia and any department therein has a responsibility to adhere to Human Rights law. Human rights legislation is quasi-constitutional. Therefore, it in effect binds the Crown to the standards set out under human rights legislation. That is, human rights legislation prevails over all other legislation with the exception of those which specifically references as exemption.

[14] Precisely. The ***Human Rights Act*** trumps the Ombudsman, the ***Building Code of Canada***, and the other affected departments of government. A complaint alleging discrimination has been filed. The HRC is obliged to deal with it. It does

not matter that other arms of government can simultaneously undertake their own investigations.

[15] The second HRO's reasons seem to imply that, if Reed's complaint is accepted, it will somehow preclude access to natural justice for individual restaurant owners. That is not the case. There is nothing to stop the Commission from hearing establishment owners while it inquires into the way in which a governmental authority administers public health policies. I suspect that such consultation would be unavoidable.

[16] As the Applicant's Counsel noted, the second HRO does not cite any provision of the ***Human Rights Act*** that justifies his refusal to accept the complaint. Nor does he set out how the complaint is outside the HRC's jurisdiction. I agree with the following statement by Counsel in paragraph 43 of his brief:

> 43. The clear implication of the (HRO's) decision is that one cannot complain against the government of Nova Scotia for selectively enforcing its regulations and policies in a discriminatory manner. That is a conclusion that is not supported by the *Act*, is absurd on its face and would effectively immunize government from discrimination despite the fact that the *Act* binds the crown.

[17] I also agree with Counsel's argument set out in paragraphs 46 and 47 of his brief:

> 46. Just before the "Summary" conclusion of the (HRO's) dismissal, the (HRO) makes the following, puzzling statement making it clear that the (HRO) considered irrelevant factors in (his) decision:
>
> > Finally, in your allegations, you state that the Department of the Environment "enforce the regulations in such a way as to discriminate against persons with physical disabilities…" In fact, other segments of the population also experience challenges when trying to access such services. For example, older persons and persons with children experience similar challenges when accessing certain establishments.
>
> 47. That other people may suffer discrimination on other protected and non-protected grounds is plainly irrelevant to a fair decision. While the exact meaning of the statement is unclear, one interpretation would suggest that because things are tough for others, somehow this excuses the effect of the discrimination alleged by the Applicants.

[18] In short, I find that the reasons for refusing to accept Mr. Reed's complaint were not valid, nor were they reasonable. Refusing to accept Mr. Reed's complaint was not "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

Conclusion:

[19] I am therefore prepared to issue an Order to the Commission requiring it to process the applicant's complaint. The applicant shall also have its costs. Counsel

for the applicant may make a submission on costs within 10 days of receipt of this decision. Counsel for the Commission/respondent may reply within 5 days later.

Edwards, J.