

Claim No: SCCH-17-470445

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Clarke v. Nova Scotia College of Early Childhood Education*, 2018 NSSM 26

BETWEEN:

ANNA-KAY SAMANTHA CLARKE

Claimant

- and -

NOVA SCOTIA COLLEGE OF EARLY CHILDHOOD EDUCATION

Defendant

AND BETWEEN

Claim No: SCCH-17-470447

PETA-GAY CLARKE

Claimant

- and -

NOVA SCOTIA COLLEGE OF EARLY CHILDHOOD EDUCATION

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on April 5, 2018 and April 17, 2018

Decision rendered on May 23, 2018

APPEARANCES

For the Claimant,
Anna-Kay Samantha Clarke

Meaghan Johnston and Jade Pictou
Counsel

For the Claimant Peta-Gay Clarke

self-represented

For the Defendant

Fergus Ford
Counsel

BY THE COURT:

[1] This decision covers two Claims which were agreed to be heard together as they involve many of the same facts.

[2] The Defendant, Nova Scotia College of Early Childhood Education (or NSCECE) is a registered Society (non-profit), which offers a two-year Early Childhood Education (ECE) diploma program at its Halifax location.

[3] The two Claimants Anna-Kay Samantha Clarke (“Anna”) and Peta-Gay Clarke (“Peta”) are sisters originally from Jamaica, both of whom came to Canada on student visas and who attended the Defendant institution between 2015 and 2017.

[4] The two Claimants both had an interest and some experience in early childhood education and both aspired to live and work in Canada. They both had a basic understanding of the immigration system that operates in Canada, and which dispenses legal status to work. They aspired to attain the status known as a Postgraduate Work Permit (sometimes referred to as a Post-Graduation Work Permit) (in either case a “PGWP”), which confers legal status to work for at least the duration of the education pursued, and which may be used as a springboard to further immigration possibilities.

[5] By way of illustration, if they had attended a two-year educational program and attained a PGWP thereafter, they could expect to be able to work in Canada under that permit for at least two years. What might have occurred after that

was not discussed during the hearing, though I take notice of the fact that people who obtain a PGWP often get to stay in Canada for longer periods of time.

[6] There are both less restrictive and more generous types of immigration status that the Claimants could have pursued, neither of which was initially on their radar. In the lesser category there is a form of status conferred upon the obtaining of a Labour Force Impact Assessment (LFIA) that determines that there is a need for such a person and that no Canadian is available to fill that position. The permit to remain in Canada is tied to the particular job, which limits the person's mobility.

[7] At the upper end, there are more expansive immigration possibilities such as applying to immigrate with a view toward permanent residence and eventually obtaining a pathway to citizenship.

[8] Both of the Claimants completed the two-year ECE program at the Defendant successfully and have no quarrel with the quality of the education they received, though at least Anna says that the program was a waste of effort given that she already had credentials that would have allowed her to work in the field.

[9] Both of the Claimants were denied postgraduate work permits by the federal government, and claim to have suffered significant financial losses as a result. They blame the Defendant for having misrepresented to them that they would qualify for PGWP status if they enrolled in and completed the Defendant's ECE course. The claims are framed in negligent misrepresentation.

The facts

[10] The two sisters' stories are similar, though not identical.

[11] Anna applied in 2015 to come to Canada. She testified that she applied both to the Defendant and to Mount Saint Vincent University. She chose the Defendant in part because it's tuition was lower. She was accepted to the Defendant program in January 2015, with course work to begin in September 2015.

[12] Peta was already in Canada studying at Saint Mary's University, and transferred to the Defendant shortly after Anna did, based on her sister's recommendation.

[13] They each paid tuition and related costs in excess of \$18,000.00 to study for two years at the Defendant.

[14] They both described participating in an interview process conducted over Skype, with a recruiter who represented the Defendant, but who no longer is employed with the Defendant. Anna testified that she directly asked the recruiter if she would be eligible for a postgraduate work permit, and said she was told that she would, after completing the program. Peta described a similar conversation shortly thereafter.

[15] This recruiter was not called as a witness, so the versions of the events testified to by the Claimants is unchallenged.

[16] The Claimants were both provided with a student handbook which set out information on what international students could expect. Page 5 of that handbook contains the following passage:

Working after graduation

Upon graduation, many students are eligible to work in Canada under the postgraduate work permit program. The application is online and the fee is \$155.

To be eligible you

Must have studied full-time and completed a program that was a minimum of eight months in length

Must have completed and passed the program of study and received a notification that you are eligible to obtain your diploma or certificate.

Must have a valid study permit when you apply for the work permit.

Generally a work permit is issued for a period no longer than the length of your program of study. For more information and to determine your eligibility to work in Canada after your graduate from NSCECE, please visit: cic.gc.ca/english/study/work-postgrad-who.asp

[17] Both of the Claimants testified that they consulted the government website address referred to in the manual. Neither of them described having any concern with that, as their understanding was based on the information during the interview as well as what was contained in the student handbook.

[18] There is no doubt on the evidence that both of the Claimants embarked upon their studies with a fair degree of certainty in their minds that they would qualify for the postgraduate work permit, so long as they successfully completed the program of study. They both made major life decisions and financial commitments predicated on that belief.

[19] They both had their applications for postgraduate work permits rejected, disrupting their plans and throwing their lives into a certain amount of chaos. They have both managed to gain legal status to work in Canada, through the device of the LMIA, and as such their ability to work and stay in Canada is that much more tenuous. With LMIA status they are tied to the jobs covered by the permit, and would have to go through an additional LMIA to take a different job.

[20] The basic legal framework for attaining a postgraduate work permit is contained in policy documents which direct Immigration Officers as to what they can or cannot do in terms of granting such permits. In the case before me, the parties are in some disagreement as to whether those internal immigration policies changed sometime in 2016 or 2017, and whether those changes are material. Based on what I have seen, I do not believe that there were any material changes in the written policies. If there were such changes, it would be open to the Defendant to argue that it could not be held responsible for changes to immigration policy that might have impacted upon the correctness of the advice that they were giving either verbally or in their manual.

[21] What appears to have changed since 2015 when both the Claimants started their courses with the Defendant, is that there has been a tightening up of how existing policies are applied. There appears to have been a time when individual Immigration Officers were exercising a discretion to approve postgraduate work permits for applicants who do not meet the strict qualifications contained in the Immigration Canada policies. It would appear that, for a number of years until sometime in 2016 or 2017, some graduates of the Defendant were applying for and receiving postgraduate work permits -

notwithstanding that they did not meet the strict criteria. The administrators of the Defendant appear to have been aware that such permits were being granted, perhaps even routinely, and its position before this court is that it only told the Claimants and other applicants what it knew to be the case, namely that "many of our students are eligible to work in Canada under the postgraduate work permit program."

[22] The registrar for the College, Janet Boutilier testified that prior to 2017, approximately 90% of the students who sought postgraduate work permits were successful in obtaining them. In 2017 alone, it appears about half of the students who applied received their permits, while the other half did not. Those unsuccessful included the Claimants.

[23] The Defendant also relies on the fact that students were referred to the government website, and knew or ought to have known that this was the definitive source of advice or information as to what the students could expect.

[24] The government website currently states:

If you graduated from a designated learning institution, and want to stay in Canada temporarily while working, you may be eligible to apply for a post-graduation work permit (PGWP).

Not all designated learning institutions make you eligible for a post-graduation work permit.

Check the designated learning institution list to find out which schools offer programs that make you eligible.

Who can apply for a post-graduation work permit?

To get a post-graduation work permit, you must:

- be 18 or older when you apply
- have continuously studied full-time in Canada in a study program at least eight months long
- have a document from your school (transcript, official letter, certificate, etc.) that confirms you completed and passed all your program requirements
- have graduated from a:
 - " public post-secondary school, such as a college, trade/technical school or university, or CEGEP in Quebec or
 - " private post-secondary school that operates under the same rules as public schools (currently applies only to certain private post-secondary institutions in Quebec) or
 - " private secondary or post-secondary school (in Quebec) that offers qualifying programs of 900 hours or longer, leading to a diplôme d'études professionnelles (DEP) or an attestation de spécialisation professionnelle (ASP) or
 - " Canadian private school that can legally award degrees under provincial law (for example, Bachelors, Masters or Doctorate degree) but only if you are enrolled in a study programs leading to a degree as authorized by the province
- apply for a work permit within 90 days of when it was confirmed that you completed your program and
- have a valid study permit when you apply for the work permit.

[25] The above represents the current state of the website. It would appear that at some point in 2016 or 2017, the bullet point that reads "private secondary or post-secondary school" had the words "in Québec" added, which does not

appear to have altered the fundamental meaning, but rather to have clarified what had always been the intention.

[26] In any event, the Defendant argues that students, had they carefully examined the website and followed all of the links, would have determined that there was no clear path to the PGWP. There is a link to the words "designated learning institution" that, if followed, would lead one to doubt, or at least seriously question, whether NSCECE enjoyed such status. The Defendant's registrar Janet Boutier testified that in about 2014, the school applied to be "designated." It appears from the website that the school does have a designation, for at least some purposes, but it is shown as not being able to offer postgraduate work permit eligible programs. I am not certain whether the information on the website is the same as it was in 2015.

[27] The argument of the Defendant appears to cast the onus back on its students to question, if not reject outright, what the school was telling them. I have a great deal of difficulty with that argument. The school itself knew, or ought to have known, whether it was the type of institution that met the government's criteria for postgraduate work permits. It was its business to know such a thing, and it ought to have known that it did not have a designation that would fully satisfy the immigration authorities. The application in 2014 to achieve a designation, which designation was ultimately unhelpful, shows that the Defendant had some appreciation of the fact that it needed to work on having the appropriate status. I did not hear evidence about when, historically, the Defendant first became aware that its students, or some of them, had been granted postgraduate work permits, but at the point that it became so aware it should have asked itself how or why that could be. Perhaps it was a natural

reaction not to look a gift horse in the mouth by questioning the government as to why its students were being so favoured, contrary to the explicit terms of the immigration policies. But I believe that the Defendant's legal duty was to have a much better understanding, which could then be passed on to existing and potential students. Based on what it actually knew, or ought to have known by 2015, at the latest, a correct statement in the student handbook would have said something to this effect (my words):

“Nova Scotia College of Early Childhood Education is not a designated institution, or otherwise one of the types of educational institutions Immigration Canada recognizes for purposes of postgraduate work permits. Even so, it appears that some of our graduates are applying for and receiving such visas, for reasons which we don't fully understand. You should check with Immigration Canada or consult an immigration expert to see how you might be treated should you attend Nova Scotia College of Early Childhood Education and wish thereafter to work in Canada.”

[28] Of course, such a statement would not have been an effective recruitment tool. However, it would have been the truth.

[29] I believe that the combined effect of the representations made in the Claimants' interviews and the ordinary meaning of the student handbook was to convey an assurance to them that studying at Nova Scotia College of Early Childhood Education, as opposed to another school, would qualify them for the postgraduate work permit. Of course, there was no ironclad guarantee offered. Obviously, a work permit application could fail for any number of reasons, pertaining to the individual's history or background, but no ordinary person receiving the school's assurances would be alert to the possibility that the application would fail for the sole reason that the school was not properly accredited! For students such as the Claimants, who were considering

attending Mount Saint Vincent or Saint Mary's, understanding this point was critical. Had they received diplomas from those degree-granting universities, they would have qualified for a PGWP, all other things being equal.

[30] I believe that the Claimants were both misled by the Defendant, and that such statements made by the Defendant constituted negligent misrepresentations under the legal test that I will set out below.

The consequences

[31] Anna made her application for her postgraduate work permit in July 2017, and while waiting had begun to work, believing the application to be something of a formality. In fact, she was working at two separate jobs earning approximately \$3,000.00 per month. It was not until October 5, 2017 that she received her letter from Immigration Canada refusing the work permit. Based on that letter, she was obliged to stop working immediately at both of her jobs. She understood that she would have to leave the country, at least temporarily until a solution was found. She gave up her apartment and returned to Jamaica, believing reasonably that she stood a better chance of applying for a visa from outside Canada. With the assistance of immigration consultants she was able to eventually return to Canada in early 2018 and work under a LMIA permit, which ties her to the particular job she is working at and for a lesser duration than would have been allowed under a postgraduate work permit.

[32] Anna's evidence was that she had a bachelor's degree in psychology from Northern Carribean University, and had thereafter taught school, worked in a bank and also worked for eight months in an ECE facility owned by her mother.

She says that she did not really need a diploma such as was offered by the Defendant to get a job using the LMIA. Her education and experience were sufficient. As such, she claims, she took the Defendant's program essentially for no benefit.

[33] Peta finished her studies at the Defendant in June 2017, at which time she applied also for the postgraduate work permit. She was also refused such permit in October 2017 after she had already accepted a job in her field. She had to stop working and go through a similar process that resulted in eventually working under a LMIA. Peta claims losses which include her tuition plus loss of wages for about three months and other expenses. Peta did not testify as to her credentials to teach ECE, apart from the diploma she received from the Defendant.

[34] She claims lost wages of \$9,000.00, tuition payments of \$18,000.00 plus \$1,000.00 for the services of immigration consultants.

[35] Although she did not claim all of this in her claim initially, at the conclusion of the hearing she asked for an amendment to her claim to be able to recover \$25,000.00, i.e. the maximum allowable in Small Claims Court. The Defendant did not consent to such an amendment being made at that late date.

[36] On the question of the amendment, I am prepared to allow it on the basis that there was no prejudice to the Defendant. It conducted its defence exactly as it would have had it known that the damages claimed were greater than it saw on paper.

[37] Anna also seeks \$25,000.00, for a combination of lost wages, tuition fees, travel costs etc.

[38] As already noted, the principal defence of the Defendant is based upon the notion that the statement in the handbook had to have been seen as conditional or equivocal, and as such did not amount to a type of representation that could be relied upon. As I have stated, I believe the ordinary meaning of the assurances given to the Claimants, which includes not only the student handbook but also the statements made by the recruiter, would have assured most ordinary people that there was a legal pathway to success in obtaining the postgraduate work permit, and that it was not merely a roll of the dice at the whim of some nameless and faceless Immigration Officer.

[39] The requirements to establish a claim in negligent misrepresentation are set out in the frequently quoted case of *Queen v. Cognos Inc.* [1993] 1 SCR 87 at page 99:

1. There must be a duty of care based on a "special relationship" between the representor and the representee;
2. The representation in question must be untrue, inaccurate, or misleading;
3. The representor must have acted negligently in making said misrepresentation;
4. The representee must have relied in a reasonable manner, on said negligent misrepresentation; and
5. The reliance must have been detrimental to the representee in that damages resulted.

[40] In my view, both Claimants easily satisfy all of these five tests.

[41] The special relationship consists of a school giving important advice to people considering studying there. This is not a relationship between strangers. The circumstances were such that a greater duty of care was called for.

[42] I have already found that the representation was inaccurate or misleading, if perhaps not entirely untrue.

[43] I believe the Defendant was negligent in the sense that it did not pay sufficient attention to either solidifying its status with the government, or conveying to potential students the true state of affairs.

[44] As for the reliance, I believe both Defendants sincerely and reasonably relied on this misrepresentation, and they suffered similar detriments that were financially burdensome upon them. Both of the Claimants could have chosen to study at different schools that would have given them a clear pathway to postgraduate work permits. They chose the Defendant because its program was a little cheaper than that available through local universities, but I have no question in my mind that they would have paid a little extra had they known the difficulties that they would face trying to get postgraduate work permits through the Defendant.

[45] As such, the Claimants have made out a case for negligent misrepresentation.

Damages

[46] Both Claimants include a refund of their tuition as part of the damages.

[47] Anna bases this claim on the fact that she was already qualified to teach ECE by virtue of her university degree and ECE experience. She says that the decision to enrol with the Defendant was strategic, in the sense that she believed it would give her access to a PGWP. This evidence is credible and not contradicted by anything else. On balance, I believe she has made out a case that her tuition payments were for naught. I recognize that it could be said that there was value to the education she received, but it could also be said that she lost two years during which she might have been working and earning income, rather than studying and paying tuition.

[48] In the case of Peta, I do not find in the evidence a foundation for such a claim. I recognize that she was not legally represented, and I allow for that, but I cannot infer facts where there was no evidence offered on a particular point. She did not testify as to her previous experience in ECE, and filed no damage-related documents apart from proof of her tuition. In her case, I must deny the tuition portion of her claim.

[49] Broadly speaking, apart from Anna's tuition claim, I believe that the compensable damages suffered by each of the Claimants is causally linked to having to give up jobs, with loss of income, travel and housing expenses where they had to leave the country, and the cost of immigration assistance.

[50] In Anna's case, she was able to document flight costs of slightly more than \$700.00, \$930.00 for an immigration consultant, and loss of income for at least four months, at more than \$12,000.00. She did not attempt to quantify the costs associated with giving up her apartment and having to live in temporary lodgings. Her tuition costs were \$18,655.00. These amounts in total exceed \$25,000.00, and I accordingly assess her damages at \$25,000.00.

[51] Peta testified that she lost \$9,000.00 of income that she could have earned, and that she paid \$1,000.00 for the services of an immigration consultant. While she may have had greater damages, she did not prove them, and I assess her damages at \$10,000.00.

[52] There shall accordingly be orders awarding Anna \$25,000.00 and Peta \$10,000.00. Each is entitled to her costs of \$199.35.

Eric K. Slone, Adjudicator