

**NOVA SCOTIA COURT OF APPEAL**

**Cite as: *Nova Scotia (Workers' Compensation Board) v. Bowles, 2002 NSCA 160***

**Date:** 20021210

**Docket:** CA No. 182562

**Registry:** Halifax

**Between:**

Workers' Compensation Board (N.S.)

Appellant

v.

Glen Bowles

Respondent

**Judges:** Roscoe, Bateman and Saunders, JJ.A.

**Appeal Heard:** November 26, 2002

**Judgment Delivered:** December 10, 2002

**Held:** Appeal allowed with costs of \$2,000.00, including disbursements, as per reasons for judgment of Roscoe, J.A., Bateman and Saunders, JJ.A. concurring

**Counsel:** David Farrar & Christa Hellstrom, for the Appellant  
Wayne Bacchus, for the Respondent

Reasons for judgment:

[1] This is an appeal from a decision of Justice David MacAdam dismissing the application of the appellant to strike the respondent's originating notice and statement of claim pursuant to **Civil Procedure Rule** 14.25.

[2] The respondent was injured in a work related accident for which he was entitled to and was in receipt of workers' compensation benefits. In his statement of claim, the respondent alleges that he suffered further injury and damages as a result of following the directions of his case worker, an employee of the appellant Workers Compensation Board, to participate in work hardening and physiotherapy. He claims that the employee was negligent and acted in bad faith and that as a result of her conduct it was necessary for him to have additional surgery. It is alleged that the Board's employee was "acting in the scope of her employment". The bad faith was said to be evidenced by her intent to harm him and that her conduct was "dishonest" in that she repeatedly told the respondent that he was required to continue with the work hardening or his benefits would be discontinued, without advising him of the option of having his doctor provide a medical opinion that the physiotherapy was unsafe. The respondent claimed

damages for lost wages, loss of earning capacity, pain and suffering, in addition to punitive and exemplary damages and costs.

[3] The appellant submits that the action should have been struck because it is barred by statute and thus discloses no reasonable cause of action. Section 28 of the **Workers' Compensation Act**, S.N.S. 1994-95, C.10 as amended provides:

**28 (1)** The rights provided by this Part are in lieu of all rights and rights of action to which a worker, a worker's dependant or a worker's employer are or may be entitled against

(a) the worker's employer or that employer's servants or agents; and

(b) any other employer subject to this Part, or any of that employer's servants or agents,

as a result of any personal injury by accident

(c) in respect of which compensation is payable pursuant to this Part; or

(d) arising out of and in the course of the worker's employment in an industry to which this Part applies.

[4] The appellant Board submits that since it is an employer “subject to this Part”, no action arises against it for the injuries sustained by the respondent that may have been caused or exacerbated by the conduct of its employee.

[5] The chambers judge in a brief decision, following extensive debate with the Board's counsel, found that although the respondent's action was not likely to be successful, the appellant had not met the "obviously unsustainable" test as established by **Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959 and **Vladi Private Islands Ltd. v. Haase et al.** (1990), 96 N.S.R. (2d) 323. In discussions with counsel the chambers judge indicated that it was a matter of interpretation of s. 28 as to whether it applied to the Board's employees in the instance alleged and in particular whether it applied to one who acted in bad faith. Therefore he concluded the action was not obviously unsustainable.

[6] The chambers judge may have been correct in determining that the action was not obviously unsustainable as a result of the application of s. 28, because there were some factual disputes requiring evidence to resolve, such as whether the Board was an employer subject to Part 1 of the **Act**, and whether the subsequent injury was one for which compensation was payable.

[7] However, s. 167 does operate to bar the claim made here and its application prohibits this action. Although the respondent claims that s. 167 of the **Act**

provides a right of action if the Board's employee acted in bad faith, it is on a plain reading of the section, the exact opposite. Section 167 provides:

**167** No person may bring an action or other proceeding for damages in any court of law against

- (a) the Board;
- (b) any member of the Board of Directors;
- (c) any officer or employee of the Board;
- (d) the Appeals Tribunal or any member of the Appeals Tribunal; or
- (e) any member of the Medical Review Commission established pursuant to Section 203,

for any action or omission within the jurisdiction conferred by this Part, or beyond the jurisdiction conferred by this Part, where the person responsible for the action or omission acted in good faith.

[8] By operation of this section, all actions against the Board and its employees “for any action or omission within the jurisdiction conferred by this part” are unequivocally prohibited. Actions and omissions beyond the jurisdiction of Part 1 are prohibited where the person acted in good faith. In other words, actions for bad faith are permitted only when the Board or the employee acted beyond the jurisdiction conferred by this Part 1 of the **Act**. Part 11 of the **Act** begins at s. 238. This interpretation is consistent to that noted by Cromwell, J.A. in **Martin v. Nova**

**Scotia (Workers' Compensation Board)**, 2000 NSCA 126 ; [2000] N.S.J. No.

353 (Q.L.) at ¶ 113:

... Members of the Board have immunity from suit for action within their jurisdiction and good faith action outside it: s. 167. The Board is given exclusive decision-making authority in these terms: ...

[9] The respondent alleges in his statement of claim that the Board employee was acting within the scope of her employment when she required him to attend for work hardening. She was consequently acting on behalf of the Board in the discharge of her duties. The respondent as an injured worker and recipient of compensation was obligated by s. 84 of the **Act** as follows:

**84 (1)** Every worker shall

(a) take all reasonable steps to reduce or eliminate any permanent impairment and loss of earnings resulting from an injury;

(b) seek out and co-operate in any medical aid or treatment that, in the opinion of the Board, promotes the worker's recovery;

(c) take all reasonable steps to provide to the Board full and accurate information on any matter relevant to a claim for compensation; and

(d) notify the Board immediately of any change in circumstances that affects or may affect the worker's initial or continuing entitlement to compensation.

**(2)** The Board may suspend, reduce or terminate any compensation otherwise payable to a worker pursuant to this Part where the worker fails to comply with subsection (1).

[10] As a result of s.167 of the **Act**, no action against the Board or its employee is allowed when acting within its jurisdiction. The pleadings therefore disclose no reasonable cause of action and should have been struck out. The chambers judge erred in failing to so order. I would allow the appeal with costs of \$2,000. including disbursements, strike out the originating notice and statement of claim and set aside the costs order in favour of the respondent made by the chambers judge.

Roscoe, J.A.

Concurred in:

Bateman, J.A.

Saunders, J.A.