NOVA SCOTIA COURT OF APPEAL

Citation: *Daigle v. Mark's Work Wearhouse Ltd.*, 2022 NSCA 5

Date: 20220121
Docket: CA 504673
Registry: Halifax

Between:

Sandra Daigle

Appellant

v.

Mark's Work Wearhouse Ltd., Labour Board of Nova Scotia and the Attorney General of Nova Scotia

Respondents

Judge:	The Honourable Justice Elizabeth Van den Eynden
Appeal Heard:	September 20, 2021, in Halifax, Nova Scotia
Subject:	*Labour Standards Code;* complaint under s. 71(1) time-barred under s. 23(4)
Summary:	Ms. Daigle appeals the Board's dismissal of her complaint against the respondent employer. As a preliminary matter, the Board decided her complaint was outside the statutory time frame set out in s. 23(4) of the *Code* and dismissed her complaint. Ms. Daigle alleged the Board erred in doing so. She also made a motion to introduce fresh evidence.
Issues:	(1) Should fresh evidence be admitted? (2) Did the Board err in dismissing the complaint?
Result:	Fresh evidence not admitted. It does not meet the admissibility test. Ms. Daigle contended the Board misapprehended evidence; however, she did not identify any misapprehension, let alone a material one that played an essential part in the Board's decision. Appeal dismissed without costs.

NOVA SCOTIA COURT OF APPEAL

Citation: *Daigle v. Mark's Work Wearhouse Ltd.*, 2022 NSCA 5

Date: 20220121
Docket: CA 504673
Registry: Halifax

Between:

Sandra Daigle

Appellant

v.

Mark's Work Wearhouse Ltd., Labour Board of Nova Scotia and the Attorney General of Nova Scotia

Respondents

Judges:	Bourgeois, Van den Eynden, and Beaton, JJ.A.
Appeal Heard:	September 20, 2021, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Van den Eynden, J.A.; Bourgeois and Beaton, JJ.A. concurring
Counsel:	Sandra Daigle, self-represented appellant James B. Green, for the respondent Mark's Work Wearhouse Ltd. Labour Board of Nova Scotia and the Attorney General of Nova Scotia, not participating

Reasons for judgment:

Overview

[1] The appellant (Ms. Daigle) appeals a decision (2021 NSLB 3) of the Nova Scotia Labour Board (Board) wherein the Board dismissed her complaint against the respondent Mark's Work Wearhouse Ltd. (MWW).

[2] Ms. Daigle was a former employee of MWW and complained to the Board that she was constructively dismissed from her position with MWW in contravention of s. 71(1) of the *Labour Standards Code*, R.S.N.S. 1989, c. 246 (*Code*).

[3] Section 71 limits an employer's ability to terminate an employee with ten or more years of service absent just cause unless the circumstances fall within an exception set out in the *Code*. Ms. Daigle was a tenured employee with 31 years of service. She asked the Board to award her pay in lieu of notice for the alleged violation. She did not seek reinstatement.

[4] As a preliminary matter, the Board was called upon to decide whether Ms. Daigle's complaint was untimely. The Board concluded the complaint was outside the statutory time frame set out in s. 23(4) of the *Code*, and dismissed her complaint.

[5] Ms. Daigle appeals to this Court alleging that the Board erred. She also made a motion to introduce fresh evidence in support of her appeal.

[6] As these reasons will explain, I would not admit the fresh evidence and would dismiss the appeal without costs.

Background

[7] Ms. Daigle's complaint, filed September 12, 2019, was originally before the Director of Labour Standards (Director) as contemplated by the *Code*. On July 13, 2020, the Director determined there was no violation of the *Code* and issued a Notice of No Violation to that effect. Ms. Daigle was not satisfied with the Director's determination and, as permitted under the *Code*, requested the Board determine her complaint. The Board adjudicates complaints *de novo*.[1]

---

[1] *Code*, s. 26(1).

[8] From the outset of the proceedings before the Board, MWW argued Ms. Daigle's complaint was time-barred. It asked the Board to determine this issue as a preliminary matter before addressing the merits of the complaint. The parties agreed the Board should address this as a preliminary issue. The Board received written submissions together with supporting documents from the parties and decided the preliminary issue on these written materials.

[9] Given the decision under appeal pertains to the preliminary issue of whether Ms. Daigle's complaint was out of time, it is only necessary to set out the relevant background underpinning the Board's determination of this issue.

[10] To assist in contextualizing the Board's decision it is helpful to review the governing statutory provision regarding the time limits for filing complaints. The *Code* provides:

> s. 23(4) The Board shall not proceed with any matter arising out of a complaint referred to in subsection (1) unless the matter to which the complaint to the Director refers occurred within the six months preceding
>
> (a) the receipt of that complaint by the Director; or
>
> (b) the initiation of an inquiry by the Director.

[11] Ms. Daigle started working for MWW in 1988. Her last day of active employment was May 30, 2016. Ms. Daigle claimed that she was harassed and bullied in her workplace and this created a toxic work environment that was harmful to her health. She went on a medical leave of absence and never returned to work.

[12] In her complaint, Ms. Daigle referenced numerous circumstances prior to going on medical leave that she says created an untenable work environment. These circumstances included transfers to smaller stores owned/operated by MWW that resulted in her receiving lower bonus entitlements; restrictions on her ability as a store manager to hire, discipline and manage staff; receiving demeaning emails; being yelled at; and receiving unfair criticism. MWW developed a return to work plan while Ms. Daigle was on medical leave but Ms. Daigle perceived this as unreasonable and offensive and did not participate.

[13] During her medical leave, Ms. Daigle encountered difficulties in securing disability insurance benefits. Her initial benefit application and subsequent appeals to secure short term disability benefits were unsuccessful. She was ultimately denied short term benefits in August 2018. MWW then made it clear she was

expected to return to work, failing which she would be considered to be on an unauthorized leave of absence.

[14] In her complaint Ms. Daigle took issue with MWW's actions towards her while she was pursuing disability coverage between 2016 to 2018. These grievances related to the management of her disability insurance claim and her related allegation MWW wanted to terminate her employment during this period.

[15] As stated, Ms. Daigle did not return to work after going on leave in 2016. The record indicates as of May 2019, Ms. Daigle communicated to MWW that a return to employment was unlikely. In August 2019, Ms. Daigle provided MWW with medical documentation advising she would never be able to return to work due to permanent disability.

[16] On September 11, 2019, MWW terminated Ms. Daigle's employment due to frustration of contract. Although MWW stated it was not required to do so under the *Code*, it still paid Ms. Daigle eight weeks' salary.

[17] In its decision the Board found as a fact Ms. Daigle had actual knowledge of the circumstances giving rise to her complaint long before the six-month period set out in s. 23(4) of the *Code*.

[18] MWW contended the circumstances underlying Ms. Daigle's complaint fell within two categories. The Board summarized MWW's position:

> [23] According to the Employer, the matters underlying the Complaint can be separated in two groupings as follows:
>
> > a. The 2013-2016 allegations flowing from her work conditions, including transfers between stores, limits on her ability to manage, conduct by her Regional Manager, and the employer's return to work plan meant to be implemented at the end of her medical leave.
> >
> > b. The disability management allegations, relating to the actions taken by her Employer during her medical leave, including the allegation that the Employer tried to dismiss her twice while she was on medical leave.
>
> [24] The Employer states that these two groupings are distinct in nature. The first grouping deals with conditions in the workplace. The second grouping deals with the Employer's requests to receive supporting documentation for her absences and is closely connected to Ms. Daigle's applications for disability insurance through a third-party insurance provider. The two groupings include events involving different people and do not overlap in time.

…

[26] According to the Employer, even allowing Ms. Daigle a reasonable time period to consider whether to protest the employer's actions in 2016, those matters did not occur within the six months preceding September 12, 2019, when her Complaint to the Director was filed.

[27] Moreover, the Employer states that the allegations relating to the employer's disability management efforts in grouping "b" are also out of time and are not connected to the previous allegations about working conditions, so they cannot be considered a continuation of those allegations. …

[28] The Employer's argument on timeliness is premised on the understanding that when Ms. Daigle stated the Employer tried to dismiss her twice while she was on medical leave, she was referring to the two attempts by the Employer to have her return to work due to her failure to provide documentation supporting her continued absence, first in September 2017 … and second, in August 2018 …. Neither of those events occurred within six months of the filing of the Complaint to the Director on September 12, 2019. The Employer therefore asserts that those are time-barred and should not be considered by the Board.

[19] The Board accepted this contention, explaining:

[29] Having considered all submissions and evidence in this matter, the Board finds that it is appropriate to separate the two groupings of allegations as suggested by the Employer, as they involve events that are distinct in nature and involve different people and timelines.

[30] Regarding the first grouping of allegations put before the Director in the Complaint, relating to Ms. Daigle's work conditions, including transfers between stores, limits on her ability to manage, conduct by her Regional Manager, and the return to work plan following her medical leave**, the Board finds that these were known to Ms. Daigle no later than August 23, 2016.** This was evidenced by an email to Ms. Kennedy in which she stated that the events from 2013 onward have caused her illness because it is a "workplace environment harmful" to her health (see email attached to the Employer's submissions as Exhibit 2). **The Board finds that these allegations are time-barred as they were known by Ms. Daigle well before six months prior to her filing her Complaint to the Director on September 12, 2019.**

[31] As for the second grouping of allegations which relate to the disability management aspect of her claim of constructive dismissal, this grouping of allegations deals with events unfolding in 2016, 2017 and 2018. They include issues relating to the management of her disability insurance claims up until 2018 and her claims that the Employer attempted to terminate her employment while she was on medical leave.

[…]

> [34] **The Board therefore finds** that the allegations regarding the disability insurer's appeal process and the Employer's attempts to get Ms. Daigle to return to work in 2017 and in 2018 as described above **were known to Ms. Daigle no later than September 11, 2018, which is more than six months prior to the date of filing of her Complaint to the Director.**
>
> [emphasis added]

[20] The Board then concluded:

> [42] In conclusion, the Board finds that the matters raised in the Complaint to the Director on September 12, 2019 were known to Ms. Daigle more than six months prior to the filing of the Complaint. Therefore, they are untimely based on Section 23(4) of the *Code*.

[21] The above matters formed the subject of the complaint and alleged violations under s. 71 of the *Code*.

[22] I note the Board also addressed whether it could hear an additional argument advanced by Ms. Daigle that did not form part of her original complaint. This additional argument related to an allegation, advanced in May 2019, to the effect MWW failed to accommodate her.

[23] The Board set out MWW's position respecting Ms. Daigle's failure to accommodate argument:

> [36] The Board must consider whether it has jurisdiction to consider the allegation of failure to accommodate in Ms. Daigle's lawyer's letter of May 29, 2019. According to the Employer, this matter was not before the Director and therefore is not currently before the Board. The Employer argues that the allegation was not before the Director because it was not part of the original Complaint or the Summary of Allegations which was disclosed to the Employer on December 9, 2019.
>
> [37] Indeed, Section 23(2) of the *Code* prohibits the Board from considering complaints under Section 23(1) unless they have been presented first to the Director, and either the Director;
>
> a. has informed the complainant in writing that he will not entertain the complaint or that he is not proceeding with the matter; or
>
> b. one month has elapsed and the complainant has not received either notice of an order by the Director under subsection (3) of Section 21 or notice that a hearing shall be held by the Board in accordance with Section 24.

> [38] The Employer also argues that the allegations of a failure to accommodate flow from obligations under the *Human Rights Act* of Nova Scotia RSNS 1989, c 214, and that the Board is without jurisdiction to deal with such matters (see: *Labour Board Act*, SNS 2010, c 37, s. 9(2)) which ought to be deferred to the Human Rights Commission.

[24] The Board considered the submissions, reviewed the record, and concluded these allegations were not properly before it:

> [40] The Board reviewed the Complaint and the Summary of Allegations which were submitted as Exhibit 15 to the Employer's written submissions on timeliness. Having considered the Director's decision, the Complaint, and the Summary of Allegations, the Board finds that the failure to accommodate Ms. Daigle's illness was not raised in the original Complaint to which the Employer was asked to respond, and on which the Director was asked to make a determination.
>
> [41] Accordingly, the Board does not have jurisdiction to hear evidence regarding the Employer's alleged failure to accommodate raised in the May 29, 2019 letter from counsel for Ms. Daigle in the context of this Complaint. Because of this determination, the Board does not need to consider the timeliness of this allegation. Because of this determination, the Board also does not need to determine whether it has the jurisdiction to deal with alleged violations of the *Human Rights Act of Nova Scotia*.
>
> …
>
> [43] Moreover, the allegations of failure to accommodate from the May 29, 2019 letter to the Employer were not included in the Complaint to the Director on September 19, 2019. Therefore, they are not properly before the Board as a result of Section 23(2) of the *Code*.

Issue

[25] The issue on appeal is whether the Board erred in law when determining the complaint was untimely/statute-barred. Underpinning this alleged error is the assertion the Board misapprehended evidence before it.

[26] Before setting out the standard of review for this issue and my analysis, I will address Ms. Daigle's motion to admit fresh evidence.

Fresh evidence

[27] *Civil Procedure Rule* 90.47(1) permits this Court to admit fresh evidence where there are "special grounds". As explained by Fichaud, J.A. in *Armoyan v. Armoyan*, 2013 NSCA 99:

> [131] Rule 90.47(1) permits the Court of Appeal to admit fresh evidence on "special grounds". The test for "special grounds" stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Under *Palmer*, the admission is governed by: (1) whether there was due diligence in the effort to adduce the evidence at trial, (2) relevance of the fresh evidence, (3) credibility of the fresh evidence, and (4) whether the fresh evidence could reasonably have affected the result. Further, the fresh evidence must be in admissible form. *Nova Scotia (Community Services) v. T.G.* 2012 NSCA 43, paras 77-79, leave to appeal denied [2012] S.C.C.A. 237, and authorities there cited. *McIntyre v. Nova Scotia (Community Services),* 2012 NSCA 106, para 30.

[28] Ms. Daigle is self-represented on appeal. It is evident from the record she has a long list of grievances with MWW and is focused on establishing the merits of the alleged unfair and/or unlawful treatment in her workplace.

[29] As stated earlier, the Board's decision under appeal adjudicated the preliminary issue of whether Ms. Daigle's complaint was out of time. The Board did not address the merits of her complaint because it found her complaint to be time-barred. Yet, Ms. Daigle's motion for fresh evidence, like her written and oral submissions on appeal, focusses on the merits of her complaint against MWW, as opposed to attempting to establish how the Board erred in law when deciding the preliminary issue.

[30] In my view, the proposed fresh evidence fails to meet the test for admissibility in several ways. Some of the evidence does not meet the due diligence requirement, nor the relevance requirement, and in more limited circumstances, the admissible form requirement. However, the overarching reason why I would dismiss the motion is because I am satisfied the fresh evidence could not reasonably affect the result of this appeal.

Standard of Review

[31] Section 20(2) of the *Code* restricts appeals to this Court to questions of law or jurisdiction. The section provides:

> Any party to an order or decision of the Board may, within thirty days of the mailing of the order or decision, appeal to the Nova Scotia Court of Appeal on a question of law or jurisdiction.

[32] Ms. Daigle argues the Board misapprehended the evidence, which raises a question of law. As established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 36-37, appellate standards of review apply where a statute contains a statutory appeal provision, like s. 20(2) of the *Code*. Therefore, in this case, the appellate standard of review is correctness.

Analysis

Did the Board err in law when determining the complaint was untimely?

[33] Ms. Daigle's allegation the Board erred is not persuasive.

[34] The Board's determination that Ms. Daigle's complaint was statute-barred hinges on clear factual findings made by the Board. As noted, the Board found the circumstances giving rise to her complaint were known to Ms. Daigle long before she took any action against MWW. To briefly recap, the Board found:

- the allegations in Ms. Daigle's complaint relating to her work conditions (including transfers between stores, limits on her ability to manage staff, being the target of inappropriate communication by management, and the return to work plan following her medical leave) **were known to Ms. Daigle no later than August 23, 2016;** and

- the allegations of MWW's wrongdoing regarding the disability insurer's appeal process, attempts to get Ms. Daigle to return to work in 2017 and in 2018, and attempts to dismiss her **were known to Ms. Daigle no later than September 11, 2018.**

[35] For convenience I repeat the *Code* provision which imposes a time limitation:

> s. 23(4) The Board shall not proceed with any matter arising out of a complaint referred to in subsection (1) unless the matter to which the complaint to the Director refers occurred within the six months preceding
>
> (a) the receipt of that complaint by the Director; or
>
> (b) the initiation of an inquiry by the Director.

[36] The Board's findings of fact respecting when Ms. Daigle knew of the subject matter of her complaint are well-anchored in the record. Ms. Daigle has not

demonstrated any misapprehension of any evidence by the Board—whether that be a failure to consider evidence relevant to a material issue, being mistaken as to the substance of the evidence, or failing to give proper effect to the evidence.

[37] I will also address the Board's determination that the allegation of failing to accommodate Ms. Daigle's disability, raised in May 2019, was not properly before the Board as it seems Ms. Daigle might be suggesting this too was in error. As I will explain, it was not.

[38] As MWW correctly points out in its submissions to this Court, although the Board hears the complaint *de novo*, the Board is confined to matters put to the Director pursuant to s. 23 of the *Code*. The materials before the Board contained Ms. Daigle's complaint and a detailed summary of the alleged circumstances that she claimed supported her contention of constructive dismissal contrary to s. 71(1) of the *Code*. There is nothing in the record to suggest Ms. Daigle took issue with the summary. Furthermore, it is clear the Board was alive to and specifically addressed the allegations she did raise in her complaint in its decision.

[39] In paragraphs 22 to 24 herein, I set out the Board's reasons for determining why the failure to accommodate allegation did not form part of Ms. Daigle's complaint to the Director and was therefore not properly before the Board. I need not repeat them here. Ms. Daigle has not put forward any argument or authority to support the Board erred in its determination. Nor do I see any.

[40] In summary, to succeed on her ground of appeal Ms. Daigle needed to establish the Board misapprehended the evidence, the misapprehension was material and played an essential part in the Board's decision.[2] With respect, she has not done so.

[41] In essence, Ms. Daigle takes issue with pivotal findings of fact made by the Board, findings that left the Board with no option but to dismiss her complaint. I reiterate that s. 20(2) of the *Code* limits appeals to this Court to questions of law or jurisdiction. Findings of fact are not appealable to this Court.

[42] I would dismiss this ground of appeal and the appeal.

---

[2] *R. v. Izzard*, 2013 NSCA 88 at para. 40; *ING Insurance Company v. SREIT (Park West Centre Ltd.)*, 2009 NSCA 38 at para. 20; *Leddicote v. Nova Scotia (Attorney General)*, 2002 NSCA 47 at para. 74.

[43] There is one observation I would make, unrelated to the merits of the appeal, that arises from the Board's reference to an earlier case concerning the interpretation of s. 23(4) of the *Code*. The Board said:

> [19] This time limit, which the Board has no ability to extend, applies to the Board's jurisdiction, and does not affect rights as between the parties (*Slaunwhite* v. *Aluma Systems Inc.*, 2018 NSLB 171, at paras. 14 and 19-31).

[44] In *Slaunwhite* the Board considered whether a claim was statute-barred by s. 23(4) and whether the discoverability principle applied and said:

> [28] This legislative history suggests that the clear intent of the legislature in enacting subsection 23(4) was to expressly limit the conferral of authority to the *Board* to a six-month time period. ... As a result, we are now specifically restricted from hearing and deciding matters arising out of violations of the *Code* occurring more than six months prior to the filing of a complaint.

[45] I simply make note that the law on the discoverability principle has evolved since the *Slaunwhite* decision.[3] That recognized, given the circumstances of this case[4] we need not decide if or how the rule of discoverability may apply to complaints before the Board.

Disposition

[46] For the reasons explained, I would dismiss both the motion for fresh evidence and the appeal. As this is an appeal from a Tribunal decision, I would not award costs.

Van den Eynden, J.A.

Concurred in:

Bourgeois, J.A.

Beaton, J.A.

---

[3] *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 31, *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 at para. 3, and *Tomec v. Economical Mutual Insurance Company*, 2019 ONCA 882, leave to appeal denied [2020] S.C.C.A. No. 7.

[4] The Board found Ms. Daigle had knowledge (discovery) of the material facts underpinning her complaint to the Director no later than September 11, 2018. As explained, this Court is bound by the Board's factual findings. Ms. Daigle had six months from that point to file her complaint with the Director, which she did not.