NOVA SCOTIA COURT OF APPEAL

Citation: *HFX Broadcasting Inc. v. Cochrane*, 2022 NSCA 67

Date: 20221103
Docket: CA 512290
Registry: Halifax

Between:

HFX Broadcasting Inc. and Evanov Radio Group Inc.
Groupe Radio Evanov Inc.

Appellants

v.

Lindsay Cochrane

Respondent

Judge: The Honourable Justice Joel Fichaud

Appeal Heard: September 26, 2022, in Halifax, Nova Scotia

Subject: Limitations of action – constructive dismissal

Summary: Ms. Cochrane sued her employer, HFX Broadcasting Inc. for wrongful dismissal. She alleged the employer's "toxic work environment" amounted to a constructive dismissal. Her particulars included allegations of both sexual harassment and non-sexual harassment through ostracism, and verbal and emotional bullying. The alleged sexual harassment occurred before the 2-year limitation period under the *Limitations of Actions Act*. The alleged non-sexual harassment continued thereafter and culminated within 2 years before the lawsuit was filed.

HFX Broadcasting moved in the Supreme Court for summary judgment to strike Ms. Cochrane's sexual harassment allegations from the wrongful dismissal claim. HFX Broadcasting submitted those allegations were limitation-barred. The judge of the Supreme Court dismissed the motion

for summary judgment. HFX Broadcasting appealed to the Court of Appeal.

Issues: Should the allegations of sexual harassment be severed for the purposes of the limitations defence?

Result: The Court of Appeal granted leave to appeal but dismissed the appeal. Ms. Cochrane's only claim was for breach of the employment contract by constructive dismissal. Constructive dismissal occurs when the employer unilaterally makes a fundamental change to the terms of the employment contract. Whether that occurred is a question of fact, involving a cumulative analysis of all the circumstances. That analysis would include the allegations of both sexual and non-sexual harassment. The alleged non-sexual harassment continued within 2 years of Ms. Cochrane's commencement of the action. The cumulative analysis cannot be thwarted by cleaving away other evidence under the *Limitations of Actions Act*.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 8 pages.

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Judges: Van den Eynden, Fichaud and Beaton, JJ.A.

Appeal Heard: September 26, 2022, in Halifax, Nova Scotia

Decision Released: November 3, 2022

Held: Leave to appeal granted but appeal dismissed with costs, per reasons for judgment of Fichaud, J.A.; Van den Eynden, and Beaton, JJ.A. concurring

Counsel: David G. Coles, Q.C. and Eliane Francis, a/c for the appellants
Augustus Richardson, Q.C. and Laura Neilan, for the respondent

Reasons for judgment:

[1] Ms. Cochrane sued her employer, HFX Broadcasting, for wrongful dismissal. She claimed HFX Broadcasting's "toxic work environment" amounted to constructive dismissal. Her particulars included allegations of repeated sexual harassment by her immediate supervisor and non-sexual harassment through ostracism and verbal and emotional bullying. Under the *Limitations of Actions Act*, S.N.S. 2014, c. 35, as amended by S.N.S. 2015, c. 22, the relevant limitation period was two years. Ms. Cochrane acknowledges the alleged sexual harassment ceased before two years prior to her filing of the Notice of Action. However, she says the non-sexual harassment continued after the sexual harassment ceased and the cumulative pattern of behaviour culminated within the limitation period.

[2] HFX Broadcasting moved in the Supreme Court for summary judgment to dismiss Ms. Cochrane's claim insofar as it relied on sexual harassment. HFX Broadcasting submitted that aspect of Ms. Cochrane's claim was barred by the two-year limitation. The judge dismissed the motion. He held the allegations respecting sexual harassment could not be severed, for limitations purposes, from the rest of the wrongful dismissal claim.

[3] HFX Broadcasting appeals and reiterates its submission to the motions judge. The issue is whether Ms. Cochrane's allegations of sexual harassment may be treated separately for HFX Broadcasting's limitations defence.

Background

[4] On January 16, 2017, the Appellants HFX Broadcasting Inc. and Evanov Radio Group Inc. Groupe Radio Evanov ("HFX Broadcasting") hired the Respondent Lindsay Cochrane. They signed an Employment Contract dated January 17, 2017. Ms. Cochrane began by co-hosting a morning show on an FM rock radio station. In November 2017, she was re-assigned to hosting an afternoon show. Throughout, her supervisor was Jason Desrosiers, Program Director.

[5] Ms. Cochrane alleges that during her employment, Mr. Desrosiers and others with HFX Broadcasting harassed her sexually and non-sexually. The motions judge's decision (2021 NSSC 341, paras. 6-20) particularizes the allegations. The allegations include sexual comments mainly by Mr. Desrosiers, being propositioned by another employee, ostracism and verbal bullying. This is an appeal from an interlocutory ruling respecting a limitations defence, meaning none

of the allegations have been proven. For the purposes of this appeal, I will assume the allegations are accurate.

[6] On April 30, 2018, Ms. Cochrane filed a complaint with HFX Broadcasting's in-house counsel. The complaint alleged harassment by Mr. Desrosiers and another individual. The in-house counsel investigated and, on June 13, 2018, gave Ms. Cochrane a report on behalf of HFX Broadcasting. The report said the merits depended on one's perspective, declined to determine whether harassment had occurred, but noted that both Mr. Desrosiers and the other individual had been reprimanded. Mr. Desrosiers remained as Ms. Cochrane's superior.

[7] On June 14, 2018, Ms. Cochrane filed a complaint with the Canadian Human Rights Commission. The Commission has jurisdiction over telecommunications enterprises.

[8] On July 26, 2018, Ms. Cochrane gave HFX Broadcasting two weeks' notice to terminate her employment, meaning her last day would be August 9, 2018. This was consistent with her Employment Contract:

> 26) You may terminate Your employment at any time, for any reason, upon giving two (2) weeks' prior written notice to the Station. The Station may require You to work all or part of Your normal shifts during all or part of the notice period. Alternatively, the Station may require You to cease performing Your employee duties prior to the expiration of the notice period, provided the Station shall continue to make full payment of the Base Salary in accordance with this agreement to the end of the notice period as if this Agreement has not been terminated, unless the Station releases You. ….

[9] On August 8, 2018, the day before her notice expired, HFX Broadcasting told Ms. Cochrane to stop work and had her escorted from the premises.

[10] By July 2020, Ms. Cochrane had become dissatisfied with the time taken for the Canadian Human Rights Commission's investigation. She withdrew her complaint to the Commission.

[11] On July 30, 2020, Ms. Cochrane filed a lawsuit in the Supreme Court of Nova Scotia against HFX Broadcasting. Her only cause of action was constructive dismissal – *i.e.,* breach of the employment contract. Her Statement of Claim set out particulars, then pleaded:

> 11. The Plaintiff states that the harassment and toxic work environment to which she was subjected constituted unilateral changes to the terms of her employment contract to which the Plaintiff did not agree, and that such changes amounted to constructive dismissal.
>
> 12. On November (sic) July 26, 2018, the Plaintiff gave notice to the Defendants that she was no longer able to work for the Defendants due to the intolerable environment. In order to honour her statutory notice requirements, the Plaintiff stated that she would continue to work for the Defendants until August 9, 2018, to give the Defendant an opportunity to seek a replacement.
>
> 13. On August 8, 2018, while at work, the Plaintiff was suddenly advised that she was to cease working immediately, was asked for her key and then was escorted out of the building.
>
> 14. The Plaintiff states that the Defendants breached their respective duties to the Plaintiff of good faith and fair dealings in the employment relationship with her. Particulars of such bad faith include, but are not limited to:
>
> a) Harassment (both sexual and non-sexual) specifically perpetrated by the Defendants' agent, Desrosiers;
>
> b) Failing to properly investigate the Plaintiff's harassment complaint against Desrosiers;
>
> c) Failing to protect the Plaintiff from further harassment and toxicity after she complained about Desrosiers' behaviour;
>
> d) Prematurely terminating the Plaintiff's contract of employment, without warning, and escorting her out of the building as if she had been fired.

[12] On November 17, 2020, HFX Broadcasting served Ms. Cochrane's counsel with a Request for Admission that said:

> The misconducts of Mr. Jason Desrosiers, and the refusal of the Defendants to meaningfully address the Plaintiff's complaints, are alleged by the Plaintiff to have occurred on or before July 26, 2018.

[13] On December 3, 2020, Ms. Cochrane's Response to Request for Admission said:

> The Plaintiff says that Jason Desrosiers's sexual misconduct occurred prior to July 26, 2018.
>
> The Plaintiff says that Jason Desrosiers' non-sexual harassment (referred to at paragraph 8 of the Statement of Claim) continued in the form of ostracism up until the Plaintiff's departure on August 8, 2020. The Plaintiff was subjected to a toxic work environment until August 8, 2020.

> The Plaintiff states that the Defendants' refusal to meaningfully address Mr. Desrosiers' misconduct continued up until August 8, 2020, at which time the employment relationship between the parties ended.

I assume that "August 8, 2020" in the second and third paragraphs of the Response should read "August 8, 2018".

[14] On July 15, 2021, further to Civil Procedure Rules 13.02 and 13.04, HFX Broadcasting filed a Notice of Motion for Summary Judgment. HFX Broadcasting's Motion Brief submitted:

- Further to Ms. Cochrane's admission, the alleged sexual harassment had fully occurred and was "discovered" before July 26, 2018.
- Consequently, the two-year limitation period in the *Limitations of Actions Act*, s. 8(1)(a) expired on July 26, 2020 for the sexual harassment allegations.
- Any allegations involving sexual harassment were limitation-barred and should be struck from Ms. Cochrane's claim, filed on July 30, 2020.
- Ms. Cochrane's lawsuit could continue respecting allegations that did not involve sexual harassment, such as "ostracism" and "toxic work environment".

[15] Justice Arnold of the Supreme Court of Nova Scotia heard the motion on August 5, 2021 and issued a Decision on December 14, 2021. The judge dismissed HFX Broadcasting's motion for summary judgment. Justice Arnold held the sexual harassment allegations could not be severed for limitations purposes and the limitation for the entire claim of wrongful constructive dismissal began to run on Ms. Cochrane's last date of employment. Consequently, her action was filed within the statutory limitation.

[16] On January 31, 2022, HFX Broadcasting filed a Notice of Application for Leave to Appeal and Notice of Appeal, followed by an Amended Notice filed on the same day.

Issue

[17] HFX Broadcasting submits that Ms. Cochrane's claim for constructive dismissal is limitation-barred "to the extent it is based upon sexual harassment"

and the motions judge erred in law by not issuing summary judgment to dismiss that aspect of Ms. Cochrane's claim.

Analysis

[18] I will summarize the elements of HFX Broadcasting's submission by quoting its factum:

- The submission begins:

  > 19. … The claim of sexual harassment must be "hived off".

- The factum explains. It notes that section 2(1)(a) of the *Limitations of Action Act* defines "claim" as "a claim to remedy the injury" and section 2(2)(a) says "a claim is brought…when a proceeding in respect of the claim is commenced". The factum continues:

  > 22. In this case, the constructive dismissal claim is "…a claim to remedy the injury…", of alleged sexual harassment, and also of alleged, distinct, unparticularized non-sexual harassment injuries.

  HFX Broadcasting's theory is that Ms. Cochrane has separate "claims" for her two categories of "injury" – one injury from sexual harassment and the other from non-sexual harassment, each with its own start date for a limitation.

- The factum, para. 23, says human rights legislation "clearly establishes 'sexual harassment' as a prohibited ground of discrimination", *i.e.,* an independently litigable claim.

- Section 8(1)(a) of the *Limitations of Actions Act* says "a claim may not be brought after the earlier of…two years from the day on which the claim is discovered…". The factum says:

  > 33. The sexual harassment was discoverable, and was discovered, prior to the two-year limitation set forth in 8(1)(a)…

- The factum concludes:

  > 36. It is submitted the Learned Motion's Justice erred in his determination of questions of law…
  >
  > 37. The *Limitations of Actions Act*, in this case, directs that any action, predicated in whole or in part on sexual harassment must have been commenced within two years of the date the harassment was discovered…The Appellants request that this Honourable Court

> recognize that the applicable limitation period for the sexual harassment claim is two years from the date it was discovered, and that limitation period is not extended by the non-sexual harassment claims occurring up until August 8, 2018.

[19] I respectfully disagree.

[20] Ms. Cochrane's Statement of Claim does not make a tort claim based on alleged sexual harassment or a civil claim for infringement of human rights legislation. The *Limitations of Actions Act*, s. 2(1)(a) defines "claim" as "a claim to remedy the injury, loss or damage that occurred as a result of an act or omission". Ms. Cochrane's only "claim" is breach of the employment contract by constructive dismissal. The alleged "injury, loss or damage" is loss of her employment from constructive dismissal. The "remedy" sought is damages in lieu of notice and interest for that breach of contract.

[21] When an employer unilaterally makes a fundamental or substantial change to an employee's employment contract, a change that violates the contract's terms, the employee may treat the change as a constructive dismissal and claim damages in lieu of reasonable notice: *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at paras. 34-35.

[22] Ms. Cochrane's contract of employment, clause 36, incorporated as terms of employment the provisions in HFX Broadcasting's Policy Handbook. The Handbook stated that employees are to be free from harassment, defined to include both conduct with a sexual connotation and conduct that "poisons the workplace". Ms. Cochrane's claim is that both types of misconduct occurred, with the cumulative effect that her workplace differed fundamentally from that envisaged by her employment contract. She alleges that the second type continued to the last day of her employment, August 8, 2018.

[23] Ms. Cochrane's sexual harassment allegations are not a separate "claim" under the *Limitations of Actions Act*. They are just facts, among others, that Ms. Cochrane says cumulatively support her single claim for breach of contract. It does not matter that the sexual harassment allegations might support a separate complaint under human rights legislation. Ms. Cochrane's lawsuit does not make a claim under human rights legislation.

[24] Ms. Cochrane's constructive dismissal claim for breach of the employment contract is based on allegations, some of which (*i.e.,* the non-sexual ones) she says

continued to her last day of employment on August 8, 2018. Whether her allegations support her claim will be primarily an issue of fact for which the evidence would be considered cumulatively in the merits analysis. See, for example, *Dick v. Canadian Pacific Ltd.*, 2000 NBCA 10, where Drapeau J.A., as he then was, said:

> **[35]** It is commonplace that whether an employee has been constructively dismissed is **essentially a question of fact**. The court must determine whether on a reasonable interpretation of the facts, the employee has established that he was constructively dismissed as a result of conduct by the employer that breaches a fundamental or essential term of the employment contract. …
>
> **[36]** A wide array of unilateral modifications to the employment relationship brought about by the employer may, if sufficiently significant, be treated by the employee as wrongfully terminating the employment contract. …
>
> …
>
> **[38]** It is axiomatic that each constructive dismissal case must be decided by applying the relevant principles of law to its own particular facts. Whether a given change to an employment contract is a fundamental alteration **will depend on all the circumstances** of the particular case, including the specific features of the employment contract in issue. …
>
> **[39]** In the case at bar, any consideration of Canadian Pacific's possible liability for constructive dismissal **must take into account the cumulative effect** of the various actions it undertook over the course of the last few years of Mr. Dick's employment and which, certainly from his perspective, made his job intolerable. …
>
> [bolding added]

[25] The cumulative factual analysis cannot be thwarted by cleaving away relevant evidence under the *Limitations of Actions Act*. The sexual harassment allegations cannot be "hived off" for separate treatment under the *Limitations of Actions Act*, as HFX Broadcasting urges.

[26] Consequently, Ms. Cochrane's limitations period did not begin to run until the last day of her employment – August 8, 2018. Her two-year limitation period had not expired on July 30, 2020, when she filed the Notice of Action and Statement of Claim.

[27] The judge made no error. He properly dismissed HFX Broadcasting's motion for summary judgment.

Conclusion

[28] I would grant leave to appeal but dismiss the appeal.

[29] The motions judge ordered $1,000 costs plus $100 for disbursements. This Court's occasional benchmark is 40%. In my view, $400 is too low for this appeal. I would order HFX Broadcasting to pay Ms. Cochrane's appeal costs of $2,000, inclusive of disbursements, in any event of the cause.

Fichaud J.A.

Concurred: Van den Eynden J.A.

Beaton J.A.