Citation: Wells v Manitoba Human Rights Commission, 2024 MBCA 79
Date: 20241004
Docket: AI23-30-09962

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre

***B E T W E E N**:*

	)	***M. W. Wells***
	)	*on her own behalf*
MAXINE WENDY WELLS	)	
	)	***S. R. McEachern***
(Applicant) Appellant	)	*for the Respondents*
	)	*The Manitoba Human*
	)	*Rights Commission and*
- and -	)	*The Manitoba Human*
	)	*Rights Commission*
	)	*Board of Commissioners*
THE MANITOBA HUMAN RIGHTS	)	
COMMISSION, THE MANITOBA HUMAN	)	***M. D. Zacharias*** *and*
RIGHTS COMMISSION BOARD OF	)	***E. A. Rempel***
COMMISSIONERS and THE BORDER	)	*for the Respondent*
LAND SCHOOL DIVISION	)	*The Border Land*
	)	*School Division*
(Respondents) Respondents	)	
	)	*Appeal heard and*
	)	*Decision pronounced:*
	)	***October 4, 2024***

CAMERON JA (for the Court):

Introduction

[1] The applicant appealed the decision of the application judge dismissing her application for leave to apply for judicial review of a decision of the respondents, The Manitoba Human Rights Commission Board of

Commissioners (the board) of The Manitoba Human Rights Commission (the MHRC). In that decision, the board dismissed the applicant's complaint pursuant to what was then section 29(1)(c) of *The Human Rights Code*, CCSM c H175 [the *Code*], that her son was the victim of discrimination due to the prolonged failure of the respondent, The Border Land School Division (the school division), to reasonably accommodate his disability-related needs in the classroom, contrary to section 13 of the *Code*.

[2] In addition, she filed three motions for fresh evidence.

[3] Just prior to the first appeal hearing, we asked the parties whether the correct issue on appeal should be whether the application judge erred in proceeding with the application for leave at all, rather than whether he erred in dismissing the applicant's application for leave to apply for judicial review. This issue arose because the parties indicated in their facta that leave was not required under the *Code* for the applicant to apply for judicial review of the board's decision. The appeal hearing was adjourned to allow the parties time to address the issue and the question of the appropriate remedy.

[4] At the second hearing, the parties agreed that oral argument was not required on the issue of whether leave was required under the *Code*. This is because there is no provision in the *Code* that required the applicant to obtain leave to file an application for judicial review, nor is there any legislated time limit within which she was required to file an application for judicial review. She was entitled to file her application for judicial review as of right. We agree.

[5] As a result, the second appeal hearing was limited to addressing the issue of the appropriate remedy. The school division and the MHRC argue

that the appeal should be expanded to include the issue of whether the applicant unduly delayed in bringing her application, and all parties argue that we should consider the merits of the judicial review application as a matter of first instance. The alternative remedy would be to have all issues determined in the trial court.

[6] At the hearing, we allowed the appeal and set aside the order of the application judge. We ordered costs on tariff against the school division. We indicated that brief reasons would follow. These are those reasons.

Background and Decision of the Application Judge

[7] Pursuant to the *Code*, the applicant filed a complaint with the MHRC in January 2016. She received the board's decision dismissing her complaint pursuant to section 29(1)(c) of the *Code* on November 1, 2021. While the applicant was representing herself, she did consult a lawyer about challenging the decision. She was advised that there was a thirty-day period to apply for judicial review, that the time limit had expired and that she would have to obtain leave before she could apply for judicial review. Based on that legal advice and, after three unsuccessful attempts, her application for leave to apply for judicial review (the application) was filed on August 22, 2022.

[8] The applicant advised the application judge at the hearing that, despite having filed the application, she questioned whether she was required to obtain leave. The application judge responded by stating that he understood her argument, however, his role was not to answer her question, but to listen to her submissions and determine whether they were persuasive in terms of granting her leave to apply for judicial review. In the result, he did not address the issue of whether leave was required.

[9] The matter then proceeded as a leave application. The application judge applied the factors in *Melew v Yukon Human Rights Commission*, 2022 YKSC 41 [*Melew*], to determine whether there was undue delay in bringing the application. The factors identified in *Melew* at paras 33-45 are (1) the merits of the case, (2) the prejudice to the parties, (3) the explanation for the delay, and (4) the length of the delay.

[10] While referring to these factors, the application judge did not consider them. He indicated that he did not permit extensive argument on the merits of the case because it was a leave application. The parties agree that he did not consider the merits. Furthermore, he did not identify any specific prejudice to the parties but, rather, stated that "public administration requires that administrative decisions be made in a timely way" and the public interest is served where such decisions have a degree of finality. He rejected the applicant's explanation for the delay of nine months, stating that, despite her documents being rejected, she should have contacted the board or the school division and advised them of her intention to bring a review. He did not appear to give any weight to the fact that she had been given erroneous legal advice or to her personal circumstances. Finally, absent any legal analysis, he stated that the "six month 'rule of thumb'" established by Canadian jurisprudence had been exceeded, thereby militating against granting leave. In doing so, he did not consider that the delays in the reference cases were significantly longer. For example, the delay in *Melew* was more than sixteen months.

Discussion and Decision

[11] Legal counsel prepared a supplementary factum for the applicant regarding the issue we raised on the first appeal hearing. He acted for the applicant for that limited purpose only. That factum requests that the order of the application judge be set aside and returned to the Court of King's Bench for a new hearing. However, before us, the applicant requested that we hear the merits of an application for judicial review.

[12] The school division and the MHRC ask that we consider the school division's position that there was undue delay in filing the application as if it was an application for judicial review. Absent a finding of undue delay, they ask that we consider the merits of this case as an application for judicial review. Regarding the motions for fresh evidence filed by the applicant, the school division indicates that it would consent to the admission of the fresh evidence, subject to it being able to make submissions regarding the relevance of and weight to be placed on the evidence.

[13] In support of their positions, the school division and the MHRC rely on section 26(1) of *The Court of Appeal Act*, CCSM c C240, which states:

Court may pronounce proper judgment **26(1)** The court, upon an appeal, may give any judgment which ought to have been pronounced, and may make such further or other order as is deemed just.	**Prononcé des jugements appropriés par le tribunal** **26(1)** Le tribunal, saisi d'un appel, peut rendre tout jugement qui aurait dû être prononcé ainsi que tout e ordonnance supplémentaire ou autre ordonnance qu'il estime juste.

[14] In addition, the school division relies on *Smith v The Appeal Commission*, 2023 MBCA 23 [*Smith*], where this Court determined the merits of a judicial review after finding that the application judge in that case refused to consider the application for judicial review based on a misdirection of law.

[15] The problem with the position taken by the school division is that, unlike *Smith*, no application for judicial review or originating process has been filed in this case. Thus, there is no proceeding before the courts in which a decision can be made. Any decision would be hypothetical.

[16] Further, although not determinative, we observe that, in *Bains v Loader*, 2023 MBCA 102, this Court stated, "A new hearing is usually ordered where there are no reasons from the court below, findings of fact must be made and/or the determination of the appropriate order requires the making of discretionary decisions" (at para 12). Unfortunately, the application judge refused to consider the merits of the decision at all. There are no reasons in this regard. Despite the arguments advanced concerning judicial efficiency, the significant amount of evidence in this case, including the proposed fresh evidence and arguments related to its relevance and weight, are considerations that factor against this being an appropriate case for this Court to embark on a first instance judicial review.

[17] Having determined that it is not appropriate for us to review the board's decision, the school division's argument regarding undue delay is best left for the judge hearing the judicial review. If there is a new hearing, it should be before a different judge.

[18] In the result, the appeal was allowed and the decision of the application judge was set aside. Costs on tariff were ordered against the school division.

Cameron JA

Beard JA

leMaistre JA