SUPREME COURT OF NOVA SCOTIA

Citation: *Northwoodcare v. Nova Scotia (Human Rights Commission) and Bundy*, 2025 NSSC 212

Date: 20250623
Docket: Hfx, No. 535608
Registry: Halifax

Between:

Northwoodcare Halifax Incorporated

Applicant

v.

Nova Scotia Human Rights Commission and Angeline Bundy

Respondents

Judge:	The Honourable Justice Muise
Heard:	March 6, 2025, in Halifax, Nova Scotia
Final Written:	June 23, 2025
Counsel:	James B. Green and Erin Mitchell, for the Applicant Jason T. Cooke, K.C. and Ashley Hamp-Gonsalves, for the Human Rights Commission Angeline Bundy, Self-Represented, Not appearing

By the Court:

JUDICIAL REVIEW DECISION

INTRODUCTION

[1] Northwoodcare Halifax Incorporated ("Northwood") provides, among other things, long term care services. It terminated Angeline Bundy's employment on May 13, 2019, following alleged abuse of a resident. On November 1, 2019, Ms. Bundy filed a human rights complaint alleging, among other things, that her termination was motivated by her African Canadian ancestry.

[2] Successive human rights officers ("HRO's") were assigned to investigate the complaint and there were periods during which the investigation was placed in abeyance because of Covid restrictions and uncertainties regarding jurisdiction arising from a Board of Inquiry decision interpreting *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, as making it such that the Commission lacked jurisdiction to deal with complaints involving unionized workplaces.

[3] The investigation report and recommendation were completed and provided to the parties March 8, 2024 ("HRO Report"). On June 26, 2024, the Commission informed the parties that the complaint had been referred to a Board of Inquiry ("BOI").

[4] On July 31, 2024, Northwood filed the within Notice for Judicial Review requesting that the referral decision be quashed, and that the administrative proceeding be stayed, on grounds that the Commission committed an abuse of process and breached the duty of procedural fairness by engaging in undue and inordinate delay which has caused Northwood significant prejudice, and is likely to cause it additional prejudice due to continuing delay pending an inquiry.

[5] The parties agree that, though the issue of stay for delay was raised before the HRC, it did not address the issue and, therefore, I am to determine this Judicial Review as a procedural issue, without a standard of review, such that I must decide whether it was correct that the HRC not have dismissed the complaint on the basis that delay breached the duty of fairness and amounted to abuse of process.

ISSUES

[6] This Judicial review raises the following issues:

1. Has the delay impaired Northwood's ability to respond to the complaint to such an extent that it impairs the fairness of the Board of Inquiry hearing?
2. Did the delay amount to an abuse of process based on inordinate delay having caused other significant prejudice?
3. If the delay amounted to an abuse of process, what is the appropriate remedy?

LAW AND ANALYSIS

ISSUE 1: HAS THE DELAY IMPAIRED NORTHWOOD'S ABILITY TO RESPOND TO THE COMPLAINT TO SUCH AN EXTENT THAT IT IMPAIRS THE FAIRNESS OF THE BOARD OF INQUIRY HEARING?

[7] Northwood submits that the delay impaired its ability to respond to the complaint based on the following:

- The resident, who alleged the abuse, passed away on May 1, 2020. Northwood relied on her account of what allegedly occurred, along with the injuries observed on her, in terminating Ms. Bundy; and the HRO report was critical of that reliance, citing reasons to question the resident's account. The resident was not interviewed as part of the investigation process to probe into the reliability concerns. Northwood was not aware of those concerns prior to receipt of the HRO Investigation Report dated February 26, 2024. There was no other staff member present during the impugned portion of Ms. Bundy's interaction with the resident. In the absence of the resident, it will be unable to rebut the criticisms and show the alleged abuse occurred.
- All the employees who interacted with the resident in the hours and days following the alleged incident, except one, i.e. Nurse Naugler, left Northwood's employ in or before 2021. Nurse Naugler left in May 2023. The HRO Report notes concerns regarding the credibility or accuracy of records made by those employees, and "insinuates" backdating of records. None of them were interviewed during the investigation. The first Northwood learned of the concerns was when it received the HRO Report. If the former employees cannot be located, Northwood will be unable to address these points of concern. Even if they can be located, it

will require much more extensive resources to do so, and, as they are no longer employees, they are less likely to be cooperative. With an earlier report, Northwood could have questioned its employees regarding the credibility or accuracy concerns before they left. Before that, Northwood would not have recognized how central those employees were to the complaint.

- If the HRO's investigation was going to look into reliability, that should have been its focus from the beginning, and employees ought to have been interviewed accordingly, instead of the HRO speaking to management.
- The passage of almost six years since the alleged incident can be expected to have already eroded memories and the additional inevitable delay in having the matter heard by a BOI will result in further deterioration of memory.
- The fact that the hearing will be before a BOI makes Northwood entitled to a high degree of procedural fairness because such a hearing is highly adversarial, adjudicative in nature, and bound by rules of evidence, and it involves: the powers of a public inquiry, including compelling witnesses; potential remedial consequences; the potential stigma of a finding of discrimination; and, putting Northwood's reputation on public display.
- Northwood need not establish "significant prejudice" to establish abuse of process based on impairment of their ability to answer the complaint against them: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, paras [40] and [41].
- It is not reasonable to require Northwood to lead evidence of lost memories because it cannot know what the former employees forgot.
- There is ample judicial comment that the quality of evidence, more likely than not, deteriorates over time. Cases have recognized that fading of memories and risk of loss of evidence can lead to procedural unfairness.

[8] The Human Rights Commission ("HRC") submits Northwood has failed to establish that the delay has caused hearing unfairness for the reasons which follow:

- The resident passed away on May 1, 2020, only six months after the complaint was filed. Therefore, she would not have been available even

if the delay in question had not occurred. It is unrealistic to expect that the investigation to unfold, the investigation to be completed, the parties to make submissions, a decision to be made, and the BOI hearing to be scheduled within six months. Such a timeline would, practically speaking, be impossible.

- The question of what actually happened to the resident is not determinative of the issues to be determined by the BOI. It need only decide whether race-based discrimination was part of the reason Ms. Bundy was dismissed.
- Northwood's evidence fails to establish that any of its other witnesses would be unavailable to attend and give evidence before a BOI. It or its lawyers have already received replies from three of them. There are processes they can engage in to locate the witnesses, and the BOI has power to compel attendance.
- In addition, three of the five witnesses left Northwood's employ by July 31, 2020, less than one year after the complaint was filed. A fourth left in November 2021. Even if the speediest track to a BOI hearing that could reasonably be expected had been followed, those employees would have been gone in any event.
- The fifth left on May 23, 2023, but has responded to, and spoken with, Northwood about gathering evidence for this matter, after being notified in September 2024.
- In relation to the question of fading memories, there is no evidence that any material witness is unable to remember details of the incident in question and/or could not have their memories refreshed by documents.
- Northwood has not shown that the potential witnesses have evidence that is sufficiently probative to affect trial fairness.
- There is extensive documentation available for the hearing, including from Northwood itself, from the Nova Scotia Health and Wellness, Protection for Persons in Care – Final Investigation Report, and documents obtained by the HRO during the investigation. Those documents can act as an aide-memoire for witnesses and a BOI can receive evidence that would be inadmissible in a court.
- It was open to Northwood to conduct its own internal investigation as soon as it was notified that the Human Rights Complaint had been laid

and even as soon as the resident complained of abuse. Tab 104 of Volume II of the Record does contain documents which Northwood sent the HRO related to the investigation of Ms. Bundy's complaint. It includes, among other things, an incident occurrence report, photographs and health records of the resident, and notes of Northwood's interviews with various employees. It was a serious incident involving allegations of patient abuse which led to quick dismissal of Ms. Bundy who had been an employee for almost 10 years. If Northwood is now of the view its internal investigation was not thorough enough, it acted or refrained from acting at its own peril.

- Concerns regarding the accuracy of Northwood's records were raised in the Health and Wellness Report dated January 28, 2021. At that time, two of the five ex-employees were still working at Northwood.
- In summary, Northwood has failed to establish that its ability to advance a full defence has been seriously compromised by the delay, considering the guidelines in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44.
- In addition, it would be unfair to Ms. Bundy who could not have her complaint heard on its merits.

[9] *Abrametz* and *Blencoe* both describe two ways in which delay can create a denial of natural justice or an abuse of process. The first was described in *Abrametz*, at paragraph 41, as being where "delay impairs a party's ability to answer the complaint against them, such as when memories have faded, essential witnesses are unavailable or evidence has been lost". The second was described at paragraph 42 of *Abrametz* as potentially occurring "if significant prejudice has come about due to inordinate delay".

[10] Hearing fairness concerns were not an issue in *Abrametz*. Therefore, it only commented briefly on a denial of natural justice, or an abuse of process based on prejudice to the fairness of a hearing resulting from delay. It was explored more fully in *Blencoe*, specifically in the context of administrative human rights proceedings, at paragraphs 101 to 104, from which the following guidelines or principles can be extracted:

- A stay will not be warranted unless there is "proof of significant prejudice" resulting from "an unacceptable delay".

- "Where delay impairs a party's ability to answer the complaint against him or her, … then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy."
- Examples of such impairment include where "memories have faded, essential witnesses have died or are unavailable, or evidence has been lost".
- "[U]ndue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied."
- There must be proof of prejudice "of sufficient magnitude to impact on the fairness of the hearing".
- The delay must "result in a hearing that lacks the essential elements of fairness".

[11] So, it is not just any delay that will suffice. It must be unacceptable or undue. In addition, it is not just any impairment of ability to answer the complaint that will suffice. It must be significant enough to make it such that the hearing will lack "the essential elements of fairness".

[12] In the case at hand, the arguments of the parties, related to this fairness-of-the-hearing branch of abuse of process by delay, focussed more on the degree of impairment to Northwood's ability to answer Ms. Bundy's complaint, than on the overall length of the delay. Their submissions regarding whether the overall delay was "inordinate" were directed more at the "other prejudice" branch of abuse of process by delay. Similarly, I will address, more comprehensively, the question of whether the overall delay was unacceptable, undue or inordinate when I deal with the issue of whether the delay caused other significant prejudice.

[13] In relation to the passing of the resident, I agree with the HRC that it would have been practically impossible for the matter to have reached the BOI hearing stage, or even the referral stage, before the resident passed, as it was only about six months after the complaint was filed. Therefore, it was not unacceptable or undue delay which caused the unavailability of the resident as a witness.

[14] For the reasons which follow, I also agree with the HRC that Northwood has failed to establish that the loss of the resident as a witness is a sufficiently significant prejudice to render the BOI hearing unfair.

[15] In *Blencoe*, the judge who heard the judicial review concluded that Mr. Blencoe's statement that two prospective witnesses had died, and the memories of other witnesses would have faded, were "very vague assertions" that fell "far short of establishing an inability to prove facts necessary to respond to the complaints". The Supreme Court of Canada upheld that conclusion.

[16] *Blencoe* involved complaints of sexual harassment. So, whether the harassment occurred would be determinative. Yet, the death of two prospective witnesses was not found to have established an inability to defend. That appears to have been because there was no information regarding the importance of those witnesses or the probative value of the evidence they would have given.

[17] In the case at hand, whether the resident was abused, or not, will not be determinative of the outcome of the Inquiry. That outcome will be based on what information Northwood had about the alleged abuse and what it did with that information, perhaps in comparison with how it handled other similar situations with other employees. The BOI will not need to determine whether Ms. Bundy abused the resident. It will only need to determine whether discrimination based on race formed part of the reasons for Ms. Bundy's dismissal, considering the information Northwood had about the incident, what information it sought, what inquiries it made, and what factors it considered. Northwood has documented that information and its inquiries, and those responsible for the dismissal decision ought to be able to testify as to what factors they considered. So, the passing of the resident has little impact on Northwood's ability to present evidence to defend against Ms. Bundy's claim of race-based discrimination.

[18] In relation to the employee-witnesses, it would have been practically impossible for the BOI hearing to have occurred by July 31, 2020. Therefore, the departure of the first three employees cannot be attributable to unacceptable or undue delay. For reasons which I will provide when I discuss "inordinate" delay in more detail, the departure of the fourth employee, on November 29, 2021, is also not due to unacceptable or undue delay.

[19] Even if the departures were due to such delay, I agree that Northwood has failed to establish that the employee witnesses cannot be located.

[20] Three of the five ex-employees have responded to the registered letter sent to each of them, including the one who left most recently, i.e. on May 1, 2023. All five have signed for their respective registered letters. That indicates that

Northwood has the correct address for the two remaining ex-employees who have not responded. Therefore, they ought to be relatively easy to locate.

[21] Northwood presented cases in which human rights proceedings were terminated for delay based, at least in part, on factors that included: risk of inability to locate witnesses; increased cost and inconvenience in getting evidence from ex-employees who had left the province; and significantly increased difficulty in locating former employee witnesses. Those cases were:

- *NLK Consultants Inc. v. British Columbia (Human Rights Commission),* 1999 CarswellBC 381 (B.C.S.C.);
- *Ontario (Ministry of Health) v. Ontario (Human Rights Commission),* 1993 CarswellOnt 952 (O.C.J., G.D.); and,
- *Kodellas v. Saskatchewan (Human Rights Commission),* 1989 CarswellSask 259 (Sask. C.A.).

[22] Those all pre-dated the Supreme Court of Canada decision in *Blencoe*. *NLK* relied on the British Columbia Court of Appeal Decision in *Blencoe*, which the Supreme Court of Canada overturned. In *Kodellas*, the inquiry was stopped as against the individual under s. 24(1) of the Charter, but not against the corporation. There was no Charter challenge in the case at hand and Northwood is a corporation. For these reasons, these comparison cases are not of assistance to Northwood.

[23] I also agree with the HRC that Northwood has failed to provide evidence of anything their potential ex-employee witnesses no longer remember. Northwood says it cannot provide evidence of what the witnesses do not remember, if they do not remember it. However, it could generally provide evidence that they recall nothing about the incident or that they no longer remember things they recorded at the time, or that they stated and was recorded at the time. For instance, there is an incident occurrence report and there are progress notes, as well as notes of discussions and meetings involving the ex-employees who are potential witnesses, which are all purported to have been made close to the incident.

[24] Further, even if memories have faded, there is no evidence the memories of the witnesses cannot be refreshed from that report and those notes.

[25] Whether they are cooperative or not, they can be compelled to appear before the BOI and testify. If they are uncooperative, because they are no longer in

Northwood's employ, that will help eliminate concerns over partiality in assessing the evidence they give in support of Northwood. If they left on bad terms and give evidence detrimental to Northwood's case, Northwood could point to them being disgruntled ex-employees as a factor to consider in assessing their evidence. In this way, the fact that these potential witnesses are ex-employees is more likely to work in Northwood's favour, than to weaken their case.

[26] In relation to Northwood's argument that, because it was not alerted to the concerns regarding the reliability of the resident's allegations and the credibility or accuracy of the records made by the employees, it did not become aware of the need to interview the employees on those points before they left, I note that which follows.

[27] I agree that the seriousness of the resident's allegations and of the rapid dismissal of an employee approaching 10 years of service ought to have, itself, prompted Northwood to conduct a very thorough and well documented investigation from the start. The importance of such an approach was amplified when it was notified of Ms. Bundy's human rights complaint, on January 7, 2020. None of the employees had left by that point.

[28] Then, when Northwood received the Health and Wellness Report dated January 28, 2021, two of the five ex-employees were still in its employ. That report raised concerns regarding the accuracy of Northwood's records. Yet, there is no indication that the employees which remained were questioned in relation to that concern.

[29] As noted at paragraph 60 of *Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission*, 2006 NSCA 63, Northwood cannot seek to gain advantage from the HRC's delay while "ignoring their own opportunities to gather evidence well within their custody and control" following filing and notice of the complaint.

[30] Northwood itself is responsible for any shortfall in the depth of its own investigation and the inquiries it made of its own employees.

[31] In addition, though the Health and Wellness and HRO reports raise concerns regarding the reliability of the resident's allegation, a question for the BOI will be whether Northwood had information, or ought to have acquired information, alerting it to reliability concerns, before dismissing Ms. Bundy, not whether

additional evidence led at the BOI hearing confirms the reliability of the resident's allegations.

[32] Northwood refers to an "insinuation" of backdating of records. It is unclear whether that will be an issue before the BOI. However, if it is, it is something which the witnesses, including past and present employees of Northwood ought to be able to respond to.

[33] I agree that there is extensive documentation, including that noted by the HRC, for Northwood to use as aide-memoires or evidence for the purposes of the BOI hearing.

[34] I note that the evidence filed in this Judicial Review does not state when the one employee who had direct contact with the resident and Ms. Bundy, immediately after the alleged abuse, and helped Ms. Bundy change the resident, left Northwood's employ. There is also no evidence of registered mail having been sent to her or of whether there was any attempt to locate her. That may be because she was interviewed as part of the Health and Wellness and HRO investigations. There is no evidence regarding her importance to Northwood's case. However, the records of what she had said at the relevant times, to Northwood, to the Health and Wellness Investigator, and to the HRO, suggest that the anticipated evidence of this one employee would be more likely to assist Ms. Bundy than Northwood.

[35] For these reasons, I find that Northwood has failed to establish that the delay has impaired its ability to respond to Ms. Bundy's complaint to such an extent that it compromises the fairness of the BOI hearing.

[36] In addition, I agree that, in the circumstances, it would be unfair to Ms. Bundy to deny her the opportunity to have her complaint determined on its merits. There is no evidence she has been responsible for any delay following the filing of her complaint.

ISSUE 2: DID THE DELAY AMOUNT TO AN ABUSE OF PROCESS BASED ON INORDINATE DELAY HAVING CAUSED OTHER SIGNIFICANT PREJUDICE?

Three Step Test

[37] *Abrametz*, at paragraphs 43 and 44, stated:

> [43] *Blencoe* sets out a three-step test to determine whether delay that does not affect hearing fairness nonetheless amounts to an abuse of process. First, the

> delay must be inordinate. Second, the delay must have directly caused significant prejudice. When these two requirements are met, courts or tribunals will proceed to a final assessment of whether the delay amounts to an abuse of process. Delay will amount to an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute: *Behn*, at paras. 40-41.
>
> [44] The minority reasons in *Blencoe* concluded that there was an abuse of process, although the appropriate remedy was not a stay but rather an order for an expedited hearing and costs. In my view, the two sets of reasons in *Blencoe* can be read as complementing each other and expressing a coherent set of principles. The majority reasons set a higher threshold only for an abuse of process requiring a stay, and accepted that lesser remedies continue to be available where a stay is not warranted. With respect to when a stay of proceedings is warranted, the minority reasons recognized that a threshold of "shocking abuse" is necessary to justify a stay of proceedings (para. 155). Moreover, the minority reasons set a lower threshold for an abuse of process which might call for a lesser remedy, such as an order for an expedited hearing or costs.

Whether the Delay is Inordinate

[38] *Blencoe*, at paragraph 122, stated:

> [122] The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

[39] *Blencoe*, at paragraph 123, indicates that the delay of concern is the inexplicable, inexcusable or unjustifiable delay.

[40] Abrametz, at paragraphs 50 and 51, with references omitted, stated:

> [50] That a process took considerable time does not in itself amount to inordinate delay. Rather, one must consider the time in light of the circumstances of the case … . A process that seems lengthy may be justified *on the basis of fairness*.
>
> [51] In determining whether delay is inordinate, the court or tribunal should consider the following contextual factors: (a) the nature and purpose of the proceedings, (b) the length and causes of the delay, and (c) the complexity of the facts and issues in the case. These factors are not exhaustive, such that additional

> contextual factors can be considered in a particular case. [Emphasis by italics in the original]

Nature and Purpose of the Proceedings

[41] *Blencoe*, at paragraphs 126 and 127, discussed the nature and purpose of human rights proceedings, as well as the delays inherent in such proceedings, stating, among other things, the following:

> [126] … [T]he human rights process of receiving complaints, investigating them, determining whether they are substantial enough to investigate and report and then to refer the matter to the Tribunal for hearing is a very different process from the criminal process. The British Columbia human rights process is designed to protect respondents by ensuring that cases are not adjudicated unless there is some basis for the claims to go forward and unless the issue cannot be disposed of prior to adjudication. … [T]he Commission may dismiss a complaint if, *inter alia*, it is brought too late, the acts alleged do not contravene the Code, there is no reasonable basis for referring the complaint to a hearing, if it does not appear to be in the interest of the group bringing the complaint, the complaint was filed for improper motives or if the complaint was made in bad faith. The Commission therefore performs a gatekeeping or screening function, preventing those cases that are trivial or insubstantial from proceeding. There is also the goal of settlement through mediation which is lacking in the criminal context. The human rights process thus takes a great deal more time prior to referring a complaint to the Tribunal for hearing.
>
> [127] The principles of natural justice also require that both sides be given an opportunity to participate in reviewing documents at various stages in the process and to review the investigation report. The parties therefore have a chance to make submissions before a referral is made to the Tribunal. These steps in the process take time.

[42] These paragraphs also reflect the nature and purpose of the human rights administrative process in Nova Scotia.

[43] The following statement in HRC's "*Dispute Resolution Policy*" must be read in the context of these extensive and broad ranging elements of the HRC's "gatekeeping or screening function":

> "All investigations must be conducted in a timely manner having regard to the parties and situations. The Commission shall endeavour to complete all investigations within 200 days of acceptance."

[44] This policy statement is not to be taken as suggesting that investigations exceeding 200 days presumptively involve inordinate delay. Each case, depending

on its nature and other circumstances, will reasonably import its own reasonably tolerable period of delay before it becomes inordinate. That tolerable period is to be determined based on multiple contextual factors as outlined in *Blencoe*.

[45] In the case at hand, the periods of inherent delay attributable to the parties reviewing and making submissions on the complaint and the investigation report arising from it were from January 7 to March 13, 2020, and from March 8 to April 26, 2024, respectively.

[46] The Complaint was provided to Northwood on January 7, 2020. It responded on January 27, 2020. Ms. Bundy provided her rebuttal on March 13, 2020. It was only provided to Northwood on June 16, 2020. There was no explanation why it was not provided earlier. However, from at least January 7 to March 13, 2020, the delay was inherently created by the parties needing time to make submissions.

[47] Similarly, the HRO Report was completed and provided to the parties on March 8, 2024, with a request to provide a response by March 29, 2024. On April 5, 2024, Northwood requested and was provided an extension to April 26, 2024, at which time it did provide its response.

Complexity of the Facts and Issues in the Case

[48] Northwood submits the case was not complex as the issues were what happened between Ms. Bundy and the resident, including, if it happened as the resident described, what injuries resulted, and whether the combination justified dismissal. Therefore, it ought not have taken long to interview witnesses. That is supported by the fact that the Report following investigation pursuant to the *Protection for Persons in Care Act* was completed January 2021 and that investigation was focussed on the same thing as the HRC investigation, i.e. whether it had nothing to do with race.

[49] With respect, the Health and Wellness Investigation did not look into whether race played a role in Ms. Bundy's dismissal. Its purpose and focus were only to attempt to determine whether Ms. Bundy had used "physical force resulting in pain, discomfort or injury as defined in section 3(1)(a) of the *Regulations*". It did not inquire into race-based discrimination, or discrimination of any kind. Only the resident, Ms. Bundy and the worker who assisted her immediately following the alleged event were interviewed. In the end, the investigator was unable to determine whether Ms. Bundy had used such physical force. It was a much more cursory investigation than that of the HRC, in which many more witnesses were

interviewed, including witnesses beyond those who observed the resident and her injuries, and more issues were to be explored, including the extent of Northwood's own investigation into the event and how other employees had been treated in similar situations.

[50] I note as well that, unlike the HRC investigation, there were no responses to the preliminary Health and Wellness Investigation Report for the investigator to consider.

[51] For these reasons, the HRC investigation can reasonably be expected to take significantly longer than the Health and Wellness Investigation.

Length and Causes of the Delay, Including Whether the Party Raising the Delay Issue Has Contributed to or Waived Delay

[52] Contrary to Northwood's submission that the period of delay to be considered is that which starts with when Ms. Bundy first approached the HRC and ends with the likely dates of the BOI hearing, *Blencoe*, at paragraphs 124 and 132, and *Abrametz*, at paragraph 58, clearly direct that the period of delay to be considered is that between the filing of the complaint and the referral to the BOI, as the HRC cannot control the scheduling of BOI hearings.

[53] In *Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission*, *supra*, the court considered the time leading to the BOI hearing and decision. However, that case involved an appeal from the BOI decision, not a judicial review of the referral to the BOI.

[54] In the case at hand the relevant period of delay is from the filing of the Complaint on November 1, 2019, to June 26, 2024, when the HRC advised the parties of its decision to refer the matter to the BOI for hearing. That is a total period that is slightly short of four years and eight months.

[55] The are multiple periods of delay in relation to which the HRC submits there are reasonable explanations, excuses or justifications. Northwood disagrees. Those periods of delay, and the reasons for them, include those which follow.

1. The HRC submits the delay from March 22, 2020, to August 3, 2021, was due to the declaration of the state of emergency and the shutdowns associated with the Covid-19 Pandemic. From January 7 to June 16, 2020, the HRC engaged in some actions that were not completely prevented by the Pandemic, even though the state of emergency was

announced in March 2020. It forwarded the Complaint to Northwood, obtained its response and Ms. Bundy's rebuttal, and provided each to the reciprocal parties.

Northwood submits there is no evidence that the investigation process was impacted by the Pandemic. However, it was referred to in the Record. For example, an email dated June 2, 2020, from the HRO then investigating to Ms. Bundy, states:

> "Sorry for the delay in reaching out to you. Like many government employees, my work schedule has been frustrated by Covid-19."

Another such email to Ms. Bundy dated May 11, 2021, states:

> "I apologize for the delay in getting the investigation completed. The pandemic and related shutdowns have been playing havoc with all our work lives!"

I can take judicial notice that a state of emergency was declared in Nova Scotia on March 22, 2020, and successive emergency orders had a widespread impact, particularly in terms of restricting travel and the ability to have in-person contact. In addition, long-term care facilities, such as Northwood's, were closed to visitors. This prevented proper interviews of witnesses.

So, even though the HRC engaged in some action up to June 16, 2020, the pandemic still prevented it from meaningfully pursuing the investigation.

Northwood also submits the Covid-delay would not have occurred if the HRC had proceeded reasonably before the restrictions surfaced in March 2020. However, as noted, the HRC did not receive Ms. Bundy's rebuttal to Northwood's response to the Complaint until March 13, 2020, and, as the HRC submits, in practice, the investigation starts after the submissions of the parties.

For these reasons, I agree that the delay from March 22, 2020, to August 3, 2021, was explained by the pandemic.

2. The delay from August 26 to October 6, 2021, was due to the investigating HRO leaving their position and another HRO having to be assigned to the file.

3. From November 8, 2022, to September 28, 2023, the investigation was formally put in abeyance because of a Board of Inquiry decision, dated August 12, 2022, stating, based on *Northern Regional Health Authority*

> *v. Horrocks*, 2021 SCC 52, that the HRC had no jurisdiction to investigate an employment-related complaint filed by a unionized employee. The HRC appealed the decision and formally put the file in abeyance by notifying the parties on November 8, 2022. However, it had been advised of lack of jurisdiction in all files involving unionized employees on August 12, 2022, and the HRC indicated the file was put in abeyance in October 2022, without specifying the exact date. Therefore, I will use October 15, 2022, as a reasonable effective commencement date for this period of delay. *Nova Scotia (Human Rights Commission) v. Nova Scotia (Attorney General)*, 2023 NSCA 66, a September 28, 2023-decision of the Nova Scotia Court of Appeal, clarified that the HRC did have jurisdiction to investigate such a complaint. By then, a new HRO had to be assigned to the file. That occurred in November 2023 and the new HRO reached out to Northwood on November 27, 2023, making it such that the effective end date of the entire period of delay caused by the jurisdictional uncertainty is reasonably November 15, 2023.
>
> Northwood submits it was unreasonable for the HRC to put the file in abeyance pending determination of the jurisdictional question because of how far the investigation had progressed and Northwood had not raised an objection to jurisdiction.
>
> However, as noted by the HRC, it would not make sense to expend limited resources on matters over which it had been decided the HRC had no jurisdiction, and, given that the BOI had decided, based on a Supreme Court of Canada decision, that it lacked jurisdiction, it was reasonable to place the file in abeyance.
>
> In addition, it would arguably signal a lack of respect for the BOI decision to have continued investigations in files which the BOI had determined the HRC had no jurisdiction.
>
> Further, the fact Northwood did not raise jurisdiction as an issue did not give the HRC the jurisdiction the BOI had decided it did not have.

[56] Contrary to Northwoods submissions, I find these to be reasonable explanations, excuses or justifications for these periods of delay. Therefore, as indicated in *Blencoe*, these periods of delay are not of concern in assessing whether the delay was inordinate.

[57] They total approximately two years and six months of explained, excusable, or justifiable delay.

[58] That leaves only two years and two months of delay for which explanations, excuses or justifications have not been provided, other than that it involved delay inherent in the process, such as the process of conducting a fulsome investigation and allowing time for review and submissions, by the parties, on: the complaint; the opposing party's position; and the preliminary investigation report.

[59] As noted, there was a total of roughly three months delay attributable to the time required for the parties to review the investigation report and provide submissions.

[60] Except for the four-week extension requested by Northwood to file its response to the HRO Report, neither party was "to blame" for this inherent delay. However, it is also not a delay by the HRC and the HRC could not properly pursue its investigation or deliberations while awaiting submissions from the partes. As such, though it is part of the inherent delay, it is also effectively explained delay.

[61] On this point, I highlight that *Abrametz* made it clear, at paragraphs 45 to 48, that it would not "*Jordanize*" the *Blencoe* approach to assessing delay in administrative proceedings. As such, unlike in *R. v. Jordan*, 2016 SCC 27, which dealt with criminal proceedings, the inherent delay in administrative proceedings related to awaiting party submissions can properly be treated as explained delay.

[62] Therefore, the result is that the actual "investigative" delay was about one year and eleven months.

Whether Delay Inordinate Considering These Contextual Factors

[63] *Ambrametz, supra*, in the context of disciplinary proceedings against a lawyer, a delay of about five years and nine months was found to give rise to serious concern but not to be inordinate. The case was complex and involved a significant investigation into trust account irregularities. The lawyer was responsible for 14.5 months of delay and his request to put the matter on hold pending the outcome of a different matter before the courts and his own complaint against the law society's disciplinary counsel had contributed to the delay.

[64] Northwood presented the case of *PNB v. NB Human Rights Comm.*, 2009 NBQB 047, highlighting that it concluded a delay of five years and eight months between the making of the complaint and the referral to the Minister was

"excessive" and constituted an abuse of process. However, in doing so, it relied on *NLK Consultants v. British Columbia (Human Rights Commission)*, *supra*, which itself relied on the British Columbia Court of Appeal decision in *Blencoe*, which was overturned by the Supreme Court of Canada. In addition, its discussion of the delay issue was very brief and it did not follow the *Blencoe / Ambrametz* approach to assessing delay and its impact. For example, although there were periods of delay which were explained, it did not deduct those or state why the explanations were not reasonable.

[65] *PNB* addressed the other "procedural" issues much more fully, concluding that there had been a lack of procedural fairness because the Commission:

- Improperly broadened the complaint without informing the Province;
- Had not interviewed witnesses or considered information it should have;
- Had not addressed the appropriate question, nor performed a comparative analysis; and,
- Should have dismissed the complaint because it should have concluded that the Board could not find discrimination.

[66] So, the delay issue was just an additional issue it did not need to address and was not fully explored. As such, it is not a useful precedent regarding acceptable length of delay in human rights investigation cases.

[67] Similarly, other case presented by Northwood in support of the delay in the case at hand being unacceptable and warranting a stay did not follow the *Blencoe / Ambrametz* analytical framework, including the following cases:

- *NLK Consultants v. British Columbia (Human Rights Commission)*, *supra*;
- *Kodellas v. Saskatchewan (Human Rights Commission)*, *supra*;
- *Douglas v. Saskatchewan (Human Rights Commission)*, 1989 CarswellSask 300 (Q.B.); and,
- *Ontario (Ministry of Health) v. Ontario (Human Rights Commission)*, *supra*.

[68] Northwood also refers to paragraph 69 of *Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission*, *supra*, in support of its

submission that, in the human rights investigation context, a delay of three or four years from the laying of the complaint is inordinate. However, as noted in the last sentence of that paragraph, the court's conclusion was based on there being nothing in the case "to even remotely justify such an extended period of time". The case involved alleged gender and sexual harassment of a female administrative assistant who was fired following the laying of a complaint with the HRC. Interviewing of witnesses did not start until two years after the laying of the complaint and the interviews of some of them took place more than three years after the laying of the complaint, with no explanation for the delay.

[69] Northwood submits that the HRC could have referred Ms. Bundy's complaint to a BOI without even completing the investigation, thus avoiding the delay. However, I agree with the HRC that such a power is only properly used in limited circumstances, such as where there is no dispute on the facts and it is clear that an inquiry is warranted.

[70] In the circumstances of the case at hand, as was found in *PNB v. NB Human Rights Comm.*, the failure to conduct a complete investigation would have been a breach of the duty of procedural fairness owed to Northwood. Similarly, as noted by the HRC, this Court, in *Tessier v. Nova Scotia (Human Rights Commission)*, 2014 NSSC 65, quashed a decision of the HRC to dismiss a complaint because the investigator breached procedural fairness by failing to interview key witnesses. More likely than not, the same result would have obtained in the case at hand if the HRC had not conducted a thorough investigation, particularly given that multiple witnesses were interviewed at Northwood's request.

[71] The unexplained delay in the case at hand was only two years and two months, or only one year and eleven months if you deduct the time for the submissions of the parties. Either way, that is far less than the cases in which the delay was found to be inordinate, and also significantly less than in some case where the delay was found to be acceptable.

[72] Considering these points and circumstances, including the contextual factors I have discussed, I find that the delay in the case at hand would not offend the community's sense of fairness. Rather, it was needed to ensure a complete and thorough investigation into a complaint which required exploring multiple facets. As such, the delay is justified on the basis of fairness, both to Northwood and to Ms. Bundy. Therefore, the delay was not inordinate.

Whether the Delay has Directly Caused Significant Prejudice

[73] As noted at paragraph 101 of *Blencoe*, under this branch, "there must be proof of significant prejudice which results from an unacceptable delay".

[74] The evidence or information of prejudice under this branch of the inquiry is the following.

[75] Caroline Campbell deposed to that which follows. Northwood is a non-profit organization dependent on government funding and fund raising through Northwood Foundation. It employs about 300 care providers, and about 2200 employees in all. Its staff and residents are from many racial, cultural and ethnic backgrounds. Therefore, "combatting discrimination in the workplace and fostering respect and inclusivity in every aspect of [their] organization has been of particular importance to Northwood", and "unaddressed allegations of unfair or discriminatory treatment in the workplace will often have a negative impact on staff morale and Northwood's ability to retain employees".

[76] The Record indicates that 28 co-workers signed a petition, and an immediate supervisor wrote a letter, in support of Ms. Bundy. Her immediate supervisor told the HRC investigator that Ms. Bundy had been treated unfairly and that Northwood dismissed her for "political" reasons, to avoid media coverage anticipated because the resident's daughter was management at another long-term care facility. She added that "[a]ll of the staff were in complete shock". These points show some general knowledge of the dismissal among staff.

[77] Based on this evidence and information, Northwood advances the prejudice caused by the delay as being a negative impact on reputation, morale and employee retention.

[78] However, as noted in *Abrametz*, at paragraph 68, this type of prejudice is one that results from the proceedings being undertaken, not the delay, but whether the delay exacerbates it is to be taken into account.

[79] The Record indicates that the impact on staff manifested itself relatively soon after the dismissal. Neither the affidavit nor the Record reveal actual ongoing prejudice. The affidavit only states that such "unaddressed allegations … will <u>often</u> have a negative impact on staff morale and Northwood's ability to retain employees". It does not state that such ongoing negative impact existed in the case at hand. There is also no evidence that Northwood's funding has been negatively impacted. In an organization with 300 care-workers, and 2200 employees overall,

it seems unlikely that the wrongful dismissal of one employee would have such prejudicial effects.

[80] In addition, if the matter remaining undetermined has been causing such prejudice, dismissing the matter without a hearing on the merits will simply prolong the prejudice, perhaps indefinitely. It would only be rectified by a determination that discrimination has not been established.

[81] Further, the prejudice advanced is a prejudice to a corporate entity. *Abrametz*, at paragraph 67, in discussing the "significant prejudice" requirement, stated that "[i]t is only where there is *detriment* to an individual that a court or tribunal will conclude there has been an abuse of process".

[82] Also, similar and more serious prejudice has been found to not meet the test of significant prejudice caused by the delay in other cases. Here are some examples.

[83] In *Blencoe* itself, the alleged perpetrator in the sexual harassment and discrimination complaints, after having been a member of the British Columbia Legislature for 12 years was: removed from cabinet; dismissed from his party caucus; hounded by media; unable to stand for re-election; required to move to Ontario with his family to escape media attention and find work; suffering from severe depression; undergoing psychological counselling, along with his wife; and, prevented from coaching his son's soccer team. The delay was two years and nine months. Yet, the Supreme Court was "not convinced that such prejudice can be said to result directly from the delay": para 133.

[84] In *College of Physicians and Surgeons of Ontario v. Sazant*, 2012 ONCA 727, the appellant advanced the following forms of prejudice listed at paragraph 221:

- he was forced to sell his office building in 2004 due to personal financial circumstances resulting from his legal fees;
- he was precluded from acting as the ringside doctor for amateur boxing events because of practice restrictions;
- he found the practice restrictions humiliating to explain to patients and their parents;
- media coverage had been humiliating and a source of distress;
- he suffered from anxiety and depression;".

[85] At paragraph 246, effectively combining the second and third steps of the test to determine whether delay amounts to abuse of process, the court stated:

> [T]he appellant failed to demonstrate that he suffered actual, significant prejudice caused by the delay in the College proceedings of a magnitude that would bring the administration of justice into disrepute.

[86] So, without stating whether the significant prejudice step was established, it concluded the prejudice was not of sufficient magnitude to amount to abuse of process.

[87] *Abrametz*, at paragraphs 69 to 71, provided the following guidance on the type of significant prejudice *Blencoe* was referring to:

> [69] Prejudice is a question of fact. Examples include significant psychological harm, stigma attached to the individual's reputation, disruption to family life, loss of work or business opportunities, as well as extended and intrusive media attention, especially given technological developments, the speed at which information can travel today and how easy it is to access.
>
> [70] In *Misra*, a doctor was suspended from practice for almost six years, while the College of Physicians and Surgeons chose to wait for years for the completion of criminal proceedings against him before proceeding with the disciplinary process. The criminal proceedings were eventually abandoned. Dr. Misra's reputation had suffered; he had been unable to practice his profession; his professional prospects were diminished.
>
> [71] In *Investment Dealers Association of Canada v. MacBain*, 2007 SKCA 70, 299 Sask. R. 122, lengthy delays exacerbated the harm to the applicant's reputation by publicity from a disciplinary investigation. Profits from his business collapsed, then recovered to some degree as publicity around the initial investigation faded, only to be threatened again after the negative publicity around his business was revived years later when the notices of hearing were finally issued: paras. 40-41; see also *Financial and Consumer Services Commission v. Emond*, 2020 NBCA 42. This is the type of significant prejudice contemplated in *Blencoe*.

[88] The prejudice argued in the case at hand, even if it had been established, would clearly not constitute "the type of significant prejudice contemplated in *Blencoe*".

[89] For these reasons, I find that Northwood has failed to establish that it has suffered significant prejudice caused by the delay.

Whether the Delay Amounts to an Abuse of Process

[90] Northwood submits, based on paragraph 44 of *Abrametz*, that the Court can find an abuse of process in the absence of significant prejudice. With respect this is a misreading of paragraph 44. Both *Blencoe* and *Abrametz* stated that there cannot be abuse of process without significant prejudice having been caused: *Abrametz*, paras 42 and 67; *Blencoe*, para 115.

[91] In the case at hand, significant prejudice has not been established. Therefore, the delay does not amount to an abuse of process.

[92] In the event I am wrong in my conclusion and that Northwood has validly established prejudice that could be said to be significant, in the circumstances, it cannot be said that the delay was unfair to Northwood, would otherwise bring the administration of justice into disrepute, or even approach the threshold of "shocking abuse".

[93] Rather, it would be unfair to Ms. Bundy, and contrary to the public interest, to prevent her complaint from being heard on its merits as none of the delay was of her making and any prejudice to Northwood, assuming prejudice to a corporation may be considered, was so minimal that preventing the BOI hearing from proceeding would bring the administration of justice into disrepute.

[94] This case would not even come close to being amongst the "clearest of cases" where a stay would be warranted.

[95] Consequently, I find that Northwood has failed to establish that the delay amounted to an abuse of process.

ISSUE 3: IF THE DELAY AMOUNTED TO AN ABUSE OF PROCESS, WHAT IS THE APPROPRIATE REMEDY?

[96] As no abuse of process has been made out, there is no need to address the question of remedy.

CONCLUSION

[97] For the foregoing reasons, Northwood's application for judicial review of the HRC's decision to refer Ms. Bundy's complaint to a BOI is dismissed.

[98] If the parties are unable to agree on costs, I will receive submissions in writing on the issue.

[99] In the meantime, I ask Counsel for the HRC to prepare the order, and to do so without including the issue of costs if agreement cannot be reached on that point within two weeks of the parties receiving this decision.

Muise, J.