

CITATION: Frith v. Cable Bridge Enterprises Limited, 2013 ONSC 6436  
**BARRIE COURT FILE NO.:** CV-12-0502  
**DATE:** 20131015

**ONTARIO**  
**DIVISIONAL COURT**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
 )  
 ANNE MARIE FRITH )  
 ) Anne Marie Frith, Self-Represented Plaintiff  
 Plaintiff(Respondent) ) (Respondent)  
 )  
 - and - )  
 )  
 CABLE BRIDGE ENTERPRISES )  
 LIMITED A.K.A. ONTARIO CORP )  
 NUMBER 1147636, LUIGI BIFFIS A.K.A. )  
 LOU BIFFIS, ROCCO LOMBARDI, )  
 ASSUNTA BIFFIS A.K.A. SUE BIFFIS, )  
 PETER BIFFIS, DINO BIFFIS AND )  
 SYLVIA BIFFIS )  
 Defendants(Appellants) ) K.E. Kemp, for the Defendants(Appellants)  
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 )  
 ) **HEARD:** October 9, 2013

**ON APPEAL FROM THE DECISION OF DEPUTY JUDGE**  
**A. FISHER DATED MARCH 20, 2012**

**REASONS FOR DECISION**

**DiTOMASO J.**

**THE APPEAL**

[1] The Appellants Cable Bridge Enterprises Limited a.k.a. Ontario Corp Number 1147636, Luigi Biffis a.k.a. Lou Biffis, Rocco Lombardi, Assunta Biffis a.k.a. Sue Biffis, Peter Biffis, Dino Biffis and Sylvia Biffis (“Cable Bridge”) appeal from the decision of Deputy Judge A. Fisher dated March 30, 2012. At the commencement of trial, Cable Bridge objected to the Plaintiff Anne Marie Frith (“Ms. Frith”) being allowed to proceed with

her action in Small Claims Court and relied upon s.97 of the *Employment Standards Act*, S.O. 2000, c.41, as amended (the “Act”). Following the trial of an issue, the trial judge held that Ms. Frith was allowed to proceed with her Small Claims Court action and was not estopped from being able to proceed by virtue of the provisions of s.97 of the Act.

## **OVERVIEW**

- [2] On April 27, 2009, Ms. Frith’s employment was terminated with Cable Bridge. Thereafter, Cable Bridge paid termination and severance pay to Ms. Frith. However, Ms. Frith disputed the amounts paid. She contacted the Ministry of Labour in respect of the correct calculation of termination and severance payments as well as the calculation of monies owed to her as a result of her employment with Cable Bridge as a commissioned sales person. Cable Bridge is in the business of building and selling houses.
- [3] Cable Bridge claims that Ms. Frith filed a claim/complaint with the Ministry of Labour by completing an online application form for entitlement on October 27, 2009. Ms. Frith did not remember any such online application form being submitted to the Ministry of Labour. Section 97 of the Act prohibits a claimant from thereafter commencing a civil proceeding unless the complaint is withdrawn within two weeks.
- [4] Following the receipt of Ms. Frith’s claim/complaint, the Ministry of Labour conducted an investigation and made certain findings. In accordance with the Act, the Ministry of Labour thereafter scheduled a “meeting” for June 21, 2011. However, on June 3, 2011, more than seven months following the original complaint, Ms. Frith withdrew her claim/complaint from the Ministry of Labour. On February 1, 2011, she commenced an action in the Ontario Court of Justice – Small Claims Court related to the very same matters that had been raised in the Ministry of Labour complaint.
- [5] On March 30, 2012, a trial of an issue was conducted to determine whether Ms. Frith could continue the Small Claims Court action in light of s.97 of the Act. The trial judge ruled that she could. Cable Bridge brings this appeal on the basis that the trial judge erred in fact and law in finding that she could continue with her Small Claims Court action.

## **POSITION OF THE PARTIES**

### **Position of the Appellant Cable Bridge**

- [6] Cable Bridge submits that Ms. Frith did file a complaint/claim with the Ministry of Labour in which she alleged contraventions of the Act. The complaint/claim was made by means of an online application form. The existence of the complaint/claim was confirmed by the Ministry of Labour. The Ministry of Labour made certain findings relating to the claim and a hearing and/or “meeting” was scheduled for June 21, 2011.
- [7] However, before the meeting took place, Ms. Frith withdrew her claim with the Ministry of Labour and proceeded with the Small Claims Court action that she had commenced.

- [8] The withdrawal of her claim took place some seven months after she had filed her claim/complaint with the Ministry of Labour on October 27, 2009.
- [9] Cable Bridge takes the position that Ms. Frith knew the law, had the benefit of legal advice and engaged in forum shopping by obtaining formal findings from the Ministry of Labour which, if favourable, would then be used by her in a civil proceeding.
- [10] Cable Bridge submits that Ms. Frith did file a complaint/claim with the Ministry of Labour and, therefore, was statute barred from commencing a civil proceeding in the Small Claims Court in accordance with the provisions of s.97 of the Act. Further, Cable Bridge submits if the court resorts to its inherent jurisdiction to permit an extension of the two week time frame beyond that contemplated by s.97(4) of the Act, such an exercise of discretion is not warranted in this case.
- [11] Cable Bridge therefore seeks an order setting aside the decision of Deputy Judge Fisher and for an order that Ms. Frith be estopped from continuing with her Small Claims Court action by virtue of the provisions of s.97 of the Act.

#### **Position of the Respondent Anne Marie Frith**

- [12] Ms. Frith submits that she did not file a complaint/claim with the Ministry of Labour. No hearing with the Ministry of Labour ever took place and no ruling was ever made by the Ministry of Labour in respect of the calculation of termination pay, severance pay and commissions owed to her by Cable Bridge.
- [13] She asserts that officers of the Ministry of Labour never communicated with her that a claim was active and that those officers knew of her intent to commence proceedings in the Small Claims Court.
- [14] She asserts that she has no other course of justice but to proceed with her Small Claims Court action which she had commenced on February 1, 2011. Ms. Frith submits that the decision of the trial judge was correct in permitting her to continue with her Small Claims Court action in light of s.97 of the Act. She submits that the trial judge made findings that under s.97(2) of the Act, she was not making a claim for wrongful dismissal. Further, pursuant to s.97(4) of the Act the trial judge found that it was not known that a claim was filed with the Ministry of Labour and so how could such a claim be withdrawn if there was no knowledge of its existence.
- [15] She submits that the decision of Deputy Judge Fisher should be permitted to stand and that this appeal be dismissed.

#### **ISSUES**

- [16] Cable Bridge submits that there are two issues on this appeal:

**Issue #1 – Did Deputy Judge Fisher make a palpable and overriding error of fact, unsupported by the evidence, by concluding that Ms. Frith never filed a complaint with the Ministry of Labour?**

**Issue #2 – Did Deputy Judge Fisher err in fact and law in concluding that s.97 of the Act did not act as a bar to continue the Small Claims Court action?**

## ANALYSIS

### Standard of Review

[17] The standard of review for decisions in the Small Claims Court is determined by the principles outlined by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33 (CanLii), [2002] SCR 235. On a pure question of law, the standard of review is that of correctness. The standard of review for findings of fact are mixed fact and law are reviewable only for palpable and overriding error.

[18] For the following reasons, I would allow this appeal.

**Issue #1 – Did Deputy Judge Fisher make a palpable and overriding error of fact, unsupported by the evidence, by concluding that Ms. Frith never filed a complaint with the Ministry of Labour?**

[19] I find the trial judge clearly misapprehended the evidence and made a fundamental and palpable error when he held:

Firstly, the plaintiff says that she never filed a claim with the Ministry of Labour and she gave her evidence under oath today saying that.

...

The plaintiff advised that she never filed a claim. So how was she to withdraw it and she didn't know about withdrawing it within two weeks when she never filed it in the first place, according to the plaintiff.

...

Here we have no evidence of a claim form.<sup>1</sup>

[20] The plaintiff's evidence is not that she never filed a claim. Rather, the trial record and evidence of Ms. Frith supports the following:

- she did not initiate a claim by going to a Ministry of Labour office;

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<sup>1</sup> Appeal Book, pp. 104 and 105, Tab 6

- she did not initiate a claim with the Ministry of Labour by signing something; and,
- she did not initiate a claim with the Ministry of Labour by giving verbal instructions
- she claimed that she did not “remember” submitting a complaint/claim via an online internet application with the Ministry of Labour.

[21] However, to the contrary, the evidence is extensive that she submitted a complaint/claim by means of an online internet application dated October 27, 2009.

[22] I find that the trial judge made a palpable and overriding error of fact in circumstances where there was sufficient evidence on the record for him to find that Ms. Frith had filed a complaint/claim with the Ministry of Labour. With respect, I conclude that the trial judge committed such an error even in the absence of fresh evidence on the appeal which I will deal with shortly.

[23] References to the exhibits filed at trial as contained in the Exhibit Book filed on this appeal, the exchange of correspondence and emails between Ms. Frith and the Ministry of Labour are confirmatory that a claim had been filed with the Ministry of Labour alleging contraventions of the Act. A claim number had been assigned by the Ministry regarding Ms. Frith’s claim. In a letter dated January 28, 2010 (Exhibit 1) the Ministry of Labour confirmed that Ms. Frith had filed a claim which had not been resolved and remained open. The claim was being forwarded to another Employment Standards Officer who would investigate and make a decision. A copy of said correspondence was sent to Cable Bridge.

[24] Exhibit 2 consisted of a chain of emails between Ms. Frith and Ministry of Labour Officer David Laity in which Ms. Frith and the Ministry of Labour referred to her claim number and the claim. In addition, while she advises that she is considering going to Small Claims Court Ms. Frith indicates “I am aware that if I go this route I cannot resubmit a claim with the Ministry of Labour”.

[25] In her submissions, Ms. Frith stated that this was an unfortunate choice of words and that she had never intended to submit a claim to the Ministry of Labour.

[26] Exhibit 3 at trial was a letter dated June 2, 2010 from the Ministry of Labour to Cable Bridge advising that a meeting would take place at the Ministry of Labour on June 21, 2010 and that the claimant (Ms. Frith) was also required to attend this meeting. The purpose of the meeting was to discuss the following issues: unpaid wages in the form of commission, termination pay and severance pay.

[27] Exhibit 4 was Ms. Frith’s note of June 3, 2010 wherein she reports her discussion of that date with Monica Dixon of the Ministry of Labour advising that she had received the hearing date but would not be attending as she would be pursuing her claims in Small

Claims Court. Even after June 3, 2010, Ms. Frith was in contact with the Ministry of Labour in January 2011 (Exhibit 5) requesting that Mr. Laity change some wording in his opinion which he was not prepared to do.

- [28] The evidence is clear that on October 27, 2009, Ms. Frith did file a complaint/claim with the Ministry of Labour in which she alleged contraventions of the Act. The complaint/claim was made by means of an online application form. Following receipt of her complaint/claim, representatives of the Ministry of Labour communicated with representatives of Cable Bridge, both in person and in writing and advised the existence of the complaint/claim. There was a dialogue between Ms. Frith and the Ministry of Labour in respect of her claim. Ministry of Labour representatives thereafter conducted an investigation and Cable Bridge invested staff time and resources to respond to the complaint/claim.
- [29] The record is clear that the Ministry of Labour thereafter made certain findings relating to Ms. Frith's claim and a hearing and/or "meeting" was scheduled for June 21, 2011. The plaintiff decided not to attend the meeting. However, in communicating with the Ministry of Labour, Ms. Frith had acknowledged and made reference to her claim and the resubmission of a claim with the Ministry of Labour.
- [30] At trial, Ms. Frith did claim that she did not "remember" submitting a complaint/claim via an online internet application with the Ministry of Labour.
- [31] Based on the evidence before the trial judge, I find that he fundamentally misapprehended the evidence and erroneously described Ms. Frith's evidence as being that she had "never" filed an application with the Ministry of Labour.<sup>2</sup>

#### **Fresh Evidence – Additional Facts**

- [32] Ms. Frith only disclosed selected portions of her Ministry of Labour file as part of the legal proceeding. At trial, she refused to consent to an adjournment to enable the complete records of the Ministry of Labour to be obtained and similarly refused to consent to disclosure of the Ministry of Labour records.<sup>3</sup>
- [33] Thereafter, representatives of Cable Bridge submitted a Freedom of Information Request to the Ministry of Labour. Although Ms. Frith objected to the disclosure of the file, the Ministry of Labour nevertheless provided a partial copy of the file with some documents redacted.<sup>4</sup>
- [34] The contents of the Ministry of Labour file clearly reflects that Ms. Frith submitted a claim with the Ministry of Labour by means of an online application on October 27,

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<sup>2</sup> Appeal Book, pp. 93 and 94, Tab 6

<sup>3</sup> Appeal Book pp. 95 and 96, Tab 6

<sup>4</sup> Appeal Book p. 115, Tab 12

2009. That same day a letter was generated by the plaintiff acknowledging receipt of her claim.<sup>5</sup>

[35] In addition, there can be found in Ms. Frith's Compendium at Tab 5 pp. 4 and 5 of her online claim against Cable Bridge. The document comes from Ms. Frith and clearly identifies the nature of her claims with the form repeating the word "Claim" in at least three places.

[36] The form also indicates the following:

My employer did pay me termination and severance pay, my dispute is the amount they calculated is incorrect. I have called the Labour Board on several occasions to get the calculation that should be used and have received three different scenarios. However, no matter what formula was used it still totalled more than the amount paid to me.

I would like to know what the correct calculation truly is and have that calculation applied.

[37] Section E of the form is the Claimant's Declaration. The box ticked declares "I declare that, to the best of my knowledge, this information is complete and accurate".

[38] The name at the bottom of Section E is Anne Frith. The date is October 27, 2009 and under the heading of signature, the Declaration reads "online".

[39] I would permit the filing of this fresh evidence on the appeal which can be found in Cable Bridge's Appeal Book and Compendium at Tab 12 and in Ms. Frith's Compendium at Tab 5 pursuant to s. 134(4)(b) of the *Courts of Justice Act*.

[40] Further, in *Dean v. Mr. Transmission (International) Limited*, 2010 ONCA 443, the Ontario Court of Appeal admitted fresh evidence. The Court held at para. 17:

We admit the fresh evidence. The due diligence for the admission of fresh evidence is less significant when the evidence is in the hands of a party against whom it is tendered and there was an obligation on the party to disclose or to produce it. See *R. Clancy Heavy Equipment Sales Ltd. v. Joe Gourley Construction Ltd.* (2001), ABCA 114 (Alta.C.A.).

[41] At para. 18 the Court held:

In our view, the fresh evidence calls for an explanation from MPI. Without that explanation, the motions judge, through no fault of

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<sup>5</sup> Appeal Book Tab 12

his own, simply did not have a full and fair record sufficient to pronounce judgment on this case. The exercise of statutory interpretation is a contextual one that ought to be done with the benefit of a full and fair record. In the circumstances, without taking any position on the correctness of the motion judge's interpretation of the legislation, we are of the opinion that the Summary Judgment must be set aside.

- [42] I find that this fresh evidence ought to be admitted and considered on the Appeal. It provides a full and complete record and context within which an interpretation of s.97 of the Act ought to be considered. Nevertheless, as I have stated, the Record is sufficient even without a consideration of this fresh evidence to support a conclusion that Ms. Frith had filed a complaint/claim with the Ministry of Labour. The additional evidence is confirmatory of that filing which underscores the error on the part of the trial judge.
- [43] I further note that the online filing was within the control of Ms. Frith and that excerpt from her online claim form surfaced as part of her Compendium materials.
- [44] Notwithstanding Ms. Frith's admission that she never filed a complaint/claim with the Ministry of Labour, the totality of the evidence, even apart from the fresh evidence, overwhelmingly supports a conclusion to the contrary. She did make a complaint/claim to the Ministry of Labour by way of an online filing on October 27, 2009.
- [45] I also note that following the termination of her employment and throughout the Ministry of Labour complaint/claim process, Ms. Frith had access to and received legal advice from the law firm of Mills and Mills.<sup>6</sup>
- [46] Ms. Frith also specifically acknowledged that she "knew the law" and the fact that "if I go to the Ministry of Labour, I can't go to Small Claims Court".<sup>7</sup>
- [47] Notwithstanding Ms. Frith's submissions that she never engaged in forum shopping, it is clear that the investigative process of the Ministry of Labour was fully utilized by Ms. Frith for the purposes of assisting her in her Small Claims Court action.<sup>8</sup>
- [48] In respect of issue #1, I find that the trial judge did make a palpable and overriding error of fact, unsupported by the evidence, by concluding that Ms. Frith never filed a complaint with the Ministry of Labour.

**Issue #2 – Did Deputy Judge Fisher err in fact and law in concluding that s.97 of the Act did not act as a bar to continue the Small Claims Court action?**

- [49] The relevant provisions of the *Employment Standards Act*, 2000, c.41 are:

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<sup>6</sup> Appeal Book pp. 97 – 100, Tab 6

<sup>7</sup> Appeal Book pp. 101, 102, Tab 6

<sup>8</sup> Appeal Book pp. 101, 102, Tab 6



### **When civil proceeding not permitted**

97.(1) An employee who files a complaint under this Act with respect to an alleged failure to pay wages or comply with Part XIII (Benefit Plans) may not commence a civil proceeding with respect to the same matter. 200, c.41, s.97(1).

### **Same, wrongful dismissal**

(2) An employee who files a complaint under this Act alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment. 200, c.41, s.97(2)

[50] Section 97(4) provides:

### **Withdrawal of complaint**

(4) Despite subsections (1) and (2), an employee who has filed a complaint may commence a civil proceeding with respect to a matter described in those subsections if he or she withdraws the complaint within two weeks after it is filed. 200, c.41, s.97(4).

[51] In her submissions, Ms. Frith argued that hers was not a wrongful dismissal case and accordingly, the provisions of section 97 of the Act did not apply. Respectfully, I disagree. I have found that she filed a complaint under the Act. Section 97(1) is clear that an employee who files a complaint under the Act with respect to an alleged failure to pay wages may not commence a civil proceeding with respect to the same matter. The subject matter of Ms. Frith's complaint/claim forms the same subject matter as her Small Claims Court action.

[52] Further, s.97(4) speaks to an employee who has filed a complaint, withdrawing the complaint within two weeks after it is filed and thereafter being permitted to commence a civil proceeding. In the case at bar, Ms. Frith did not withdraw her complaint until some seven months after it had been filed with the Ministry of Labour.

[53] In *Desai v. Everything for a Dollar Store (Canada) Inc.*<sup>9</sup> at para. 12, Echlin J. considered the legislative intent of s.97(1) and 97(4) of the Act. He found that both a complaint and a civil action may not be initiated unless the complaint is withdrawn within two weeks after it is filed.

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<sup>9</sup> *Desai v. Everything for a Dollar Store (Canada) Inc.* [2003] O.J. No. 6287 Ont. S.C.J.

- [54] The legislation ensures that the Employment Standards Officer does not proceed to fact find unnecessarily.<sup>10</sup>
- [55] In *Desai*, Echlin J. considered whether the inherent jurisdiction of the court should be exercised in order to extend the two week period set out in s.97(4) of the Act. Counsel referred to him the decision of Peral J. (as she then was) in *Scarlett v. Wolfe Transmission Ltd.*<sup>11</sup> He found that decision to be distinguishable from the circumstances in *Desai*. He was not prepared to exercise the inherent jurisdiction of the court regarding an extension of s.97(4) of the Act in *Desai*.<sup>12</sup>
- [56] In *Galea v. Wal-Mart Inc.*<sup>13</sup> it was held that if the court resorts to its inherent jurisdiction to permit an extension of the two week time frame beyond that contemplated by s.97(4) of the Act, then it must do so infrequently.
- [57] The authorities are clear that if the court exercises such discretion, it may only be done in the face of special circumstances that include:
- the absence of access to legal representation;
  - the absence of the Ministry of Labour being engaged in any fact finding investigation or adjudication of the plaintiff's claim;
  - the absence of prejudice to the defendant;
  - the absence of bad faith on the part of the plaintiff.<sup>14</sup>
- [58] I agree with the submissions of counsel for Cable Bridge that the facts in the present case do not warrant the rare exercise of discretion to extend the time limitation of s.97(4) of the Act. The circumstances of the case at bar are distinguishable from the circumstances in *Scarlett* as follows:
- at all times, Ms. Frith had access to and received legal advice relating to her claim;
  - the Ministry of Labour undertook an investigation and made findings and scheduled a hearing before Ms. Frith withdrew her application more than seven months later;
  - Ms. Frith was not a 20 year employee who was terminated for cause. She had received severance and termination pay in the amount of \$7,500 and continued to

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<sup>10</sup> *Scarlett v. Wolfe Transmission Ltd.* [2002] O.J. No. 4403 (S.C.J.) at para. 16

<sup>11</sup> *Scarlett v. Wolfe Transmission Ltd.* [2002] 21 C.C.E.L. (3d) 69 (Ont. S.C.J.)

<sup>12</sup> *Desai* (supra) at para. 10

<sup>13</sup> *Galea v. Wal-Mart Inc.* [2003] O.J. No. 1765

<sup>14</sup> *Scarlett, Desai and Galea* (supra)

be paid commissions at a minimum of \$33,000 following her termination of employment;

- Ms. Frith will not be subject to a draconian result as Cable Bridge will not object to her proceeding with the Ministry of Labour complaint;
- Cable Bridge has suffered some prejudice by engaging significant staff time and resources to respond to Ms. Frith's Ministry of Labour investigation;
- Ms. Frith's complaint was not made and withdrawn within two weeks or within a short period of time. Rather, she waited more than seven months from the commencement of her claim until she purported to withdraw it in June of 2012;
- although Ms. Frith denies that she was engaged in forum shopping and while Cable Bridge alleges that she acted in bad faith, it is not necessary for me to decide whether she acted in bad faith or was engaged in forum shopping. It is clear that she resorted to the investigative process of the Ministry of Labour in order to assist her with her claim. She had the benefit of that work product which was available to her in the advancement of her Small Claims Court action.

[59] Regarding the second issue, I find that the trial judge erred in fact and in law in concluding that s.97 of the Act did not operate as a bar to Ms. Frith continuing her Small Claims Court action.

[60] All of the evidence before the trial judge supports a finding that the operation of s.97(1) and s.97(4) resulted in Ms. Frith's Small Claims action being statute barred. Further, the evidence does not support the exercise of this court's inherent jurisdiction in this case to extend the two week time period set out in s.97(4).

### **DISPOSITION**

[61] The appeal is allowed. The decision of Deputy Judge Fisher dated March 30, 2012 permitting Ms. Frith to proceed with her Small Claims Court action is hereby set aside. It is ordered that Ms. Frith is estopped from continuing with her Small Claims Court action by virtue of the provisions of s.97(1) and 97(4) of the Act.

[62] Costs are sought by Cable Bridge. The parties have agreed that the issue of costs is to be determined by way of written submissions. If the parties cannot agree upon costs, counsel for Cable Bridge and Ms. Frith are to exchange and file within 14 days of this decision a concise summary of position not exceeding two pages together with a Bill of Costs, Costs Outline and copies of any cases. Those documents are to be filed with my judicial assistant at Barrie.

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DITOMASO J.

**Released:** October 15, 2013