

1990

C.AR. No. 02514

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

BETWEEN:

NICK LASCH

PLAINTIFF

- and

THE MUNICIPALITY OF THE COUNTY
OF ANNAPOLIS

DEFENDANT

HEARD: By Submissions

BEFORE: The Honourable Judge Charles E. Haliburton, J.C.C.

SUBJECT: Application to strike a Jury Notice

DECISION: The 4th day of January, A.D. 1993

COUNSEL: W. Bruce Gillis, Q.C., Esq., for the Plaintiff

David A. Miller, Q.C., Esq., for the Defendant

D E C I S I O N

HALIBURTON, J.C.C.

This is an application to strike a jury notice under Section 34(a)(ii) of the Judicature Act, R.S.N.S., Chapter 240. The trial of the matter with jury is set to commence at Annapolis Royal, Nova Scotia, on January 18th, 1993.

The claim of the Plaintiff is in wrongful dismissal. The Plaintiff, having been employed by the Defendant as "Director of Planning", had his job terminated after some seven and a half years when, on November 21st, 1989, the Municipality decided to join the Annapolis County District Planning Commission, the Commission being a joint project of several municipalities within the county boundaries.

The Plaintiff made application to be hired by the Commission which succeeded to the work which he had previously done on behalf of the County, but he was not hired.

The Municipality gave notice of termination of their Planning Department to the Plaintiff on November 29th, 1989, with termination effective December 31st. They paid to the Plaintiff a sum equal to one months' salary in lieu of notice.

Arising from this termination of employment, the Plaintiff claims general damages, special damages, exemplary damages, prejudice interest and costs. The Plaintiff alleges that the damages flow not only from his breach of contract but that he has suffered from the tort of deceit on the part of the Municipality or its officers.

The Defendant, in making this application, represents that

the facts and issues involved do not lend themselves to determination by a jury. It is argued that there are a large number of documents. The inference, I presume, is that it will consume substantial time to read and interpret those documents and that the Judge will face particular difficulty in instructing the jury with respect to the tort of deceit and whether or not punitive or exemplary damages can and should be allowed.

I am grateful to Counsel for providing a number of cases relating to an application of this nature. It is clear from the cases, all of which I have reviewed, that a Plaintiff is entitled to have his trial by jury if he so elects. Such an election clearly may be set aside by the Court for good reason. In considering this application, I am mindful of the fact that criminal trials are heard by juries and that those trials sometimes run for many months and must, of necessity, involve some degree of complexity. I am conscious, too, that at the time for decision making, the jury will be sequestered and will remain so until they have reached a decision, unlike the Judge who may take whatever time is necessary to review documents and reports and mull over or review the evidence. I am conscious, too, that it is primarily on the basis of the case as seen through the eyes of the Plaintiff that this preliminary determination should be made. That is to say, if it is correct that a Plaintiff has a **prima facie** right to have his cause heard and determined by a jury, it would seem inappropriate to permit a Defendant to have that election set aside by introducing a myriad of documents, expert opinions, and/or legal complexities.

By making this latter comment, I do not for a moment suggest that the Defence, in this case, has done so. I merely enunciate that view as background to the approach I have decided to take.

The Plaintiff Counsel, in his submission, suggests that the questions which will fall to be answered at the conclusion of the trial, are as follows:

1. What were the circumstances under which the Plaintiff was working?
2. What were the circumstances surrounding his dismissal?
3. What success has he had in mitigating his losses?
4. What would be a reasonable period of pay in lieu of notice for his dismissal? (With the appropriate deductions for amounts earned in the mean time which are not in dispute).
5. Was the manner of his dismissal high handed enough to warrant punitive damages and how much?

In putting forth those questions, Plaintiff's Counsel has indicated in effect that because the Defence is prepared to concede "lack of cause" for the termination of employment, the claim in deceit will not be pursued.

In considering the pleadings and the materials which I have before me, I had concluded before reviewing the Plaintiff's submissions that the issues which fall to be determined are almost entirely matters of fact. What is appropriate notice and to what extent has the Plaintiff mitigated his losses appear to be the primary questions.

Whether exemplary or punitive damages are available under breach of contract is a matter of law about which Counsel have opposing views. The availability of such damages is clearly

a matter of law to be determined by the Trial Judge but the assessment of damages is a question of fact properly left to the jury.

The relevant facts necessary to be proven in this matter should be determined with relative ease. The extent to which the Plaintiff has mitigated his losses, likewise. In the event that there was some **mala fides** or "high handedness" on the part of the Municipality or its officers which would, in law, entitle the Plaintiff to some further recovery, then there is no reason to think the jury incapable of assigning appropriate values.

The trial of the matter is expected to last three days. It is not a lengthy matter. There will, apparently, be some 54 documents for the jury to review but these are in the nature of letters and Council Minutes which will be neither complicated nor technical. Counsel may indeed be able to make them easier to review by abstracting relevant materials or highlighting those portions of documents, particularly Council Minutes, which may have some bearing on the issues to be raised.

In the circumstances, the application to strike the jury is dismissed.

DATED at Digby, Nova Scotia, this 4th day of January, A.D. 1993.

CHARLES E. HALIBURTON
JUDGE OF THE COUNTY COURT
OF DISTRICT NUMBER THREE

Dictated but not read.

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