IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Burns v. Sobeys Group Inc., 2008 NSSC 102

Date: 20080407
Docket: SK 217352
Registry: Kentville

Between:

Deborah Irene Burns

Plaintiff

- and -

Sobeys Group Inc., a body corporate

Defendant

Judge: The Honourable Justice Gregory M. Warner

Heard: June 26, 27, 28 and July 3, 2007 at Kentville, Nova Scotia

Final Written Submissions: April 4th, 2008

Counsel: Randall P. H. Balcome, Counsel for the Plaintiff
G. Grant Machum and Mark Tector, Counsel for the Defendant

By the Court:

A. **Introduction**

[1] The parties cannot agree on costs following this Court's decision reported as 2007 NSSC 363.

[2] The claim was in respect of constructive dismissal and consumed four days of trial. At the commencement of the original trial date in January 2007, the Plaintiff applied to amend its pleadings to claim a wrongful dismissal. The amendment was granted subject to an adjournment requested by the Defendant and costs to the Defendant of $1,500.00. The Plaintiff was successful at the trial held in June - July 2007 and awarded 16 months notice (approximately $55,000.00) together with pre-judgment interest, costs and reasonable disbursements.

B. **"Old" versus "New" Tariff**

[3] This action was commenced on March 11th, 2004. Effective September 29th, 2004, a "new" party and party tariff was promulgated pursuant to the **Costs and Fees Act** replacing the "old" tariff that applied to proceedings commenced on or after January 1st, 1989.

[4] I prefer the analysis of Justice Moir in **Bevis** v. **CTV Inc.**, 2004 NSSC 209 (Paragraph 7), and of Justice Goodfellow in **Little** v. **Chignecto Central Regional School Board**, 2004 NSSC 265 (Paragraph 3 to 6), adopted by Justice Wright in **Driscoll** v. **Crombie Developments Ltd.**, 2006 NSSC 262, and by Justice Murphy in **Sand, Surf & Sea Ltd.** v. **Nova Scotia**, 2005 NSSC 278, to the analysis in **Conrad** v. **Bremner**, 2006 NSSC 99 (Paragraphs 228).

[5] While the approach to the award of costs that recognizes that the real costs of litigation are escalating and that usually a successful party should receive substantial indemnification, all of which lead to the "new" tariff, a proper interpretation of the **Costs and Fees Act** leads to the clear conclusion that the "old" tariff applies to actions commenced before September 29th, 2004 and the method, where appropriate, to effect substantial indemnification was and is to award lump sum cost awards as described in **Bevis** and **Driscoll**.

[6] I conclude that the "old" tariff applies.

C. **Applicable Scale and Amount Involved**

[7] The parties appear to agree that the appropriate scale is Scale 3 (Basic). They do not appear to exactly agree on the amount involved and therefore what the guideline tariff is. The guideline tariff where the amount involved is $50,000.00 is $4,875.00 and the tariff guideline where the

amount involved is $60,000.00 is $5,375.00.

[8] Many court decisions have analyzed the appropriate methodology for determining the "amount involved". The most common determination is based upon the actual recovery. Based on the recovery in this case I calculate the amount involved as $60,000.00 for which the tariff guideline is $5,375.00.

D. **Lump Sum Awards**

[9] The Plaintiff seeks a lump sum award on the principle that the award of costs should represent, as stated by the Nova Scotia Court of Appeal in **Williamson** v. **Williams** [1998] N.S.J. 498, Paragraph 25, "a substantial contribution" towards the parties' reasonable costs. At Paragraph 29, the Court of Appeal noted that Civil Procedure Rule 63.02(1)(a) gives a trial judge discretion to award a lump sum in lieu of or in addition to the tariff amount.

[10] The above principle is articulately and concisely set out in **Landymore** v. **Hardy** (1992) 112 N.S.R. (2d) 410 at Paragraph 18.

[11] In **Bevis** at Paragraphs 9 and 12 to 14, Justice Moir reviews the principles set out in the case law. His analysis was adopted by Justice Wright in **Driscoll** (Paragraphs 19 to 32) and expanded upon in **Morash** v. **Burke** *et al*, 2007 NSSC 68 (Paragraph 19 to 24 and 30 to 36).

[12] In this case, the Plaintiff's counsel provides his accounting record of the time and charges on this matter. They total 282 hours for a total billable value of approximately $45,000.00 (exclusive of HST). Plaintiff's counsel represents that based on a contingency fee agreement, his client's actual legal fees will be approximately $30,000.00. He submits that the recovery by the Plaintiff of about 18% of her actual legal fees is not reasonable or fair or in accordance with the principle of substantial indemnification referenced in the above cases.

[13] Defendant's counsel submits that there is no basis to depart from the guideline tariff. This case was simple and the Plaintiff's costs include time wasted by reason of the delay of the trial caused by the late amendment application.

[14] I endorse the principle that generally a successful party should receive a substantial contribution towards its costs. I agree that principle is applicable in the circumstances of this case. It would be entirely unfair for Ms. Burns to lose most of the damage award by reason of her obligation to pay legal fees. It would be a pyrrhic victory.

[15] The Defendant's complaint that some of the Plaintiff's charges were for time wasted by reason of its late amendment application and the duplication of research by a junior lawyer or clerk is already remedied by reason of the fact that the contingent fee agreement appears to reduce the Plaintiff's legal fees from $45,000.00 to $30,000.00.

[16] Justice Wright noted in **Morash** that recovery of 20% of the actual costs was hardly a reasonable, let alone a substantial, contribution towards the successful party's costs. The tariff which this Court is applying was created in 1989. The cost of litigation has escalated considerably since that time and it is reasonable to take that into account. Doubling the 1989 "old" tariff applicable in this case to $10,750.00 would result in recovery (exclusive of any award respecting a Rule 41A settlement offer) of 36% of Ms. Burns' actual legal fees. Even this is not, in the circumstances of this case, a substantial contribution.

[17] It is noteworthy that the "new" tariff of September 2004 was intended to adjust costs to an amount closer to the principle of "substantial contribution". Under that tariff the Plaintiff's cost award would have totaled $15,250.00 ($7,250.00 by Scale 2 (basic) for claim of between $40,000.00 and $60,000.00 plus $2,000.00 a day for four days of trial).

[18] This Court awards a lump sum of $10,750.00 (inclusive of the guideline tariff).

E. **Settlement Offer**

[19] On March 14th, 2007, three months before trial, the Plaintiff made a formal offer pursuant to Civil Procedure Rule 41A to settle its claim for $40,000.00 all inclusive (that is inclusive of pre-judgment interest and costs and disbursements).

[20] Civil Procedure Rule 41A.09 states:

> "(1) Unless ordered otherwise, where an offer to settle was made by a plaintiff at least seven (7) days before the commencement of the trial or hearing of the proceeding and was not revoked or accepted prior to the commencement of the trial or hearing, and where that plaintiff obtains a judgment as favourable or more favourable that the terms of the offer to settle, that plaintiff shall be entitled to a party and party costs plus taxed disbursements to the date of the service of the offer to settle and thereafter to taxed disbursements and double the party and party costs."

[21] The award of this Court, inclusive of an estimate of pre-judgment interest, costs and disbursements, substantially exceeds this offer.

[22] Based on its Offer of Settlement, the Plaintiff seeks $5,000.00 in additional costs.

[23] The Defendant's counsel properly points out that CPR 41A.09 only provides for a doubling of costs from the date of the Offer. It notes that, based on the Plaintiff's accounting record, 60% of its time predated the Offer of Settlement and argues that I should only double 40% of the legal fees awarded to the Plaintiff. I agree.

[24] The total costs awarded (inclusive of tariff and lump sum) was $10,750.00. 40% of that is

$4,300.00. I therefore award the Plaintiff total legal fees of $15,050.00.

F. **Disbursements**

[25] The Plaintiff's counsel has produced its accounting record as Tab 1 of its memorandum. It calculates and shows the total disbursements claimed. Counsel noted that it incurred approximately $2,600.00 in photocopy charges at $0.45 per copy and other sums for electronic research. Based on objections by Defence counsel, it eliminated its claim for the electronic research disbursements and reduced its claim for photocopy made to $1,500.00.

[26] In its response memorandum, the Defendant makes the following two points:

i) the claim for photocopies is still excessive both as to the quantity of copies claimed and the per copy charge. It notes that the Plaintiff's counsel is only entitled to recover its actual reasonable disbursements. It cites **Knox** v **Interprovincial Engineering Ltd**. [1993] N.S.J. 103.

ii) the claim for transcripts of $1,278.50 is unsupported, except to the extent of a receipt of $100.08 and appeared to the Defendant to be excessive in light of what the Defendant says it paid for transcripts (which amount it did not disclose).

[27] With respect to photocopies, I assume that the Plaintiff's counsel claims that about 5,700 copies were made ($2,600.00 by $0.45). By reducing its claim to $1,500.00 it reduced its per copy charge to about $0.26. Based on my experience, this appears to be more than the actual cost to a law office to produce a photocopy. Unless costs have escalated substantially in the last few years, it appears the Defendant's objection has some merit. The claimant is obligated to prove its disbursements are actual and reasonable. The disbursements it is entitled to claim under party and party costs are not necessarily the same recovery it may contract to recover from its client, which contract may entitle the lawyer to include photocopies as a profit centre. I make no comment on the appropriateness of such a contract with its client, but I agree with Defence counsel that the Plaintiff is obligated to provide this Court with evidence of the actual cost of producing its photocopies. Unless parties can agree between them, the Plaintiff will have 30 days to provide proof of its actual costs. The Court notes that the manner of proving disbursements claimed in all cases is by affidavit evidence.

[28] With respect to the costs of transcripts, challenged by the Defendant, the Court will also afford the Plaintiff the opportunity to provide by affidavit evidence proof of the amounts paid by it or its client to obtain these transcripts.

G. **Pre-Judgment Interest**

[29] Counsel advised that they agree that pre-judgment interest is $3,864.00.

[30] Counsel agree that from the claim of the Plaintiff will be deducted $1,500.00 owed by the Plaintiff to the Defendant in respect of the amendment application.

J.