IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Lockhart v. New Minas (Village), 2005 NSSC 93

Date: 20050426
Docket Number: S.K. 212728
Registry: Kentville

Between:

Linda Lockhart

plaintiff

v.

The Village of New Minas, a body corporate

Defendant

Judge: The Honourable Justice Gregory M. Warner

Heard: April 19, 2005 in Kentville, Nova Scotia

Counsel: Randall Balcome, Esq., counsel the plaintiff

Alan Parish, Q.C., counsel for the defendant's insurer

Derrick Kimball, Esq., counsel for the defendant

By the Court:

The defendant seeks to sever the plaintiff's action into two actions (wrongful dismissal and defamation) pursuant to rule 5.03.

BACKGROUND

[2] The plaintiff was employed by the defendant ,Village of New Minas (called Village), as its clerk-treasurer for 18 years. She alleges that she was forced to resign and left her employment in May, 2003.

[3] In December, 2003, she filed an Originating Notice and Statement of Claim naming the Village as sole defendant. In her Statement of Claim she seeks damages pursuant to two separate causes of action: defamation and wrongful dismissal.

[4] She alleges that she was constructively dismissed in May, 2003, and specifies, as the factual basis of her claim, six events that occurred between December, 2002 and May, 2003.With respect to the wrongful dismissal claim, she seeks general damages, special damages and " **Wallace v. United Grain Growers"** damages. Three of the acts or events cited involve words spoken by three of the Village's commissioners on January 13, 2003, which

words, she alleges, constituted slander. With respect to the defamation claim, she seeks general, special and punitive damages.

[5] The Village is insured against claims arising from defamation (except for punitive damages) and for the costs of defending both the defamation and wrongful dismissal actions. The Village is not insured for the defamation-based punitive damage claim or for any of the wrongful dismissal-based damages.

[6] The Village's insurer has appointed its own counsel to defend the defamation claim; the Village's regular counsel is defending the wrongful dismissal claim.

[7] Counsel appointed by the insurer has applied under **Civil Procedure Rule** 5.03 to sever the plaintiff's two claims by dismissing the defamation action without prejudice to the plaintiff's ability to assert that cause in a separate action.

THE LAW

Generally

[8] Civil Procedure Rule 5.03 (1) reads:

> Where a joinder of causes of actions or parties in a proceeding may embarrass or delay the trial or hearing of the proceeding or is otherwise inconvenient, the court may order separate trials or hearings, or make such other order as is just.

[9] In **Shah v. Jesudason** (1999) 177 N.S.R. (2d) 161, the Nova Scotia Court of Appeal in upholding a Chambers judge's order to stay an action noted at paragraph 22 that the chambers judge "possessed a wide discretion under **Civil Procedure Rule 5** to order severance."

[10] The principles respecting severance were discussed and applied by Kelly J. in **Bank of Montreal v. Brett** (1991) 111 N.S.R. (2d) 335 (N.S.S.C.). The plaintiff Bank sued the defendant Brett and a joint shareholder, Taylor, on a personal guarantee of corporate debts. The defendants made cross-claims against each other and the defendant Brett sought to add as a third party an accounting firm that had provided financial statements that he relied upon. The trial had been scheduled but would not proceed as scheduled unless severance was ordered as requested by the Bank. Taylor had financial difficulties and did not intend to participate in the action involving the Bank but did intend to defend himself from allegations of fraudulent and improper conduct contained in Brett's crossclaim. The Bank claimed that the evidence

with respect to its claim against Brett was significantly shorter and different from the evidence in the various cross-claims and third party claim.

[11] The court made the following statement at para. 11:

> The court therefore must exercise its discretion to determine whether it should separate the trial of these proceedings to prevent injustice' to any party as much as is reasonable in the circumstances and to prevent delay where such delay or such prejudice works a significant or some injustice to the parties involved. ... The obligation of the court is to balance all of these factors and to determine a course of action that constitutes the least injustice to the parties involved and is consistent with the efficient and expeditious resolution of the matters in issue.

[12] Kelly J. first considered some of the factors of prejudice and unreasonable delay to the plaintiff Bank. In doing so he noted that discoveries with respect to the cross-claims and third party claim had not been held and the numerous documents exchanged had not been reviewed and there would be a considerable further delay to the plaintiff.

[13] He further stated that the most significant aspect of his consideration was "the assessment of whether the parties will suffer an injustice if the other claims, that is, the cross-claims and third party claims, are tried separately from the main action. All of the parties except Mr. Brett agree that an injustice would be suffered by them in terms of delay and cost if severance does not occur." Brett submitted an injustice would occur to him because

there would be a significant and substantial overlapping of evidence and he would be put to the time and cost of presenting essentially the same arguments and facts in two different trials.

[14] Stating that the factor of overlapping evidence as one of the most important factors, the Court cited an English Court of Appeal decision on the issue of whether " a clear line of demarcation" of the issues and evidence existed. He considered the issues relevant to the Bank's claim versus those relevant to the cross and third party claims, and the extent of the duplication of evidence. He concluded that there would not be a significant duplication of evidence in the event of severance.

[15] After considering the importance of avoiding a multiplicity of actions where possible, and after determining that there would not be a significant duplication of evidence, and after weighing the factor of costs to all parties (which he found weighed heavily in favour of severance), the Court ordered severance.

[16] In **Stone v. Raniere (1992),** 117 N.S.R.(2d) 194 (N.S.S.C.), a plaintiff who was injured in an auto accident started two separate actions, one against the driver of the other vehicle and at a later date a second against his own LTD

insurer seeking resumption of his LTD benefits. The LTD insurer counterclaimed against the plaintiff who had subrogated his claim against the driver to the LTD insurer. The LTD insurer sought to consolidate the actions under Rule 39.02. The Court refused.

[17] Saunders, J., determined that while the medical evidence was common in the two cases, the plaintiff's action against the driver was “virtually ready for trial” and the action against the LTD insurer had just commenced. All parties, except the LTD insurer, would be considerably prejudiced by delay, and in addition the consolidated action would be lengthier and more expensive for all parties. The Court found that the only issue in the LTD insurer's case was whether the plaintiff was “a totally disabled employee” as defined in the LTD policy. This was an entirely different issue from the issues in the auto accident case. It appears to this Court that on the facts of that case, it was an easy call for the Court to exercise discretion against consolidation.

[18] Some of the factors relevant to the exercise of discretion under Rule 39.02 are the same as under Rule 5.03, and for that reason the exercise of Saunders J., in analyzing the factors, is relevant to this matter.

Defamation/Wrongful Dismissal Cases

[19] Only one Nova Scotia decision was cited to the Court - **Peddle v. Rowan Cos.** (1993), 123 N.S.R. (2d) 24 (N.S.S.C.). The plaintiff sued the defendant for wrongful dismissal. The statement of claim included a sentence claiming damages for libel. On the eve of a jury trial (the Friday before the Tuesday start date) the defendant became aware for the first time, upon receipt of the plaintiff's pretrial memorandum, that the plaintiff was seriously pursuing a defamation remedy. The application to strike this sentence was heard the day before the jury trial started and the motion was granted. The Court reasoning is contained in parts of paragraphs 9, 11 and 12 as follows:

> 9. . . . My reasons would include the following: the pleading in the amended statement of claim does not specify the words allegedly used in either the slander or the libel or both. There are no facts stated with respect to the recorded publication. There are no facts pleaded with respect to the defamation allegedly caused. In the result, there is no sustainable action advanced by the plaintiff and his claim for slander and libel cannot stand.
>
> 11. . . . There is nothing to prevent Mr. Peddle, as the plaintiff, to proceed with a claim for defamation as a separate action properly framed . . . . This is not in anyway to trivialize whatever went on between the parties, but rather is to do justice between the parties, but rather is to do justice between the parties on a matter scheduled to begin with a jury tomorrow morning.
>
> 12. In my view, an action for libel and slander which is the subject of a special statute and which is one of those exclusive matters to be heard by a jury in this Province ought not be piggybacked or included within a different action for

> example, as here, an action for wrongful dismissal. I can foresee considerable difficulties and confusion for any jury asked to address it. . . .

[20] As *obiter* Saunders J. cited **Justason v. Canada Trust** (1986), 76 N.B.R. (2d) 20 (N.B.Q.B.), where a multiplicity of causes were contained in a single statement of claim (more than in the case at bar). Based on **Justason**, the Court observed:

> I, too, wonder whether an action for libel and slander should ever be jointed with another action. In these circumstances, with the case scheduled to begin tomorrow morning, I find it completely inappropriate that a claim for damages for slander and libel would be included within a separate action for wrongful dismissal. There are, after all, different and shifting onuses, materially different questions to be posed and significantly different instructions to be given to the jury. It would be totally confusing and unfair for a jury to be asked to assess both. It would not be doing justice to the parties to permit both matters to be tried by this jury.

[21] These observations were made without actually analyzing just what the "different and shifting onuses, materially different questions and significantly different instructions" would have been.

[22] In Ontario, before 1988, there was a blanket prohibition against joining wrongful dismissal and defamation claims in the same action. This appears to have been rooted in the English decision: **Addis v. Gramophone Co. Ltd.** [1909] A.C. 488.

[23] In **Kelly v. American Airlines Inc**. (1981), 32 O.R. (2d) 626 (H.C.), the Court severed the defamation claim from an action containing four claims.

The principal claim was for wrongful dismissal and the alleged defamation occurred subsequent to the termination. At paragraph 2 the Court said:

> . . . the causes of action do relate to separate and distinct occurrences and therefore many of the material facts relating to each of the two causes of action will not be the same.

[24] In **Braun v. Fleisher** (1983), 1 O.A.C. 98 (Ont. D.C.), the then-existing Ontario position that wrongful dismissal claims and defamation claims should not be tried together is succinctly set out.

[25] The decision of Granger, J., in **Foley et al v. Signtech Inc . et al** (1988), 66 O.R. (2d) 729 (Ont. H.C.J.), marked a reversal in the traditional blanket prohibition that had existed in Ontario to that time. In **Foley,** Granger, J., noted the impact of **Isaacs v. MHG Int. Ltd.** (1984), 45 O.R. (2d) 693, (O.C.A.), on the right of a plaintiff to have claims,including wrongful dismissal claims, heard by a jury. In upholding the dismissal of the defendant's request for severance, Granger, J., succinctly set out what continues to be the Ontario position:

> 29 In my view, it is obvious that the principles of *Addis*, supra, have been eroded to a significant extent. Properly instructed, juries are fully capable of considering and dealing with several issues. Given the tremendous expense and protracted nature of litigation today it appears to me to be nonsensical to sever these two claims.

30. If the defendants' position is upheld there will be two separate trials arising from the same facts. I am convinced that a trier of fact whether it be a judge or jury is capable of dealing with this action as framed.

31. The prohibition against joining a claim for defamation and wrongful dismissal is no longer valid and should be disregarded, as was the prohibition against joining a claim for loss of reputation and wrongful dismissal, in order to minimize the costs of the litigation.

32. In most cases employers are better able financially to withstand the financial strain of litigation and to require an employee to finance two separate trials would be unfair, and in many cases preclude the employee making a legitimate claim.

[26] In **Richmond v. North American Life Assurance Co**. (1998) 37 O.R. (3d) 785, the Ontario Court of Justice confirmed at paragraphs 8 - 10, that the **Foley** approach is still considered the law in Ontario.

[27] The defendant submitted that the current state of the law in Nova Scotia is that set out in **Peddle.** This Court is hesitant about the generalized prohibition proposed in **Peddle**, combined with the failure to analyze - presumably due to the rushed circumstances of the application in that case - the particulars of how the issues and evidence overlap and the nature of the different onuses. The Court prefers the approach in **Foley**.

[28] The defendant states that, even if the **Foley** approach is used, that its application should be granted.

APPLICATION OF LAW TO FACTS

[29] The defendant sets out four reasons why this Court should exercise its discretion to sever:

1. No Delay: The defendant has not filed a defence, discoveries have not been held and no part of the proceeding (except for issuance of amended statements of claim) will have to be repeated; therefore there would be no delay.

2. Jury: Section 34(a)(1) of the **Judicature Act** requires trial by jury for defamation actions unless both parties agree otherwise. The former Ontario approach and the statements of Saunders, J., in **Peddle**, point to considerable confusion for juries in understanding the different onuses and mitigate against the plaintiff's position.

3. Legal Representation: The defendant has two lawyers. The defamation insurer has its own counsel because its interest - in minimizing the defamation claim and damages - puts it in conflict with the defendant Village, who are not insured for wrongful dismissal damages.

4. Lack of Overlapping Factual and Legal Issues: The defendant, in its memorandum, lists the essential factual and legal determinations that must

be made in respect of each of the two causes of action and submits that they do not sufficiently overlap to merit trial together.

[30] The defendant does not discuss such other factors as the potential lengthening of the proceeding (in terms of the plaintiff) and the issue of the cost to the plaintiff, and the savings to the defendant(s), if severance is granted. The defendant further does not deal with the issue of whether the plaintiff, who is unemployed, would ever be able to pursue both causes of action, which is, in effect, a policy issue about the access by poor or middle class individuals to the civil justice system, especially when in contest with corporate defendants.

No delay

[31] The defendant characterizes this issue as favouring severance because there would be no repetition of proceedings (other than the re-issuance of statements of claim). This is a mis-characterization of the issue. The issue is whether the proceedings will be lengthier by reason of severance. To some degree the answer to this question is discussed in the analysis of whether the factual and legal issues are overlapping, and whether the evidence would be common to both actions. This Court finds that for the

plaintiff to go through two trials and two complete sets of pre-trial proceedings - from re-issuing the statements of claim, demands for particulars, interrogatories, discoveries and pretrial preparation would, regardless of the question of the overlap, considerably lengthen the proceedings for her, and create considerable duplication of effort. Even if the plaintiff is on a contingent fee retainer, there is still considerable cost to the plaintiff (in this case, an unemployed plaintiff) by reason of her obligation to finance the disbursements. A proper characterization of the "delay" issue strongly favours the plaintiff and not the defendant.

Jury

[32] The question of whether the combined wrongful dismissal/defamation claim may cause such confusion to a jury that, as a matter of principle, such combined claims should always be prohibited from proceeding together, was rejected in Ontario in **Foley** (following **Isaacs)**. This Court accepts the view that each case should be analysed on its own facts, balancing the conveniences and inconveniences on the potential evidence and the legal issues that are in play. Pat answers are not appropriate. An analysis of the extent of the overlap and their impact on a jury is made later in this

decision. Not only does the Province of Ontario (since 1988) permit combined wrongful dismissals/defamation actions to proceed before juries, but the publishers of standard civil jury charges (including for example CIVJI) have *pro forma* sets of instructions for circumstances where defamation has been included in a wrongful dismissal action.

Legal representation

[33] I fail to understand how being represented by two lawyers is relevant to the issue of severance. The defendant says that to have two lawyers represent a party is unusual. A jury would not, of course, be permitted to know that one of the defendant's lawyers represents an insurer. It should be irrelevant to the finder of fact to know who would be paying a claim on behalf of the defendant and may be highly prejudicial to the defendant. So far as a jury is concerned, if two lawyers were sitting together at the defendant’s table, they would be viewed as co-counsel. Contrary to the argument of the defendant, it is not unusual to have two lawyers represent a party. It is as common to see two counsel representing a party as one. Not only is it common to see two counsel representing one party, but often the two lawyers representing a party will not be associated in the practice of law with each other. The week

before this application was heard, the Court heard a week-long trial in which the plaintiff and defendant were each represented by two lawyers, none of whom were associated in the practice of law with the other.

Overlap of evidence and issues

[34] Of the factors raised for the defendant this is by far the most significant. As set out in the background, the plaintiff claims that the wrongful dismissal arose from six specific events between December, 2002 and May, 2003. Three of those events occurred on January 13, 2003 and are the subject matter of the defamation action. The plaintiff states that the witnesses for both causes of action are identical and that the time frame of the event that are relevant to the plaintiff's two causes of action are the same. The defendant made no submissions with regard to the plaintiff's claim that the witnesses would be the same. When the applicant submitted that the only defamation claim against the defendant occurred on January 13, 2003, he was asked by the Court whether that meant that the only evidence he considered relevant was evidence of the events of January 13, 2003; he quite properly conceded that such would not be the case. In other words, he would cover, in his examination and cross-examination, the same factual

circumstances and background as the Village would cover in respect of the wrongful dismissal action. This is so, not only by reason of issues of liability, but just as importantly, with respect to the bases and quantum of damages for both claims.

[35] Because the claim is one of constructive dismissal the acts of defamation that are alleged by the plaintiff against the defendant are part of the elements of the proof of liability in respect of the wrongful dismissal action. It is apparent from the pleadings, that the determination of the issue of defamation will have a significant impact upon the finding of the Court with respect to the defendant's liability for wrongful dismissal (based on constructive dismissal).

[36] Because of the Court's concern with the statement in **Peddle** that a defamation action should never be joined with a wrongful dismissal action because of the “different and shifting onuses”, some time was spent exploring exactly what those shifting onuses are (in the case at bar) so that an analysis could be made as to whether they were too complex for a jury to understand.

[37] It appears that with respect to the constructive dismissal claim, the onus remains on the plaintiff throughout to prove that the actions of the defendant

establish a unilateral change in the essential terms of the employment contract so as to justify the defendant in treating the employment contract as at an end. In this case it appears the plaintiff is relying upon alleged interference, harassment, unfair treatment and criticism and public humiliation, the latter of which constitutes the basis of the defamation action.

[38] The fundamental difference between the case at bar and the majority of the wrongful dismissal actions is that in the normal wrongful dismissal action, the plaintiff need only prove that he or she was terminated and thereafter the onus shifts to the defendant to prove that it had just cause. This circumstance is not relevant to the case at bar and probably constitutes the most significant onus shift referred to in the reported cases.

[39] In the defamation action the onus remains with the plaintiff to prove that the alleged defamatory statements were made, and, in this case, what type of criminal offence was implied by them. The shift in onus to the defendant is only to thereafter prove the substantial truth of the statements, or alternatively that qualified privilege applied. If the defendant does establish qualified privilege, it is presumed to have acted in good faith, and the plaintiff has the burden of proving malice

[40] On the facts of this case, as pleaded, it appears that the only significant shift in onus is that if the plaintiff can show that the alleged statements were made on January 13, 2003, and the defendant cannot show that the occasion was one of qualified privilege, then the defendant has the onus of proving that the statements were substantially true.

[41] The Court notes that the legal basis for damages differs between the two causes of action. This does not mean that they are somehow in conflict as to be unintelligible to a jury that is given proper instruction on the law of damages. For example, if a jury were to find for the plaintiff in the constructive dismissal claim, the plaintiff is entitled to damages for a reasonable notice period. With respect to the defamation action, some damage is presumed, and the measure of it is the loss of her reputation and how it affected her ability to get other employment.

[42] The evidence of mitigation of loss with respect to the reasonable notice period in the wrongful dismissal action would be similar to the proof of the extent to which Ms. Lockhart's ability to find replacement employment was caused by the damage to her reputation.

[43] With respect to punitive damages, the onus under both causes of action remains throughout on Ms. Lockhart.

Access to justice - costs

[44] Granger, J., in **Foley,** stated that employers are better able financially to withstand the financial strain of litigation, and, to require an employee to finance two separate trials would be unfair and in most cases preclude the employee making a legitimate claim. This Court would add to that, that when the defendant has an insurer backing it, that financial imbalance is magnified significantly.

[45] In this case, in response to questions by Mr. Parish, Ms. Lockhart confirmed that she is not employed. She confirmed that the action was commenced pursuant to a contingent fee agreement and stated that to date she had paid $1,800.00 to her lawyer, which, the Court concludes must relate to disbursements. No defence has been filed, no interrogatories have been made or answered, no discoveries have been held, and no pre-trial preparation or trials have been held. On the basis of this, it is reasonable to infer that Ms. Lockhart may not be able to pursue a legitimate claim to its final conclusion. In her circumstances, financing a single lawsuit against such powerful defendants will be difficult; financing two lawsuits, could be devastating.

[46] A fairness concern is the inability of the average Canadian to access the civil justice system because of its complexities, delays and costs. The facts of this case appear to fit squarely within those that are put forward by proponents of change to our civil justice system. Ordinary persons have a right to have legitimate legal claims determined by an objective third party in an efficient and cost effective way. This fairness issue weighs heavily for the plaintiff and against the defendant, for whom (backed by an insurer) cost is not a barrier, and complexity and delay can be a tactical tool.

CONCLUSION

[47] The case at bar differs from many cited to the Court by the defendant’s insurer. The alleged defamatory statements are an important portion of the basis of the plaintiff's claim of constructive dismissal. The witnesses in both matters will be substantially the same. The factual ground to be covered in discovery and at trial in the defamatory action will not be limited to January 13, 2003, but will, as counsel for the defendant (insurer) acknowledged, involve the circumstances around the employment of Ms. Lockhart by the defendant. The claim for punitive damages will require both defence counsel to cover the same subject matter. While some of the legal issues are

different, they are not in significant conflict in this case because of the nature of the claims of this plaintiff.

[48] The defendant insurer did not advise the Court what would happen with respect to the plaintiff's defamatory action at trial where the plaintiff was seeking not just compensatory damages (which are covered by the defendant insurer) but also punitive damages (which are not covered by the defendant insurer). Would it mean, by reason of the potential conflict for which reason the defendant’s insurer appointed its own counsel, that the Village's own lawyer would still participate. Just as the Village can not force the insurer to defend the action by the Village's lawyer, similarly, where the insurer has no liability to the Village for punitive damages, the Village is entitled to have its counsel participate in the defamatory action. This could add costs, delay, and complexity.

[49] To the extent that there may be some areas, particularly as to damages, that are more relevant to the defamation insurer than to the wrongful dismissal claim, there may be some increased cost to the defendant(s). This possible minor increase in costs does not come close to balancing the significant cost, even in terms of disbursements and delay, to the plaintiff in restarting and pursuing two separate sets of litigation.

[50] The greatest concern to this Court in terms of the arguments of the defendant was whether a reasonable jury could be properly instructed with respect to both claims. The Court accepts after reviewing in detail the defendant's lists of factual and legal issues in both the wrongful dismissal and the defamation action, and its review of the onuses that apply in the respective actions, that while this is a matter of some concern, it is not of such great concern as to trump the obvious delay and increase costs to an impecunious plaintiff.

[51] In summary, while a single action may embarrass (complicate) the trial somewhat, two actions dealing with the same evidence and with substantially overlapping issues will delay significantly the resolution of all the issues and will otherwise inconvenience the plaintiff to the point that the claims may not be determined on their merits.

[52] The application is dismissed with costs against the defendant insurer in favour of the plaintiff. If the parties cannot agree on costs the Court will receive submissions.

J.