SUPREME COURT OF NOVA SCOTIA
Citation: *MacLellan v. Canada (National Defence)*, 2015 NSSC 125

Date: 2015-04-21
Docket: Hfx. No. 355119
Registry: Halifax

Between:

JOHN CYRIL MACLELLAN

Plaintiff/Respondent

v.

ATTORNEY GENERAL OF CANADA representing the Department of National Defence and LIEUTENANT COLONEL DAVID T. LEWIS

Defendants/Moving parties

-AND-

Docket: Hfx. No. 392048

Between:

JOHN CYRIL MACLELLAN

Plaintiff/Respondent

v.

HER MAJESTY, QUEEN ELIZABETH II, IN THE RIGHT OF THE DOMINION OF CANADA, CAPTAIN (N) DARREN GARNIER, COMMANDER GARRETT REDDY, MAJOR PATRICK KAVANAGH, MAJOR PREM RAWAL

Defendants/Moving parties

DECISION ON COSTS

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: December 18, 2014, in Halifax, Nova Scotia

Counsel: M. Kathleen McManus and Susan R. Taylor for the Defendants/Moving Parties

Kevin A. MacDonald for the Plaintiff/Respondent

By the Court:

Introduction

[1] This is a decision on costs following the pre-trial dismissal of the plaintiff's claims. Starting in the 1970s, the plaintiff was a Reserve Cadet Instructor List Officer, serving at various times as an instructor at the Regional Gliding School and as Deputy Regional Cadet Air Operations Officer and as the Deputy Commanding Officer of the Gliding School. After changes to the terms of reference for his contract position in 2009, the plaintiff alleged that his commanding officer was seeking to replace him in the position with a younger officer. After retaining counsel, the plaintiff accepted a different position, but claimed that his CO verbally assaulted him and made false accusations against him. The plaintiff ultimately took a release from the Armed Forces. He subsequently commenced two actions in tort, as well as advancing various Charter and statutory claims. The various defendants claimed that his complaints were subject to the military grievance process and were not properly before the court. On a motion to strike the claims on various grounds, the defendants were successful. The court found that some of the claims were properly subject to the *National Defence Act* grievance process, while others were struck as unsustainable: 2014 NSSC 280.

Party-and-party costs

[2] The defendants seek costs in the amount of $24,000.00, plus disbursements. The court's authority over costs is described at Civil Procedure Rule 77. A judge may "make any order about costs as the judge is satisfied will do justice between the parties": Rule 77.02(1). The Rules do not limit "the general discretion of a judge to make any order about costs": Rule 77.02(2). Party-and-party costs are generally, but not necessarily, determined in accordance with the tariffs, though a judge may award lump sum costs instead: Rule 77.08.

[3] On motions, Tariff C applies "unless the judge hearing the motion orders otherwise": Rule 77.05(1). Tariff C provides for costs of $2,000.00 per full day for a motion of one day or more. The hearing took 2.5 days. This indicates a starting point under Tariff C of $5,000.00.

[4] Tariff C contemplates the application of a multiplier where an order on a motion is "determinative of the entire matter at issue in the proceeding…" In that

case, the judge "may multiply the maximum amounts in the range of costs set out in this tariff C by 2, 3 or 4 times, depending on … (a) the complexity of the matter, (b) the importance of the matter to the parties, [and] (c) the amount of effort involved in preparing for and conducting the application…"

[5] The defendants argue for the application of the multiplier factor of four under Tariff C, as the decision brought the proceedings to an end. They cite several cases where a multiplier of four was considered or applied. In *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2008 NSSC 322, the proceeding was disposed of on summary judgment after a two-day hearing. Coughlan J. considered applying a multiplier of four to the base costs of $4000.00, but ultimately decided on a lump sum of $40,000.00, from which $6,000.00 was deducted on account of appeal costs. Justice Coughlan described the proceeding as a "complicated proceeding involving disclosure of numerous documents and discovery of twenty-seven witnesses... The plaintiff amended its statement of claim on two occasions. The proceeding involved novel claims. It was subject to case management" (para. 1).

[6] In *Barthe v. National Bank Financial Ltd.*, 2010 NSSC 220, Hood J dealt with costs following an unsuccessful two-day summary judgment motion. She referred to the decision of Goodfellow J. in *Armour Group Ltd. v. Halifax (Regional Municipality)*, 2008 NSSC 123, where he set out a list of special circumstances to serve as guidance where a party seeks to go beyond Tariff C (see *Armour Group* at para 20). Hood J. noted that "[t]he matter took two full days in Chambers, but the cross-examination of Lutz Ristow on his Affidavit filed on the motion was completed beforehand pursuant to an earlier Order of this Court. The discovery was lengthy taking two days followed by undertakings and interrogatories" (para. 9). She emphasized that the summary judgment motion did not dispose of the matter, as in *Cherubini*, adding, "[a]s Justice Goodfellow pointed out in *Armour Group, supra*, the complexity of the matter, to warrant deviation from the chambers tariff, must be greater than one would anticipate in ordinary chambers matters. Although this matter was lengthier than many summary judgment motions, it was largely due to the complicated factual underpinning of the entire KHI litigation. The legal issues which were raised were left for trial" (paras. 17-18). Justice Hood ultimately awarded lump sums in varying amounts to the various defendants, totalling some $52,000.00.

[7] The defendants also cite *Robertson v. McCormick*, 2012 NSSC 156, where the defendant sought costs after a successful summary judgment motion. The

plaintiff had been a substitute teacher who claimed that the defendant school principal had wrongfully denied him a teaching post. The hearing in that case lasted 2.5 days. McDougall J summarized the circumstances as follows, at para 3:

> The plaintiff did not succumb to the inevitable dismissal of his claim without first putting the defendant to considerable effort and expense. The motion for summary judgment followed full disclosure and discovery. It consumed two and one-half days of court time. The Court had to first deal with the complete review and overhaul of the plaintiff's own supporting affidavit along with another supporting affidavit from his son. Significant portions of these affidavits were either redacted or struck in their entirety. This might be attributed in part to the plaintiff's lack of legal training; it can also be attributed to his determined but unfounded quest to make the defendant pay for what he characterizes an attack on his reputation and his ability to teach while all the defendant was really doing was what one would expect of a person in her position. There was no evidence that she was motivated by anything other than what was best for the students while maintaining the professional integrity of the school and its staff. There certainly was no evidence to support a cause of action framed in defamation. The plaintiff's claim for damages was unfounded, misguided and totally unsupportable.

[8] In determining that a multiplier of three was appropriate, McDougall J. noted that the issues had been "made somewhat more complex than they should have been by the rather novel and convoluted manner in which the plaintiff pursued his claim…" (para. 7). The issues were important and had demanded a considerable effort to prepare and argue the motion. Further, the defendant had made an offer to settle by way of a dismissal without costs. Pursuant to Rule 10.09, this led to an increase of 75 percent of the Tariff amount ($15,000 with the multiplier), for total costs of $26,250.00.

[9] The last case cited by the defendants is *Bridges v. Dominion of Canada General Insurance Co.*, 2012 NSSC 249, where the self-represented plaintiff had brought an action against more than 25 defendants in relation to a sewer back-up and oil spill. The court dismissed the claim as an abuse of process. Rosinski J. concluded that the circumstances suggested that the plaintiff was "deliberately making (in part) scandalous allegations, while herself not actively participating in the judicial process, and ignoring court directions and orders" (para. 17). He awarded Tariff C costs to the nine defendants' counsel involved; for the two-hour motion to dismiss (which determined the proceeding), this was set at $1000 per defendant, with a multiplier of two, with supplemental amounts under Rule 88.02(1) on account of the plaintiff's abuse of the court's process.

[10] In the present case, then, the defendants ask the court to apply a multiplier of four to the base amount under Tariff C, which is $5000.00. This would give a total of $20,000.00. The defendants do not request a lump sum. In addition, they seek disbursements of $4251.73.

[11] The defendants argue that the motions were complex, that they involved issues that were important to the parties, that they involved substantial time and effort to prepare and argue, and that they were determinative of the two actions.

[12] The plaintiff was advised by counsel for the Attorney-General as early as May 2011 that his complaints were subject to the grievance process, and that a grievance filed before he was released from the Armed Forces could be continued after his release. Instead, the plaintiff took a release and commenced the two civil actions. This led to the filing of motions to set aside and dismiss, as Attorney-General's counsel had previously indicated would occur. There were multiple adjournments, requiring refiling of affidavits and other documents. The statements of claim filed in the two actions – both struck out – were some 300 paragraphs and 250 paragraphs, respectively.

[13] When the first action was commenced, the defendants gave notice of their intention to move for summary judgment on the pleadings, seeking to strike the statement of claim on the basis that some of the claim properly fell under the grievance procedures in the *National Defence Act*, R.S.C. 1985, c. N-5 (the NDA), and some were otherwise statute-barred by the NDA. Shortly before the motion was to be heard in the first action, in June 2012, it came to light that the plaintiff had filed another statement of claim in respect of the events concerned in the first claim, against different defendants. This necessitated a delay in hearing the motion in the first action.

[14] A new date was then set for a motion to strike the plaintiff's affidavits along with the summary judgment motions. On the date of the hearing, in January 2013, the plaintiff announced his intention to amend the pleadings, necessitating a delay in the hearing. The plaintiff eventually filed amended statements of claim in each proceeding. The defendants thereupon brought amended motions to strike affidavits and for summary judgment.

[15] The matter eventually came to a hearing in December 2013. The motion to strike all or part of the affidavits filed by the plaintiff was partly successful. The matter then proceeded to the motion on the pleadings. As referenced above, I heard the motion and dismissed the actions, concluding that the claims were in part

subject to the statutory process under the National Defence Act, to which the court must defer. Other elements of the claims were encompassed by the *Code of Service Discipline*, and did not fall within the exception under s. 270 of the *National Defence Act*. Alternatively, I found that those claims were not sufficiently pleaded, leading to striking under Rule 13. Finally, s. 92 of the *Compensation Act*, S.C. 2005, c. 21, required that the claims be stayed.

[16] The defendants submit that the success of their motion brought an end to the proceedings, and that they are therefore entitled to costs on the basis of the requested 2.5 days of court time and the multiplier of four. They seek $2000.00 per day, for a total of $5000.00 over 2.5 days. Applying the multiplier of four brings the total to $20,000.00. They seek disbursements on top of this amount.

[17] The plaintiff emphasizes that costs are discretionary: he cites *Bent v. Farm Loan Board* (1978), 30 N.S.R.(2d) 552 (S.C.A.D.). The plaintiff takes the position that he is impoverished, and that the court should exercise its discretion to limit the costs award and allow him to pay over a period of years. He did not seek relief from liability for costs on the basis of poverty pursuant to Civil Procedure Rule 77.04. The plaintiff maintains that the fact that he did not follow the mandated procedure should not prevent his financial circumstances from being taken into account in determining costs. The defendants say any financial issues on the plaintiff's part should await any attempt to recover on a costs award by way of execution.

[18] I am satisfied that the absence of a prior motion under Rule 77.04 is not a bar to considering a respondent's financial situation on a motion for costs. See, most recently, *Body Shop Canada Ltd v Dawn Carson Enterprises Ltd*, 2015 NSSC 39, at paras 6-8, and *Mercier v Nova Scotia (Police Complaints Commissioner)*, 2014 NSSC 309, at paras 5-9. The plaintiff cites *Windsor v. Adu Poku*, 2003 NSSC 95, and *Hill v. Cobequid Housing Authority*, 2011 NSSC 219, in each of which the unsuccessful plaintiffs' impecuniosity was factored into the costs determinations after trial.

[19] In addition to the claim of impecuniosity, the plaintiff maintains that the Crown should be denied its costs because it was "fair and reasonable in the circumstances" for him to proceed as he did. He argues that the decision on the motions clarified an area of law that had not previously been decided in Nova Scotia and thereby served the public interest. I am not convinced that the issues in this case were in any way novel, or that the law was unsettled.

[20] The plaintiff also says he has not been reimbursed for certain costs incurred in defending a court-martial, and asks this court to award costs in that proceeding, or to otherwise apply this as a limiting factor in this proceeding. The plaintiff requested that I issue a subpoena requiring the Assistant Judge Advocate General for the Atlantic Region to appear at the hearing. It is not at all clear where this court would obtain jurisdiction to make an order in respect of expenses incurred in defending a court-martial, and I decline to make any such order. Nor am I satisfied that I can properly consider those alleged expenses in determining costs in this proceeding.

[21] While I am satisfied that it is appropriate in some circumstances to take account of the unsuccessful plaintiff's financial situation, I cannot conclude that this is a reason to relieve him entirely of liability for costs in this case. There is limited evidence before the court respecting his current circumstances. The general rule remains that costs follow the event. Having considered the authorities, I am of the view that an appropriate amount of party-and-party costs in this instance is $18,000.00.

Disbursements

[22] The defendants maintain that their disbursements are primarily related to the preparation of their brief and book of authorities and attendance at the hearings on the motion to strike affidavits and the main motions. The defendants have not claimed HST on disbursements. The disbursements claimed include filing fees for the two main motions and for the motion to strike portions of the plaintiff's affidavits ($185.30), travel costs for two defence witnesses required by the plaintiff to travel to Nova Scotia from Ontario for cross-examination ($2762.29), costs of photocopying the defendants' brief and book of authorities on the main motions and the affidavit motion ($1282.70), and courier fees for serving the plaintiff with the brief and book of authorities on the affidavit motion ($21.44). The total disbursements claimed amount to $4251.73.

[23] The plaintiff submits that there was no need for the defendants to bring witnesses from out of the province, claiming on the basis of his own training and experience that "subject matter experts" could have been found in Halifax. Failing that, he submits that the witnesses could have been accommodated in military messes rather than hotels at lower expense. There is no evidence going to either of these arguments, and I do not accept them.

[24] I am satisfied that the disbursements claimed are reasonable. The defendants shall have their disbursements in the amount of $4251.73.

Conclusion

[25] Accordingly, I award costs of $18,000.00 and disbursements of $4251.73, for a total of $22,251.73. I would ask the defendants' counsel to prepare the order.

LeBlanc, J.