IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Johnston v. Clearwater Seafoods Ltd., 2008 NSSC 403

Date: 20081003
Docket: S.H. 243137
Registry: Halifax

Between:

William Johnston

Plaintiff

v.

Clearwater Seafoods Limited

Defendants

Judge:	The Honourable Justice Simon J. MacDonald
Submissions:	On Costs received August 5th and 20th, 2008
Written Decision:	**October 3, 2008**
Counsel:	Bernadette Maxwell, Counsel for the Plaintiff David Hirtle, Counsel for the Plaintiff Nancy F. Barteaux, Counsel for the Defendant

By the Court:

COSTS

[1] Following my decision in the above captioned matter I requested counsel for the plaintiff and defendant to make submissions with respect to the issue of costs and pre-judgment interest.

[2] I received the plaintiff's submission on August 5th, 2008 and the respondent's on August 20th, 2008.

POSITION OF THE PARTIES:

Plaintiff's Position on Costs Is:

a) party and party costs should represent a substantial and reasonable cost contribution towards the plaintiff's absolute costs.

b) three quarters of the plaintiff's actual costs in the amount of $18,750.00 is appropriate. The total bill submitted for counsel's services was $25,000.00. The plaintiff claims over and above that amount the HST of the award.

(c) In the alternative if the court should determine to apply the Tariff under the **Costs and Fees Act** costs should be awarded on a scale 2 of Tariff A which would amount to $7,250.00, plus $2,000.00 per day for trial which would make a total account owing for fees of $15,250.00, plus HST.

(d) The pre-judgment interest on a damage award should be at the average rate of 3.74% and be applied for the period of January 17th, 2005 to July 4th, 2008. Based on the figures supplied by plaintiff's counsel that would amount to $6,152.30. In arriving at the rate plaintiff's counsel used the rates of interest for treasury bills during said period of time.

(e) The plaintiff further claims disbursements of $5,661.41.

[3] **THE DEFENDANT SUBMITS**:

(a) neither Scale 2 of Tariff A, nor 3/4 of the plaintiff's actual costs is appropriate. The defendant also claims the plaintiff.

(b) if the Tariff Scale is used it should Scale 1 for costs of $5138.00 and $2,000.00 per day of trial not be allowed.

(c) the total amount of costs claimed is approximately 60% of the actual award.

(d) the defendant argued based on the findings of the court there was only an award of five months notice and the amount of costs sought by the Plaintiff is not appropriate. Defence argue the plaintiff sought reasonable notice for a period of approximately 16 months based on 16 years employment when in fact the court concluded the only appropriate time for consideration of unlawful dismissal was a period of time from 2000 to the plaintiff's termination in 2005. The court disallowed his employment history from 1990 until 2000.

(e) The plaintiff's claim for so called Wallace damages was denied as the court found there was no bad faith on the part of the employer.

(f) it had some success which should be considered in the costs.

(g) that the court consider an offer to settle it made at a Settlement Conference on September 24, 2007 in the amount of $40,000.00. It argues this because it was made close to the trial and was in close proximity to the amount awarded by way of damages. The defendant states the plaintiff rejected this offer and made a formal offer on September 28, 2007 in the amount of $90,000.00.

LAW AND ANALYSIS

[4] Nova Scotia Civil Procedure Rule 63 deals with the matter of costs. The starting point with respect to costs is that costs are in the discretion of the court. Rule 63.04 provides a number of considerations for determining costs and directs the use of Tariffs in assessing costs.

[5] One of defence arguments is they made an offer to settle during the Settlement Conference on September 24, 2007 in the amount of $40,000.00. Ms. Barteaux argues the plaintiff rejected defence offer and argues Rule 41A.11 should be considered. It provides the court in exercising its discretion on costs to take into account any offer to settle.

[6] There are many cases where this was invoked, such as **Goode v. Ourson** [1991] NSJ 669 and **Wheel Ranch Ltd. v. Sun Alliance Insurance Company** [1995] 142 NSR (2d) 154.

[7] The difficulty I have with the offer made by the defendant in this case was it was made during a Settlement Conference. I firmly believe Settlement Conferences are held as a way to encourage settlement and what is said is to be kept confidential. If counsel could use offers, counter offers or discussions in settlement conferences at trial it would impact negatively on the use and purpose of settlement conferences.

[8] As Justice Tidman said in **Perry v. Keyplan Housing Cooperative Ltd.** [1997] 164 NSR (2d) 158 in paragraphs 2, 3, 4 and 5:

> 2) "In their submissions, counsel dealt with the effect matters arising from an earlier settlement conference should have on costs of the action."
>
> 3) "Let me leave no doubt on this issue. What occurred in relation to the settlement conference will have absolutely no bearing on the award of costs. It is inappropriate for counsel to refer to matters occurring during settlement

> conference process in arguing a claim for costs, including pinions which may be expressed by the settlement judge."
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> 4) "In order to maintain the integrity of the settlement conference process, it is absolutely essential that all discussions, positions taken and opinions expressed during the process remain confidential. If that were not so, parties understandably would be reluctant to frankly and openly discuss their positions either with each other or the settlement judge thus defeating the very objective of a settlement conference, i.e. to achieve a negotiated settlement of the action. All positions put forward by the parties should be on a strict "without prejudice" basis. If not, there would be an added danger that settlement judges might later be called as witnesses to give evidence of what occurred at the settlement conference. This, to say the least, would be an undesirable situation."
>
> 5) "If counsel wish to use the effect of attempts at settlement in arguing costs, the Civil Procedure Rules make provision for doing so. Even informal timely offers of settlement are routinely considered by the court in exercising discretion in relation to costs, but not offers made during the settlement conference process."

[9] I am not prepared to take into account the offer made by Ms. Barteaux at the settlement conference.

[10] I find the discretion granted in 41A.11 and referred to in **Goode v. Ourson**, supra by Justice Goodfellow is not applicable to offers made in the midst of settlement conferences.

[11] I also conclude the plaintiff's formal offer to settle in the amount of $90,000.00 made on September 28, 2007 does not trigger Rule 41A.09 because it is substantially more than awarded him in this matter.

[12] Ms. Maxwell in her submission on costs referred to **United Parishes of St. George and St. Patrick v. Guy** [2006] 245 NSR (2d) 48 and **Williamson v.**

Williams [1998] NSJ No. 498 to argue 3/4 of the plaintiff's actual cost ought to be paid by the defendant based on the plaintiff's success.

[13] I have reviewed these cases and find the facts are different. For example, in **Williamson v. Williams** it was a much more complicated matter in that there was a trial, appeal, a re-trial and another appeal.

[14] I do not conclude the proceedings were all that complex and furthermore, there were no experts involved. This case involved factual findings, a lot of documents and took four days. The plaintiff also made unwarranted claims which were eventually dismissed. He was also slow in producing documents relative to income until shortly before trial.

[15] Considering the trial findings, conclusion of the court, as well as representations by counsel as to costs, I conclude the proper award of costs is Tariff A, Scale 1. The award was $47,000.00. Using the aforesaid scale would make a cost award of $5,138.00, plus $2,000. per day of trial for a total of $13,138.00. The plaintiff claims HST on top of this figure.

[16] The defendant submits the HST is not recoverable and quotes **GBR** and **Hollett** 1996 154 NSR (2d) 161 CA and **Wyatt v. Franklin** [1993] NSJ No. 624 SC. There appears to be a variety of different opinions regarding the awarding of HST,- on party and party costs.

[17] I prefer the approach of Justice Hall in **Eaton v. Manning** (2003) 214 NSR (2d) 222; 671 A.P.R. 222 (S.C.) especially where he stated at :

> 25) "It would be illogical and unreasonable for a court to fix an award of costs only to have it subsequently reduced or diminished by the imposition of a tax over which the parties and the courts have no contol."
>
> 26) "Accordingly, in order to maintain the quantum of the award of costs made by the court, the unsuccessful party must bear the proportionate amount of costs that the award attracts as part of the other party's expenses."
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> 27) "Accordingly, the party and party costs award is to be increased by 15%."

[18] Hence the award of costs, $13,138.00 should be increased by 13%, $1707.94 for a total of $14,845.94.

[19] The plaintiff is also entitled to disbursements. However, the defendant challenged a number of those items. I have reviewed them and award as follows, inclusive of any HST taxes on applicable taxable items:

[20] First of all is photocopies. The plaintiff claims the sum of $2,544.00 for photocopying at .25 cents per page. I find that amount to be unreasonable and concur with the remarks of Goodfellow, J. in **Osborne v. Osborne** [1994] NSJ No. 217 where he said at paragraph 44:

> 44) "Mrs. Osborne seeks recovery for xeroxing of 184 pages at .50 a page, a total of $92. .50 a page is an unreasonable rate, and a more reasonable rate of .25 a page would also be subject to a 25% deduction to remove costs of overhead xeroxing that was done solely for the benefit of reporting to the client. Accordingly, the claim for xeroxing of $92 is reduced to $34.50. There must be

> some limitation and control over photocopying for which an unsuccessful party is responsible. Wyatt v. Franklin (1993), 123 N.S.R. (2d) 347. Mrs. Osborne shall be entitled to recover disbursements taxed and allowed in the amount of $597.13."

[21] I would therefore reduce the disbursement for photocopies to $2000.

[22] The defence also argues similarly that a dollar a page for 356 pages for fax appears to be an excessive amount. I agree the charge for faxes appears to me to be unreasonable and there is no doubt some of this was done solely for the benefit of plaintiff's counsel reporting to their client and as well would be incurred as overhead expenses. Accordingly I would reduce this amount to the sum of $275.00.

[23] The binding charges are as well disputed by the defendant and I agree as well the amount appears to be unreasonable and excessive and should be reduced to reflect overhead costs and the costs of reporting to the client. I do so and fix same at $325.00.

[24] Defence counsel as well challenged the parking fee submission of $42.00 and I apply that as part of counsel's overhead expenses because they have to put themselves at trial.

[25] The remaining disbursements are not challenged and thus are awarded.

[26] In summary, the plaintiff is awarded $14,845.94 costs, $3246.94 in disbursements, plus pre-judgment interest in the amount of $6152.30.

J.