IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Halifax (Regional Municipality) v. Nova Scotia (Superintendent of Pensions) 2005 NSSC 228

Date: 2005 08 19
Docket: S.H. 222531A
Registry: Halifax

BETWEEN:

The Members of the Halifax Regional Municipality Pension Committee, as Administrator of the Halifax Regional Municipality Pension Plan

Appellant

and

Superintendent of Pensions for the Province of Nova Scotia, Joan Mahoney and Patricia Oldham

Respondents

DECISION ON COSTS

Judge: The Honourable Justice Gerald R. P. Moir

Submissions Received: 17 May 2005, 24 May 2005, 27 May 2005

Counsel: Mr. Hugh H. Wright, Counsel for the Appellant
Ms. Catherine J. Lunn, Counsel for the Respondent Superintendent of Pensions
Ms. Joan Mahoney, for herself
Ms. Patricia Oldham, for herself

Moir, J.:

[1] The style of cause refers to “Members of the Halifax Regional Municipality Pension Committee”. The parties and the Court agreed to this expression on the understanding that it refers to several individuals. Through their counsel, Mr. Wright, they appeared before the Superintendent of Pensions in March 2004 to argue that she should not prevent the committee from charging fees to plan members for calculating the amount that would be transferred for the member in the event of a transfer under a reciprocal transfer agreement. The Superintendent decided against the committee members and in favour of two plan members who had requested calculations, the respondents Joan Mahoney and Patricia Oldham. The committee members appealed to this Court and I allowed the appeal. The only remaining question is costs.

[2] The plan members, Ms. Mahoney and Ms. Oldham, attended the appeal but they made no submissions. No one suggests any costs should be awarded against them and none will be ordered. The Superintendent participated fully in the hearing through her counsel, Ms. Lunn. The Superintendent did not restrict herself to defending jurisdiction. Mr. Wright suggests, and Ms. Lunn does not disagree, that costs should be assessed on the basis that the Superintendent stood for the Crown as opposed to standing strictly as decision-maker under review. As Ms. Lunn wrote, “the court has

an inherent jurisdiction to award costs against the crown as an ordinary litigant, in appropriate circumstances".

[3] Firstly, I must decide whether to award any costs against the Superintendent. Ms. Lunn suggests a departure from the principle that costs usually follow the result on the basis that the case resolved a novel issue. She writes:

> The issue before the court on this appeal as to whether the fees charged by the committee for reciprocal transfers of pension entitlements was a section 50 transfer and whether the *Pensions Benefits Act* permitted the charging of a fee. It is further submitted this is a matter of far-reaching application where two public bodies are trying to elucidate the law. It is a matter of significant public importance to the greater body of government employees in this jurisdiction. Essentially the matter involved interpretation of an ambiguous statutory provision(s) in which both parties financed the costs of the hearing of this appeal funded with public funds. The Respondent Superintendent further submits the court's decision in the interpretation of the statue is of great benefit to both parties and particularly to government employees of Halifax Regional Municipality who are considering changing jobs from one level of government to another.

This case was an exercise in statutory and contractual interpretation. I would not use the word "ambiguous" to describe the statutory provision at issue. The issues were not so novel. Rather, they involved the application of fundamental, one could say rudimentary, principles of interpretation to a statute and a contract involving a difficult subject, pension calculations. This exercise is not so novel as would move me to deprive a successful litigant of costs.

[4] The parties are far apart on the amount of costs. The Superintendent says $250, if any. The committee members say $4,050. The old tariff applies in this case because the application was made before the new tariff was published. Each side has an approach to "amount involved" under the old tariff and complexity under the old tariff, leading to their divergent positions. The divergence itself is some indication that the tariffs are unworkable in this case.

[5] The objective of the tariffs, both the old and the new, is to provide a substantial but partial indemnity against what, on an objective assessment, would ordinarily be charged to a successful litigant by ordinary counsel in a like case. Where tariff costs would not, without artificiality, produce a substantial but partial indemnification, the Court may resort to a lump sum award by exercising its discretion under Civil Procedure Rule 63.02(a): *Williamson* v. *Williams*, [1998] N.S.J. 498 (CA) para. 15 to 33; *Keddy* v. *Western Regional Health Board*, [1999] N.S.J. 464 (SC); *Campbell* v. *Jones*, [2001] N.S.J. 373 (SC) para. 54 to 72; *Campbell-MacIsaac* v. *Deveaux*, [2005] N.S.J. 42 (SC); *Hardman Group Ltd.* v. *Alexander* [2003] N.S.J. 267 (SC) para. 109 to 153.

[6] In my assessment, genuine use of the old tariff cannot produce a just result in this case. To apply the tariff as the Superintendent suggests and award $250 would show disrespect for the principle founding the tariff itself, partial but substantial indemnification. To apply the tariff as the committee members suggest would involve shoehorning a judicial review into concepts of complexity and amount suitable to an ordinary trial. This is a case for departing from the tariff.

[7] The decisions cited above recognize that evidence of actual fees charged to the successful litigant are to be considered, but with caution, in assessing a lump sum. Justice Hood put it this way at para. 142 of *Hardman*: "Although evidence of the actual costs incurred is of some relevance, it is up to the court to objectively assess what would constitute a substantial indemnity." Mr. Wright advised me that the committee's legal fees exceed $22,000 before disbursements. It is not clear whether this includes fees for the hearing before the Superintendent. In light of the disbursements claimed, it probably does.

[8] Based upon the work evident to me during the hearing and upon my knowledge of the efforts that go into preparing work of that kind, I would expect fees over ten

thousand dollars. In my opinion, the result suggested by Mr. Wright is fair to both parties. I will award party and party costs of $4,000.

[9] Disbursements are also in dispute. The committee members claim $10,167 plus HST of $1,525. These include expenses incurred before proceedings were commenced on 30 June 2004 associated with the hearing before the Superintendent, most notably $9,308 for the committee's expert. I see no authority by which the Superintendent could award costs for or against any party. I do not see how I could award costs in reference to that proceeding.

[10] The total of disbursements in connection with the appeal is $473.84, all but four dollars of which is for photocopying charged at twenty eight cents a page. Ms. Lunn cites *Bank of Montreal* v. *Scotia Capital Inc.*, [2002] NSSC 274, which reduced photocopy disbursements from $391.55 to $195.78, but that appears to have been a case of excessive photocopying. Ms. Lunn cites *Boyne Clarke* v. *Steel*, [2002] N.S.J. 186 (S.C.C.) for "charge of $334.10 @ $.25/page was unreasonable - reduced to $100". However, Adjudicator Richardson said:

> There was a total of $334.10 for photocopying. Ms. Conlon advised that there was a standard charge of $0.25 a page for photocopying, which works out to 1,336 pages

> of photocopying. Such a charge again strikes me as unreasonable in the circumstances, and I reduce the total disbursement charge to $100.00.

His finding may have been that the amount of photocopying, rather than the rate, was unreasonable. In *Coleman Fraser Whittome & Parcells* v. *Canada* [2003] N.S.J. 272 (S.C.C.) Adjudicator Richardson found ten cents a page to be reasonable. He does not say what the outer end of the reasonable range would be.

[11] It has been practice for decades for law firms to charge clients for photocopy as a disbursement. One commonly sees twenty cents a page and more. In the absence of evidence showing this common practice to be unreasonable and in the absence of evidence that large bundles should have been sent to the printers, I would allow the photocopy disbursements as claimed.

[12] The committee members will have costs against the Superintendent of $4,000 for fees, $473.84 for disbursements and $71.08 for HST on the disbursements.

J.

Halifax, Nova Scotia
19 August 2005