

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Boutcher v. Clearwater Seafoods Limited Partnership, 2010 NSSC 64

Date: 20100426

Docket: Hal. 244471

Registry: Halifax

Between:

Cecil Boutcher and Clyde Knickle

Plaintiffs

v.

Clearwater Seafoods Limited Partnership, a
Nova Scotia Limited Partnership

Defendant

DECISION ON COSTS

Judge: The Honourable Justice Douglas L. MacLellan

Heard: November 3rd to 7th, 2008 (trial), in Halifax, Nova Scotia

**Final Written
Submissions:** January 6th, 2010 (on costs)

Counsel: Grant Machum and Mark Tector, for the plaintiffs
Nancy F. Barteaux and Isabelle French, for the defendant

By the Court:

[1] In my decision dated April 3rd, 2009, I found in favour of the plaintiff Clyde Knickle and awarded him \$55,498.00 as damages for wrongful dismissal plus costs, I dismissed the claim of the plaintiff Cecil Boutcher and awarded costs against him.

[2] My decision was appealed and by a decision dated February 23rd, 2010, the Nova Scotia Court of Appeal upheld my decision in regard to Clyde Knickle and overturned my dismissal of Captain Boutcher's claim. The Court determined that the damages awarded to Mr. Boutcher should be based on the formula I used to determine Captain Knickle's damages.

[3] I have been advised by counsel for the defendant that the parties have agreed that using that formula would result in damages being awarded to Cecil Boutcher in the amount of \$60,507.24.

[4] Prior to the decision from the Court of Appeal the parties had made written submissions to me based on the terms of my decision. Counsel have now made

additional submissions after the Court of Appeal decision and ask that I determine the costs resulting from the Court of Appeal decision.

[5] Counsel agree that the action was started in October 2004 and therefore the Civil Procedure Rules and costs tariffs (effective September 2004) existing at that time should apply.

[6] Prior to the trial there were a number of applications. The defendant applied to sever the actions of both plaintiffs. That application was dismissed and apparently it was appealed where the appeal was dismissed.

[7] The defendant also applied to strike a jury trial notice filed by the plaintiffs. That was successful and the matter proceeded by judge alone.

[8] Costs of the first application were awarded to the plaintiff in the amount of \$250.00 at trial and \$1,250.00 at the appeal level. Disbursements of \$282.22 were awarded at each level.

[9] On the application to strike the jury notice Justice Pickup allowed the application and awarded “\$500.00 costs in the cause”.

[10] Counsel for both plaintiffs in their submission after the trial requested that the Court approach the matter by looking at Tariff A Scale 2 (Basic) costs based on the amount awarded to each plaintiff plus the daily amount for trial, and then add a lump sum to bring the costs award up to a level which would be a substantial contribution to their actual costs.

[11] Counsel indicated that the total legal costs incurred by both plaintiffs to pursue the action was \$100,000.00.

[12] Counsel for the plaintiffs base that request on the case of *Landymore v. Hardy* (1992), 112 N.S.R. (2d) at 410.

[13] Counsel for the defendant takes the position that while the plaintiffs are entitled to costs the Court should not award a lump sum and instead use Tariff A Scale 1 and not allow for the daily amount for the days of trial.

[14] That submission is based on the fact that on October 20th, 2008, before the trial which was scheduled to start on November 3rd, 2008, the defendant offered to settle Mr. Knickle's claim for the sum of \$54,000.00 less required statutory deductions, and for Mr. Boutcher the sum of \$42,000.00 all inclusive.

[15] Counsel for the defendant also asks the Court to consider that both plaintiffs asked in their pre-trial briefs for very high damages and prior to trial Mr. Knickle offered to settle for the sum of \$102,728.00 and Mr. Boutcher for \$161,658.00.

Civil Procedure Rule - Costs

[16] Rule 63.02 provides as follows:

“63.02. (1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,

- (a) award a gross sum in lieu of, or in addition to any taxed costs;
- (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding;
- (c) direct whether or not any costs are to be set off.

(2) The court in exercising its discretion as to costs may take into account,

- (a) any payment into court and the amount of the payment;
- (b) any offer of contribution.

(3) The court may deal with costs at any stage of a proceeding.”

[17] Rule 63.04 provides:

“**63.04.** (1) Subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties shall be fixed by the court in accordance with the Tariffs and, in such cases, the ‘amount involved’ shall be determined, for the purpose of the Tariffs, by the court,

(2) In fixing costs, the court may also consider

- (a) the amount claimed;
- (b) the apportionment of liability;
- (c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;
- (d) the manner in which the proceeding was conducted;
- (e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;
- (f) any step in the proceeding which was taken through over-caution, negligence or mistake;
- (g) the neglect or refusal of any party to make an admission which should have been made;
- (h) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence;
- (i) whether two or more plaintiffs, represented by the same solicitor, initiated separate actions unnecessarily; and
- (j) any other matter relevant to the question of costs.”

[18] The *Costs and Fees Act* provides the tariffs for the awarding of costs. It provides:

“In these Tariffs unless otherwise prescribed, the ‘amount involved’ shall be

- (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
 - (i) the amount allowed,
 - (ii) the complexity of the proceeding, and
 - (iii) the importance of the issues;

- (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to
 - (i) the amount of damages provisionally assessed by the court, if any,
 - (ii) the amount claimed, if any,
 - (iii) the complexity of the proceeding, and
 - (iv) the importance of the issues; ...”

Case Law

[19] In *Williamson v. Williams*, [1998] N.S.J. No. 498, Freeman J.A. speaking for our Court of Appeal said about the issue of costs:

“The present tariffs were adopted in 1989 to replace the antiquated **Costs and Fees Act** then in effect. In *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410 Saunders J. stated:

‘The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:

‘...the recovery of costs should represent a substantial contribution towards the parties’ reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity.’

In my view a reasonable interpretation of this language suggests that a ‘substantial contribution’ not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer’s reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs,

objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.”

[20] In that case the court increased the tariff amount of costs of \$14,180.00 by a lump sum of \$30,000.00 after considering the plaintiff’s actual legal costs of \$80,000.00. The plaintiff therefore received total costs of \$44,180.00.

[21] I consider the issues here to be as follows:

- (1) What scale of Tariff A should be used?
- (2) Should the daily trial amount be awarded?
- (3) Should the court award an additional lump sum?
- (4) Should HST be added to the costs award?

[22] I accept the plaintiff’s position that Scale 2 (Basic) should be used based on the damage awards made to each plaintiff which total \$116,005.00.

[23] Counsel for the defendant argues that the offers to settle made shortly before trial should be considered to reduce the plaintiffs' costs. I am not prepared to do that.

[24] The offer was made very close to the trial. It was made apparently on October 20th, 2008, and the trial started on November 3rd, 2008.

[25] The offer to settle was considerably below what the plaintiffs will eventually receive. Added to the actual award of damages will be added considerable amounts of interest and disbursements and costs.

[26] If I use Tariff A Scale 2 (Basic) for the total damages of \$116,005.00 the costs award would be \$12,250.00 plus \$10,000.00 for five days of trial for a total of \$22,250.00 under Tariff A.

[27] The plaintiffs ask for an additional lump sum to more adequately reflect their actual legal costs. Counsel submits that the plaintiffs actual legal costs were in the area of \$100,000.00. That submission has not been challenged.

[28] I conclude that an award of \$22,250.00 would not be a substantial contribution to the plaintiffs' legal costs. The plaintiffs had to deal with two applications prior to trial and the trial took five days to hear. It involved a lot of evidence on the issue of how the defendant came to terminate the plaintiffs' services after many years of employments.

[29] To allow costs that would be significantly less than their actual legal costs would result in the plaintiffs using a significant part of their damage awards to pay their lawyer. In the case of *Burns v. Sobeys Group Inc.*, [2008] N.S.J. No. 117, Warner J. of this court made a lump sum award in addition to the tariff amount in circumstances where the tariff amount would not adequately compensate the plaintiff for his actual legal costs. In *Morash v. Burke*, [2007] N.S.J. No. 95, Wright J. of this court did the same thing by increasing the tariff amount of costs there from \$12,700.00 to \$22,500.00.

[30] In *Bevis v. CTV Inc.*, 228 N.S.R. (2d) 34, Moir J. said:

“Both parties have referred to one of my decisions, *Campbell v. Jones*, [2001] N.S.J. No. 373 (N.S. S.C.), para 54 to 72 reversed on other grounds [2002] N.S.J. No. 450 (N.S. C.A.). This decision was followed by Justice Hood in *Hardman v. Alexander*, [2003] N.S.J. No. 267 (N.S. S.C.) at para. 140-144. Rather than repeat myself I provide a summary of my conclusions. (1) Costs are normally set in accordance with the Tariff. (2) However, the Tariff system serves the principle of a substantial but incomplete indemnity. The Courts do not choose artificial

means, such as selection of an artificial ‘amount involved’, in order to make the Tariff serve the principle. Therefore, when reasonable approaches to amount involved or scale under the Tariff fail to produce a substantial but partial indemnity, the Court may resort to its discretion under rule 63.02(a) and order a lump sum. (3) To settle an appropriate lump sum the Court will have regard to the actual costs facing the successful party or the labour expended by counsel, but the Court will seek to settle the amount objectively in conformity with one of the policies of the Tariff, to provide an indemnity that has nothing to do with the particularities of counsel’s retention. The Court will attempt to provide a substantial but partial indemnity against what would ordinarily be charged by any competent lawyer for like services. (4) Finally, the Courts have usually avoided percentages. Substantial but partial indemnity is a principle, not a formula.”

[31] There are I find a number of cases where the same approach was used. (See, for example, *Miller v. Royal Bank of Canada* (2008), N.S.S.C. 139 and *Willis v. Bernard L. Mailman Projects Limited and Dorey* (2008), N.S.S.C. 94)

[32] I am satisfied that it has become a common practice for this court to be faced with such a request and to grant a lump sum of costs in circumstances where the tariff amount does not result in close to a substantial contribution to a party’s actual legal costs. To do so the court must be satisfied that the legal costs were actually incurred and were reasonable considering the complexity of the case.

[33] When the matter involved only Mr. Knickle’s claim for costs counsel for the plaintiff requested \$15,000.00 in additional costs by way of a lump sum payment.

[34] Considering the fact that both plaintiffs have now been determined to be successful I feel that an additional award of \$20,000.00 is appropriate here and therefore the total award of costs will be \$42,250.00.

[35] Disbursements - The plaintiffs seek \$10,800.00 for disbursements and while the defendant objects to a number of items of disbursements I am satisfied that all the disbursements requested should be paid.

HST Issue

[36] The plaintiffs ask for HST to be added to the amount of costs. The defendant objects and suggests that the Court of Appeal decision in *G.B.R. v. Hollett*, [1996] N.S.J. No. 345, settled that issue.

[37] I agree with counsel for the defendant and no HST will be added to what the plaintiffs recover.

[38] I understand counsel have agreed on the interest payable to both plaintiffs considering the amount of damages awarded.

[39] I have not calculated any costs awarded on the applications heard prior to trial because it appears these costs were ordered payable forthwith except the award striking the jury notice and counsel have not confirmed whether in fact the costs were paid.

[40] The \$500.00 awarded by Justice Pickup will also be payable by the defendant.

J.