

SUPREME COURT OF NOVA SCOTIA

Citation: *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2009 NSSC 260

Date: 20090528

Docket: Hfx No. 267432

Registry: Halifax

Between:

Tissa Amaratunga

Plaintiff

v.

Northwest Atlantic Fisheries Organization

Defendant

Judge: The Honourable Justice M. Heather Robertson

Heard: May 28, 2009, in Halifax, Nova Scotia

Decision: May 28, 2009 (**Orally**)

Written Release: September 9, 2009

Counsel: David A. Copp, for the plaintiff
John T. Shanks and Richard M. Dunlop, for the
defendant

Robertson, J. (Orally)

[1] Mr. Amaratunga has brought a wrongful dismissal law suit against his former employer the Northwest Atlantic Fisheries Organization (“NAFO”).

[2] By Notice of Motion NAFO seeks a determination of NAFO’s claim that as an international organization it enjoys immunity from Mr. Armaratunga’s lawsuit.

[3] This determination involves a three step process, which the applicant outlines as follows:

Step 1 - Set Date of Hearing of Separation Issue and Address Discovery and Disclosure Issues Raised in the Plaintiff’s Appearance Day Notice - At the April 1, 2009 hearing, the Hearing for which this Brief was prepared, NAFO also requests the Court schedule a date for a hearing as to whether, pursuant to Rule 12.02, this Honourable Court may separate the legal question of immunity from the other issues raised in the proceeding and provide for the determination of the issue of immunity before trial. We request that the Court also set dates for the submissions of the following:

- (a) Affidavits;
- (b) Reply Affidavits; and
- (c) Briefs.

The Court will also address the issues raised in the Appearance Day Notice.

Step 2 - Hearing of the Separation Issue - The Court will hear from the parties on the issue of separation and determine whether the requirements of Rule 12.02 is satisfied in this instance.

Step 3 - Hearing of Motion - In the event that this Honourable Court decides that separation is appropriate pursuant to Rule 12.02, this Court will then hear evidence and submissions as to whether NAFO enjoys immunity. Appropriate dates for the submission of affidavits, briefs, and cross examination of affidavits will have to be set.

[4] Rule 12.02 outlines the following 3-part test which NAFO will have to satisfy at Step 2 of the process:

A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:

- (a) the facts necessary to determine the question can be found without the trial or hearing;
- (b) the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;
- (c) no facts to be found in order to answer the question will remain in issue after the determination.

[5] The Court has before it the affidavits of:

1. Professor Ed Morgan
2. Dr. Johanne Fischer

[6] Although Professor Morgan's affidavit appears to provide an opinion of law that NAFO enjoys the benefits of the NAFO immunity order. This is an affidavit that for my purposes merely sets forward that immunity is a live issue. It would be up to the Chambers judge in any subsequent hearing (Step 3) to consider this affidavit in evidence, hear cross examination on the affidavit and receive subsequent affidavits from the plaintiff's side, proffering an alternate opinion.

[7] Dr. Johanne Fischer's affidavit, merely sets forth the legislative grounds for NAFO's assertion of immunity to this claim.

[8] My role is therefore limited to the consideration of whether this is a proper case for a determination of a question of law in the absence of an agreed statement of facts, pursuant to new Rule 12 (Step 3).

[9] I am providing you with an oral decision today.

[10] I do not see such complexity of facts that this issue of law should not go forward and be determined as a single issue by a judge at the next step - Step 3. And I think it will be expeditious and it will save expense.

[11] In my view, the criteria with respect to Rule 12 have been met. There are facts necessary to determine the question can be found without a trial or a hearing. And, in fact I agree with Mr. Shanks that the facts that you outlined Mr. Copps in your own brief, an extensive recital of facts are all matters that suggest to me that those facts can be relevant to the interpretation of the immunity clause. Further, there is ample time in the procedure under Rule 12.03(2) to allow the court to consider further affidavits and hear cross examination on the affidavits.

[12] So, I do not see a prejudice to your client Mr. Copps. I see perhaps a benefit. And, I do not have to decide the merits of the immunity issue today. I have viewed the Professor's affidavit which was filed after May 8th. It is before the Court and we have all read it. That affidavit will be before a judge in Chambers at Step 3. You will have ample opportunity Mr. Copp's to produce additional affidavit evidence. I will give you until the end of July to meet the challenge of that affidavit. And, I have only looked at that affidavit for the purposes of saying "Okay I recognize here that there is an issue of law, a singular issue of law relating to the grant of immunity made by parliament and how it impacts on the litigation that is before the Court." That question should be answered first in my view, making this an appropriate Rule 12 application.

[13] Rule 12 has a purpose. It is a new Rule. It is quite different than the old Rule 25. And, the old Rule 25 does call for that agreed statement of facts and hence, the court's comments in *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115, in particular paragraph 24, 25, and 26 that you were relying on Mr. Copps.

[14] In the present case I do not believe any of the *Elliott* concerns are present. This will not result in fragmented litigation or increased costs of litigation to the prejudice of your client Mr. Copps. I do think that there is a discernable advantage in dealing with this issue of law before the trial on the merits. There is a lot of latitude at this third stage of analysis to determine how the matter could subsequently proceed to trial if that was the Court's view that it should. So, I really see this as almost a perfect example of what was intended by Rule 12. I will grant the application.

[15] This is assigned August 25 and 26, 2009. I will be happy to deal with any preliminary issues of timing and briefs or you might contact Justice LeBlanc and say we have had a chat and here is what we agree to. That would be good - it might be better to deal with him because its his summer, his holiday and his sense of preparedness for your people on those two days in late August. I am at your disposal. If you agree on some matters you can present it to me. We do not want to complicate the matter. We want to be expeditious about making the matter advance and go forward.

Justice M. Heather Robertson