

SUPREME COURT OF NOVA SCOTIA

Citation: Awan v. Cumberland Health Authority, 2009 NSSC 295

Date: 20090915

Docket: Hfx No. 214285

Registry: Halifax

Between:

Shahid I. Awan

Plaintiff

v.

Cumberland Health Authority and the Attorney General of Nova Scotia
representing Her Majesty the Queen in Right of the Province of Nova Scotia

Defendants

Judge: The Honourable Justice C. Richard Coughlan

Heard: September 8, 2009, in Halifax, Nova Scotia

Decision: September 15, 2009 (Orally)

**Written Release
of Decision:** October 20, 2009

Counsel: Alan V. Parish, Q.C. and Cory J. Withrow, for the
plaintiff
Peter M. Rogers, Q.C. and Katie Roebothan, for the
defendants

Coughlan, J.: (Orally)

[1] Shahid I. Awan is an anaesthetist. He entered into an Agreement dated September 28, 1989 with Highland View Regional Hospital Board of Trustees for the provision of anaesthetic services to the Hospital. The contract contained a mechanism by which it could be terminated.

[2] Notice was given by the Cumberland Health Authority to Dr. Awan by letter dated August 13, 2002 that the Agreement would conclude on November 1, 2002. Dr. Awan commenced action against the Health Authority and the Attorney General of Nova Scotia on January 21, 2004.

[3] The Cumberland Health Authority filed a Defence February 16, 2004. The Attorney General filed a Defence March 23, 2004.

[4] The action against the Attorney General was dismissed by order issued February 24, 2005. Both Dr. Awan and the Health Authority brought applications for summary judgment which were heard November 22 - 23, 2004 and dismissed by order dated April 18, 2005. Dr. Awan filed a List of Documents October 24, 2005. On June 9, 2006 an order was issued compelling the Cumberland Health Authority to file a List of Documents by July 15, 2006. The Health Authority filed a List of Documents on July 13, 2006. Dr. Awan filed a first Supplemental List of Documents on August 17, 2006.

[5] An unsuccessful mediation was held September 26, 2006. Discoveries of Dr. Awan and Mr. Bruce Quigley, Chief Executive Officer of the Health Authority, were held January 22 - 24, 2007. Dr. Awan filed a second Supplementary List of Documents on June 7, 2007. On October 4, 2007 an order was issued requiring the Health Authority provide certain information within 30 days and Dr. Awan file a Notice of Trial within 90 days.

[6] On November 14, 2007 Dr. Awan made a formal Offer to Settle upon payment of "the sum of \$475,000.00 plus prejudgment interest and costs payable at the time of acceptance of this offer".

[7] Dr. Awan filed a Notice of Trial Without a Jury on November 16, 2007. The trial was scheduled for November 12 - 14 and November 17 -24, 2008. By consent, the trial was rescheduled for May 4 - 7 and May 11 - 14, 2009.

[8] The Cumberland Health Authority accepted Dr. Awan's Offer to Settle by Acceptance of Offer to Settle on April 7, 2009, which was accompanied by a cheque in the amount of \$570,000.00.

[9] Dr. Awan's legal account from March 12, 2002 to April 15, 2009, including HST, which account was paid by Dr. Awan, totalled \$146,778.99.

[10] Dr. Awan brings this Motion to determine the amount of prejudgment interest and costs. The parties agree Dr. Awan's disbursements payable by the Cumberland Health Authority total \$4,618.08.

[11] Dr. Awan submits as the Offer to Settle was accepted April 7, 2009, the Civil Procedure Rules which came into force January 1, 2009 apply in calculating the amount of prejudgment interest.

[12] The Health Authority submits acceptance of the Offer was part of the settlement process initiated by the Offer, and as a result the 1972 Civil Procedure Rules apply.

[13] Section 41(i) of the *Judicature Act* R.S.N.S. 1989 c. 240 provides:

(i) in any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;

[14] Dr. Awan is entitled to prejudgment interest. In his brief filed in response to the Health Authority's brief, Dr. Awan agrees with the Health Authority prejudgment interest is to be calculated from November 1, 2002 (the date his contract was terminated) to April 7, 2009 (the date payment was made to him). I agree that is the appropriate period.

[15] Dr. Awan refers to Civil Procedure Rule 70.07 as authority for prejudgment interest at 5% a year. However, Rule 70.07 deals with prejudgment interest on a "liquidated claim". A liquidated claim is defined in Black's Law Dictionary, Revised Fourth Edition as:

Claim, amount of which has been agreed on by parties to action or is fixed by operation of law...

A claim which can be determined with exactness from parties' agreement or by arithmetical process or application of definite rules of law. ...

[16] Dr. Awan's claims against the Cumberland Health Authority include unliquidated claims. Civil Procedure Rule 70.07 does not deal with prejudgment interest on unliquidated claims.

[17] In any event, considering all of the facts of this case, including the period during which prejudgment interest is calculated, except for three months and seven days, was under the 1972 Civil Procedure Rules, it is appropriate Practice Memorandum 7 be used in calculating prejudgment interest.

[18] In determining an appropriate rate of prejudgment interest, I refer to Practice Memorandum 7 to the 1972 Civil Procedure Rules which provides:

1. **Judicature Act**

Section 41 of the **Judicature Act**, R.S.N.S. 1985, c. 240, as amended, provides that in any proceeding for the recovery of any debt or damages the court shall include in the sum for which judgment is to be given, interest thereon at such rate as it thinks fit for a certain period. There are other provisions in the section with respect to the rate of interest and related matters.

2. Evidence to Calculate Rate of Interest

- (a) Counsel shall strive to agree upon a rate prior to the conclusion of the trial, which rate the court may, but is not bound to accept.
- (b) In the event counsel cannot agree upon a rate prior to the conclusion of the trial, counsel should place before the court evidence upon which the court may arrive at a rate of interest which is proper. Such evidence shall include the prevailing rates of interest for the relevant period of time, which, it is suggested, be in the form of a table prepared and introduced into evidence showing the average rates of interest for one (1) year or two (2) year term deposits or treasury bills. The table shall show the various

rates existing during the relevant period and the calculation of the average rate.

[19] Exhibited to the affidavit of Anne Emery deposed to August 18, 2009 was a printout from the Bank of Canada's website showing the average monthly interest rate for one year treasury bills from November 2002 to March 2009 with the average for the period being 3.18%. Also exhibited to the affidavit was a printout from the same website for the same period showing average monthly interest rate for one year guaranteed investment certificates, with the average for the period being 1.98%, for an average of the two being 2.58%.

[20] Exhibited to the affidavit of Cory J. Withrow, deposed to August 28, 2009, was a printout from the Bank of Canada's website showing the average monthly rate for one year treasury bills for the period November 2002 to April 2009, with the average rate for the period being 3.14%. Also exhibited to the affidavit from the same website for the same period was a printout showing benchmark Government of Canada two year bond yields, with the average yield for the period being 3.27%, for an average of the two being 3.205%.

[21] The material filed on behalf of the Health Authority did not contain any information concerning two year investments; whereas the material filed on behalf of Dr. Awan did include information concerning two year investments - the two year Government of Canada bonds.

[22] On the evidence before me, I find prejudgment interest at the rate of 3.205% on the sum of \$475,000.00 for the period of November 1, 2002 to April 7, 2009 shall be paid by the Cumberland Health Authority to Dr. Awan.

[23] Murphy, J. of this Court awarded costs of \$4,000.00 for both summary judgment applications to the successful party in the cause. Dr. Awan is the successful party. He was paid \$475,000.00 plus prejudgment interest and costs for his claims. The Cumberland Health Authority shall pay \$4,000.00 to Dr. Awan as costs on the summary judgment applications pursuant to the order of the Honourable Justice Murphy.

[24] Civil Procedure Rule 77.06(1) provides:

Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

[25] This proceeding was commenced by Original Notice Action and Statement of Claim issued January 21, 2004, therefore the Tariff of Costs and Fees in a proceeding commenced on or after January 1, 1989 applies.

[26] I must determine the amount involved. I find the “amount involved” is \$475,000.00, the amount set out in the Offer to Settle. Prejudgment interest is not to be taken into account in determining the amount involved. See *Skeffington v. McDonough and Vanamburg* (1993), 114 N.S.R. (2d) 181 at p. 182; *Hines v. Englund* (1994), 124 N.S.R. (2d) 156 at p. 162; and *Gay v. MacDonald* (1999), 170 N.S.R. (2d) 322 at para. 24.

[27] This proceeding concluded by acceptance of an Offer to Settle. There has been no trial. Costs allowable when a proceeding has been discontinued or settled have consistently been treated differently than costs after trial. The offer accepted included “costs payable at the time of acceptance of this offer”. While costs are in the discretion of a judge considering all of the relevant factors in the particular proceeding, a party accepting an offer could reasonably consider costs would be on the tariff scale for settled proceedings.

[28] With an amount involved of \$475,000.00 under the 2004 and 2009 Tariffs, costs of \$12,500.00 would be allowed. Under the 1989 Tariff, costs of \$6,700.00, plus the individual tariff items which may amount to an additional \$1,000.00 or \$2,000.00, would result. It is clear with all the Tariffs, costs on the settlement of a proceeding are treated substantially differently than costs after trial.

[29] Civil Procedure Rule 10.08(1) provides:

(1) A judge who determines costs under an accepted formal offer to settle that was delivered by a party who started a proceeding must award costs to that party, unless an injustice would result.

[30] In exercising discretion in awarding costs, the judge is to do justice between the parties considering the Civil Procedure Rules, tariffs and facts of the particular

case. In all the circumstances of this proceeding, I find the Cumberland Health Authority will pay Dr. Awan costs of \$12,500.00.

[31] In conclusion, Dr. Awan will receive prejudgment interest on \$475,000.00 at the rate of 3.205% per annum for the period November 1, 2002 to April 7, 2009; costs pursuant to the order of Murphy, J. concerning the summary judgment applications of \$4,000.00; costs on settlement of the proceeding of \$12, 500.00; and disbursements of \$4,618.08. The \$95,000.00 already paid by the Cumberland Health Authority to Dr. Awan is to be deducted from the amount payable.

[32] The Cumberland Health Authority shall pay Dr. Awan costs in the amount of \$2,000.00 in connection with this motion.

Coughlan, J.