SUPREME COURT OF NOVA SCOTIA

Citation: Bent v. Atlantic Shopping Centres Ltd., 2011 NSSC 180

Date: 20110524
Docket: ST 184818
Registry: Truro

Between:

Catherine Lynn Bent

Plaintiff

v.

Atlantic Shopping Centres Limited,
a Nova Scotia corporation

Defendant

DECISION ON COSTS

Judge: The Honourable Chief Justice Joseph P. Kennedy

Heard: January 8, 9, 10 & 11, 2007, in Truro, Nova Scotia

Counsel: Robert H. Pineo and Jennifer Hamilton (A/C) for the Plaintiff

G. Grant Machum and Mark Tector for the Defendant

By the Court:

Introduction

[1] This is a decision on costs arising out of an action for wrongful dismissal. The plaintiff, Bent, brought the action after being terminated as manager of a shopping mall operated by the defendant. The issues were when notice of termination occurred, whether that notice was sufficient, whether there was notice by agreement and whether *Wallace* damages applied. At trial, I concluded that the plaintiff received ten months' notice, and that this was sufficient notice in the circumstances. As a result, I concluded that she was not entitled to damages: 2007 NSSC 231 and 258 N.S.R. (2d) 352. The defendant (Atlantic) now seeks costs.

Law and argument

[2] Costs in this case are governed by *Rule* 63 of the *Nova Scotia Civil Procedure Rules* (1972). The general rule under *Rule* 63 was set out at *Rule* 63.03(1), which provided that "[u]nless the court otherwise orders, the costs of a proceeding, or of any issue of fact or law therein, shall follow the event."

[3] The applicable Tariff is the 1989 *Tariffs of Costs and Fees*, the proceeding having been commenced before the 2004 Tariffs came into effect: *Bevis v. CTV Inc.*, 2004 NSSC 209, [2004] N.S.J. No. 454 (S.C.), at para. 7 and *Driscoll v. Crombie Developments Ltd.*, 2006 NSSC 262, [2006] N.S.J. No. 352 (S.C.), at paras. 23-25.

[4] The basic principle underlying party-and-party costs in Nova Scotia is that a costs award should provide a substantial contribution but not a complete indemnity for reasonable fees incurred by the party entitled to costs. Freeman J.A. interpreted this phrase in *Williamson v. Williams* (1998), 223 N.S.R. (2d) 78, [1998] N.S.J. No. 498 (C.A.), at paras. 24-25, citing *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410, 1992 CarswellNS 90 (S.C.T.D.):

> The present tariffs were adopted in 1989 to replace the antiquated *Costs and Fees Act* then in effect. In *Landymore v. Hardy* ... 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.

[5] In *Landymore, supra*, Saunders J. (as he then was) commented on the purpose of costs and added that courts must be cautious in considering the actual costs incurred. He said, at paras. 18-20:

> Costs are intended to reward success. Their deprivation will also penalize the unsuccessful litigant. One recognizes the link between the rising cost of litigation and the adequacy of recoverable expenses. Parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement is encouraged. Winning counsel's fees will not be entirely reimbursed, but ordinarily the losing side will be obliged to make a sizeable contribution.
>
> As it is the court's responsibility to assess the fairness and reasonableness of the effort expended, the trial judge will have to be told how much it cost the successful party to present or defend its case. Counsel will be expected to outline the amount of time spent on the file and the total fees charged the client, preferably in the form of a short affidavit filed with the court. Only then will a judge be able to assess whether those expenses were "reasonable" before going on to decide whether the costs to be awarded will in fact represent a significant contribution to such expenses.
>
> By today's standards so much is measured in terms of a barrister's time. Nevertheless, fees for professional services must never be unreasonable or incurred to train the inexperienced, negate the improbable, pad the unnecessary or exaggerate

> the obvious. The tariff cannot hope to attain its goal of providing a "substantial contribution" to the successful parties' reasonable expenses if those expenses are not disclosed to the court.

[6] The defendant, Atlantic, seeks party-and-party costs, with the Tariff amount supplemented by a lump-sum award. Atlantic says pre-trial proceedings lasted more than five years, and suggests that delay was caused by amendments to Bent's claim. Bent withdrew her claim for disability benefits at the date assignment conference, after Atlantic incurred costs responding to it. The trial lasted four days. Atlantic says its legal fees came to more than $88,000.00, of which $56,814.48 was incurred before its offer of January 5, 2007, and $31,826.00 was incurred after the offer. It argues that its fees reflect the complexity of Bent's original claim.

[7] Bent argues that the parties should bear their own costs. She says the trial resulted in mixed success. In support of this submission, Bent cites the following pleadings in the Statement of Defence:

> 3. The Defendant specifically denies that the Plaintiff was wrongfully dismissed as alleged in the Statement of Claim or otherwise.
>
> 4. The Defendant denies that it has done or omitted to do anything that would render it liable to the Claimant, whether as alleged in the Statement of Claim or otherwise.

[8] Bent says these paragraphs amount to a defence of just cause for dismissal. She also notes that in its pre-trial brief, Atlantic submitted that the employment relationship required her to accept a transfer, or her employment could be terminated. Despite Atlantic's claim that she was terminated for just cause, Bent argues, she was held to be entitled to ten months' notice, which she quantifies at $33,982.50. She says this was an implicit finding that she was wrongfully dismissed.

[9] Atlantic disagrees, and says it was entirely successful in having the wrongful dismissal claim dismissed, and is therefore entitled to costs following the result. Atlantic maintains that it did not allege that there was just cause for dismissing the plaintiff, either in its pleadings or at trial. It says its position was that it provided Bent with reasonable notice of her dismissal, as pleaded in the Defence (at para. 7) and as found by the Court. As there was proper termination by reasonable notice, there was no wrongful dismissal.

[10] Atlantic did not plead just cause for dismissal. The paragraphs of the Defence relied on by Bent do not support the conclusion that there was an "implicit" pleading of just cause. The conclusion at trial was that Bent received ten months' notice, and that this was adequate and reasonable in the circumstances. She was not entitled to

damages. Success was not mixed. Bent alleged wrongful dismissal, but the Court concluded that she was not wrongfully dismissed.

Amount involved

[11] The 1989 *Tariffs of Costs and Fees* provide, at subrule (b):

> In these Tariffs, the "amount involved" shall be
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> . . .
>
> (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to
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> (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

[12] Bent sought damages for lost wages of about $105,400.00 and pension benefits of $7,782.96, for a total of $113,182.96. This amount included lost salary and benefits, general damages for loss of employment, *Wallace* damages, losses attributable to acceleration of income tax payable, costs and interest. Atlantic submits that the amount claimed should stand as the "amount involved," in accordance with subrule (b)(ii).

[13] In the alternative to her argument that the parties should bear their own costs, Bent submits that the Court should use the amount of damages "provisionally assessed" at trial to determine costs, pursuant to subrule (b)(i) of the 1989 Tariffs. She argues that the trial decision assessed her claim as one calling for ten months' notice. At her salary of $40,779.00, ten months' salary would equate to $33,982.50.

[14] Bent also says the defendant's conduct as described earlier should prevent the use of the "amount claimed" (at *Rule* (b)(ii) of the Tariffs). The plaintiff also says the proceeding was straightforward, and so the elements of complexity and importance (at (b)(iii) and (iv)) are not relevant. This would leave the amount of damages provisionally assessed as the relevant factor. Applying Scale 3 of Tariff A, this results in costs of about $3500.00.

[15] There were no damages assessed at trial, provisional or otherwise, and so Bent's submission cannot succeed. There is no convincing reason to depart from the "amount claimed" as the source of the "amount involved."

Lump sum costs

[16] Atlantic submits that a lump sum award of costs is called for in addition to the Tariff amount in order to provide a substantial contribution towards its reasonable costs. It says the Tariff amount would not be sufficient, and seeks an additional lump sum award of $10,000. Using an amount involved of $113,182.96, the 1989 Tariff would provide party-and-party costs of $7,770.50. Atlantic seeks costs of $21,655.75, plus disbursements of $3,232.62, for a total of $24,888.37.

[17] Although costs are presumptively fixed according to the Tariffs (*Rule* 63.04(1)), it is well established that the Court may order lump sum costs. The old *Rule* 63.02(a) provided that, as a function of its discretion over costs, the Court may "award a gross sum in lieu of, or in addition to any taxed costs." The principles governing lump sum awards were set out by Moir J. in *Bevis*, *supra*, at para. 13:

> . . . (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.

[18] Bent says that this is not a case where a substantial contribution to the defendant's costs is called for. She says Atlantic's conduct should eliminate any call for increased costs. She also argues that Atlantic's costs were not reasonable. More specifically, Bent says Atlantic did not need to use two lawyers, where she relied on a single lawyer and an articled clerk. This submission was not supported by authority.

[19] As Atlantic argues, the Tariff would provide party-and-party costs of $7,770.50. This does not provide a substantial indemnity for reasonable costs incurred in this case. Atlantic should receive a lump sum award to supplement the Tariff amount. A lump sum of $10,000.00 will be added to the amount provided by the Tariff.

Offers to settle

[20] Atlantic offered to settle for $10,000 (subject to deductions required by law) three days before trial. Bent rejected this offer and reiterated her own previous offer under *Rule* 41A to settle for $65,000.00 plus costs and disbursements to be taxed. Atlantic says its offer of $10,000.00 was reasonable in view of Bent's lack of success at trial. While this was not a formal offer, the defendant says, it is still open to the Court to consider any offer to settle. On that basis, Atlantic seeks an increase of 50 per cent over the Tariff amount of $7,770.50, which would be an additional $3,885.25.

[21] Bent says the Court should not consider the offers to settle, noting that her own offer remained open until two days before trial, while Atlantic's offer was made just before trial and was not an official offer for the purposes of *Rule* 41A.

[22] The mandatory costs consequences of *Rule* 41A do not apply to an offer made less than seven days before the commencement of trial. Nevertheless, pursuant to *Rule* 41A.11, the Court "may take into account any offer to settle made in writing, the date the offer to settle was served, the terms thereof and any other relevant matters."

Change of position

[23] Bent alleges that Atlantic changed its position on liability, forcing her to expend additional energy and resources to prepare, and that this should be reflected in costs. According to Bent, Atlantic first pleaded just cause (which I have already found it did not do), then indicated at discovery and confirmed at the date assignment conference that just cause was not being alleged "in any way." Atlantic then indicated at the pre-trial conference that it intended to raise the defence of just cause for dismissal on the basis of Bent's refusal to accept a transfer. Atlantic withdrew from this position at the beginning of the trial. Bent submits that these changes of position, particularly occurring just before trial, should be considered in assessing costs.

[24] I am not satisfied that the allegation that just cause was raised and then dropped shortly before trial is of enough significance to have any bearing on costs, absent specific evidence that the plaintiff was somehow prejudiced.

Undertakings

[25] Bent also submits that Atlantic's conduct with regard to undertakings given at discovery should be taken into account. Bent does not elaborate on this in its written

argument, but only attaches application materials for an application that apparently never went forward. It appears that her allegation is that there was difficulty in having undertakings fulfilled. Atlantic denies any improper behaviour with respect to undertakings and submits that none of the allegations in the application materials were proven. It says the issues raised in the application materials were not raised at trial. As such, Atlantic submits, the allegations in the application materials should have no bearing on the costs award. I am not prepared to draw any conclusions as to costs from documents filed for an application that did not proceed.

Disbursements

[26] Arguing that Atlantic has not established the reasonableness of the claimed disbursements, Bent suggests an "arbitrary" reduction of the claimed disbursements ($3,232.62) by 25 per cent, leaving a total of about $2,400.00. The result would be a total costs award of $5,900.00. In response, Atlantic has provided a draft bill of costs and a summary of its disbursements, which do not include costs of legal research and certain other disbursements. Atlantic says the claimed disbursements are reasonable. I can see no reason to find that they are not.

Conclusion

[27] Atlantic is entitled to costs on a substantial contribution basis. The amount provided by the 1989 Tariff ($7,770.50) is to be supplemented by a lump sum of $10,000.00.

Joseph P. Kennedy
Chief Justice