

**SUPREME COURT OF NOVA SCOTIA**

Citation: MacBurnie v. Halterm Container Terminal Limited Partnership,  
2011 NSSC 322

Date: 20110811  
Docket: Hfx. No. 341635  
Registry: Halifax

Between:

**Tim MacBurnie**

Plaintiff

-and-

**Halterm Container Terminal Limited Partnership**, a body corporate

Defendant

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**Decision**

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**Judge:** The Honourable Justice Robert W. Wright

**Heard:** August 11, 2011 in Chambers at Halifax, Nova Scotia

**Oral**

**Decision:** August 11, 2011

**Written**

**Decision:** September 15, 2011

**Counsel:**

Counsel for the Plaintiff - Kevin A. MacDonald

Counsel for the Defendant - Richard M. Dunlop and Jessica White

Wright, J. (Orally)

[1] This is a motion by the plaintiff under Civil Procedure Rule 77.04 for an Order that he is to pay no costs in this proceeding.

[2] This action was commenced on December 24, 2010 under Rule 57 for damages for wrongful dismissal following the termination of the plaintiff's employment on May 21, 2010 after 22 years of service with the defendant.

[3] A defence was filed, asserting just cause, on February 17, 2011 which was the last step taken in this proceeding before this motion was filed.

[4] Civil Procedure Rule 77.04 reads as follows:

**77.04 (1)** A party who cannot afford to pay costs and for whom the risk of an award of costs

is a serious impediment to making, defending, or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.

**(2)** A motion for an order against paying costs must be made as soon as possible after either of the following occurs:

(a) the party is notified of a proceeding the party wishes to defend or contest;

(b) a claim made by the party is defended or contested.

**(3)** An order against paying costs may be varied when the circumstances of the party change.

[5] In support of this motion, the plaintiff has filed an affidavit outlining his dire financial circumstances which are said to be directly attributable to his dismissal without any severance, compounded by the denial of his appeal for employment insurance benefits in August of 2010 in light of the employer's position of having asserted just cause for termination. He has since remained unemployed and submits that he cannot afford to pay any costs award that might be made against

him and that any such award would stifle his pursuit of a meritorious claim.

[6] Costs are an important element of the litigation process. The purposes of costs can be summarized as follows (see Orkin on *The Law of Costs* (2 ed.) Vol. I at page 2-1):

- (a) As partial indemnity or, in some limited circumstances, full indemnity to the successful party for the legal costs it incurred;
- (b) To encourage settlement;
- (c) To deter frivolous actions or motions;
- (d) To discourage unnecessary steps that unduly prolong the litigation; and
- (e) To facilitate access to justice.

[7] These purposes are undermined when a party has an exemption from costs exposure. In the words of Justice Gruchy in *Rafuse v. Zinck's Bus Co.* (1992) 122 N.S.R. (2d) 183 (when considering the predecessor Rule 5.17 under our 1972 Rules), "... when a party has such an exemption, it becomes a very significant tool. A party with such an exemption may then pursue an adversary with financial immunity."

[8] Justice Gruchy concluded in that case that the exercise of judicial discretion in awarding costs was best left to the trial judge after the case had been fully exposed and the relative merits of both sides evaluated.

[9] Because of the imbalance that a costs immunity order would create, the court should exercise its discretion to grant such an order only as an extraordinary remedy where it is fully satisfied that to deny costs immunity would effectively deny the applicant's access to justice. That is to say, the two criteria specified in Rule 77.04 should be stringently applied and only where there is a comprehensive body of evidence adduced in support.

[10] Those two criteria are:

- (1) That the party cannot afford to pay costs, and
- (2) The risk of an award of costs is a serious impediment to litigating a claim.

[11] In my view, the stringent application of these criteria requires that the court be satisfied that without an order granting immunity from costs, the applicant would not be able to pursue the claim because of impecuniosity and the action would have to be abandoned. This in turn requires that the court have a full picture of the applicant's financial situation, a requirement articulated and applied by the Ontario Superior Court of Justice in *Farlow v. Hospital for Sick Children*, 2009 CarswellOnt. 7124.

[12] In the present case, counsel for the defendant employer argues that the plaintiff has not provided full and complete disclosure of his financial circumstances, pointing out that in his supporting affidavit, the pertinent paragraphs read as follows:

*(14) I confirm that my only current source of income is the Social Assistance monthly payment which I receive in the amount of \$819.00 and which barely offsets my ongoing expenses.*

*(15) I have no other source of funding nor savings to pay for legal fees and disbursements or any costs that may be awarded as part of the within action.*

[13] Counsel for the defendant, who declined to cross-examination on the affidavit, goes on to point out that:

(a) The affidavit does not provide any details of his monthly expenses, what assets he may have, or how he manages to support himself. He has provided no documentation that provides a full and complete picture of his financial circumstances;

(b) The affidavit reads that the applicant has “no steady source of income” other than a monthly payment of \$819.00 from Social Assistance. However, he does not state what, if any, other non-steady sources of income he may have;

(c) The affidavit does not include any information regarding the number and type of applications for employment the plaintiff has made and the reasons for the denial of such applications;

(d) There has been no evidence lead as to how the plaintiff is able to support himself. He has lead no evidence with regard to his regular monthly expenses, no evidence regarding other sources of income such as savings, investments or other government benefits or family support, and no information, such as bank account and credit card statements, related to assets and debts.

[14] All things considered, the court is not satisfied that it has the full degree of disclosure of the plaintiff's financial circumstances (or employability) to conclude that he cannot pursue his claim, absent a costs immunity order. That requirement is to be stringently applied. I recognize that Court Administration granted the plaintiff a waiver of filing fees for this action but that holds little sway in the outcome of this motion. It is not based on the criteria set out in Rule 77.04.

[15] Even if it can be said that the plaintiff cannot afford to pay a costs award, the court is not satisfied that he has met the further requirement of showing that the risk of an award of costs would effectively deny him his ability to pursue his claim.

[16] It is acknowledged that the plaintiff has entered into a contingency fee agreement with his counsel. That said, there is no indication that counsel intends to withdraw his services or that an exemption for costs is a prerequisite to continuing his services. That same observation was made by Justice Goodfellow in *Phillips v. Robert A. Jeffries Architecture & Design Ltd.*, 2002 NSSC 114. That case turned on a different fact situation from the one here, and again involved the interpretation of the former Rule 5.17. However, it is nonetheless instructive of this further consideration to be made in the disposition of this motion.

[17] The only other case to which I have been referred (and the only one addressing the new Rule 77.04) is *Mader v. Hatfield*, 2011 NSSC 121. In that case, the defendant sought a costs exemption subsequent to a trial. The trial judge found that there was inadequate information to satisfy the court that a costs exemption would be appropriate, quite apart from the irregularities of that motion.

She concluded (at para 11):

I am not satisfied, based on the information that is before the Court, that such an extraordinary remedy, and one that is not usual in the course of matters, would be appropriate in these circumstances....

[18] Indeed, it appears there are no reported cases in this jurisdiction where such an order has been granted. I am not persuaded on the evidence and submissions before me that this ought to be the first such case.

[19] This motion is accordingly dismissed. Notwithstanding the provisions of Rule 77.04(2), I prefer to leave the exercise of discretion in awarding costs in this proceeding to the trial or motions judge who, under Rule 77.02(1) may at any time make any order about costs as the judge is satisfied will do justice between the parties. Costs of this motion are not sought by the defendant and would not have been ordered by the court in any event.

J.