SUPREME COURT OF NOVA SCOTIA
Citation: Nassar v. Capital District Health Authority, 2011 NSSC 464

Date: 20111005
Docket: Hfx. No. 216958
Registry: Halifax

Between:

Dr. Bassam A. Nassar

-and-

Capital District Health Authority and Dr. Michael Moss

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: October 4, 2011 in Halifax, Nova Scotia

Oral Decision: October 5, 2011

Written Decision: December 20, 2011

Counsel: Counsel for the Plaintiff - Blair Mitchell
Counsel for the Defendant CDHA - Kathryn Raymond
Counsel for the Defendant Dr. Michael Moss - Jennifer Ross
Counsel for Dalhousie University - Philip Chapman

Wright J. (Orally)

[1] In this action, the plaintiff has sued Capital District Health Authority ("CDHA") and Dr. Michael Moss, his former department head in the medical faculty at Dalhousie University, for various causes of action, foremost of which is a claim for damages for abuse or wrongful exercise of public authority.

[2] There are a number of instances or events where the plaintiff says that he was wronged by these abuses of public authority, including Dalhousie's Continued Appointment for Periodic Review Process ("CAPR") and the Dalhousie Medical Research Foundation ("DMRF") grant process dating back some 10 years ago. The plaintiff also alleges, *inter alia*, that abuses occurred pertaining to the Ciba Corning Breast Cancer Research Project dating back some 15 years ago.

[3] The plaintiff commenced this action in 2004 during the course of which voluminous documents have been produced by the parties, and also by Dalhousie University, under the dictates of the Civil Procedure Rules. There have also been extensive discovery examinations of the parties held over the years, with lots more to come.

[4] From this discovery of documents and witnesses, the plaintiff has formed the belief that there were systemic flaws and abuses by a number of senior administrators, and especially Dr. Moss, in the administration of the CAPR and DMRF processes in which he was involved, which remain unrectified to this day. He holds the same belief in respect of the Ciba Corning research project when it was being carried on some 15 years ago (although it has long since been

discontinued). Nevertheless, the plaintiff believes that abuses of public authority occurred which should not be allowed to be repeated. He has therefore embarked on a campaign to bring these perceived systemic abuses to the direct attention of the Board of Governors of Dalhousie University and the Board of Directors of CDHA respectively, for remedial action.

[5] The approach initially taken by the plaintiff's legal counsel was the writing of a letter to counsel for Dalhousie University and CDHA respectively earlier this year requesting, if not demanding, that these matters be referred to those Boards as the statutory governing bodies of those institutions. More specifically, that request was made to Ms. Raymond, counsel for CDHA in respect of the Ciba Corning research project, and to Mr. Chapman, counsel for Dalhousie University, in respect of the CAPR and DMRF grant processes.

[6] Those lengthy letters asserting many of the plaintiff's accusations of impropriety were accompanied by several related documents that had been produced in the course of the litigation, which were thereby subject to the implied undertaking rule.

[7] The Court had made it clear on earlier occasions that the implied undertaking rule was to be observed by the parties unless and until a successful motion was made by the party seeking relief from it. That meant, of course, that the plaintiff could not use any documents disclosed in the course of the litigation for any extraneous or collateral purpose, without first obtaining relief from the rule by order of the Court.

[8] The plaintiff jumped the gun on that by having his counsel send these letters of request and attached documents to Ms. Raymond and Mr. Chapman respectively, demanding that they be transmitted to the governing board of their respective clients, all with the objective of initiating an internal investigation or review, and corrective action, of the three impugned processes and the individuals who had administered them at the relevant times.

[9] What ought to have first happened was the bringing of a motion by the plaintiff before this Court, seeking permission to use those documents for such an extraneous purpose.

[10] In light of the implied undertaking rule, Ms. Raymond and Mr. Chapman both declined to transmit the letters written by plaintiff's counsel and the documents attached to the governing board of their respective clients and chose instead to transmit them to the person(s) at those institutions from whom they take their instructions.

[11] It is only now, in the wake of the Court's directions on the implied undertaking rule given at the hearing of an April 26, 2011 motion, that counsel for the plaintiff has filed these three combined motions for relief from the rule. The motions were filed in July of this year and came before me on October 4, 2011 as the case management judge.

[12] The stated purpose behind the motions is to allow the plaintiff, by judicial leave, to place the pertinent documents directly before the Board of Governors of Dalhousie University and the Board of Directors for CDHA respectively (divided by subject matter as aforesaid) and to let those Boards take such action as they see fit. Clearly, however, the objective is to trigger an internal investigation or review, and corrective action, by each Board on its area or areas of responsibility. That is plainly the plaintiff's expectation, gleaned both from the original and follow- up letters written by plaintiff's counsel.

[13] The implied undertaking rule has always been recognized as being critical to the litigation process. Its application in Nova Scotia is specifically recognized in Civil Procedure Rule 14.03 which reads as follows:

> **14.03 (1)** Nothing in Part 5 diminishes the application of the implied undertaking not to use information disclosed or discovered in a proceeding for a purpose outside the proceeding, without the permission of a judge.

[14] The leading Nova Scotia case on the rule is *Sezerman v. Youle*, [1996] N.S.J. No. 172. In that decision the Nova Scotia Court of Appeal held that the implied undertaking rule applied in Nova Scotia (following the Ontario jurisprudence) and described its rationale as follows (at para. 35):

> The primary rationale for the implied undertaking rule is the protection of privacy and confidential information and the secondary rationale for it is that collateral use would inhibit full and frank disclosure. In considering limits or any exceptions to the rule, there must be balanced against these, the public interest in the full disclosure of and use of the truth. In any given case, the injustice resulting from the application of the rule must be balanced against that which would result from not applying it.

[15] That case has since been subsumed by the Supreme Court of Canada decision in *Juman v. Doucette*, 2008 SCC 8 which is now the leading case authority on the rule. The operation of the rule, and its rationale, is set out in paras. 25-27 which for expedience, I will simply incorporate by reference in this decision. I will, however, quote from paras. 30-32 of that decision which spells out the test that must be met in order for a motion such as this to succeed:

> 30. The undertaking is imposed in recognition of the examinee's privacy interest, and the public interest in the efficient conduct of civil litigation, but those values are not, of course, absolute. They may, in turn, be trumped by a more compelling public interest. Thus, where the party being discovered does not consent, a party bound by the undertaking may apply to the court for leave to use the information or documents otherwise than in the action, as described in Lac d'Amiante, at para. 77:
>
> > Before using information, however, the party in question will have to apply for leave, specifying the purposes of using the information and the reasons why it is justified, and both sides will have to be heard on the application.
>
> In such an application the judge would have access to the documents or transcripts at issue.
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> . . . .
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> 32. An application to modify or relieve against an implied undertaking requires an applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation. In a case like the present, of course, there weighs heavily in the balance the right of a suspect to remain silent in the face of a police investigation, and the right not to be compelled to incriminate herself. The chambers judge took the view (I think correctly) that in this case that factor was decisive. In other cases the mix of competing values may be different. What is important in each case is to recognize that unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the undertaking will not achieve its intended purpose.

[16] The Supreme Court went on to say (at paras. 35-36):

> 35. The case law provides some guidance to the exercise of the court's discretion. For example, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted (citations omitted).
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> 36. On the other hand, courts have generally not favoured attempts to use the discovered material for an extraneous purpose, or for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained in the absence of some compelling public interest (citations omitted).

[17] Plaintiff's counsel strenuously argues that there is such a compelling public interest here. He stresses the public nature of the CDHA and Dalhousie University institutions by virtue of their founding statutes and the nature of their functions. He further argues that the administrators in question were exercising a public responsibility in authoring the various documents, which attenuates the privacy concern that in part underpins the implied undertaking rule.

[18] The plaintiff's allegations are that a number of individuals abused their positions of public authority or responsibility; that the problems were systemic (at least in respect of the CAPR and DMRF grant processes and the Ciba Corning research project); and that therefore there is a public interest in placing these documents before the respective Boards of those two institutions for investigation and corrective action if required. Put another way, he contends that it is in the public interest that the Boards who are entrusted with responsibility for the administration of the operations of these institutions be given the opportunity to investigate and to act as required.

[19] Counsel for the defendants counter with a number of arguments. They assert

that the intended use of these documents by the plaintiff is for a purely collateral purpose extraneous to this litigation, namely, one designed to generate an investigation of the impugned individuals and events as a parallel battle front over the same issues, serving as a further attempt to discredit these individuals. They view this case as a determination of the plaintiff's private and personal interests from his own involvement with the impugned processes and not as a public interest case.

[20] It is also strenuously argued on behalf of the defendants that the materials before the Court on these combined motions do not provide actual evidence of any systemic abuse that might otherwise present grounds for relief in the public interest. Rather, it consists of allegations and speculation on the part of the plaintiff, which are summarized in his counsel's letters aforesaid to Ms. Raymond and Mr. Chapman which, of course, do not constitute evidence coming in that form.

[21] There are a number of other legal arguments made by defence counsel based on various equitable grounds but the main thrust of their submissions is that the plaintiff has failed to demonstrate a superior public interest in the disclosure sought. These motions primarily turn on that issue and I do not consider it necessary to deal with all the other secondary arguments in their disposition.

[22] There can be no denying the fact that the disclosure sought here is for a

collateral purpose extraneous to this litigation, namely, to trigger an investigation by the governing Boards of CDHA and Dalhousie University respectively, and for corrective action to the impugned processes to be taken if required.

[23] There can also be no denying that these impugned processes are the central issues in this litigation, as well as how the plaintiff was affected by them as an individual.

[24] The ultimate question here is whether the plaintiff has demonstrated a superior public interest in the disclosure and use of these documents sought, that should trump the implied undertaking rule. In the final analysis, I conclude that the plaintiff has not satisfied that onus. In my estimation, this is first and foremost a private personal matter, obviously of great concern to the plaintiff given the tenacity with which he has been litigating this action. It is apparent that he seeks not only monetary damages for how the alleged wrongdoings have adversely affected him, but also vindication of his position against his adversaries.

[25] The plaintiff is bound to be confined to this litigation to achieve those ends in the use of the documents disclosed unless he can demonstrate, by evidence, that there is a superior public interest in the disclosure sought in the need to curb systemic abuses in the impugned processes. I find that need has not been established by the plaintiff on the motion materials before me.

[26] I would add parenthetically, as attenuating circumstances here, that the

plaintiff's allegations in respect of the three impugned processes are to be taken as already well-known to persons of high positions of responsibility within both CDHA and Dalhousie University through this protracted and intensive litigation. Indeed, the subject documentation has largely emanated from these two institutions in the first place. If either of these two institutions were to become aware of systemic abuses of public authority, either past or present, there would be no impediment to their launching an appropriate investigation on their own initiative by the personnel charged with such responsibilities.

[27] It is also to be observed that the merits of the plaintiff's allegations regarding the CAPR and DMRF processes and the Ciba Corning research project will ultimately be fully adjudicated upon by the Court at trial.

[28] These, however, are only secondary observations I have made. The bottom line is that I have not been persuaded that a superior public interest in the disclosure sought has been sufficiently demonstrated on the motion materials before me, such that the implied undertaking rule should be overridden.

[29] The plaintiff's combined three motions for relief from the implied undertaking rule are accordingly dismissed.

J.