SUPREME COURT OF NOVA SCOTIA

Citation: *Reiner v. Maritime Business College (1990) Ltd., 2016 NSSC 331*

Date: 2016-12-06
Docket: Hfx No. 450482
Registry: Halifax

Between:

Dr. Emily Reiner

Applicant

v.

Maritime Business College (2009) Limited, a body corporate

Respondent

DECISION ON COSTS

Judge: The Honourable Justice James L. Chipman

Written Submissions: November 25 and December 5, 2016

Counsel: James B. Green, for the Applicant
Jeremy P. Smith, for the Respondent

Introduction:

[1] In my decision released October 26, 2016, *Reiner* v. *Maritime Business College (2009) Limited*, 2016 NSSC 291, I invited the parties to provide written costs submissions. They were received on November 25 with the Applicant seeking $6,114.66 and the Respondent asking for $6,514.07. On December 5 the Respondent revised their disbursements figure to include HST such that the total amount claimed increased to $6,741.18.

[2] The parties agree that Tariff A, Scale 2 costs are appropriate and that the amount involved, $22,609.64, results in a table amount of $4,000. Additionally, they agree the half-day hearing attracts $1,000 for a total costs amount of $5,000. The Applicant's disbursements totalled $1,114.66 and the Respondent's were $1,741.18.

Background

[3] Each side submitted a six-page brief and an affidavit in support of their position. Included with the documents attached as exhibits to the affidavits, were formal Offers to Settle:

- June 15, 2016 from the Applicant offering to accept $32,000, less all statutory deductions plus costs of $2,500.
- June 30, 2016 from the Respondent offering to pay $10,000, all inclusive.

[4] During the Application in Court the Applicant argued her reasonable notice period should be in the range of six to nine months. The Respondent countered that reasonable notice should be one to two months. After considering all the evidence I determined three and one-half months' pay in lieu of notice was appropriate, resulting in an award (inclusive of prejudgment interest) of the aforementioned $22,609.64. In the result it is apparent that neither of the formal Offers "hit the mark". Accordingly, they have had little bearing on my final costs determination.

Discussion and Analysis

[5] Civil Procedure Rule 77.02 provides the Court with general discretion regarding costs. Rule 77.03(3) reads:

> Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.

[6] Each party submits that they should be regarded as the successful party. In support of their position, the Applicant states as follows at Page 4 of her brief:

> This was a wrongful dismissal claim. The Applicant's Notice of Application in Court stated, *inter alia,* that the Respondent had breached the contract of employment and that the Applicant was entitled to damages for insufficient notice of dismissal. The Respondent denied that any breach had occurred or that damages were suffered.
>
> Your Lordship found that a breach of the employment contract did occur, and that the damages were owed by the Respondent. The Applicant was successful on these issues and submits that it was the substantial "successful party" for the purposes of awarding costs.
>
> It is expected that the Respondent will argue the Applicant was not successful for two reasons:
>
> (a) The Applicant was not awarded general damages [for bad faith]; and
>
> (b) The notice award was less than sought by the Applicant.
>
> While the Applicant did claim for general damages in its Notice of Application in Court, the claim was withdrawn at the hearing. Although admittedly not successful with respect to the general damages, it does not necessarily follow that the Applicant was not substantially successful, especially given that that claim was at all times secondary to that of wrongful dismissal. The case law in this province supports that position.

[7] As for the Respondent, at Pages 4-6 of their brief, they raise these points:

- The Applicant only withdrew her bad faith claim on the eve of the hearing.
- The Applicant's inducement claim was unsuccessful.
- The allegations of bad faith and inducement were without basis in fact or law.
- Given that the Applicant initially claimed damages of approximately $61,700 and the Respondent's initial position was $7,000, the Respondent

> was "more successful with respect to the factual determination of the reasonable notice period and successful overall."

[8] With respect to the last point, the Respondent provided no case authority to support such a proposition. By contrast, the Applicant cited four decisions of this Court and summarized them in an accurate manner as set out below:

> In *Wilmot v. Ulnooweg Development Group Inc.*, 2006 NSSC 299, the plaintiff employee was successful with respect to their claim of wrongful dismissal, but was not awarded aggravated or punitive damages, and was unsuccessful in their claim for intentional infliction of mental suffering. Justice Murphy nonetheless found the plaintiff to be the successful party and awarded costs on the Tariff A, Scale 3 basis (under the 1979 Rules) despite finding the majority of the trial was concerned with the claims and damages for which the plaintiff was not successful. (*Wilmot* at para. 50).
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> In *Butler v. Annapolis Valley Radio Ltd.,* 1997 CarswellNS 541, 255 N.B.R. (2d) 289, 668 A.P.R. 289 (NSSC), the plaintiff employee succeeded in his claim for wrongful dismissal, but was not awarded punitive damages and was unsuccessful in his claim for defamation. Justice Boudreau nontheless awarded costs to the plaintiff on the basic Scale 3 (also under the 1979 Rules).
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> . . .
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> The case law in this province and others supports the Applicant's argument. For example, in *Pine Grove Developments Inc. v. Town & Country Property Improvements Ltd.,* 2013 NSSC 155, the defendant argued the plaintiff was not the "successful" party, as it did not succeed in its largest claim of negligent misrepresentation, with the result that the plaintiff was awarded only $27,000 of their $93,000 claim. Justice Warner disagreed, finding that the plaintiff was the successful party to the extent of the awarded damages, and ordered Tariff A, Scale 2 costs.
>
> In *Northbridge Consulting Services Inc. v. Quigley,* 2015 NSSC 49, Justice Coady found the plaintiff to be the "successful" party despite being unsuccessful in its motion for an interlocutory injunction and punitive damages, and having only received damages equal to 24% of its claim.

[9] When I review the above cases, they also assist in refuting the other three points raised by the Respondent. Furthermore, as I noted in *Shannon et al. v. Frank George's Island Investments Ltd.,* 2015 NSSC 133 at para. 17:

> Costs are not determined on an argument by argument basis. In the normal course of an application or trial, one may expect skirmishes which will be decided one way or the other. Consistent with the decisions of Coady J. and several other costs judgments, I see my role as adjudicating costs disputes in the context of the overall case.

[10] I would add that this Application was conducted very efficiently and I do not regard the (previously asserted) general damages for bad faith claim or the inducement claim as requiring a great deal of preparation or court time. Accordingly, in the context of the overall case I regard the Applicant as the successful party.

Disposition

[11] In all of the circumstances, I hereby award $5,000 costs, along with $1,114.66 disbursements payable by the Respondent to the Applicant.

Chipman, J.