

SUPREME COURT OF NOVA SCOTIA

Citation: *Nemburt v Wolfville (Town)*, 2018 NSSC 300

Date: 20181126

Docket: Ken No 470299

Registry: Kentville

Between:

Ergin Nemburt

Applicant

v.

Town of Wolfville

Respondent

Judge: The Honourable Justice Gregory M. Warner

Heard: October 17 and 18, 2018, in Kentville, Nova Scotia

Cost Decision

Written November 20, 2018

Submissions:

Counsel: Jonathan Cuming, for the applicant Ergin Nemburt
(costs only)

Will Russell, for the defendant Town of Wolfville

By the Court:

[1] This is a cost decision respecting an Application in Court heard on October 17 and 18, 2018.

Application

[2] The applicant commenced work as a building official with the Town on August 17, 2015. On March 15, 2017, the Town terminated the applicant for cause and provided salary continuation to July 1, 2017.

[3] The applicant commenced this Application in Court, denying just cause (poor performance) as well as claiming reasonable notice (*Wallace / Honda v Keyes* damages) and special damages totalling about \$62,000.00.

[4] In its pretrial submission, the Town submitted that reasonable notice was two months (less than the three-and-a-half months salary continuation), denied it acted in bad faith (so no *Wallace / Honda v Keyes* damages), denied the special damages claims and, by reason of the applicant's failure to mitigate, submitted that it owed the applicant nothing.

[5] After the application was commenced, and the applicant's pretrial affidavit and his brief were submitted, the applicant and his counsel parted ways. The applicant continued this proceeding as a self-represented party.

[6] In an oral decision, the court found that:

- a) The applicant was dismissed without just cause;
- b) Reasonable notice was five months;
- c) The applicant had failed to mitigate his loss, as of July 1, 2017, so was only entitled to the three-and-a-half months salary continuation already paid;
- d) The Town did not act in bad faith, so the applicant was not entitled to *Wallace / Honda v Keyes* damages;
- e) The applicant was entitled to special damages of \$1,045.00.

Submissions

[7] The Town made a formal Offer to Settle on October 5 – six clear days before the hearing, to pay an additional four weeks’ salary less statutory deductions. At or about the opening of the hearing, it topped this up with an informal offer of an additional \$500.00. The offers were not accepted.

[8] The Town says it was largely successful in the application. It claims costs per *Tariff A*, Scale 2, based on a \$62,000.00 claim, in the amount of \$7,250.00 plus \$2,000.00 per day (for two days), increased by 25% per *CPR 10.09(2)(d)* for a total of \$14,062.50.

[9] The applicant retained a solicitor to make costs submissions.

[10] The applicant accepts that the Town obtained a favorable judgment per *CPR 10.09* and that while the general rule is that *Tariff A* applies, the court has discretion to deviate from it based on a non-exclusive list of factors.

[11] The applicant notes that his original claim was based on the advice of a very experienced employment lawyer. He says that the *Wallace / Honda v Keyes* damages claimed were in response to the Town’s claim that he was terminated for just cause (poor performance). He said he would have abandoned the *Wallace / Honda v Keyes* claim if the Town had conceded that he was not terminated for just cause, which concession was not made until after the hearing of the application commenced. Effectively, the Town failed to admit something that should have been admitted.

[12] He submits that the “amount involved” for the purposes of *Tariff A* costs can consider not only the amount claimed but also the amount provisionally assessed, the complexity of the matter and the importance of the issues to the parties.

[13] He submits that the court provisionally assessed damages as five months less one-and-a-half months for failure to mitigate, or \$17,580.00, plus special damages of \$1,045.00. He therefore submits that the *Tariff A*, Scale 2, “amount involved”, based on the provisional assessment of damages was about \$18,600.00, an amount below the \$25,000.00 threshold for the award of *Tariff A*, Scale 2 costs of \$4,000.00.

[14] He acknowledges the two days of hearing and, on that basis, claims costs should be \$8,000.00.

[15] He argues that an increased award, based on the very late *CPR 10* offer is discretionary and should not be made in the circumstances of this case.

Analysis

[16] Costs of a proceeding follow the result usually (*CPR 77.03(3)*). A judge may make an order about costs that will do justice between the parties (*CPR 77.02(1)*).

[17] The tariffs are a useful starting point but are subject to being increased or decreased based on the totality of the circumstances.

[18] These factors affect my analysis of a just costs order:

a) It was clear that, at the hearing, the self-represented applicant was not knowledgeable respecting employment law or civil procedure and had relied upon the pleadings, affidavits and pre-hearing brief submitted by his then-counsel.

b) Part of the applicant's actions during the proceedings were based on the Town's pleading and claim that it had terminated him for just cause; he was not equipped to respond to the Town dropping its "just cause" argument.

c) The court's decision on the bigger issue – the reasonable notice period, was between but a little closer to the Town's position than the applicant's position, and its position on mitigation was mostly accepted, but its submission of "reasonable notice" was rejected, some special damages were awarded, and its initial position that it had just cause to terminate the applicant was not accepted.

[19] Based on these factors, an award of costs that will do justice between the parties is \$8,000.00. I so order.

Warner, J.