2001 File No. 1201-56071
SFHD12249

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

[Cite as: Coolen v. Coolen, 2002 NSSF 034)

BETWEEN:

RONALD JOSEPH COOLEN
- APPLICANT

- and -

PAULETTE CECILIA COOLEN
- RESPONDENT

D E C I S I O N

Before The Honourable Justice Moira C. Legere on the 18th day of June, 2002 at Halifax, Nova Scotia

DECISION: July 3, 2002

COUNSEL: **Richard Arab - for Ronald Coolen**
Kay Rhodenizer - for Paulette Coolen

LEGERE, J.

This Application to Vary was commenced by Mr. Coolen on March 13, 2002. The variation he requests pertains to a change in circumstances relating to his employment income. He seeks a retroactive variation to January 31, 2002 of an Interim Order for spousal support rendered on January 25, 2002 and issued by the Court on February 22, 2002. The current order resulted from a contested court application which took place on the 15th and 16th day of January, 2002.

Mr. Coolen also seeks a suspension or moratorium on the payment of the retroactive support of $6600.00.

The parties have agreed that this Interim Variation Application relates solely to Mr. Coolen's employment and income situation. Mrs. Coolen's needs and circumstances for the purposes of the interim variation were not argued and have not changed.

At the Interim stage, both entitlement and quantum were in issue. The decision contains findings of fact on the issue of entitlement. At that time I considered all of the then current circumstances relating to the parties' financial needs, means and ability to pay. I found the following:

> The parties are in significantly different financial situations. They lived extravagantly given their current financial circumstances. Mr. Coolen continues to live fairly extravagantly given they are in the throes of separation. The evidence causes me to conclude that if I find entitlement, there is an ability to contribute.
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> ... The request for spousal support in this relationship is not advanced by a party to a traditional spouse or relationship. This is a second marriage. There are no children of the marriage. Both parties worked throughout the marriage, albeit earning significantly different amounts of income.
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> ... Mrs. Coolen argues that the Respondent's abrupt leaving and failure to contribute towards joint indebtedness has required her to maintain the indebtedness, thereby depleting her resources and ability to support herself.
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> ... The evidence appears to support an argument that because of their joint life style choices they jointly engaged in indebtedness which has put her (the Respondent herein) now separate with a lesser income, in a disadvantaged state. Until she is able to re-establish herself she argues she requires on-going maintenance.
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> ... This is not a case where spousal support will be indefinite. It is not a situation where she ought to be allowed sufficient monies to retrain. It is a marriage of medium duration with no children. It is my conclusion that the economic disadvantage arises out of the financial decisions that are made as a result of the marriage and not as a result of the role that she assumed in the marriage.
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> ... Once there is a determination on the division of property and division of debts Mrs. Coolen may well be in a position of determining whether she can afford to continue to live in the matrimonial home with or without Mr. Coolen's support. It appears that the kind of support required by Mrs. Coolen is non-compensatory in that she is placed in a situation of hardship which results from the decisions they made as a couple and the breakdown of the marriage.
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> ... In this case there is a significant drop in household income since the separation and this had disadvantaged the wife, particularly in relation to financial arrangements which were entered into as a couple and which

> are no longer tenable in her current position. It is not my intention in awarding support to conclude there is a need for long term support to replace the lost income from the husband. I have decided that there is an entitlement, based on an interim basis, for spousal support. The question of duration is best left to the Trial Judge.

And in particular I noted the following:

> ... My definition of “interim” is not restricted to “interim pending resolution of the divorce proceedings”. Clearly the parties ought to have the flexibility of negotiating a division of property and spousal support package which allows for self-sufficiency. It allows for the option, failing consent of the parties, to have a trial judge assess the long term need based on the classification and division of assets and debts as assessed at trial.

At the time trial dates had not been set. Currently trial dates have been set for October 10 and 11, 2002.

I was satisfied, having reviewed the Statement of Property, that Mr. Coolen had an ability to pay retroactive spousal support of $6600.00 and that Mrs. Coolen’s need required such an award. On an on-going basis I awarded $1100.00 per month pending further assessment or consent of the parties. The retroactive spousal support commenced August 2001.This left the issue of a full consideration of retroactive spousal support as requested between the date of separation and August 2001, for the Trial Judge.

The time and sequence of events which triggered the Application to Vary are critical to a full understanding of the Applicant's request for a variation. The Applicant is 53 years of age. At the time of the original hearing he was employed as a special investigator with Canada Customs and Revenue Agency, having been so employed for approximately twenty years earning an annual income of approximately $67,000.00. Mrs. Coolen was employed with an annual income of $27,000.00.

On January 17, 2002 (one day after the contested hearing) Mr. Coolen testifies that the manager of his Department called him into the office. He describes the tenor of events as one where he was met with a suggestion that he consider how he was going to spend the next 1½ years which remained in his career with this employer. He believed his productivity and quality of work was being questioned due to the stress of his job, separation and pending divorce. In the course of their discussions he was advised by his employer to consider his options and to render a decision with respect to his preference. There was no time limit set on this and it is recognized that his anticipated retirement date was July 7, 2003.

The Applicant testifies that he thought about it, considered his options and decided to opt for pre-retirement which would lessen his work load and salary by 40%. On January 23rd he submitted an application which was approved by his manager on January 25th. He filled in an application for pre-retirement transition leave.

As a result of his selection of the pre-retirement transition leave his salary was reduced effective February 1st from $67,392.00 to $40,435.00 - a reduction of approximately $26,956.00. He then makes an Application to Vary which is dated March 13, 2002. He currently works three days a week and takes Mondays and Fridays off.

On January 25th he was told by his lawyer about the Court's decision and his financial obligations that resulted from this. He made his first payment on February 1st. He argued strenuously against entitlement and a retroactive award at the hearing and now seeks to have a moratorium placed on his obligation to pay this sum.

Pre-retirement transition leave was introduced by the Treasury Board of Canada to help employees better balance their work and personal lives as well as “help the government reduce its salary budget”.To qualify, a person must be within two years of retirement to apply. Successful applicants may reduce their work week by up to 40%.

Mr. Coolen opted for leave effective February 4, 2002 - confirming his effective date of resignation to be July 7, 2003.The selection of this option makes the effective date of resignation irrevocable.

Mr. Fulton, the Assistant Director and Mr. Coolen’s manager, confirmed that there were questions about Mr. Coolen’s work such that there were discussions between Mr. Coolen and Mr. Fulton about a change in the scope of his work. He confirmed in writing that he spoke with Mr. Coolen about his marital separation and on-going legal proceedings. He concluded as a result of this conversation that this caused Mr. Coolen a degree of stress in his personal life which has infringed on the quality of his work.

At this January 17th meeting Mr. Fulton raised with Mr. Coolen the need to do some planning and to make some decisions about what he was going to do. Mr. Coolen testified that based on his own observations, his supervisor was pleased with the progress he was making.

Mr. Coolen described in detail his work which involves the investigation of possible illegal activities to determine whether there is sufficient evidence to support charges of tax evasion, etc. Cases are referred to him from the Audit section (a section with which he has been personally involved in a prior section of his work life). He would investigate to determine whether there was sufficient evidence to support allegations of tax evasion. The job requires investigative skills and obviously an ability to follow a paper trail as well as to work with financial documentation. Cases can last six months to one year, some cases four to six years, but with an average of two years per case. He had just completed a four year case in the Spring of 2001 which resulted in a successful conviction.

He was assigned another complex case in the Spring 2001. After he submitted his report his work and conclusions were questioned in a

meeting. He explained some of his difficulties. He testified he was not as sharp and noticed a difference in the manner in which he pursued this investigation after just coming out of a four year complex investigation. He was embarrassed at his inability to answer some of the questions and as a result of that he concluded that he had lost his edge. He indicates he did not feel very good leaving that meeting.

As a result of that meeting he decided it was in the best interests of himself and his work environment that he should be reassigned. He is adamant that he does not intend to go back to criminal investigations.

Mr. Coolen confirmed that other options were made available to him - options which he rejected including lateral moves to another section of the Department, a temporary change in his work environment, a movement out of the criminal investigation unit and into piece work and project work for a time certain.

Mr. Coolen made it clear that he was not prepared to return to the criminal investigation field although he was invited to do so by his employer.

There is no evidence to support a conclusion his supervisor lacked confidence in his ability to complete his work either in criminal investigations, in the Audit branch or in other branches of this Department. His supervisor gave him ample time to do other projects and time away from the criminal investigation scene. They discussed various options, including transferring him to a different section, either Audit or Collections, or to another case which may not be as complex. Mr. Coolen concluded that it is not the complexity of the case but his lack of drive. He did not feel good about that and he feels it affected his self-esteem.

Mr. Coolen raised the issue of dismissal. His employer rejected this option. Mr. Coolen remembers he said, “You worked good up to this point and you only have 1½ years before retirement”.

His employer tried to find a way Mr. Coolen could finish to his retirement date in a less stressful manner. He gave Mr. Coolen three separate projects, the last being completed by April 1, 2002. These projects were quite separate from his regular pattern of work. He noted that towards the end of November/December 2001 he began to feel better and he

himself began to look at options.

He confirmed no deadlines were given to him in the January 17th meeting when his employer faced him with the discussion that they should plan for the final 1½ years of his retirement. He confirms the employer continued to seem pleased with his progress. Retirement was not on his mind.

Mr. Coolen is clear he did not intend to and did not consider short term disability leave. He did not consider and has no intention of looking at other options of work, full time work, in other departments as offered by the employer. He further indicated that he did not consider using his flex time to reduce the number of days he worked. He rejected a transfer; rejected a consideration of all options except for one.

He did indicate to his employer that he wanted to go to a particular section of the Department. He was informed by the employer that there was not enough work to justify a full time position. It was out of this inquiry that came the request for the pre-retirement package which would allow him to

work three days at a reduced salary and work where he wanted.

Mr. Coolen suggests that they had previous discussions about retirement. I am satisfied that the only serious and specific discussion regarding the selection of this office came about as a result of the meeting on January 17, 2002. Any previous discussions were not specific or serious. I am further satisfied that Mr. Coolen was and is not interested in retirement nor did an interest in retirement motivate the change in house and salary.

When initially reading Mr. Coolen's affidavit it appeared at first blush that the incentive to change came from his employer. I am satisfied, after hearing all the evidence, that the selection of this option was entirely voluntary. Mr. Coolen admits that it could have been himself who brought up the option.

Mr. Coolen filed the pre-retirement transition leave package prepared by the Treasury Board of Canada. This package describes the pre-retirement transition leave. The description contains multiple cautions to the potential applicant. Commencing on Page 2 of this October 1995

pamphlet the following is inserted:

> Important Notes
>
> 3. Before applying for the pre-retirement transition leave program, employees should carefully consider the financial implications from the leave arrangement on their personal situation and consult their compensation specialist.

Again, at Page 3 the typical questions and answers are set out including the following question:

> How soon can I start my leave arrangement?
>
> Answer: Subject to the approval of your manager you should be able to start your leave arrangement on the date you indicate on your application form. However, to ensure there is sufficient lead time for your application to be processed through the pay system, you and your manager are advised to consult your compensation specialist prior to selecting the start date. ...

With respect to the possibility to change or cancel the application the following appears on page 5:

> Can the leave arrangement be changed or cancelled?
>
> Answer: Cancelling or changing leave arrangements can lead to increased administrative costs, negative impacts on the management of work and resources, and to the need to declare other employees surplus. Since changing or cancelling leave arrangements will result in pay adjustments, employees are advised to consult their compensation specialist.
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> Employee-requested changes to, or the cancellation of leave arrangements may occur only prior to the end of the leave period (otherwise, the employee will already have received the benefit). ... Approval will be at the discretion of managers. ...
>
> This is another reason why employees should carefully review both the timing of their leave arrangement, and the implication on their personal situations *before* applying for a leave arrangement.
>
> ...

> ***Cancellation*** of approved leave arrangements will be approved only in exceptional circumstances (for example, marriage breakdown, death of a family member, or significant changes in the financial, personal or health status of the employee). In the few cases where the cancellation is initiated by management, employees shall be reimbursed for certain reasonable expenses as determined by the employer. ...

It is not suggested and there is no evidence to support that this is a management-initiated selection.

The brochure goes on to describe in detail the changes which will occur as a result of the pre-retirement transition leave.

Mr. Coolen advanced as the reason for the selection of the pre-retirement leave his dissatisfaction with his current work arrangements. Retirement, he confirms, played no part in the selection of this option. He wants to work.

He advances as proof of his inability to return to his ordinary course of work a suggestion that he has suffered sufficient anxiety to cause him to change this although there is insufficient medical information to support any short term or long term disability. In fact, he rejected any notion that he should apply for short term leave or disability.

There is evidence that supports a conclusion that the selection of the pre-retirement transition leave is solely a matter of personal preference and life style choice as opposed to a desire to retire or a compelling need to retire based on health related reasons or other. They include the following:

While Mr. Coolen indicates that his employment performance was questioned on an informal, verbal basis by Mr. Fulton, the Assistant Director of Investigations, there was never any formal process which would put into question his performance ability.

Mr. Coolen admits that he has had prior satisfactory performances in his work and the only evidence that I have with respect to his work performance being questioned was in relation to the particular file and resulted out of a discussion in 2001.

Mr. Coolen admits that there was no suggestion that he take pre-retirement from his employer or anyone else prior to January 17, 2002 and his discussion with Mr. Fulton. He admits that the pre-retirement option

was offered to accommodate a change in his work duties, requiring three days a week only.

Mr. Coolen confirms that he visited his doctor on a number of occasions over the last two years with very short durations of time and did mention in passing his work, his separation and the anxiety he was feeling as a result of them. There is no on-going medical intervention.

Mr. Coolen indicates that he did not once give thought to the possibility that a decision which would result from the January hearing would contain a financial commitment and that possibility did not enter into any deliberations as he selected his option.

Despite the repeated directions in the Pre-retirement leave package he did not request at any time to reconsider his option once he learned of the decision on January 25th nor did he make any inquiries as to any changes that might take place. He clearly indicates he does not intend to make any inquiries because he has no intention of changing back to his previous level of employment. He does admit that while his own supervisor

had approved his selection on January 25th, that the whole application process was still in the Pay and Benefit Section as of January 29, 2002.

Mr. Coolen offers that he did attend counselling related to his work through his Employment Assistant Plan. He saw a work counsellor through his EAP Program. Her file has been provided. The first meeting was in the Fall of 2001 and the second and final meeting was in 2002. During the course of that meeting they discussed the separation proceedings and stress as well as his current work situation and stress. She recommended he see the family doctor and share his concerns about stress. She also recommended that he connect with a local counsellor to assist him with his current stress. Mr. Coolen did not follow up on that. She recommended that he come back to see her and he did, reviewing with him notes he made, at her recommendation, in preparation for meetings with the manager and family doctor. There is some indication that there was some coaching done in preparing for these meetings. Nothing further was booked at the January 21, 2002 meeting and Mr. Coolen indicates he had no further need to pursue this line.

The counsellor confirmed, in a response to Interrogatories, that in her October 2001 meeting with Mr. Coolen she did not form the opinion that his stress was to the point where it was necessary for him to consult with his family doctor. In meeting with him on January 18, 2002 (immediately subsequent to the court proceeding) his stress increased to the point that she felt he should consult with his family physician. She did not recall him mentioning any specific health concerns except sleep disorder.

She also indicates that she does not recall Mr. Coolen indicating any work performance problems in October of 2001.

She also confirmed that at no time in her meeting with Mr. Coolen did he indicate that there was a deadline with respect to his election of work options.

I have reviewed the doctor's file and note that there is nothing significant that would constitute sufficient grounds for any long term disability and clearly there was nothing either the doctor or Mr. Coolen considered serious enough to approach his employer for short term

disability. In any event Mr. Coolen did not choose to pursue this avenue.

When asked about his doctor, after attending a few meetings with the doctor and in which stress was raised by him, no medication was offered. Mr. Coolen does not exactly recall the symptoms he had at the time and he does not remember specifically any recommendation made in the meeting with his doctor. He confirms he has never made any inquiries about stress leave.

The evidence fully supports that this is a life style option and it was not the only option available. Indeed, there were many other options available to Mr. Coolen. It is strictly a matter of choice. Medical leave was not discussed. There were no inquiries made of his doctor to pursue medical leave or of his employer or insurer to obtain medical leave. He was and felt able to work. He had the ability to work. He had a great desire to work, in his terms, but not in criminal investigations.

It is most interesting to note that Mr. Coolen re-enforces that he did not once consider the consequences of the decision that would be shortly rendered with respect to his contested obligation to pay spousal support.

In addition, Mr. Coolen notes that he was scheduled to leave on a trip for the Dominican Republic with his current girlfriend from March 9 - 24, 2002. He had invested $1500.00 in this prior to his decision to take pre-retirement leave. He confirmed that he was paying for his girlfriend's trip. He confirmed he did not, after the pre-retirement selection, approach his girlfriend to contribute to the payment of this trip even though she earned income in the approximate amount, according to him, of $30,000.00 - $40,000.00.To fund the trip he used joint matrimonial air mile points.

While he advises that the $1500.00 he invested would be lost to him he confirmed that he obtained medical insurance such that if he were ill he would have received a refund. No efforts were made by him to submit any medical claim to suggest that he was unable, due to illness, to travel. The cost of that trip was approximately $6000.00; almost sufficient monies to satisfy the outstanding indebtedness by way of retroactive support award.

Mr. Coolen also admits that there are no financial implications to this other than a reduced income. He currently resides in a home without a

mortgage, which home is assessed at approximately $152,600.00 subject to an increase in 2003 to $168,000.00. His budget does not reflect a change in the property tax adjustment due to the successful appeal of his tax assessment. The property taxes are currently overstated.

His budget has not been adjusted to reflect a change in his expenses as a result of a three-day work week.

His asset position is largely unchanged from the trial although he continues to deposit $100.00 per month to mutual funds. He has paid out $12,000.00 for legal fees for the first application and some monies have been paid toward his support obligation. He has, therefore, reduced one of his mutual funds from $60,622.00 to approximately $25,000.00 - $30,000.00. He continues to contribute to this account.

He is also continuing to contribute to Canada Savings Bonds and he currently estimates he has between $1000.00 - $2000.00 of voluntary contributions.

The employer has confirmed that the estimated amount of severance pay to which Mr. Coolen would be entitled over the years is $36,415.00 and the estimated amount of severance for the co-habitation period of September 1,1990 to March 21, 2000 (approximately 9.5 years) would be $12,406.07.

It is clear that Mr. Coolen was given every opportunity to consider the implications of his selection, both by his employer and the counselor. There was never a suggestion that he could not go back to his ordinary work or that he would take a demotion. His employer gave him all the time he needed to complete the tasks that he was assigned. He confirmed that he had not completed it by the end of January and he could continue to work until he had it finished. When he moved to the current work section on January 31, 2002 he was permitted to continue with one of the projects until it was completed in April.

When asked about whether the flex time option was available and why it was not considered as an option to minimize his time at work, Mr. Coolen frankly admitted he had never really thought about it and that he did

not need flex time now, though with flex time he would be working full time and have full salary.

He confirmed that pre-retirement as a retirement option was not seriously being considered and he re-enforced that this option was selected to put him in a department doing work that he wanted to do.

When asked whether he considered that his health was in jeopardy if he was going to continue to work a five-day week in his current job he indicated, “No, as I’ve said before the number of days working, be it five or three, was not the problem”.

Other than changes in his employment income there are minimal changes in the other aspects of his financial statement.

It is clear that there has been a significant reduction of Mr. Coolen’s income. The reduction comes at his own instigation, totally on his own initiative, when other available options were not carefully pursued having regard to his financial obligations. Mr. Coolen has no intention of

considering other options. It is a life style choice.

The consequences of that life style choice are that he has less money to meet his obligations. He has admitted that he had made no inquiries with respect to any other options, either financially or from an employment perspective. He has made no inquiries with respect to his indebtedness in relation to this option. He investigated no other options other than to make an application to reduce the spousal support, only one month after the spousal support award was issued.

He has admitted that he made this option and asked for it to be implemented immediately within days of completing a contested hearing on spousal support, during which he adamantly opposed entitlement, interim maintenance and retroactive maintenance. He admits that he had no regard whatsoever to the decision and did not consider that the two issues were related. He either acted wilfully, blind to the consequences of his decision, or he acted, considering the obligation to be imposed by the Court irrevelent, or one might conclude he acted, knowing that whatever obligations were imposed, would have to be met by him and he willingly undertook to live with the consequences of his decision.

Mr. Coolen is not an unsophisticated person. He has been involved in criminal investigations for some twenty years and has had an association with lawyers as a result of the nature of his work. He is familiar with the court system and has been part of the process of instituting allegations and laying complaints with respect to other persons, advising and being involved with counsel, following criminal investigations through to completion. He is articulate, able and knowledgeable when it comes to following a financial trail. To suggest that he was unaware of the possible consequences is simply not a sustainable notion. The only conclusion I can make is that he acted in total disregard to his spousal obligations, wilfully blind to the consequences without being under duress of such a nature as would justify an impulsive decision.

In reference to my decision I indicated this was not a situation which merited long term spousal support. The obligation for spousal support arises out of the circumstances of their marriage and the joint mutual obligations undertaken by them. Mrs. Coolen is attempting to address these without appropriate assistance from Mr. Coolen. The depletion of her

resources to sustain matrimonial debts has placed her in a position of need.

It is clear that these parties ought to pursue an immediate settlement of all of their affairs in order to appropriately deal with the division of matrimonial property and debts. Incorporated into that discussion will inevitably be the issue of the duration and quantum of spousal support.

In recognition of the fact that the obligations which arise were sustainable by Mr. Coolen at the time of the Application to Vary and could have been addressed appropriately had he continued to work or selected options that would place him in a position of continuing to draw his salary, had they effectively pursued final settlement with respect to this matter, the spousal award was sustainable.

The change in circumstance is wholly within the control of the Applicant and was not necessary nor sufficient to support a change in his support obligations. In light of the above I decline to interfere with the interim spousal award.

The lump sum is payable in accordance with the interim Decision and I decline to place a moratorium or suspension on the payment of that award.

Moira C. Legere, J.