SUPREME COURT OF NOVA SCOTIA

Citation: *Whalley v. Cape Breton Regional Municipality*, 2019 NSSC 410

Date: 20190905
Docket: 451638
Registry: Sydney

Between:

John Whalley

Plaintiff

v.

Cape Breton Regional Municipality

Defendant

Judge: The Honourable Justice Patrick J. Murray

Cost Submissions: March 15, 2019; May 27, 2019; August 8, 9, 2019.

Written Decision: September 5, 2019

Counsel: Blair Mitchell, for the Plaintiff
Tony Mozvik, Q.C., for the Defendant

By the Court:

Introduction

[1] This is a decision on costs. In my decision reported at 2018 NSSC 325, I dismissed Mr. Whalley's claim that he had been constructively dismissed by the Cape Breton Regional Municipality in 2015.

[2] The Cape Breton Regional Municipality now seeks costs as the successful party. Mr. Whalley asserts, it has not been the practice of the Municipality to seek costs against unsuccessful litigants. He asks that no costs be awarded or in the alternative, that a substantially lower cost award be made.

[3] Under the *Civil Procedure Rules of Nova Scotia*, this Court has jurisdiction to make any order concerning costs that will "do justice" between the parties. (*Rule 77.02*)

[4] Cost orders are discretionary an are necessarily dependant on the facts of each case. In the normal course, the Tariffs set under the rules apply unless there is reason to depart from it. (*Rule 77.06*)

[5] There is little question as to whom the successful party was, but there are some differences in the parties' positions in regard to the amount involved, the number of days of trial costs and, whether the various considerations put forth by each party should apply.

Position of the Defendant, CBRM

[6] The Municipality seeks an increased cost awarded against the Plaintiff based primarily on the nature of the claims made by Mr. Whalley which included impropriety as alleged.

[7] Mr. Whalley asserts he was expected to provide an opinion to council that he did not agree with. A proposed commercial transaction involving the Port was "seriously flawed", he alleged. This ultimately led him to being removed from his position, he said. According to him, his duties were lost.

[8] The Court found, despite the allegations of Mr. Whalley, that he left of his own accord and that the position he previously held, that of Economic Development Officer was still available to him. In short, he was not forced or made to resign.

[9] The Municipality takes particular issue with an interview given by the Plaintiff shortly after the Court's decision was released. CBRM, in the affidavit of Carolyn MacAulay, referred to certain of Mr. Whalley's comments during that interview at paragraphs 5, 6, and 7.

[10] As such CBRM submits, not only is it entitled to costs as the successful party, but it should receive an increased cost award because the Court must not condone or allow its processes to be used for the purpose suggested by Mr. Whalley in the interview.

[11] In short, CBRM urges the Court to send a message in the form of a cost order to show that frivolous, vexatious, and unwarranted actions, will be met with stiff costs consequences. CBRM argues it was put through great expense.

[12] CBRM says the trial occupied considerable time of several of its employees, taking them away from their regular duties.

[13] In the result, CBRM claims that the higher scale, number 3, should be selected to send the appropriate message and to allow CBRM to recoup the significant legal costs incurred at the expense of the CBRM tax payer.

[14] The calculation of the appropriate cost award sought by CBRM at Scale 3 is $20,938.00, based on an amount involved of $ $132,785.01. In addition, CBRM seeks an additional $2,000./day times the number of days of trial which it says is five (5) day for a total of $10,000.

[15] The total award claimed by CBRM in costs therefore is $30,938.00 plus disbursements.

Position of the Claimant, Mr. Whalley

[16] Mr. Whalley objects strenuously to the use of the CBC interview in support of CBRM's position on costs. He stands by what he said, and in no way was this claim without merit.

[17] Mr. Whalley says the record shows that he called evidence to demonstrate the concerns he had with a proposed land transaction. Mr. Whalley believed the disposal of lands to private commercial interests was contrary to legislative authority.

[18] This was the context he says that led to the meeting with the CAO, Mr. Merritt and the removal of his responsibilities. He argues that the evidence implicates important public policy issues that were relevant to his claim of wrongful dismissal. In a management position, these circumstances left him "exposed", thus resulting in his claim for fixed term damages as per the severance provision in the employment contract that he alleged he had with CBRM.

[19] The Courts decision is made and I will not repeat my reasons for same here. Mr. Whalley takes issue with Ms. MacAulay's affidavit. The objectionable paragraphs according to him are numbers 5, 6 and 7 which state as follows:

> 5. On December 20, 2018 I listened to a CBC radio show called Mainstreet hosted by CBC journalist, Wendy Bergfeldt. Ms. Bergfeldt interviewed both Mr. Tony Mozvik, Q.C. and Mr. John Whalley about this case.
>
> 6. During the interview, Mr. John Whalley made comments about costs and also pertaining to the fact that he never expected to win the case. I have provided a typed transcript of Mr. John Whalley's comments to assist the court. I have created this transcript and confirm it is true an accurate to the best of my knowledge and belief. It is attached hereto this my affidavit as Exhibit "A".
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> 7. The interview can be heard online for a full audio at the following URL: https://www.cbc.ca/listen/shows/maintstreet-cape-breton/segment/15651984.

[20] These provisions should be struck he says. They are irrelevant and the proceeding was brought by him in good faith, Mr. Whalley submits.

[21] Instead, Mr. Whalley argues the Court must consider the public nature of this litigation as well as other factors to reduce or eliminate the need for costs to be assessed against him. Some of those factors include what Mr. Whalley says is: (1) CBRM's policy not to claim costs against an unsuccessful litigant; and (2) the fact that CBRM's budget for 2019 does not include any recovery for costs from litigation.

[22] Mr. Whalley submits that even if the Court is inclined to award some costs, these circumstances warrant a reduction by as much as 50 to 60 percent of normal costs. Mr. Whalley believes the Court should order no costs at all against him.

Analysis

i) The Affidavit

[23] Having carefully reviewed the evidence of Ms. MacAulay, I am inclined not to place much weight on the paragraphs pertaining to the CBC interview by Mr. Whalley.

[24] There are several reasons for this but mainly, the context of the interview was that it occurred just after the release of my decision at trial. Up to that point Mr. Whalley did not speak publicly, as he said. Also, the transcript of the interview is not evidence before the Court and does not form part of the record at trial. *Costs Rule 77* refers to costs in the "proceeding". Proceeding as defined in *Civil Procedure Rule 94.10* would not include comments to the media that are not part of the record. I acknowledge that Mr. Whalley stands by what he said and what he believed. In addition, stating a case may be "difficult to prove", does not mean the case has no merit. For all of these reasons, I think restraint is called for. I shall move on to consider other factors in terms of costs in these circumstances.

[25] Mr. Whalley's brief on costs contained an extensive submission, claiming the issues in this case amount to public interest litigation or contained a component or components of that type of litigation. This should serve to eliminate costs altogether, he argues.

[26] Alternatively, the Plaintiff submits costs or disbursements should be reduced in any event, because: 1) the concerns he had were shared by the present CAO; and a Government Official and 2) had a documentary basis. Mr. Whalley's actions came as a last resort, "after other avenues were blocked".

[27] There is little question that Mr. Whalley's personal motivation in commencing proceedings were based on his strongly held belief in what he claimed were substantial public policy issues. At the same time, he states in his brief that the reasons in the decision show the litigation was straight forward and not complex.

[28] The nature of Mr. Whalley's allegation against CBRM, resulted in the litigation being "hard fought". I accept CBRM's statement that significant resources were placed into defending the matter. The legal costs for the municipality, which amounted to $40,000. in round figures, is evidence of that. Mr. Whalley is undoubtedly faced with significant costs of his own in preparing for and bringing the matter to trial.

[29] Following the approach taken in the trial decision, I am going to decide the cost issue in as straight forward a manner as possible. In doing so, the public interest claim by the Plaintiff is clearly something which must be addressed .

ii) Public interest

[30] There is no clear definition of what constitutes public interest litigation. The leading cases however, provide guidance. These cases include: ***Little Sisters Book and Art Emporium v. Canada (Minster of Justice)***, [2000] 2 S.C.R. 1120, ***British Columbia (Minister of Forests) v. Okanagan Indian Band***, 2003 SCC 71, ***Cabana v. Newfoundland and Labrador et al.***, 2016 NLCA 75, ***The Valhalla Wilderness Society v. R.***, [1997] B.C.J. No. 2331, and ***The St. James Preservation Society v. Toronto (City)***, 2007 ONCA 601. More recently in Nova Scotia there is ***Trinity Western University v. Nova Scotia Barristers' Society***, 2015 NSSC 100, ***Livingston v. Cabot Links Enterprises ULC***, 2018 NSSC 256, and ***St. Mary's Bay Coastal Alliance Society v. Nova Scotia (Minster of Fisheries and Aquaculture)***, 2014 NSSC 50.

[31] A brief summary of some of the considerations was provided in ***Cabot***, at paragraphs 38-58. I refer to this because the Plaintiff relied on it extensively in its written submission in seeking a reduction in costs, given what he says, are public interest issues present here.

[32] Some criteria commonly used to identify public interest litigation include:

i) The issue or issues transcend the interests of the parties;
ii) The issues raised are of broad public importance;
iii) The ruling will benefit the larger community;
iv) The issues have never before been decided;
v) The cost award will have a chilling effect on future cases being advanced;
vi) The nature of the Plaintiff;
vii) The nature of the Defendant;
viii) The nature of the "lis", the action being taken; and
ix) The ultimate issue to be decided.

[33] Mr. Whalley is a private citizen but had been a public employee. He was accountable to his CAO, Mr. Merritt who was in turn accountable to the CBRM Council.

[34] The CBRM is a public body, but the matter involving Mr. Whalley was private, with the key feature being his claim of wrongful (constructive) dismissal. The evidence naturally involved aspects related to his work on issues of public interest, with the port and land disposal being critical elements of his dealings as Economic Development Officer. His interactions with other staff, municipal affairs and the CAO formed part of the evidence that Mr. Whalley focussed on to explain and prove his claim.

[35] The Plaintiff has submitted the case of ***House of Sga'Nisim v. Canada (Attorney General)***, 2012 B.C.S.C 1152, in submitting that the identify of CBRM as municipality can itself be a factor in determining whether litigation is public interest litigation.

[36] Specifically, Mr. Whalley argues that like First Nation Governments, municipalities are public entities and are not comparable to a private body in the assessment of private interest costs.

[37] With respect, I find that the issue of Mr. Whalley's dismissal was not one that raised an issue of broad public importance.

[38] There may have been some considerable interest by the public in his case, but that is not a factor that automatically deems the litigation to be one of public importance in assessing costs.

[39] The real question for cost purposes is whether Mr. Whalley's case had a public interest component to it.

[40] The ultimate issue, which is where the focus should be, is not in deciding if his concerns were legitimate, but whether he was constructively dismissed, according to law.

[41] The ruling is not one that will be of benefit to the larger community. It is not an issue that "begs to be decided" or that had never before been decided.

[42] It is possible that a cost award could have a chilling effect in future cases being advanced but is this is any different than the considerations of any litigant in

deciding whether to commence legal action against an institution be it public or private.

[43] In ***Cabot***, there was a longstanding issue surrounding title to land at the beach, one that had been used by the public for parking.

[44] In ***Trinity***, there was an issue which very clearly transcended the immediate interest of the parties, involving equality rights.

[45] In ***Little Sisters***, the definition of "obscene" was being considered. In ***Cabana***, the case had repercussions for the Muskrat Falls Hydro Electric project.

[46] In ***Oro-Medonte (Township) v. Warkentin***, 2013 ONSC 6088, at issue was a challenge by forty residents with respect to the Town's ownership of certain lands.

[47] In ***Valhalla***, the issue involved government action with respect to the creation of watershed reserves. In the balance stood the water supply of two communities.

[48] In ***St. Mary's Bay***, the court recognized that the case had a public interest component because it involved the preservation of salmon stocks in St. Mary's Bay, Nova Scotia. The Nova Scotia Minister of Fisheries and Agriculture were a party. Licences had been issued for two fish farms located in Grand Passage and Freeport.

[49] In that case, I recognized there was a "public interest factor" and the so called "chilling effect" a cost order can have on public interest litigants. In that case the Court reduced costs from $12,500 to $10,500 a reduction of approximately 15 % in an attempt to balance these interests.

[50] In ***Das v. George Weston Ltd.***, [2018] O.J. No. 6742, submitted here by the Plaintiff, the Court of Appeal held that the trial judge had failed to appreciate the public interest component of the claim. ***Das*** involved a class action, where damages were claimed as a result of a collapse of a building in Bangladesh in 2013. Many, many people were killed, with more being injured in this catastrophic event. The court ultimately held that the action was statute barred by the law of Bangladesh.

[51] In ***Das*** the court held that a monetary claim for damages can co-exist with a public interest component and are not mutually exclusive.

[52] The court stated in paragraphs 262, 263, that the decision advanced "laid bare important – public policy questions going to the role of Canada and, more specifically, its business community, play and should aspire to play in the global marketplace".

[53] Although money compensation was the primary motivation, the court held that was not inconsistent with the significant public interest component in the issues.

[54] Since Mr. Whalley was also claiming damages, I have considered whether by analogy ***Das*** and these other cases support his position. Plaintiff's counsel has informed the Court that his client was motivated to make his claim in the public interest, at considerable expense to himself. It had to be combined they say, with their damage claim based on wrongful dismissal.

[55] I have little doubt as to Mr. Whalley's personal motivation or that his claim was made *bona fides*. That said, I have difficulty seeing how the public interest was being served by his claim for wrongful dismissal, other than as a private citizen "standing up" against his employer, on the legal issue involving his dismissal.

[56] In ***Das*** , the court said, even where the allegations go beyond that which the appellants had to prove to establish their claim, this would not preclude costs reductions should the circumstances otherwise warrant them.

[57] In ***House of Sga***, an individual plaintiff who challenged the treaty rights of Sga First Nation was found liable for less than the full amount of costs, finding that a 30% reduction in the cost award was warranted.

[58] I have concluded, with due respect, that the circumstances here do not warrant cost reductions based on the public interest. The issue brought forward by Mr. Whalley did not involve the resolution of an issue of wide public interest or importance.

[59] I have further considered whether some aspects of Mr. Whalley's claim touched upon issues affecting the public, even though it was for the private purpose of Mr. Whalley pursuing his claim for wrongful dismissal.

[60] Taking into account all of the submissions, I find that the facts and circumstances here do not rise to the level of this being public interest litigation,

nor does it raise a significant public interest issue to warrant a reduction in costs for that reason.

[61] To that end, the factors and principles contained in *Rule 77* are more than adequate to allow the Court the discretion to reach a just decision on costs as between the parties.

Tariff A – Amount Involved

[62] *Rule 77.03(3)* states that costs of a proceeding follow the result, unless a judge orders or a rule provides otherwise.

[63] There is no question here that the result favoured CBRM, and in accordance with this rule are entitled to costs.

[64] Further, *Rule 77.06(1)* states that party and party costs of a proceeding must, unless a judge orders otherwise, be fixed in accordance with the Tariff of costs, and Fees, reproduced at the end of *Rule 77*. (The *Costs and Fees Act*)

[65] It can be seen that under these particular rules, the words, "unless a judge orders otherwise", denotes that a judge has discretion to order otherwise, while acting judicially.

[66] Tariff A is intended to deal with costs allowable to a party entitled to costs on a decision or order in a proceeding.

[67] In applying Tariff A the "length of trial" is to be fixed by the trial judge. This is an additional factor to be included in calculating costs under the Tariff. It provides that ($2,000.) two thousand dollars for each day of trial shall be added to the amount calculated under the tariff as determined by the trial judge.

Amount Calculated

[68] The Tariff also prescribes a method for determining the "amount involved" under the Tariffs. How the "amount involved" is calculated depends on whether the main issue is a monetary or non monetary issue.

[69] The tariffs also provide for the situation where there is a substantial, non monetary issue involved, and whether or not the proceeding is contested.

[70] Clause "a" provides for the situation when the main issue is a monetary claim which is allowed. That is not the case here. I shall therefore focus on paragraphs (b) and (c).

> (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to
>
> (i) the amount of damages provisionally assessed by the court, if any,
> (ii) the amount claimed, if any,
> (iii) the complexity of the proceeding, and
> (iv) the importance of the issues;
>
> (c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to
>
> (i) the complexity of the proceeding, and
> (ii) the importance of the issues;

[71] Although the main issue was whether Mr. Whalley was constructively dismissed, his claim also involved a claim for damages for such dismissal, as alleged by him. An award of damages went hand in hand with his claim. One was dependant on the other.

[72] I therefore find clause (b) to be the appropriate method of calculating the amount involved here.

Decision on Costs

[73] Mr. Mitchell suggests that the amount involved should be set at $110,000. He argues there was a disclosure issue that arose during trial in relation to the CBRM employment file for Mr. Whalley. I agree that some consideration should be given to this in terms of costs, and further that the number of days of trial should be set at four and not five days. I have reviewed the total hours spent over the 5 days, and given that sitting time was limited on August 23 and 24, four days is reflective of the actual trial time and is reasonable. I acknowledge that counsel were required to appear for each of the five days.

[74] *Rule 77.07* is instructive in applying the tariff amounts, having regard to numerous examples of factors that might increase or decrease the tariff amount. It is attached as Appendix "A".

[75] Having regard to the "amount claimed", CBRM is correct that the sum claimed by the Plaintiff was $132,785.01in his pre-trial submissions. I am not

aware of any written policy of CBRM that costs will not be sought against unsuccessful litigant employees nor has any been established.

[76] Weighing and considering the various factors and applying the foregoing rules and principles, I have decided that the amount involved is in the $125,000 - $130,000. range and that the Basic Scale 2 should be used and applied. As stated the length of the trial shall be four days.

[77] This would result in a cost award of between $20,250. and $24,750. not including disbursements.

[78] *Rule 77.10* provides that an award of costs shall include necessary and reasonable disbursements.

[79] The Defendant CBRM claims disbursements in the amount of $3,220.01. Of that amount the Court sought clarification with respect to airfare and hotel, and some of the meal expenses.

[80] I find the Defendant provided a reasonable explanation for the incurrence of these expenses. I cannot accept that preparation of an important witness for trial and discovery should be done by phone rather than in person. It seems the Defendant was alive to these costs and the need to reduce by half (the hotel), and even waive some of them to avoid duplicity.

[81] In the final result, I have decided that the cost award in favour of CBRM, payable by Mr. Whalley shall be for the all inclusive sum of $25,000.00. This is a substantial but incomplete indemnity which is a key principle in the awarding of costs.

[82] CBRM was totally successful and worked very hard during the trial in defence of this matter. Mr. Whalley had been a long term and valued employee of the municipality. He is also facing legal costs of his own.

[83] I am hopeful this amount will strike a balance that will do justice between the parties. In all of the circumstances, I consider it to be a fair amount.

[84] Order accordingly.

Murray, J

APPENDIX "A"

Increasing or decreasing tariff amount

77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.

(2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:

(a) the amount claimed in relation to the amount recovered;

(b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;

(c) an offer of contribution;

(d) a payment into court;

(e) conduct of a party affecting the speed or expense of the proceeding;

(f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;

(g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;

(h) a failure to admit something that should have been admitted.

(3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.