SUPREME COURT OF NOVA SCOTIA

Citation: *Baxendale v. The Board of Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 2021 NSSC 175

Date: 20210526
Docket: Hfx 474011
Registry: Halifax

Between:

Brenda Baxendale

Applicant

v.

The Board of Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund

Respondent

DECISION ON COSTS

Judge:	The Honourable Justice C. Richard Coughlan
Last Written Submissions:	February 26, 2021
Written Decision:	May 26, 2021
Counsel:	Laura H. Veniot, for the Applicant Colin D. Bryson, Q.C., for the Respondent

By the Court:

[1] Brenda Baxendale filed an Application in Court seeking declarations that the Board of Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund (Fund) was in breach of its agreement with her regarding repayment of the Fund's subrogated claim, that she has been eligible to receive long term disability benefits from the Fund since October 2010 and all retroactive benefits are owing. In a written judgment issued May 30, 2019 (reported 2019 NSSC 143) I found her part-time income from her employment at the Cape Breton Regional Hospital was not to be deducted from the monthly long term disability (LTD) entitlement pursuant to the settlement agreement. At paras. 30 and 31 of the judgment I stated:

> [30] Counsel will do the calculations to determine the current status of the $360,000 attributed for future wage loss. If the parties are unable to agree on the calculations, I will hear them. I will then be in a position to make the appropriate declarations.
>
> [31] I will hear counsel on the issues of costs and pre-judgment interest.

[2] In February 2021 the parties contacted the Court stating they agreed the retroactive benefits, including prejudgment interest, calculated in accordance with my judgment was $445,742.26.

[3] The parties were unable to agree on costs. They filed written submissions as well as affidavits from Laura H. Veinot on behalf of Ms. Baxendale and Colin D. Bryson, Q.C. for the Fund.

[4] The issue here is what is the appropriate costs award.

Position of the Parties

[5] Ms. Baxendale, the successful party, submits Tariff A applies. The amount involved is $445,742.26. The application was complicated which required extensive research of various areas of law including long term disability contracts, principles of statutory interpretation, the relationship between statutes and subordinate legislation, non-statutory instruments and the law of trusts. Four briefs were filed, each requiring in-depth research. Subsequent to my judgment the parties were involved in extensive negotiations, which took over a year to complete, to come to agreement on the amount owing to Ms. Baxendale. She submits that the application was sufficiently complicated the court should apply Tariff A, and in all the circumstances of the application a reasonable assessment of costs is $40,000.

[6] The Fund submits this is one of those cases where Tariff A should not be followed and the Court should use its discretion to "order otherwise".

[7] This Application in Court involved an exchange of affidavits of documents; two affidavits per party with no cross-examination on the affidavits; a half-day hearing involving argument only; pre and post-hearing memorandums, and post-decision negotiations on the amount of LTD benefits and prejudgment interest payable. There were no discoveries.

[8] Considering the facts of the application $40,000 would be an exorbitant amount of costs for a matter which occupied only a half day of court time. Costs in the range of $10,000 is appropriate. There is no precedent for the post-decision negotiations to be a factor in a costs award. In the alternative, if the Court applies Tariff A, scale 1 should be used with an amount involved of approximately $350,000.00 as the remainder is prejudgment interest.

Analysis

[9] *Civil Procedure Rule* 77 deals with costs.

[10] A judge has discretion to make any order about costs which the judge is satisfied will do justice between the parties (Rule 77.02(1)). Of course, the discretion must be exercised judicially taking into account the circumstances of the proceeding.

[11] Normally, absent some particular circumstances, costs of the proceeding follow the event (Rule 77.03(3)). Rule 77.06(2) which deals with costs of an Application in Court provides:

> …
>
> (2) Party and party costs of an application in court must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial.
>
> …

[12] *Civil Procedure Rule* 77.08 provides a judge may award lump sum costs instead of Tariff costs.

[13] In determining the amount of costs pursuant to a Tariff the Rule*s* provide:

> In these Tariffs unless otherwise prescribed, the "amount involved" shall be

(a) Where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to

(i) The amount allowed,

(ii) The complexity of the proceeding, and

(iii) The importance of the issues;

…

[14] The first step is to determine the amount involved.

[15] Ms. Baxendale submits the amount involved is $445,742.26, the amount to which she is entitled including prejudgment interest.

[16] The Fund submits the amount involved is not $445,742.26, as that amount includes a substantial component of prejudgment interest, which is not generally included in the amount involved. Using the interest rate of 4.5% set out in the 2001 Offset Agreement compounded annually results in an amount not including prejudgment interest of $330,654.02; using simple interest of 4.5% results in an amount not including prejudgment interest of $380,929.22. The Fund submits the average of the two calculations $355,791.25 should be used as the amount involved.

[17] Prejudgment interest is not to be taken into account in determining the amount involved. See *Skeffington v. McDonough and Vanamburg* (1993), 114 N.S.R. (2d) 181 at p. 182; *Hines v. Englund* (1994), 124 N.S.R. (2d) 156 at p. 162; and *Gay v. MacDonald* (1999), 170 N.S.R. (2d) 322 at para. 24.

[18] Does the $445,742.26 include prejudgment interest? *Civil Procedure Rule* 4.03 which addresses prejudgment interest provides:

4.03(1) A plaintiff who claims only on a debt, and who claims no interest, interest under an agreement that expressly provides for the payment of interest, or prejudgment interest under the *Judicature Act* may start an action by filing a notice of action for debt.

(2) A plaintiff who files a notice of action for debt, and who has not contracted a rate of interest, may claim prejudgment interest under the *Judicature Act* at five percent a year calculated simply from the day the debt came due.

…

[19] The amount of $445,742.26 does not include prejudgment interest under the *Judicature Act*, but rather the amount due to Ms. Baxendale as of February 1, 2021

which was calculated using the assumptions to determine the treatment of the Net Recovery as agreed to by the parties.

[20] There were a number of issues which had to be addressed by the parties in this application. The application was of moderate complexity.

[21] The issue involved was of importance to the parties. For Ms. Baxendale to determine her entitlement to benefits pursuant to her LTD plan. It is also important to the Fund as the issue could affect the calculation of benefits of other members of the Fund.

[22] I find the amount involved is $445,742.26.

[23] Tariff A provides:

> **Tariff A**
>
> *Tariff of Fees for Solicitor's Services Allowable to a Party Entitled to Costs on a Decision or Order in a Proceeding –*
>
> In applying this Schedule the "length of trial" is to be fixed by a Trial Judge.
>
> The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars ($2000) shall be added to the amount calculated under this tariff for each day of trial as determined by the trial judge

Amount Involved	**Scale 1 (-25%)**	**Scale 2 (Basic)**	**Scale 3 (+25%)**
$300,001 - $500,000	**26,063**	**34,750**	**43,438**

[24] A judge who fixes costs may add an amount to or subtract an amount from, Tariff costs (Rule 77.07(1)). Examples of factors which may be relevant to the consideration of increasing or decreasing Tariff costs are set out in Rule 77.07(2).

[25] The amount involved in this Application in Court was substantial, $445,742.26. Even if the Fund's submission as to the amount involved, $355,791.62 had been accepted, the Tariff A category would be the same between $300,001 and $500,000.

[26] The hearing of the application took less than one half day from 9:36 a.m. to 11:50 a.m. . The hearing involved argument only, there was no cross-examination on the affidavits. The parties filed written post-hearing submissions.

[27] This application did include extensive post-judgment negotiations as to the current amount due to Ms. Baxendale pursuant to the agreement between the parties.

The judgment of the court was issued May 30, 2019. It was not until February 2021 - more than a year and eight months later - that counsel contacted the Court stating they had agreed on the retroactive benefits calculated in accordance with my judgment.

[28] If costs in this application were assessed pursuant to Tariff A, considering the circumstances of the application, Scale 1 is the appropriate scale to use which would result in a costs award of $27,063.00, when $1,000.00 is added to Scale 1 as the hearing was one half day in length.

[29] Is this a case in which Tariff A should be followed or a lump sum awarded?

[30] The issue as to the principles to be considered in making the determination as to whether a Tariff amount or a lump sum awarded was dealt with in *Armoyan v. Armoyan*, 2013 NSCA 136 in which Fichaud J.A., in giving the Court's judgment stated:

> [15] The tariffs are the norm, and there must be a reason to consider a lump sum.
>
> [16] The basic principle is that a costs award should afford substantial contribution to the party's reasonable fees and expenses. In *Williamson*, while discussing the 1989 tariffs, Justice Freeman adopted Justice Saunders' statement from *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410:
>
>> The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
>>
>>> "… the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity."
>
> Justice Freeman continued:
>
>> In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.
>
> [17] The tariffs deliver the benefit of predictability by limiting the use of subjective discretion. This works well in a conventional case whose circumstances conform

> generally to the parameters assumed by the tariffs. The remaining discretion is a mechanism for constructive adjustment that tailors the tariffs' model to the features of the case.
>
> [18] But some cases bear no resemblance to the tariffs' assumptions. A proceeding begun nominally as a chambers motion, signalling Tariff C, may assume trial functions, contemplated by Tariff A. A Tariff A case may have no "amount involved", other important issues being at stake. Sometimes the effort is substantially lessened by the efficiencies of capable counsel, or handicapped by obstructionism. The amount claimed may vary widely from the amount awarded. The case may assume a complexity, with a corresponding workload, that is far disproportionate to the court time, by which costs are assessed under provisions of the Tariffs. Conversely, a substantial sum may turn on a concisely presented issue. There may be a rejected settlement offer, formal or informal, that would have saved everyone significant expense. These are just examples. Some cases may combine several such factors to the degree that the reflexive use of the tariffs may inject a heavy dose of the very subjectivity – *e.g.* to define an artificial "amount involved" as Justice Freeman noted in *Williamson* – that the tariffs aim to avoid. When this subjectivity exceeds a critical level, the tariff may be more distracting than useful. Then it is more realistic to circumvent the tariffs, and channel that discretion directly to the principled calculation of a lump sum. A principled calculation should turn on the objective criteria that are accepted by the *Rules* or case law.
>
> …

[31] The amount of the legal fees incurred by Ms. Baxendale are not in evidence. She is claiming disbursements including HST of $578.09. The half-day hearing occupied less time than many special time motions or applications in chambers. There were no discoveries. There was not cross-examination on the affidavits filed. However, there were the extensive negotiations to determine the amount due to Ms. Baxendale which differentiates this matter from a usual special time motion or application.

[32] Considering the facts and circumstances of this application, to do justice to the parties it is appropriate to depart from Tariff A and award a lump sum. The Fund will pay costs to Ms. Baxendale of $20,000 together with disbursements including HST in the amount of $578.09 for a total of $20,578.09.

Coughlan, J.