SUPREME COURT OF NOVA SCOTIA
Citation: *Gentleman v. Kings (County)*, 2024 NSSC 165

Date: 20240603
Docket: 529393
Registry: Kentville

Between:

Beverly Margaret Gentleman

Applicant

v.

Municipality of the County of Kings

Respondent

Decision on Motion to Convert Application to Action

Judge:	The Honourable Justice Gail L. Gatchalian
Heard:	March 1, 2024, in Kentville, Nova Scotia
Counsel:	Randall Balcome, K.C., for the Applicant
	Bradley D. J. Proctor, for the Respondent

By the Court:

Introduction

[1] Beverly Gentleman started this proceeding as an Application. The Respondent, the Municipality of the County of Kings, wants to convert the Application to an Action.

[2] In the Application, Ms. Gentleman claims damages for wrongful dismissal, breach of contract, negligent misrepresentation and negligence against the Municipality arising from an offer of employment made by the Municipality that was accepted by Ms. Gentleman but that was subsequently revoked by the Municipality two days before her intended start date, after the Municipality spoke with an individual from Ms. Gentleman's former employer, the Town of Kentville.

[3] The Municipality filed a Notice of Contest, claiming, in part, that the claim falls within the exclusive jurisdiction of an arbitrator under the collective agreement between the Municipality and the Canadian Union of Public Employees, Local 2618: see *Weber v. Ontario Hydro*, [1995] 2 SCR 929.

[4] In support of its motion to convert the Application to an Action, the Municipality says that:

- The Municipality wants the opportunity to bring a motion for summary judgment on the evidence to determine the Weber issue, and summary judgment on the evidence is not available in an Application.

- The Application will not be ready for a hearing in "months," as there is a need for discovery examinations, disclosure of documents from the Town of Kentville, disclosure of medical documents given Ms. Gentleman's claim of damages for mental distress, and a possible motion for an order compelling the individual from the Town of Kentville to testify.

- It is highly unlikely that the Application can be heard in four days, but it can probably be heard in five days.

- Ms. Gentleman alleges bad faith and negligent misrepresentation and seeks aggravated damages for mental distress and humiliation resulting from her treatment. These causes of action and damages claims raise credibility issues that may not be satisfactorily assessed without viva voce evidence presented at trial.

[5] Ms. Gentleman responds as follows:

- Ms. Gentleman agrees to have the Weber issue determined under Civil Procedure Rule 5.14(1), which states that a respondent who maintains that the court does not have jurisdiction over the subject of an application may make a motion to dismiss the application for want of jurisdiction. Ms. Gentleman agrees with the Municipality that evidence will be required for such a motion, that discoveries must take place first, and that she will not argue that the Municipality has attorned to the jurisdiction of the court.

- The Application can be heard in less than two years, as Ms. Gentleman only intends to discover two witnesses, who are employees of the Municipality, and there is very little document disclosure because the relevant facts are minimal: the Municipality encouraged Ms. Gentleman to apply for the position, offered the position, and then changed their mind. Ms. Gentleman

will not be relying on medical evidence to support her claim for damages.

- The Application can be heard in three days.
- Credibility in this case can adequately be determined by cross-examination on the affidavits.

Presumption in Favour of Application

[6] There is no presumption in favour of an Application in this case. Substantive rights asserted by a party are not eroding, and the court is not requested to hold several hearings in one proceeding. See Civil Procedure Rule 6.02(3).

Presumption in Favour of Action

[7] The Municipality says that an Action is presumed to be preferable here because the proceeding cannot be heard less than two years from the day it was started: Civil Procedure Rule 6.02(4)(c).

[8] The Notice of Application was filed on December 20, 2023. It was amended on January 24, 2024.

[9] The Municipality says that the following steps must be completed before the Application will be ready for hearing:

- Discovery examinations of Ms. Gentleman and two employees from the Municipality.

- A motion to dismiss for want of jurisdiction, which can only occur after discoveries are completed.
- Production of employment documents relating to Ms. Gentleman's previous employment with the Town of Kentville, which may require a motion for third party production.
- Production of documents relating to Ms. Gentleman's efforts to mitigate her losses.
- A potential motion for an order compelling the individual from the Town of Kentville to testify at the hearing.

[10] There no longer seems to be a need for the Municipality to seek disclosure of medical evidence from Ms. Gentleman.

[11] In my view, the parties should be able to complete discoveries and the motion to dismiss within this calendar year.

[12] If the motion to dismiss is not successful, the parties should be able to complete any motion for production, any motion to compel the individual from the Town of Kentville to testify, and other pre-hearing steps within the 2025 calendar year. In my view, the hearing of the Application can be scheduled in 2025, within two years of the date that the Application was filed.

[13] The presumption in favour of an action in Rule 6.02(4)(c) does not apply.

Factors in Favour of Application

[14] Civil Procedure Rule 6.02(5) sets out five factors in favour of an application:

1. The parties can quickly ascertain who their important witnesses will be.

2. The parties can be ready to be heard in months, rather than years.

3. The hearing is of predictable length and content.

4. The Application can be heard in four days or less.

5. The evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony and cross-examination.

[15] I find that all factors in Rule 6.02(5) are present here:

1. The parties have already ascertained who their important witnesses will be. Ms. Gentleman will be the only witness for the Applicant. The Municipality will be calling three representatives of the Municipality, as identified in the Notice of Contest, and the individual from the Town of Kentville. The Municipality says that there might be two other witnesses from the Municipality who made the calls and did the vetting of Ms. Gentleman, and made the decision to withdraw the offer, but the Municipality said it did not know for sure.

2. As I have already found, the parties can be ready to be heard in months rather than years.

3. The hearing is of predictable length and content. The hearing can likely be completed in four days. The legal issues are defined. According to counsel for Ms. Gentleman, the factual underpinnings for the various causes of actions and heads of damages overlap, as they concern the alleged encouragement to

Ms. Gentleman to apply for the position, the offer of employment and the withdrawal of the offer.

4. I find that four days is a reasonable estimate of the time required for the hearing. There will likely be cross-examination of Ms. Gentleman and of two employees of the Municipality, and there may be viva voce evidence from the individual from the Town of Kentville. There will be no medical evidence. The Municipality's estimated hearing length was five days. The Municipality's estimated hearing length was based, in part, on the assumption that there would be medical evidence. Ms. Gentleman's estimate was three days.

5. Credibility in this case can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony from the individual with the Town of Kentville, and cross-examination. The Municipality did not identify a particular issue of credibility that cannot be satisfactorily dealt with by was of cross-examination. See *Kings (County) v. Berwick (Town)*, 2009 NSSC 398 at paras.39-41.

Rule 5.14 Motion

[16] If the motion to convert the Application to an Action is dismissed, the Municipality can still pursue its *Weber* argument by way of a Rule 5.14 motion.

Relative Cost and Delay

[17] I must also consider the relative cost and delay of an Action or an Application in determining this motion: Civil Procedure Rule 6.02(6).

[18] I am not satisfied that, in the circumstances of this case, one type of proceeding will be more costly than the other. However, I find that the hearing of an Application is likely to be heard sooner than an Action, because the Court will set deadlines for pre-hearing steps and dates for the hearing of an Application.

Conclusion

[19] In conclusion, the relevant factors set out in the Civil Procedure Rules favour an Application in this case.

[20] I am also guided by the instruction of the Supreme Court of Canada to take a more pro-active approach to the management of hearings in order to promote more timely and affordable access to the civil justice system: see *Superport Marine* at para.31, citing *Hryniak v. Mauldin*, 2014 SCC 7 at para.2. Having considered the relevant factors, I am not persuaded that a conventional trial, likely quite far into the future, is proportional to the needs of this particular case.

[21] The Municipality's motion to convert this Application to an Action is dismissed, with costs to Ms. Gentleman. If the parties cannot agree on the amount of costs, I will receive written submissions from Ms. Gentleman within two weeks of this decision, and from the Municipality within four weeks of this decision.