SUPREME COURT OF NOVA SCOTIA

Citation: ***Kerr v Valley Volkswagen***, 2014 NSSC 111

Date: 2014-03-24
Docket: Ken No. 419749
Registry: Kentville

Between:

Gary Wilfred Kerr

Applicant

v.

2463103 Nova Scotia Limited,
carrying on business as Valley Volkswagen

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	January 8 and 10, 2014, at Kentville, Nova Scotia
Final Written Submissions on Costs:	March 5, 2014
Counsel:	Michael Coyle for the Applicant
	Peter Nathanson and Cheri Killam for the Respondent

By the Court:

Costs Decision

[1] The Applicant commenced this proceeding as an Application in Court, claiming he was dismissed, with the Respondent claiming that the Applicant quit. The Applicant filed one affidavit; the Respondent filed four. The Court ruled that one of the Respondent's Affidavits was inadmissible as it dealt with irrelevant information respecting a former employer of the Applicant.

[2] The hearing of the Application was set down for two days. Counsel then agreed to commence the hearing at 2:00 p.m. on the first day. On the afternoon of the first day, the Applicant and the owner of the Respondent were cross-examined on their Affidavits. At the opening of the second day, Applicant's counsel advised that he did not wish to cross-examine the two other Affiants. Counsel made their closing oral submissions and the hearing ended before noon.

[3] The Court issued a written decision (2014 NSSC 27) on January 23, 2014, dismissing the Applicant's claim. The parties have been unable to agree on costs.

Submissions

[4] The Respondent submits:

a) That party-and-party costs of an Application in Court must be assessed in accordance with Tariff A, as if the hearing was a trial, unless the judge otherwise orders.

b) Party-and-party costs are determined on the basis of the "amount involved" applied to one of three scales.

c) Where a monetary claim is dismissed, the "amount involved" is determined having regard to the amount claimed, the complexity of the proceeding and the importance of the issue. It submits that the proceeding was not complex but the issues were important to the parties.

d) The Respondent notes that the Applicant claimed damages in lieu of reasonable notice in the range of 9 to 12 months. Based on the Applicant's $35,000.00 per year annual salary, the claim was between $26,000.00 and $35,000.00.

e) Applying the amount claimed to the Tariff A - Basic Scale (Scale 2 of 3) generates a costs award of $6,250.00 plus $2,000.00 per day for a two-day hearing for total of $10,250.00.

[5] The Applicant submits that costs are discretionary. *CPR 77* provides guidance but does not restrict the Court's exercise of discretion. He submits:

a) An Application in Court was employed to limit costs and facilitate access to justice.

b) The matter was not complex.

c) The time in Court was approximately five hours, or not more than one day, part of which time was taken up with the Respondent's unsuccessful attempt to introduce irrelevant material.

d) While the Applicant's claim was for more than $26,000.00 (in the $25,000.00 to $40,000.00 category of Tariff A), the amount claimed should not be definitive, as the Respondent's argued that damages in lieu of reasonable notice should amount to between $10,000.00 to $20,000.00.

e) *CPR 77.06(2)* expressly provides the Court with discretion not to apply Tariff A.

f) Counsel referred the Court to *Viehbeck v Pook*, 2012 NSSC 113 at paras 10 and 11; *Dataville Farms Ltd v Municipality of the County of Colchester*, 2014 NSSC 9 at para 15, and four other decisions involving Applications in Chambers, as authority for reducing costs, or awarding costs in accordance with Tariff C as opposed to Tariff A.

g) The Applicant submits that this costs award, based on Tariff C, should be between $2,050.00 and $3,300.00.

h) Alternatively, because of the irrelevant allegation in the Respondent's Notice of Contest and materials advanced before the hearing (ruled inadmissible by the Court), the Respondent's "egregious and unsavory" litigation misconduct should lead the Court to direct that each party bear their own costs.

Analysis

[6] Costs awards are governed by *CPR 77*.

[7] *CPR 77.02* gives the Court discretion to make any order of costs that will do justice between the parties. The discretion is not to be exercised arbitrarily, nor is it unlimited. It gives some flexibility in the application of the principles set out in the *Rules* and the case law.

[8] It starts with the general proposition that costs of a proceeding follow the result. The *Rule* provides for different awards based on the type of proceeding through six tariffs. Case law in Nova Scotia overlays the application of the formulae contained in the respective tariffs, with the overriding principle that a successful party should recover a substantial proportion but not all of its reasonable litigation costs.

[9] *CPR 77.06(2)* specifically provides that in the matrix of an Application in Court, the starting point of the determination of a costs award is Tariff A, not Tariffs B, C, D, E or F. It reads:

> 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.

[10] Tariff A is applicable the circumstances of this case, subject to the exercise of judicial discretion.

[11] Application of Tariff A involves two steps. First is the determination of the "amount involved", defined in the Tariff, and second is the determination of the appropriate scale to the "amount involved".

[12] Where the main issue in a proceeding is a monetary claim which is dismissed, the "amount involved" is determined having regard to:

i. the amount of damages provisionally assessed by the Court, if any (none were assessed in this case);

ii. the amount claimed;

iii. the complexity of the proceeding; and,

iv. the importance of the issues.

[13] The amount claimed in this case was between $26,000.00 and $35,000.00. Both parties acknowledge that the proceeding was not complex. It involved an application in which there were no discoveries, and no extensive pretrial disclosure or production. The Application was filed, affidavits were filed and the matter set down for hearing. Both parties say the issues are important.

[14] The circumstances of this case do not suggest that the determination of the "amount involved" should be anything other than the amount claimed by the Applicant. The amount argued by the Respondent, if found liable, is not relevant. The Court might consider the paucity of the pre-hearing processes (that is, the non-complexity of the proceeding) to reduce the "amount involved". It is more appropriate instead, in this case, to consider that fact at the second stage of the analysis - determination of the appropriate scale.

[15] Tariff A provides for three scales. Scale 2 is the Basic Scale; Scale 1 reduces party-and-party costs by 25% and Scale 3 increases costs by 25%. The simplicity of the proceedings - with minimal pre-hearing preparation, other than the preparation of affidavits and the filing of briefs, straight-forward factual and legal issues, and a short hearing, suggests that Scale 1 is the appropriate scale in this case.

[16] Party-and-party costs for an unsuccessful claim of between $25,000.00 and $40,000.00 according to Scale 1 of Tariff A is $4,688.00.

[17] In addition, the Respondent seeks $4,000.00, based on a "length of trial" of two days. This matter was set for two days, but both counsel agreed to start it at 2:00 p.m. on the first day and, by reason of the Applicant's decision not to cross-examine two of the Respondent's affiants, the hearing, including argument, was completed before noon on the second day. I fix the "length of trial" as one day.

[18] Applying the normal formula for determination of party-and-party costs, the successful Respondent would entitled to costs in the amount of $6,688.00.

[19] *CPR 77.07* provides that a judge who fixes costs may add or subtract an amount from the Tariff costs. It sets out a non-exhaustive list of eight relevant factors. The eight factors include:

> (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;

[20] The Applicant successfully argued at the opening of the hearing that the contents of one of the Affidavits filed by the Respondent related to the Applicant's prior employment. The Court agreed that it was not relevant to the issues before the Court.

[21] It is appropriate that costs be reduced to take into account this irrelevant issue raised by the Respondent in its Notice of Contest on October 11, 2013, and only taken off the table at the opening of the hearing on January 8, 2014.

[22] Furthermore the hearing was significantly shorter than a normal trial or Application in Court, indeed, even most special time motions or Applications in Chambers.

[23] As a consequence, it is appropriate that the Tariff A costs in this case be fixed at $4,000.00, plus reasonable disbursements, verified by affidavit. I so order.

Warner, J.