IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Bacich v. Braithwaite, 2005 NSSC 116

Date: 20050411
Docket: SN No. 109562
Registry: Sydney

Between:

David Braithwaite

Plaintiff

v

Jim C. Bacich, Greg A. Blanchard, Reinhold M. Endres, Q.C., George L. Fox, Grant Vaughn, Bill McKee and Lisa Morris, all as Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund

Defendants

AND

Jim C. Bacich, Greg A. Blanchard, Reinhold M. Endres, Q.C., George L. Fox, Grant Vaughn, Bill McKee and Lisa Morris, all as Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund

Appellant

v.

David Braithwaite

Respondent

Judge: The Honourable Justice Simon J. MacDonald

Heard: April 11, 2005 at Sydney, Nova Scotia

Written Decision: May 13, 2005

Counsel: Colin D. Bryson, for the Plaintiff
David Braithwaite in person

By the Court:

PRELIMINARY:

[1] I have had an opportunity to review my notes on the testimony today and Mr. Braithwaite's additional paper. I have already reviewed the other material submitted. So, I propose to deal with the matter by way of an oral decision but I reserve the right to add to or detract from the decision should a written request be deemed necessary.

APPLICATIONS:

[2] In this decision Mr. Braithwaite will be referred to as the Plaintiff. Jim C. Bacich, Greg A. Blanchard, Reinhold M. Endres, Q.C., George L. Fox, Grant Vaughn, Bill McKee and Lisa Morris, all as Trustees of the Nova Scotia Public Service Long Term Disability Plan Trust Fund will be referred to as the Defendants.

[3] There are several applications before me and it has been agreed they be dealt with all at once.

[4] Mr. Braithwaite has filed an application to extend time so he could file a Notice of Trial pursuant to *Civil Procedure Rule* 24.11(4) which he made in December 16, 2004. The **Defendants** responded to that application.

[5] Mr. Bryson made an application January 10, 2005 on behalf of the Defendants to have the Plaintiff's claim struck pursuant to *Civil Procedure Rule* 14.25(1)(d) or in the alternative, an order for security for costs per *Civil Procedure Rule* 42.01(1)(d).

BACKGROUND:

[6] The Plaintiff commenced an action against the Defendants.

[7] The following is a brief summary of the background for purposes of all the applications that have been agreed to be heard today. Mr. Braithwaite was an employee at the Cape Breton Correctional Center working as a guard. He was a member of the Correctional Services Bargaining Unit and had rights and benefits under the Collective Bargaining Agreement Unit with the Province. Mr. Braithwaite made a claim for disability benefits and received same from the 23rd of March, 1995 to July 1, 1996 or thereabouts.

[8] The Plan Administrator terminated Mr. Braithwaite's benefits claiming he was not disabled and Mr. Braithwaite appealed this decision to the Appeal Division through the appeal process and he lost.

[9] The Defendants applied before Justice Edwards to strike Mr. Braithwaite's claim which was denied. They then appealed to the Appeal Court and their appeal was dismissed.

[10] As can be seen in the reasons of Justice Cromwell in the Appeal Court's decision of May 11, 1999, Mr. Braithwaite is suing over the same issue originally before the Plan Administrator and he has raised other matters as well.

[11] Mr. Braithwaite is a self represented person and has been so since June of 2000. He also filed a grievance alleging improper termination. The Arbitrator denied this by decision dated May 5, 2000.

[12] On March 3, 2004 a 30 day notice was sent out pursuant to *Civil Procedure Rule* 28.11. On March 30, 2004 Mr. Braithwaite filed a Notice of Intention to Proceed.

[13] On October 4, 2004 a Notice of an Order dismissing the action within 21 days pursuant to *Civil Procedure Rule* 28.11 was sent out by the Prothonotary's Office. Counsel Cheryl MacKenzie on October 29, 2004 requested a sustation of the 4th of October 2004 notice indicating she wanted to review the file. She stated she would file an extension request if she was going to represent Mr. Braithwaite.

[14] On November 16, 2004 there was a letter to Cheryl MacKenzie indicating an extension was granted until the 16th day of December, 2004, for her or Mr. Braithwaite to make an application.

[15] This application was made by Mr. Braithwaite on December 16, 2004 to extend time to file the notice of trial. There was also notice given to the court Ms. MacKenzie was not going to represent Mr. Braithwaite in this matter.

[16] On January 10, 2005 the Defendants made an application to strike the Plaintiff's Claim or alternatively for security of costs to which I have already referred.

THE LAW:

[17] *Civil Procedure 28.11* reads as follows:

> 1. Each Prothonotary shall maintain a general list that lists all proceedings in which the pleadings are closed and for which no date of trial has been fixed;
>
> 2. When a proceeding has been on a general list for a period of three years the Prothonotary shall give the parties notice in Form 28.11(a) that they have 30 days to file a Notice of Intention to Proceed;
>
> 3. Where the parties do not indicate their intention to proceed within the time set out in ss.2, the

Prothonotary shall issue an order in the form of 28.11 (c) dismissing the action;

4. Where the parties do file a Notice of Intention to Proceed they shall within six months from the date thereof or such further time as ordered by the court file with the Prothonotary, Notice of Trial in accordance with Rules 28.08 and 28.10.

5. Where the parties fail to file their Notice of Trial pursuant to Rule 28.11(4) and where no extension of time has been granted by the Court, the Prothonotary shall give the parties 21 days notice in Form 28.11(b) before issuing an order in Form in Form 28.11(c) dismissing the proceedings.

[18] It is this extension that Mr. Braithwaite is seeking before the court.

[19] In dealing with the abuse of process application, *Civil Procedure Rule 14.25(1)(d)* states as follows:

> 14.25(1) The court at any stage may at a proceeding order any pleading, affidavit or statement of fact or anything therein to be struck out or amended on the ground that:

And the Defendants argue, ss. (d) which states:

> (d) It is otherwise an abuse of process of the court.

[20] In seeking security for costs, Civil Procedure Rule 42.01 provides:

> A court may order security for cost to be given in a proceeding where, whenever it deems it just and without

> limiting the generality of the foregoing it may order security be given where ...

And the Defendants are arguing ss. (d) which states:

> (d) A plaintiff or any person through or under whom he claims has a judgment or order against him for costs that have not been paid.

[21] I have read the affidavits of Mr. Bryson, Mr. Braithwaite, Ms. Ryan and the other materials in the file. Mr. Braithwaite says at para. 7, 8, 9, 10, and 11 as follows:

> "7. That I have been self represented in this matter since June 6, 2000;
>
> 8. That on or about the month of October, 2004 I was advised I would have to file a Notice of Trial in according to Civil Procedure Rule 28.10 by October 11, 2004, if I wish to proceed in this action. This deadline was extended to December 16, 2004 by the Prothonotary on November 16, 2004;
>
> 9. That I realized that I did not fully understand the legalities surrounding my case and have been attempting to find a lawyer since October 2004 but I have still been unable to find anyone willing to represent me in this matter;
> 10. That discovery examinations have yet to be commenced in this matter;

> 11. That I am making this application to extend the time to file Notice of Trial and Certificate of Readiness to give me an opportunity to retain legal counsel and to allow me the opportunity to have discovery examinations completed before this matter is set down for trial."

[22] In short, Mr. Braithwaite says he didn't fully understand the legalities surrounding his case and the trouble he was having to get a lawyer since October of 2004. The Defendants argue there should be no extension of time because of Mr. Braithwaite's inordinate delay and he had a hearing for wrongful termination decided by the grievance procedure go to arbitration.

[23] The Defendants further argues that the issues before the Arbitrator were whether or not Mr. Braithwaite was disabled from his job as correctional officer and whether he unreasonably refused modified duties. The Arbitrator found against him on both points in 2000. The Defendants argues to allow this matter to continue would be an abuse of process as the matter was already decided and raised the issue of *res judicata*.

[24] In short, a view of the Defendants' materials indicates that the long term disability issue has already been decided as well as the wrongful dismissal allegation by Mr. Braithwaite.

[25] I will refer to the comments of Justice Hallett in *Moir v. Landry* (1991) 104 N.S.R. (2d) 281 at p. 284 where Mr. Justice Hallett states:

> "A Plaintiff has the right to a day in court and should not likely be deprived of that right therefore it is only in extreme cases of inordinate and inexcusable delay that a court should presume serious prejudice to the Defendant in the absence of evidence to support such a finding."

[26] And reference is made as well to the case of *Goodeu v. Rogerson* 2002, N.S.J. P. 46.

[27] In *Martell v. Robert MacAlpine*, (1978) 23 N.S.R. (2d) 540 which is a leading case on dismissal for want of prosecution in the Province of Nova Scotia, Mr. Justice Cooper on behalf of the Court of Appeal said at p. 445:

> "I now direct my attention to the principals that should govern the exercise of a Judge's discretion in deciding whether or not an application for dismissal of an action for want of prosecution should be granted. There must first have been an inordinate and inexcusable delay on the part of the Plaintiff or his lawyers."

[28] One must also consider the words of Lord Justice Russell as quoted by Cooper J. in *William Parker v. Hamm and Sons* (1992) 3 L.E.R. 1051 at page 1052:

> "That such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues and the action or is such as is likely to cause or to have caused serious prejudice to the Defendants."

[29] Mr. Braithwaite's claim for disability began in and around 1996. This current action began in July 1998, approximately seven years ago. Nothing was done since the appeal decision in this action. However Mr. Braithwaite had his grievance of wrongful dismissal heard in the interim.

[30] On the totality of the evidence, although it appears he is proceeding slow in this action I am not satisfied it falls within those cases (usually the courts have found in the vicinity of ten year range) of delay so as to be described as an inordinate and unexcusable delay by the Plaintiff.

[31] As soon as the notice went out he got counsel who replied but ultimately declined to take the case. He now wants to proceed on his own realizing the necessity of bringing the matter to trial.

[32] I further find on the totality of the material supplied there has not been any prejudice or substantial risk that a fair trial cannot be had or is likely to cause or to have caused serious prejudice to the Defendants.

[33] I therefore am prepared to extend the time as requested and now wish to proceed to the Defendants' application to strike.

[34] In dealing with that application I am not prepared to strike the Plaintiff's action. I find, although there was a wrongful dismissal arbitration decision,

there are other matters raised in the Plaintiff's statement of claim as referred to by other judgments on file herein and especially Justice Cromwell in his decision dated May 11, 1999 and I simply refer to para. 61 where he said:

> "In summary this case raises difficult issues of the relationship between medical grounds addressed through the medical appeals process provided for in the Plan and other disputes arising under the Plan which are to be pursued in the courts. These issues turn on factual questions which are not adequately addressed on an interlocutory application of this kind and on difficult, and in some cases, novel legal questions. These are not the kinds of questions which should be resolved against Mr. Braithwaite on an application to strike out his statement of claim. I see no error in principle in, or any injustice cased by, the Chambers judge's decision refusing to strike the statement of claim. I emphasize that I have not attempted to rule definitively on what constitutes a medical ground, the application of *res judicata* or any of the other issues raised other than to say they are triable issues. They maybe raised by way of defence and dealt with accordingly."

[35] I must say that to deprive Mr. Braithwaite of his day in court given all the material in this file is a dramatic step by the court. It will have dramatic ramifications to Mr. Braithwaite. As Mr. Bryson said in addressing the court this morning on the security for costs issue "If Mr. Braithwaite were to win it would be in the vicinity of $100,000.00".

[36] I am also aware of the efforts made by Mr. Braithwaite to get counsel and the reason for not taking on the task tend to indicate the ramifications as to the likelihood of his success or failure. I have borne that in mind but I do find at this stage he ought to have his day in court. I am not prepared to dismiss his action as an abuse of process.

[37] I am mindful of Justice Cromwell's words in the appeal decision herein but also consider those in dissent of Justice Bateman especially now the grievance procedure has been heard.

[38] In coming to an award of security for costs in this matter, as I said earlier it has been ongoing for numerous years with decisions already having been rendered against Mr. Braithwaite on his medical claim and his unjust dismissal claim. The Defendants had to defend themselves each time. Now they have to defend this civil action.

[39] Mr. Braithwaite has indicated in his testimony and in his brief he passed in today that he has been on social assistance and government grants. He explains about his bankruptcy declaration and in testimony before the court he said he worked on a grant and is now unemployed. It is interesting to note though he does have an automobile accident claim pending which he said in response to Mr. Bryson on cross examination. So it is foreseeable he

could have funds coming to him. This is a serious claim and if he tends to be serious about it then he must pay the security for costs.

[40] I am also aware in assessing security for costs of *Orkin's Law of Costs*, 2d ed. at 5.503 which states:

> "The court's discretion to reduce or eliminate security for cost on the grounds for impetuosity should however be exercised only in special circumstances and with caution and restraint. The Plaintiff should clearly demonstrate impetuosity and lack of ability to borrow or sell assets to raise the required money."

[41] Justice Cromwell said in *Wall v. Horn Abbot et al* (1999) 176 N.S.R. (2d) 96, on behalf of the Nova Scotia Court of Appeal at para. 83:

> "From this review of the authorities, I reach the following conclusions. The merit of the plaintiff's case is relevant consideration to the exercise of discretion to grant or refuse security for costs. The extent to which the merits may properly be considered varies depending on the nature of the case. If the case is complex or turns on credibility, it is generally not appropriate to make an assessment of the merits at the interlocutory stage. The assessment of the merits should be decisive only where (a) the merits may be properly assessed on an interlocutory application; and (b) success or failure appears obvious. If the plaintiff resists security that would otherwise be ordered on the basis that the order will stifle the action, the plaintiff must establish this by detailed evidence of its financial position including not only its income, assets and liability but also its capacity to raise the security. Where the order for security will prevent the plaintiff from proceeding with the claim, the

> order should be made only where the claim obviously has no merit, bearing in mind the difficulties of making that assessment at the interlocutory stage. Where the choices are, on one hand, allowing an unmeritorious claim to go to trial and on the other stifling a possibly meritorious claim before trial, the policy of our law is clear. Where there is a risk of injustice on either account, stifling a possible meritorious claim is the greater injustice."

[42] The Defendants were looking for $15,000 as security for costs, I feel a more appropriate amount ought to be $3000. given the material and evidence of Mr. Braithwaite.

[43] On the totality of the evidence I have heard in dealing with these applications and reading the material in the file, I am satisfied that I can conform a fit and just order in this matter as follows:.

> (a) In dealing with Mr. Braithwaite's application to extend the Plaintiff shall have until May 31, 2005 to file his Notice of Trial or else his action is subject to dismissal. (I note and say in this particular portion of the order that Mr. Braithwaite requests discoveries, but I am satisfied from the evidence and the cross examination of the witnesses herein and as well as looking at what actions have been taken thus far, that this matter centers around his disability claim and his wrongful dismissal grievance. Any possible future need for discoveries given the fact that these earlier hearings can be completed before trial if need be).

(b) I dismiss the Defendant's application to strike the plaintiff's claim.

(c) I am satisfied the Defendant has brought themselves within the security for costs rule and given the material before me I would include in the order a clause the Defendant should pay security for cost in the sum of $3000.00 and that sum is to be paid on or before May 31, 2005.

[44] Finally, as I am familiar with this file and the reasons why I have given this order to allow Mr. Braithwaite one last time to get this matter moving and have his day in court, any further applications are to be brought before me to deal with the order I have given.

[45] In essence Mr. Braithwaite you have got one last chance to get your material together but you have got to pay those costs on or before the end of May. Get your Notice of Trial in before the end of May or I dare say there will likely be another application and you might not be as successful.

J.