Federal Court of Appeal

CANADA

Cour d'appel fédérale

Date: 20111007

Docket: A-368-09

Citation: 2011 FCA 278

BETWEEN:

SAMEH BOSHRA

Applicant

and

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES (CAPE)

Respondent

ASSESSMENT OF COSTS - REASONS

Charles E. Stinson
Assessment Officer

[1] The Court dismissed with costs this application for judicial review of a decision of the Public Service Labour Relations Board concerning unfair labour practice relative to a grievance process. I issued a timetable for written disposition of the assessment of the Respondent's bill of costs.

I. The Respondent's Position

[2] The Respondent noted that the judicial review hearing was preceded respectively by motions to extend time to file an affidavit, to file a supplementary affidavit (the supplementary

affidavit motion) and to amend the Applicant's affidavit, as well as a status review hearing, all initiated by or in response to the Applicant's conduct. The Applicant also brought a motion, which was dismissed as untimely, for reconsideration of the judgment.

[3] The Respondent noted that although it seeks costs only for the supplementary affidavit motion, the status review hearing and the judicial review hearing, it was necessary for each of the other hearings, to review and respond to often lengthy affidavits and submissions from the Applicant. The Court concluded that the Applicant's supplementary affidavit was irrelevant and dismissed the supplementary affidavit motion with costs.

[4] The Respondent argued further to Rules 409 and 400(3)(*a*) (result), (*b*) (amounts claimed and recovered), (*c*) (importance and complexity), (*g*) (amount of work, (*i*) (conduct tending to unnecessarily lengthen a proceeding's duration) and (*k*) (improper, vexatious or unnecessary conduct), in support of the middle to maximum range counsel fees claimed, that it was successful on both the supplementary affidavit motion hearing and on the judicial review hearing; that although the Court permitted this matter to proceed after the status review hearing, the hearing was exclusively attributable to the Applicant's conduct; that the Applicant repeatedly missed requisite filing deadlines and unnecessarily lengthened the proceedings with the interlocutory applications noted above and also by informal attempts to adduce new evidence; that the Applicant's amendment of his affidavit late in the proceeding unnecessarily complicated the case; that the length of the Court's decision indicates a moderately complex proceeding, in part because of both the lack of focus and the circumvention of the Rules through repeated attempts to introduce new evidence

in the Applicant's Memorandum of Fact and Law and that the claimed Column III costs are only a fraction of the actual costs incurred in defending this proceeding.

[5] The Respondent argued further to *Caricline Ventures Ltd v ZZTY Holdings Ltd et al*, 2002 FCT 1134 (AO) at para 21 and *Starlight v Canada*, [2001] FCJ No 1376 (AO) at para 7 that the same point in the ranges throughout need not be used as each counsel fee item is discrete and must be considered in its own circumstances. As well, broad distinctions may be required between upper versus lower allowances from available ranges.

[6] The Respondent discounted the Applicant's position, predicated on *Maxim's Bakery Ltd v Maxim's Limited*, [2000] FCJ No 2138 (AO) [*Maxim's*], that the Status Review Motion should be listed under fee item 27 instead of fee item 5 by arguing that *Maxim's* addressed only a Response to Notice of Status Review and not the entire costs of a contested Status Review Hearing. Although *Maxim's* approved the former costs under fee item 27, the Tariff does not expressly require that. Here, the Respondent tried to avoid this hearing and consented to the Applicant's late filing of the Requisition for Hearing, further to which the Applicant did not act in a timely manner to preclude said hearing. Therefore, fee item 5 should be allowed in my discretion.

[7] The Respondent argued further to *Canada (Minister of Citizenship and Immigration) v Zundel*, 2005 FC 997 (AO) [*Zundel*] at paras 4, 5 and 7, that there is discretion to allow fee item 25 (services after judgment) for interlocutory matters regardless of any final judgment on the substantive issues of the litigation. If fee item 25 was limited to only services after a final disposition, it would have been listed under the Tariff B subheading "E. Trial or Hearing" rather

than “G. Miscellaneous.” The Applicant’s unwillingness to drop matters associated with the supplementary affidavit motion required the Respondent to perform services related to said motion well after its disposition.

[8] The Respondent discounted the Applicant’s position on fee item 14(*a*) (appearance of lead counsel), i.e. the recorded hearing duration was only 3 hours 5 minutes, by arguing that the claimed 4 hours account for all time in the courtroom before and after the matter was called. The Respondent argued that, although the Court did not explicitly address fee item 14(*b*) (appearance of second counsel), the Court’s direction for costs implicitly authorized said fee given that it was made further to the presence of second counsel who had led some of the Respondent’s oral argument at the judicial review hearing.

[9] The Respondent argued further to *Zundel v Canada*, 2005 FCA 260 (AO) at para 12 and *Abbott v Canada*, 2007 FC 1338 at para 19 that the cost of photocopies is allowable if essential to the conduct of the proceeding and reasonable in the circumstances and therefore it is irrelevant whether the Applicant’s photocopy costs were less or his submissions shorter than those of the Respondent. That a litigant cannot afford or does not choose to do something does not mean that it was unreasonable for an opposing litigant to claim the costs associated with doing it. The evidence supports the reasonableness of the copies of the numerous documents required, such as the Respondent’s Record (218 pages), Book of Authorities (containing only 15 cases) Affidavit of Jean Ouellette (178 pages), the Pleadings Brief and the many documents associated with motions and hearings.

[10] The Respondent discounted the Applicant's assertion concerning the former contributing to the latter's financial hardship by noting that it is unsubstantiated, given that the pertinent proceeding has not yet been adjudicated. The Respondent argued further to *Hiebert v Canada*, 2006 FC 1215 (AO) at para 6 that financial hardship is irrelevant in an assessment of costs, and further to *Scheuneman v Canada*, 2006 FC 1012 (AO) at para 5 that self-represented litigants are not immune from the costs consequences of their actions and that such costs may be assessed against them as if they were represented by counsel.

II. The Applicant's Position

[11] The Applicant asserted that maximum Column III costs cannot be allowed as litigants are limited to mid-range costs unless the Court directs otherwise. The Respondent must be limited to only one fee item 25 (services after judgment) claim, i.e. for the judicial review hearing, but not the various motions.

[12] The Applicant argued further to para 6 of *Maxim's* that the reply to Status Review Motion cannot be claimed under fee item 5 (preparation and filing of a contested motion) and instead must be claimed under fee item 27 (such other services as the assessment officer may allow). The latter's available range (1 – 3 units) is less than the former's range (3 – 7 units).

[13] The Applicant argued that as the hearing duration was entered in the court record as 3 hours 5 minutes, the Respondent's claim of 4 hours for fee item 14(*a*) must be reduced to the closest hour, i.e. 3 hours. Further to *Merck & Co Inc v Apotex Inc*, 2007 FC 312 (AO) at paras 28-29, the

Respondent cannot claim fee item 14(*b*) (second counsel) in the absence of an enabling direction by the Court.

[14] The Applicant argued further to *Murphy v Canada (Minister of National Revenue)*, 2002 FCA 160 (AO) at para. 4, that the claimed photocopy costs ($1,453.65) appear excessive. In the absence of evidence, they should be limited to the number of copies required to satisfy the requirements of the Rules. For example, the Applicant's photocopy costs were less than $700.

[15] The Applicant, by eliminating certain interlocutory costs and restricting other sections of the bill of costs to mid-range fees, calculated $3,849.10 inclusive of taxes (using, however, an unexplained formula of two-thirds of the GST and one-third of the HST) for counsel fees, to which $700 (disbursements) were added for a suggested total of $4,549.10. This is an alternative proposal to the Applicant's general position advanced at the judicial review hearing that the Respondent contributed to the deteriorating employer-employee relationship, ultimately leading to the Applicant's termination. Other acts by the Respondent associated with the Applicant's circumstances also contributed overall to the latter's significant financial prejudice and to the loss of his livelihood. That combined with the excessive costs claimed by the Respondent directly leave the Applicant unable to pay costs. Accordingly, the result of this assessment should be for nil costs.

III. Assessment

[16] I am not the "Court" as that term is used in the Rules and therefore I do not have the jurisdiction to dispense with costs as urged by the Applicant: see para 13 of *Madell v Canada*, [2011] FCJ No 432, 2011 FCA 105 (AO) [*Madell*]. Paragraphs 15 and 16 of *Madell* set out my

general approach for assessments of costs and for counsel fee items respectively. The Respondent's submission, i.e. financial hardship is not a factor in an assessment of costs, is correct. With respect and with regard to paragraph 69 of *Pfizer Canada Inc v Canada (Minister of Health)*, 2008 FC 11, [2008] FCJ No 3 [*Pfizer*], Rule 407 directing that costs be assessed per Column III unless the Court orders otherwise prescribes the full range of Column III as the default value for party and party costs, as opposed to the mid-range limitation indicated by *Pfizer*.

[17] Paragraphs 23-24 of *Shields Fuels Inc v More Marine Ltd*, [2010] FCJ No 731, 2010 FC 228 (AO) indicate my view on fee item 27 parameters. In paragraph 8 of *International Taekwon-Do Federation v. Choi*, [2008] FCJ No 402, 2008 FC 1103 (AO) [*International Taekwon-Do*], I allowed fee item 27 for status review work. All of this may be moot given my reading of the court file and the assessment materials. Paragraph 5 of the affidavit of Amy Quinn sworn April 28, 2011 (the Quinn affidavit) asserts that the Respondent claims for the costs associated with two interlocutory orders, i.e. March 30, 2010 (although the exhibited order is actually dated March 10, 2010) dismissing with costs the Applicant's motion for leave to file a supplementary affidavit, and June 28, 2010 allowing in part the Applicant's motion to amend his affidavit with costs in the cause. The Court issued a Notice of Status Review on August 25, 2010. Both sides responded with written submissions after which the Court issued an order dated October 14, 2010, silent on costs, permitting the matter to proceed. Strictly speaking, said order was not pursuant to a motion, but if it had been, my decision (paras 34-35) in *Cockerill v Fort McMurray First Nation #468*, [2010] FCJ No 1246, 2010 FC 1002 (AO) [*Cockerill*], would preclude any assessed costs. Paragraph 28 of *Cockerill* indicates that case management costs might more properly be addressed under fee items 10 and 11 as opposed to fee items 5 and 6. I indicated in paragraph 3 of *Martselos v Poitras*,

[2009] FCJ No 1205, 2009 FC 957 (AO), that costs are assessable for an order silent on costs and associated with fee items 10 (and 11). I addressed in paragraph 5 of *International Taekwon-Do* fundamental differences between interlocutory motions and pre-hearing conferences.

[18] The circumstances here are not those addressed by me in *Sander Holdings Ltd v Canada (Minister of Agriculture)*, [2009] FCJ No. 720, 2009 FCA 199 (AO) [*Sander*], except that I view the Applicant's position as akin to the general opposition to costs in *Sander* unaccompanied in some respects as there by relevant analysis which could have assisted me identifying issues and making a decision. Essentially, the bill of costs and supporting materials here correctly associate the supplementary affidavit motion with a fee item 5 claim for reply materials. I have read the materials that were before the Court and the brief reasons issued by the Court on March 10, 2010. This interlocutory matter was straightforward: I reduce the claimed maximum of 7 units for fee item 5 to 4 units from the available range of 3 – 7 units.

[19] The Quinn affidavit correctly asserts a claim for costs associated with the June 28, 2010 order, an event which had nothing to do with the status review notice, but for which fee item 5 could be claimed. The bill of costs associates the term 'status review' with the term 'motion'. There appeared to be no such motion and no associated order for costs, but the bill of costs claims a fee item 5. The Respondent is clearly entitled to a fee item 5, although for a mislabelled event (June 28, 2010). Given the state of the materials before me, and that the motion to amend was straightforward, I reduce the mid-range claim of 5 units for fee item 5 to the minimum 3 units.

[20] In *Specialized Bicycle Components, Inc v Groupe Procycle, Inc*, [2007] 4 FCR 694 (AO), I addressed parameters of practice in the context of costs. In practice, fee items such as 1 (instituting document); 2 (defences); 10 (preparation for pre-trial conference); 13 (preparation for trial); 14 (appearance at trial) etc. became payable and are assessed further to a judgment on the substantive issues between the parties and not further to an interlocutory judgment. I considered in paragraph 34 of *Aird v Country Park Village Properties (Mainland) Inc*, [2005] FCJ No. 1426, 2005 FC 1170 (AO), the notion of the subheadings in Tariff B relative to the construction of counsel fees items in the context of Column III as a whole. In paragraph 19 of *Peerless Ltd v Aspen Custom Trailers Inc*, [2010] FCJ No 842, 2010 FC 618 (A), I allowed fee item 25 further to discontinuance of the substantive proceeding on the basis that counsel would have had to brief the client on its implications, similar to the briefing of a client on the implications of a judgment further to a trial. My analysis in *Williamson v Canada (Attorney General)*, [2005] FCJ No 1013, 2005 FCA 219 (AO), does not assist the Respondent's position, i.e. that fee item 25 is assessable further to an interlocutory judgment, a position which I think is arguable. Indeed, in situations in which an interlocutory judgment makes costs payable forthwith before final judgment, fee item 26, falling under the same subheading – Miscellaneous – as fee item 25 are routinely allowed for the assessment of those interlocutory costs. Zundel did not analyze fee item 25 in the context of Tariff B as a whole. Generally, the practice has been to restrict fee item 25 to final as opposed to interlocutory judgments. I disallow the fee item 25 claims associated with the two motions above, but allow it as claimed for the substantive proceeding.

[21] Paragraph 6 of *Armstrong v Canada (Attorney General)*, [2010] FCJ No 1487, 2010 FC 1189 (AO) outlines generally my approach in resolving fee item 13, 14 and 15 issues. I reduce fee

item 13 from the claimed maximum 5 units to 4 units. This matter had some complexity. I allow the claimed maximum 3 units per hour for fee item 14(a). I find that a duration of 3.5 hours should be used for the fee item 14(a) calculation. The Applicant, in arguing for a reduction to 5 units, correctly noted that fee item 15 (written argument) should have been fee item 2 (Respondent's Record): see para. 38 of *Cockerill*. I allow 5 units under fee item 2. Paragraph 6 of *Marshall v Canada*, [2006] FCJ No 1282, 2006 FC 1017 (AO) indicates that I do not have the jurisdiction to allow fee item 14(b) (second counsel) in the absence as here of a direction from the Court. I disallow the claimed 6 units.

[22] The Applicant conceded the mid-range claim of 4 units for fee item 26 (assessment of costs), which I find a fair result in the circumstances.

[23] Although the Applicant's submissions specifically discussed only photocopies, his suggested reduced total of $700 inclusive of taxes for all disbursements addressed all categories claimed, i.e. photocopies ($1,453.65); facsimiles ($12.50); process service ($60); computer research ($286.01); couriers ($62.08) and postage ($9.32) totalling $1,994.27 inclusive of taxes. These disbursements as presented for assessment between litigants reflect issues of proof and relevance akin to my analyses in paragraphs 44 and 46 of *Cockerill* and 18 of *Madell*, including a typical law office computer program of disbursement listings by category affording little, if any, information on purpose and relevance. I find that $1,550 inclusive of taxes is an adequate allowance in the circumstances of this litigation.

[24] As sometimes happens, the bill of costs and supporting materials did not provide detail of the specific dates of respective counsel fee services. Although I concede that supervising counsel might have done work within the meaning of fee item 13 prior to June 30, 2010, I have used fee item 13 as the starting point for HST (post-July 1, 2010). That is, I calculated GST (pre-June 30, 2010) for fee items 2 and 5 and HST for the remaining fee items.

[25] The Respondent's bill of costs, presented at $9,015.57, is assessed and allowed at $6,052.55.

"Charles E. Stinson"
Assessment Officer

Vancouver, British Columbia
October 7, 2011

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-368-09
STYLE OF CAUSE:	SAMEH BOSHRA v. CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES (CAPE)

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT OF COSTS:	CHARLES E. STINSON
DATED:	October 7, 2011

WRITTEN REPRESENTATIONS:

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