

IN THE SUPREME COURT OF NOVA SCOTIA

**Citation:** Gillan v. Mount St. Vincent University, 2007 NSSC 249

**Date:** 20070823

**Docket:** SH 175730

**Registry:** Halifax

**Between:**

Brenda Anne Gillan

Plaintiff

v.

Mount St. Vincent University

Defendant

**Judge:**

The Honourable Justice Arthur J. LeBlanc

**Heard:**

May 1<sup>st</sup> & May 12<sup>th</sup>, 2006 in Halifax, NS

**Counsel:**

David W. Richey, Esq., for the plaintiff  
David A. Miller, Q.C. and Nancy Murray, Q.C., for the  
defendant

**By the Court:**

[1] The defendant seeks a decision on costs arising from my jurisdiction decision: see 2006 NSSC 250; 247 N.S.R. (2d) 170. The plaintiff argues that a decision on costs should be deferred, pending the determination of her appeal of my decision on jurisdiction.

### **Should a costs decision be deferred pending appeal?**

[2] As to the submission that I should not make a costs order pending appeal, Orkin's *Law of Costs* refers, at §202.1, to caselaw where courts "declined to defer making a decision respecting costs pending appeal of the order dismissing the plaintiff's claim." Orkin cites the following cases in support: *Titcomb v. Baker*, [1991] B.C.J. No. 2048 (S.C.); *Banyay v. Christie and Co.*, [2001] B.C.J. No. 2320, 2001 BCSC 1550 (S.C.); and *Krynen v. Bugg*, [2003] O.J. No. 2301 (Ont. S.C.J.). In *Banyay*, the plaintiff requested an adjournment of the costs decision until an appeal from the dismissal of his claims was decided. Baker J. declined to delay the decision on costs, stating that, "[a]s a party may wish to appeal the issue of costs and have that appeal decided at the same time as the appeal from the decision at trial ... I see no benefit in adjourning the decision about costs" (para. 2). The same request was made in *Krynen*, where the Court said, at para. 3:

At the opening of this proceeding ... [the applicant] submitted that I should postpone the fixture of costs because his client had appealed my decision and the fixture of costs now would somehow prejudice his rights on the appeal or on a subsequent trial of an issue, if the appeal were successful.

[3] The Court "found no merit in that submission and ordered that the costs issues should be dealt with now" (para. 4).

[4] The decision on jurisdiction effectively ended the plaintiff's claim in this Court, unless the Court of Appeal determines otherwise. I am satisfied that this is the appropriate time to fix costs of the proceeding, apart from any interlocutory matters upon which costs were already fixed.

### **Costs**

[5] This proceeding was commenced in 2003, and so the former *Tariff of Costs and Fees* would apply. The proceeding was dealt with as a determination of a preliminary question of law pursuant to Civil Procedure Rule 28.04.. There was an Agreed Statement of Facts, and Ms. Gillan, the plaintiff, testified to augment some of the agreed facts. There was no other *viva voce* evidence. The majority of time was therefore spent on argument. Approximately one-half day was spent on argument respecting the plaintiff's submission that the defendant had failed to advance its argument before trial. The remaining time was dealing with the defendant's argument that the plaintiff's claim was properly dealt with not by the Court but by way of the procedures mandated by the collective agreement and the *Trade Union Act*. Although the jurisdiction issue was determined under Rule

28.04, it proceeded in a manner more akin to an interlocutory application, in that the majority of time was spent on argument.

[6] On behalf of the plaintiff, Mr. Richey submits that the defendants have not submitted verification of their disbursements, and argues that disbursements should be allowed only if they are attributable to the jurisdiction issue.

[7] Mr. Richey also claims that the defendant delayed bringing the jurisdiction issue before the Court, and should not now be permitted to collect additional costs incurred as a result of the delay. The plaintiff argued at trial that the jurisdiction objection ought to have been raised before the costs of disclosure and discovery were incurred. Counsel claims that the plaintiff “is an ordinary person who was employed as a cleaner at Mount Saint Vincent University until she was injured, and has not returned to work in the intervening 11 years. The failure to resolve the jurisdiction issue has caused the Plaintiff to incur the cost of pre-trial preparation which could have been avoided.”

[8] Mr. Richey argues that the Court should exercise its discretion to refuse to grant costs on the basis that awarding costs “would create an undue financial

hardship”: *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 (C.A.). He refers to *Windsor v. Adu Poku* (2003), 214 N.S.R. (2d) 88 (S.C.), where MacLellan J. concluded that it was appropriate to consider the financial circumstances of an unsuccessful plaintiff in determining costs. He also refers to *Lockhart v. New Minas (Village)*, [2005] N.S.J. No. 164 (S.C.), where Warner J. made similar comments. Counsel refers to the evidence of Ms. Gillan that she has been disabled since her injury as sufficient basis upon which to conclude that an award of costs would constitute hardship.

[9] For senior counsel for the defendant, Mr. Miller and Ms. Murray, it is not unreasonable to suppose that they bill at a rate in the vicinity of \$300.00 to \$400.00 per hour. Allowing four days for the hearing, plus costs of preparation, would give a total of \$30,000.00 to \$40,000.00 as between solicitor and client. I believe that an award of party-and-party costs in the amount of \$5,500.00 would provide a substantial contribution to the overall cost of the proceedings, and would be reasonable in the circumstances. I am also satisfied that it would reflect Ms. Gillan’s financial circumstances.

[10] Costs are in the discretion of the Court. Rule 63 authorizes the Court to award costs as a lump sum. Orkin states, in *The Law of Costs*, at §201 :

Canadian courts have not tried to define with any precision the degree of indemnification intended by an award of party-and-party costs on the tariff scale. It has been said that the philosophy of the Nova Scotia tariff is to provide a “substantial contribution” toward a successful party’s reasonable expenses.

[11] I am satisfied that a lump sum award of costs is appropriate here, rather than awarding costs based on the tariff and augmenting it with a lump sum.

[12] I am mindful that Ms. Gillan may not have the financial ability to pay a substantial costs order; nevertheless, I am satisfied that the defendant should not be denied its costs in the circumstances.

[13] Accordingly, the defendant shall have costs in the amount of \$5,500.00.

**J.**