Woodley v. Yellowknife Education District, 2000 NWTSC 7

Date: 2000 01 13
Docket: CV 08329

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DR. KENNETH WOODLEY

Applicant

-and-

YELLOWKNIFE EDUCATION DISTRICT NO. 1

Respondent

MEMORANDUM OF JUDGMENT

[1] This is my ruling on costs with respect to a judicial review application in which I issued the following judgments: *Woodley v. Yellowknife Education District No. 1*, 1999 NWTSC 1 and *Woodley v. Yellowknife Education District*, 1999 NWTSC 10.

[2] In the first judgment, I quashed the suspension imposed by the Respondent on the Applicant but did not quash the dismissal proceedings initiated against him. The second judgment contains my reasons for dismissing the Respondent's application to have the Applicant's counsel disqualified from acting because of a conflict of interest.

[3] The Applicant seeks solicitor and client costs or costs in a multiple of Column 2 of the tariff or fixed costs. He has provided information indicating that his solicitor and client costs amount to $38,637.86, inclusive of fees of $35,123.50. He has calculated the amount recoverable on a party and party scale in Column 2 as $2258.35.

[4] The Respondent's position is that solicitor and client costs are not justified and that any costs awarded should reflect the fact that success was divided.

[5] The general rule is that solicitor and client costs should not be awarded except in special circumstances which justify a departure from the usual award on a party and party scale. For example, it has been said that solicitor and client costs should be awarded only where there has been "reprehensible, scandalous or outrageous conduct on the part of one of the parties": *Young v. Young*, [1993] 4 S.C.R. 3. In *Stiles v. Workers' Compensation Board of British Columbia*, [1989] B.C.J. No. 1450, the British Columbia Court of Appeal said there must be "some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement".

[6] In this Court, de Weerdt J. held in *Meek v. Northwest Territories* (1992), 14 C.P.C. (3d) 360, that an award of solicitor and client costs should be made "only in rare and exceptional instances to mark the court's disapproval of the conduct of a party in litigation".

[7] Counsel for the Applicant did not dispute the general rule or the principles set out above. He argued, however, that there are special circumstances in this case which justify an award of solicitor and client costs.

[8] First, the Applicant submits that the Respondent was malicious in its handling of the suspension. It is submitted that this is evident from the lack of notice and the terms of the suspension, which provided that the Applicant was not allowed on the Respondent's property without permission and that the chairperson was authorized to arrange for removal of his computer access and to change the locks of the Respondent's office. These terms were released to the press, although the Respondent's initial press release did not refer to them. As I noted in my judgment, this would most certainly cast suspicion on the Applicant's integrity and trustworthiness.

[9] Although the terms of the suspension were quite severe, they and the lack of notice do not necessarily indicate malice. To find malice, I would have to find that the Respondent acted without any reason at all or with ill will or that it had some other improper motive.

[10] The problems which are said to have led to the suspension were disputed by the Applicant. Because the case was argued on affidavit evidence without cross-examination or viva voce evidence, I cannot draw conclusions about credibility or motives where those issues are contested. The Respondent's affidavits disclosed

various problems which caused the Respondent to think that a suspension was necessary in order to complete its performance appraisal of the Applicant. There is no basis upon which I can firmly conclude that it acted for other than the reasons given. That I found that notice of the intention to consider suspension should have been given does not mean that the Respondent acted maliciously in not giving notice.

[11] I find that there is no basis on which to say that the press release or information to the press was issued maliciously rather than simply without sufficient thought as to its consequences. While I think it could be said that the Respondent overreacted to the situation, both by imposing the terms it did and by publicizing them, that does not amount to malice. The fact that the Applicant was paid while on suspension suggests that the Respondent was not acting maliciously.

[12] The Applicant also relies on the Respondent's dealings with the Gullberg report. The Applicant alleged that prior to the suspension, the Respondent's Board had met with the Minister of Education, who had shown them a part of the Gullberg report, and in connection with it, had told the Board that the Applicant was a personnel problem and that they should do something about him. The Applicant, through his counsel, asked the Minister for a copy of the report. The response he got was that the report was confidential and would not be disclosed to him. Subsequent to that, the Minister decided that the report could be released but on certain conditions pertaining to confidentiality. However, prior to the Minister communicating that, and without any precautions as to confidentiality, the Chairperson of the Respondent's Board attached the relevant part of the report as an exhibit to his affidavit. The Respondent says that this led to the media questioning him about the contents of the report.

[13] It was the Applicant who raised the Gullberg report and suggested that it was one of the reasons why the Board suspended him. In the circumstances, I do not think it can be seriously disputed that the Gullberg report was properly disclosed by the Respondent in this action. Whether it should have been disclosed in a filed affidavit after the Minister had asserted confidentiality is a matter between the Respondent and the Minister. The Applicant could have, but did not, request an order that the report be sealed or otherwise kept confidential after it was filed. Nothing suggests to me that the report was disclosed in the affidavit out of malice or to draw media attention to the Applicant.

[14] The Applicant also complains that the Respondent disclosed in its affidavit material a "without prejudice" settlement offer it had made to him. The sequence of events is important here. It was the Applicant who first disclosed, as an exhibit to his affidavit, the without prejudice letter but with the reference to the offer edited out. That letter also set out the Respondent's intention to take dismissal proceedings, which appears to have been the point of putting the letter into evidence.

[15] Although the Applicant edited out the reference to the settlement offer, he did attach as a further exhibit to his affidavit his counsel's response to the without prejudice letter. His counsel's response contained comments on the suitability of the offer and what, in the Applicant's view, the Respondent was trying to do by making it. Why that should have been put before the Court is not clear. It appears that the Applicant was trying to cast doubt on the bona fides of the Respondent in making the offer. That being the case, I do not conclude that the Respondent subsequently disclosed the offer itself with an improper motive. My reading of the material indicates that it was disclosed to rebut the suggestion of a lack of bona fides in the Respondent's dealings with the Applicant.

[16] If necessary, I would find that both parties waived any privilege attached to the offer. In any event, the offer was not relevant to the issues in this case and the Applicant's objection to it simply highlight the problems that ensue when correspondence between counsel is attached to affidavits and becomes evidence. In my view, the fact that the Respondent disclosed the terms of the offer in these circumstances does not justify an award of solicitor and client costs.

[17] Another factor raised by the Applicant in support of solicitor and client costs is the Respondent's filing of several affidavits just prior to the date set for hearing of the judicial review application. The hearing date of August 31 had been set in the third week of July. Counsel for the Applicant received the further affidavits on August 20; he was to file his brief on August 23. As result of the further affidavits, he requested and was granted an adjournment. He says that there was increased cost to his client because he had to re-work his submissions. He also filed further affidavits on behalf of the Applicant.

[18] Counsel for the Respondent pointed out that correspondence was sent to counsel for the Applicant in mid-July, advising him that further affidavits would be filed. He also argued that the August 20 affidavits were filed within the time provided in the Rules of Court.

[19] The problem of affidavits being filed "late" is a recurring one. I recently commented on this in *MacNeil v. MacNeil*, 2000 NWTSC 6. I think that part of the problem may be that Rule 383, which sets out the time requirements for the filing and service of affidavits, is being read as if it applies after a special chambers date has been set. I would read Rule 383 as applying when an application is set for regular chambers, because it refers to the "return date" of the application. The intention of the rule appears to me to be that all affidavits are exchanged before the return date of the application. Obviously, in practice that does not often happen and frequently matters are adjourned on the return date so that the respondent can file its affidavit material.

[20] In my view, counsel should not even be setting a special chambers date until they are sure that all affidavit material has been filed. As I have just said, I think Rule 383 should be read as setting deadlines which are prior to the regular chambers date on which the application is first brought, subject to any adjournments which may be granted. Only after all the affidavits are filed should a special chambers date be sought. If counsel want to file further affidavits after that, they may wish to seek the direction of a Judge.

[21] On my reading of the Rules, therefore, the Respondent's August 20 affidavits were not filed in time. Considering, however, that both counsel sought the special chambers date even though the Respondent had indicated an intention to file further material, I do not view the late filing to be grounds for solicitor and client costs. Much of what was in the late filed material responded to allegations made by the Applicant which were not strictly relevant to the issues the Court had to decide since the real issue was the fairness of the procedure, not the substantive problems between the parties.

[22] The Applicant also relied on the fact that he is an individual who has to look to his own resources to fund this litigation, whereas the Respondent is a publicly funded body better able to bear the costs. That discrepancy is not, however, a ground upon which to order solicitor and client costs: *McLachlan v. Canadian Imperial Bank of Commerce* (1989), 57 D.L.R. (4th) 687 (B.C.C.A.).

[23] The Applicant also argued that the application to disqualify Mr. Marshall from acting was ill-considered and only pursued at the last minute. He pointed to the minutes of a meeting held by the Respondent's Board in late February 1999, in which it was stated that it "is understood and agreed that Mr. Marshall's responsibility was ... not to represent the Board in ... [the Sarkadi lawsuit], with

the public or its district members". The minutes came into the Applicant's possession after my decision on the judicial review application was released. The Applicant submits that the minutes contradict the assertion made in the Respondent's chairperson's affidavits that Mr. Marshall was retained in part to protect the interests of the Respondent.

[24] I agree that there is a contradiction between the minutes and the position put forward by the Respondent, although the view that Mr. Marshall was retained partly to protect the Respondent's interests may have come in part from a memorandum sent by the Applicant to the Respondent in November of 1998, in which he stated that the purpose of the Sarkadi lawsuit was to protect his name and that of the Respondent. Certainly, however, the minutes of the February meeting indicate to me that by that time, the Respondent was clear that Mr. Marshall was not acting for it.

[25] Counsel for the Respondent pointed out that the disqualification application was pursued only on the point as to whether Mr. Marshall had received confidential information at a certain meeting and only because the Applicant insisted that the Sarkadi litigation was relevant to the judicial review application. I found that the litigation was not relevant, except as part of the background of the dealings between the parties.

[26] I think it is fair to say that most of the emphasis in the Respondent's argument on the disqualification application was placed on the meeting and the issue of confidential information. However, much of the argument was about whether the Respondent thought that Mr. Marshall was acting in its interests and the focus was not entirely on the meeting.

[27] There is no evidence that the minutes were intentionally withheld from the Applicant. There was also no explanation from the Respondent as to why they surfaced so late.

[28] The minutes referred to simply reinforce the doubt, expressed in my judgment on the disqualification application, that the Respondent actually viewed Mr. Marshall as its counsel or thought he might have access to confidential information.

[29] In all the circumstances, and considering the positions taken by both parties on the application to disqualify Mr. Marshall, I am not convinced that the Respondent's handling of the disqualification application was such that an award of solicitor and

client costs should be made. But I do think that an award of increased costs is justified because of the doubt I have expressed as to whether the Respondent genuinely perceived there was a conflict. That doubt has arisen in part because the Respondent waited until the date of the hearing to bring the application, rather than bringing it on earlier.

[30] The final argument made by the Applicant in support of an award of solicitor and client costs was that the Respondent made inflammatory and baseless accusations that the Applicant and his counsel misused the Respondent's funds for legal work. I understand this to be a reference to the allegations in the Respondent's chairperson's affidavit that some billings rendered by Mr. Marshall to the Respondent were for services above and beyond the Sarkadi lawsuit, which the Respondent had agreed to fund. It was alleged that the billings were for general legal advice to the Applicant on various other matters. It was also stated that the Respondent had paid the questioned amounts after receiving the billings.

[31] These allegations were not relevant to the judicial review application. They were relevant only to the disqualification application. They appear to have been put forward in an attempt to establish that Mr. Marshall was giving general advice to the Applicant in his capacity as the Respondent's Superintendent and therefore was acting for the Respondent. I ruled that no conclusions could be drawn from the billings in question. While the references in the chairperson's affidavit could have been worded more carefully, I am not satisfied that their inclusion in the material before the Court was intended to be inflammatory or was meant as an accusation that the Applicant or his counsel had improperly used the Respondent's funds in the sense of acting dishonestly.

[32] For the reasons stated, I take the view that solicitor and client costs are not justified. I am not satisfied that anything done by the Respondent leading up to these proceedings or in the context of them amounts to misconduct for which the sanction of solicitor and client costs is necessary.

[33] In my judgment on the judicial review application, I noted that success was divided. I note as well that just as much time was spent by counsel in dealing with the dismissal proceedings as in dealing with the suspension. The Applicant now says that it was the suspension rather than the dismissal proceedings that was important to him and he argues that he did achieve a measure of success on the dismissal aspect because I gave some direction to the Respondent about taking care that the Applicant be advised of the case against him and allowed an

opportunity to respond. That direction was, however, given in the context of the Applicant's unsuccessful request that I order that the Respondent hold an oral hearing. I do not view the direction as detracting from the fact that the Respondent was successful in arguing that the dismissal proceedings should not be quashed.

[34] There were really three distinct aspects to this matter: the disqualification application, the application to quash the suspension and the application to quash the dismissal proceedings. The Applicant was successful in two out of the three and should therefore recover two thirds of his total party and party costs. There will, however, be an increase in that amount for the reasons I have referred to in connection with the disqualification application.

[35] In all the circumstances, I fix costs payable to the Applicant in the amount of $5000.00, inclusive of disbursements.

V. A. Schuler
J.S.C.

Dated at Yellowknife, NT this
13th day of January, 2000

Counsel for the Applicant: Austin F. Marshall
Counsel for the Respondent: Adrian C. Wright