Woodley v. Yellowknife Education District No. 1, 2002 NWTSC 20

Date: 20020312
Docket: S-OOO1-CV2000008823

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DR. KENNETH F. WOODLEY

Plaintiff

- and -

YELLOWKNIFE EDUCATION DISTRICT NO. 1, DAN SCHOFIELD, MARK LOAN, JUDITH KNAPP, GRANT RICE, THE COMMISSIONER OF THE NORTHWEST TERRITORIES, MICHAEL MILTENBERGER, in his capacity as a former Minister of Education, Culture and Employment, SHANNON GULLBERG, JOHN DOE and JANE DOE

Defendants

MEMORANDUM OF JUDGMENT

[1] Three applications were brought before me in this matter:

(i) an application by the Defendants for security for costs;

(ii) an application by the Plaintiff for a stay of execution of costs orders previously made against him in a related action;

(iii) an application by the Plaintiff for the appointment of a case management judge.

[2] The Plaintiff was employed as the Superintendent of Education of the Defendant Yellowknife Education District No. 1 (the "District"). He was suspended and dismissal proceedings were commenced by the District. The Plaintiff initially brought an application for judicial review (CV 08329) which was successful in having the suspension quashed but unsuccessful in having the dismissal proceedings quashed. As a result of that application, in January 2000, he was awarded costs against the District in the amount of $5,000.00, inclusive of disbursements. After the District dismissed him, he again applied

for judicial review (CV 08514), but was unsuccessful. As a result, in September 2000, the District was awarded costs against the Plaintiff in the amount of $4,000.00, inclusive of disbursements.

[3] The Plaintiff appealed the refusal to quash his dismissal. He was unsuccessful in the Court of Appeal and the Supreme Court of Canada refused him leave to appeal further. Costs were awarded against him in both those Courts. Counsel advised that the Plaintiff has paid most of the costs ordered in the Supreme Court of Canada. The Court of Appeal costs remain unpaid. He has not paid the costs ordered by this Court, although the District has paid him the costs it was ordered to pay. The total costs the Plaintiff was ordered to pay are approximately $10,000.00, of which about $1,000.00 has been paid towards the costs in the Supreme Court of Canada.

[4] In this action the Plaintiff sues the District for damages for wrongful dismissal, now challenging the merits of the dismissal in addition to the process that led to it. He sues the Defendants Schofield, Loan, Knapp and Rice (with the District, collectively referred to as the "District Defendants") for what I will describe for the purposes of this decision as conspiracy and intentional interference with contractual relations. He also sues the Commissioner of the Northwest Territories and the Defendants Miltenberger and Gullberg (collectively referred to as the "Government Defendants") for conspiracy and intentional interference with contractual relations.

The application for security for costs

[5] The District Defendants and the Government Defendants claim security for costs pursuant to Rule 633(1)(c), which provides:

> 633. (1) The Court, on the application of a defendant in a proceeding, may make such order for security for costs as it considers just where it appears that
>
> (c) the plaintiff has failed to pay costs as ordered in the same or another proceeding.

[6] The only costs that it is alleged the Plaintiff has failed to pay are those ordered in the earlier proceedings.

[7] Even if it is found that the Plaintiff has failed to pay costs (and he disputes that he has "failed" to do so), it is clear that Rule 633(1) is discretionary. If the circumstances come within any of subparagraphs (a) to (f) of the rule, the Court may, but is not obliged to, make the order sought. The order is not automatic when the prerequisites are met: *Al's Truck Stop Ltd. v. Carter Industries Ltd.*, [1998] N.W.T.J. No. 167 (S.C.).

[8] The Plaintiff resists an order for security for costs. He says that he has not failed to pay the costs he was ordered to, rather, he has chosen not to pay them at this time. He anticipates that he will be successful in this lawsuit and that even if he does not actually recover the costs he was ordered to pay in the earlier proceedings as part of the damages claimed in this case, he will at least recover sufficient damages to permit him to pay those costs. He says that he does not have means readily available to post security for costs. The information he provided in his affidavit is that he was out of work for eighteen months prior to obtaining new employment in April 2001. His salary is 35 per cent lower than what he earned when employed by the District, which puts it in the range of $66,000.00 per year. He asserts that the litigation has used up all the savings he and his wife have accumulated over the years and that they have drawn on pension plans and all credit resources available. Their one significant asset at this time is their house, which is jointly owned and mortgaged. There is equity in it of approximately $60,000.00, to which they are jointly entitled. In his affidavit the Plaintiff states that if he has to put up security for costs, he will be unable to continue.

[9] As to the merits of the case, all parties very fairly conceded that they cannot be assessed on this application. It will suffice to say that there are issues to be tried and that credibility is involved and it is not possible at this stage to say where the merits lie.

[10] In support of his submission that he has not "failed" to pay costs, the Plaintiff submitted an undated excerpt from *The New Shorter Oxford English Dictionary on Historical Principles*, Clarendon Press, Oxford, which does not include in the definition of "fail" any reference to choice. However, *The Concise Oxford Dictionary of Current English*, Clarendon Press, Oxford, 1995, includes as a meaning of "fail" the phrase "choose not to". By his own admission, the Plaintiff has chosen not to pay the costs at this time; he wishes to pay them at a time of his choosing. In my view, he has to date failed to pay the costs ordered in the other proceedings.

[11] There was some discussion when counsel appeared on this application as to whether the Plaintiff is claiming impecuniousness as a ground to resist an order for security for costs, as was the case in *Mortimer v. Inuvialuit Regional Corporation*, [1987] N.W.T.R. 228 (S.C.). I do not understand the Plaintiff to claim impecuniousness. Even if he attempted to do so, the evidence in his affidavit shows that he has employment, a decent income and some equity in his home. I find, based on the evidence, that he is not impecunious.

[12] Counsel referred to a number of cases about security for costs, some from other jurisdictions with rules that are somewhat different from our Rules of Court. I have reviewed them all but will refer to only a few.

[13] One of the cases relied on by the Plaintiff, *Wilson v. Seaman's Beverages Ltd.* (1983), 42 Nfld. & P.E.I.R. 1 (P.E.I.S.C.), dealt with a rule which provided that the Court may order security for costs to be given where "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". McQuaid J. held that the intent of the rule is "to discourage that type of plaintiff who persistently brings frivolous, vexatious or nuisance actions, unsuccessfully, which actions are consistently dismissed with costs, and who fails to pay those costs".

[14] *Wilson*is not, of course, binding on this Court. With respect, I question whether that is the intent of the P.E.I. rule in that it, like our Rule 633(1)(c), by its wording can include a situation where the plaintiff has only one costs order against him. So although the type of plaintiff described by McQuaid J. would most certainly come within the rule, I do not accept the proposition that Rule 633(1)(c) is intended to be restricted to such plaintiffs. In my view the rule also reflects the general principle that a party who is ordered to pay costs by the Court should comply with that obligation before seeking further relief from the Court. Having said that, whether a plaintiff has a track record of not paying costs or whether the failure to pay costs is an isolated or infrequent event is relevant in my view to a proper exercise of the Court's discretion.

[15] Many of the cases say that once it is shown that a plaintiff falls within the circumstances contemplated by the rule, the Court should exercise its discretion by considering what is just: *Al's Truck Stop Ltd., supra*. Having found that the Plaintiff has failed to pay costs, I think the following factors are relevant to what is just.

[16] The costs the Plaintiff has failed to pay are costs resulting from his having pursued the earlier actions through all levels of appeal; this is not a situation where the orders making those costs payable may yet be reversed.

[17] The Plaintiff is not impecunious. Based on the evidence in his affidavit, I do not accept that he is unable to comply with an order for security for costs, or that such an order would necessarily prevent him from continuing, although it may require that he liquidate or encumber his one major asset.

[18] In my view the Plaintiff is not entirely correct when he says that his financial problems have been caused by the Defendants because they dismissed him or were involved in that decision. With regard to the Government Defendants, they deny any involvement in, or conspiracy to effect, his dismissal. With regard to the District Defendants, they either deny involvement in, or conspiracy to effect, his dismissal or say that his dismissal was with cause. Had the Plaintiff chosen to proceed only by way of a wrongful dismissal action, his position might be comparable to that of the plaintiff in

Mortimer, where the Court accepted that the plaintiff's inability to put up security was caused by the defendant employer's actions, be they justifiable or not. But here the Plaintiff chose to launch more than one lawsuit to deal with his dismissal. He chose first to go by way of judicial review and when that was not successful to pursue all appeal options. He was, of course, entitled to proceed in that manner, but having made those choices, at least some of the financial consequences must be laid at his door.

[19] I also consider that there is no basis on which to find that the Plaintiff will be unable to pay any future costs award.

[20] This lawsuit is at an early stage. I was advised by counsel at the hearing of this application that although statements as to documents have been filed, documents have not yet been exchanged and examinations for discovery have not yet been scheduled. This is not a case where if I make an order for security for costs and the Plaintiff does not comply with it, he will have lost a great deal of time and money invested in this court action.

[21] Although it cannot be said at this stage which party has the stronger case, I think it is clear both from the submissions made to me on this application and from what was presented to me in the earlier proceedings in this Court, in which I was the Chambers Judge, that this action will be lengthy, complicated and hard fought.

[22] I also take into account that the District has paid the costs it was ordered to pay to the Plaintiff, in effect reducing his costs burden by a significant amount.

[23] Finally, clearly the Plaintiff is not a "straw claimant", a concern expressed in some of the cases, for example, *John Wink Ltd. v. Sico Inc.*, [1987] O.J. No. 5 (Ont. H.C.J.).

[24] I also take into consideration the principle expressed by Reid J. in *John Wink Ltd.* as follows:

> There can be no question that an injustice would result if a meritorious claim were prevented from reaching trial because of the poverty of a plaintiff. If the consequence of an order for costs would be to destroy such a claim no order should be made. Injustice would be even more manifest if the impoverishment of plaintiff were caused by the very acts of which plaintiff complains in the action.

[25] The Plaintiff in this case does not fit squarely within the above paragraph because his is not a claim of poverty. Nor are his financial circumstances difficult to the degree of the plaintiffs in *Nuna Investment Corp. v. Shell Canada Products Ltd.*, [1998] N.W.T.R. 53 (S.C.). I would characterize his position this way: he does not want to pay

the costs owing at this time and if he has to pay those costs or put up security for costs he will have to make financial arrangements he would prefer not to make.

[26] Having considered all of the above I conclude that it is appropriate to order security for costs in this case. In the particular circumstances of this case, I am going to make an order that is somewhat out of the ordinary. This requires that I deal first with the Plaintiff's application for a stay of execution of the earlier costs orders.

Application for a Stay of Execution

[27] The Plaintiff asks me to stay execution of the costs orders against him from the earlier proceedings until such time as this action is finalized.

[28] I take the view that I have no jurisdiction as a Supreme Court Judge to stay the execution of a costs order made by the Court of Appeal or the Supreme Court of Canada. The Plaintiff eventually conceded this in argument.

[29] As to the costs ordered by this Court, the Plaintiff's application should have been brought in the action in which those costs were ordered, not in this action.

[30] Notwithstanding that problem, I will go on to consider the merits of the application. The cases referred to by the Plaintiff deal largely with stays pending appeal and I think must be distinguished on that basis.

[31] At this stage, it cannot be said when the trial of this action might take place. It could be a couple or even a few years away. Whether the Plaintiff will be successful at trial is not certain. Whatever the result, there could be an appeal, which would prolong matters. The Plaintiff chose, as I have pointed out above, to bring and to appeal the judicial review proceedings, knowing that he might be liable for costs in so doing. The Plaintiff is employed at a reasonable salary and has an asset with equity in it. He has also had the benefit of the costs paid to him by the District. For the reasons set out above dealing with security for costs, I find that the Plaintiff is able to pay the costs he was ordered to pay. I have considerable doubt whether even an inability to pay would justify a court staying an order for costs in one action so that a plaintiff could proceed with another action.

[32] In addition, the District having complied with its obligation to pay costs, I see no reason why it should now have to wait out the wrongful dismissal action before collecting its costs.

[33] This situation is similar to that in *Canadian Express Ltd. v. Blair et al.*, [1992] O.J. No. 2029 (Gen. Div.), a case not cited by counsel. A defendant was ordered to pay costs in one action. He had a claim in a separate libel action against the party to whom the costs were owed. Both actions arose out of the same meeting attended by the parties. The defendant applied for a stay of execution of the costs order and argued in part that he had what amounted to a counter-claim by way of the libel action or would have a set-off at the end of the libel action. Montgomery J. rejected these arguments and in doing so stated of the counter-claim argument: "This argument is contrary to the general concept that a cost order must be paid before that party can proceed further before the court. Surely a party subject to a cost order cannot avoid that order by bringing another action".

[34] All considered, and even apart from the fact that this application should have been brought in the action in which the costs were ordered, I am not persuaded that I should make the order sought. Accordingly, the Plaintiff's application for a stay of execution of the costs orders is dismissed.

Terms of the Order

[35] In all the circumstances, I have decided to make an order that will give the Plaintiff the option of paying the costs previously ordered without having to put up anything more by way of security for costs. The terms of the order I make are as follows:

> 1. Subject to paragraph 4 below, the Plaintiff will deposit cash or a bank letter of credit with the Clerk of the Court in the amount of $10,000.00 within 75 days of the date this Memorandum of Judgment is filed. That amount will be considered as $5,000.00 security for the District Defendants' costs and $5,000.00 security for the Government Defendants' costs to completion of the examinations for discovery.
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> 2. This action is stayed until the above-mentioned security is given.
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> 3. In the event of failure to give the above-mentioned security, this action shall stand dismissed with costs against the Plaintiff, without further order, unless the Court on special application otherwise directs.
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> 4. In lieu of giving the above-mentioned security, the Plaintiff may, within 75 days of the date this Memorandum of Judgment is filed, pay in full the costs ordered against him in this Court, the Court of Appeal and the Supreme Court of Canada. Confirmation in writing from counsel for Yellowknife Education District No. 1 that those costs have been paid in full will be satisfactory proof of such

payment. Such payment, if and when made, will be deemed to discharge the Plaintiff's obligation to deposit the security for costs referred to in paragraph 1 above.

[36] In making this order, I recognize that the order for security for costs is in favour of all the Defendants, whereas in allowing the Plaintiff to pay the costs already owing it might be said that only the District Defendants benefit. However, in the circumstances I think the order as made is appropriate.

Case Management

[37] The Plaintiff says that case management is appropriate because a motion made by the Defendants to strike parts of the statement of claim is still outstanding; there may yet be other motions and applications; there are several Defendants to be discovered, one of whom is outside the jurisdiction; the parties may need a schedule for the exchange of documents and for examinations for discovery.

[38] The Defendants oppose the application for case management, pointing out that the matters referred to by the Plaintiff can all be dealt with by recourse to the Rules of Court.

[39] I agree with the Defendants that case management is not warranted at this time. The Plaintiff has not put forward any reason why the three counsel involved in this case cannot deal with scheduling and the exchange of documents without the assistance of a case management judge. The fact that one of the parties is outside the jurisdiction is not unusual. Issues that may arise from the discoveries can be dealt with by application under the Rules of Court in the usual way.

[40] The application for the appointment of a case management judge is therefore dismissed.

Costs of these Applications

[41] The costs of and incidental to all three applications shall be costs in the cause.

Dated this 12th day of March, 2002.

V.A. Schuler

J.S.C.

Counsel for the Plaintiff: Austin Marshall

Counsel for the Defendants, Yellowknife Education District No. 1, Dan Schofield, Mark Loan, Judith Knapp, Grant Rice: Adrian C. Wright

Counsel for the Defendants, Commissioner of the Northwest Territories, Michael Miltenberger and Shannon Gullberg: Sheldon Toner

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Defendants

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE V.A. SCHULER
