Date: 2007 06 28
Docket: S-0001 CV 2004000074

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JONATHAN D. GOODZECK

Plaintiff

- and -

BASSETT PETROLEUM DISTRIBUTORS LTD., BASSETT AVIATION FUEL SERVICES LTD., 943622 NWT LTD., 4930 N.W.T. LTD., AND 4931 N.W.T. LTD.

Defendants

MEMORANDUM OF JUDGMENT AS TO COSTS

A) INTRODUCTION

[1] This is an action in damages for breach of contract and unlawful dismissal. The trial proceeded in Yellowknife from September 18 to 22, 2006. Reasons for Judgment were filed on December 15, 2006 and are reported at 2006 NWTSC 71. In those Reasons , I gave the parties an opportunity to make submissions as to costs if they wished. The parties attempted to reach agreement on costs and other outstanding issues, but those attempts failed. In April 2007 counsel wrote to the Court to seek an opportunity to make submissions as to costs. They agreed to presentthose submissions in writing and have now done so. The Defendants are not contesting the Plaintiff's entitlement to some costs, but take issue with certain aspects of the claim and with some of the specific amounts sought.

B) COSTS ISSUES

[2] Rule 641 of the *Rules of the Supreme Court of the Northwest Territories* (" the *Rules of Court*") is a useful starting-point in examining the variousclaims made by the Plaintiff. It reads as follows:

> 641. In this Part, "costs" include all reasonable and proper expenses that a party has paid or become liable to pay for the purpose of carrying out or appearing as party to any proceeding, including
>
> (i) the charges of a solicitor,

> (ii) the charges of an accountant, an engineer, a medical practitioner or any other expert for attendance to give evidence and, where the Court so directs, the charges of such an expert for an investigation and inquiry or assisting in the conduct of the trial,
> (iii) the charges of a legal agent,
> (iv) the expenses for the preparation of a plan, model, or copy of a document
> (v) the fees payable to the Clerk, the Sheriff, a court reporter, or an interpreter, and
> (vi) witness fees and conduct money for a witness in respect of the attentions of the witness at trial and on any examination.

[3] The areas of contention between the parties are the amount of expert costs the Plaintiff is entitled to, whether the Plaintiff is entitled to solicitor costs higher than those provided for in Schedule "A" of the *Rules of Court*, whether he can claim travel and other expenses incurred as a result of his counsel not being a resident of the Northwest Territories, and the extent to which he can be reimbursed for other expenses he engaged in the course of this litigation.

1. Disbursements for Experts

a) Leonard Boone

[4] The Plaintiff claims $47,956.22 for costs incurred to retain the services of Leonard Boone. Mr. Boone is a forensic accountant who testified as part of the Plaintiff's case.

[5] The Defendants do not take issue with the Plaintiff'sdecision to retain an expert for this case, but argue that the amount claimed is excessive. The Defendants say that their expert, Ronald Galagan, had to do the bulk of the detailed work and charged a total of $47,930.41 for his services. The Defendants also argue that Mr. Boone did not provide any evidence about what the term "net profit" is generally understood to mean in the accounting industry and that his evidence was not of assistance to the Court in the determination of the issue. Given this, the Defendantssay that the Plaintiff'sexpert costs should be taxed down.

[6] The issue is whether the amount claimed by the Plaintiff constitutes"proper and reasonable expenses" within the meaning of Rule 641. The questionis not whetherthe expert's testimony was determinative in the case, but rather, whether the expense was reasonable and proper in light of the circumstances which existed at the time it was incurred. The matter must be viewed through the eyes of the party who retained the

expert in light of the problem facing it when the expenditure was made. *Petrogas Processing Ltd* v. *Westcoast Transmission CompanyLimited* 73 Alta. L.A. (2d) 246, at p.259.

[7] There is nothing before me that establishes that Mr. Galagan had to do more work than Mr. Boone in preparing for this case. In some cases, the person preparing a rebuttal report may have less work than the person preparing the initial report, but that is not necessarily true in all cases. The evidence adduced by the parties does not show a demonstrable difference in the amount of work that Mr. Galagan and Mr. Boone had to do in preparation for this trial.

[8] I also cannot agree with the suggestion that Mr. Boone's testimony was not of assistance in deciding this case. Mr. Boone's testimony confirmed that the manner in which the Plaintiff calculated his bonus every year was consistent with the Plaintiff's testimony about what he understood the terms of his employment to be. Mr. Boone confirmed that everything the Plaintiff did in the calculation of these amounts was recorded in the companies' financial records and that it was done in a consistent way during the whole period of his employment with the Defendants. It lend credence to the suggestion that the Plaintiff was acting in good faith throughout and was not attempting to hide his method of bonus calculation. This evidence was significant in assessing the Plaintiff's credibility about what he believed the agreement to be. It was an important factor in my finding that the parties had not reached a true agreement about the method for calculating the Plaintiff's yearly bonus which, in turn, had an impact on the ultimate disposition of the case.

[9] Each party retained a forensic accountant to assist in this case and it appearsthis cost them roughly the same amount of money. It makes sense that individuals with comparable expertise, asked to prepare reports and testify in the same case, would charge roughly the same to their respective clients. I see no reason to tax down the Plaintiff's expert costs inasmuch as they relate to Mr. Boone.

b) Watkinson Hanhart

[10] The Plaintiff seeks to recover costs incurred from retaining the firm of Watkinson Hanhart. This accounting firm was retained by the Plaintiff to do some preliminary calculations after his employment was terminated. No one from that firm was called at the trial. There is no indication in Mr. Boone's reports that he made any use of work performed by Watkinson Hanhart. In my view those expenses do not fall within the purview of Rule 641 and the Plaintiff cannot claim them as costs.

2. Solicitor costs

[11] Rule 648(1) of the *Rules of Court* stipulates that unless otherwise ordered, the costs of a solicitor shall not exceed the amounts set out in Schedule “A”. The Plaintiff has calculated his recoverable costs pursuant to the Schedule and the Defendants do not take issue with those calculations.

[12] The Plaintiff says that he should be awarded costs at a higher scale than the usual Tariff in the circumstances of this case. He seeks an award of $48,715.15 for solicitor costs, which he says corresponds to half of his actual solicitor costs. The Plaintiff bases this request on the complexity of the case and on certain allegations made by the Defendants in their pleadings that remained unproven at trial.

[13] I am not persuaded that this case was of a degree of complexity that justifies a departure from the usual Tariff. The case referred to by the Plaintiff in support of his submission was a multi-party case that required 145 days of evidence. The present case, although it had its complexities, simply does not fall in the same category.

[14] The Plaintiff’s submission linked to the allegations made in the Defendants’ pleadings is more compelling. The Defendants filed their Statement of Defence on April 2, 2004. They filed an Amended Statement of Defence on October 21, 2004. One of the new Paragraphs in the Amended Statement of Defence reads as follows:

> 9. Since the Plaintiff has left the employ of the Defendant, BPD, the Defendant has discovered that it had just cause for the dismissal of the Plaintiff. The Plaintiff’s actions, or omissions give rise to cause for his termination, albeit after-acquired cause. These actions, or omissions thereof, were clearly within the scope of the Plaintiff’s position. The actions giving rise to just cause are as follows:
>
> > (a) The Plaintiff failed to file Income Tax returns for the Defendants. This breach of his employment contract resulted in the Defendants having to pay penalties to Canadian Customs and Revenue Agency, the amount of which will be proven at trial;
> > (b) the Plaintiff failed to cash a number of cheques made payable to the Defendants. After the Plaintiff’s departure, the Defendants found a duffle bag containing unopened mail and cheques under the desk of the Plaintiff;
> > (c) the Plaintiff failed to get insurance for some of the Defendant’s trucks, and in some instances falsified insurance documents;
> > (d) the Plaintiff was verbally abusive to staff;
> > (e) the Plaintiff physically assaulted at least one staff member;

> (f) After the Plaintiff departed, there were financial files missing or destroyed, or both; and
> (g) After the Plaintiff returned the personal computer, which he used to finish the financial statements, the passwords had been altered, thereby preventing access by the Defendants to their own records.

[15] The Defendants filed their Trial Brief on September 7, 2006. Paragraph 49 of the Brief states:

> Termination
>
> In order to determine whether a termination of employment was with cause, the Court is entitled to review evidence which came to the parties [sic] attention following the termination, as well as events leading up to the termination.

[16] The Defendants filed an Amended Amended Statement of Defence on the opening day of the trial, September 18, 2006. One of the amendmentswas the addition of a further alleged cause for dismissal in Paragraph 9. The addition reads as follows:

> The Plaintiff failed to prepare financial statements for the Defendants on a timely basis resulting in the inability to file corporate tax returns on a timely basis, and the need to estimate the financial position of the Defendants for business purposes.

[17] At the trial, there was limited evidenceadduced by the Defendantsto support the assertion that the Plaintiff's employment was terminated for cause. There was evidence about the fact that financial statements of the companieswere not preparedin a timely fashion but viewed in the context of the evidence as a whole, it did not amount to evidence of cause for termination. The evidence was that the Plaintiff was not responsible for the preparation of income tax returns for the Defendants. There was no evidence that he failed to cash cheques, or that a large quantity of unopened mail was found under his desk after his departure. There was no evidence of failure on his part to get insurance for vehicles, and no evidence that he falsified any insurance documents. There was no evidence that he verbally abused the staff or physically assaulted anyone. There was no evidence of any financial files going missing or being destroyed. There was no evidence about passwords being altered on computers, nor any other evidence suggesting that the Plaintiff did anything that prevented the Defendants from accessing their own records.

[18] In submissions at the conclusion of the trial, the Defendants did not pursue the argument that the Plaintiff's termination was for cause. That was a realistic approach in light of the evidence, which showed that there were personality clashes and increasing tension between Mr. Bassett and the Plaintiff, which ultimately led to a complete breakdown of their working relationship and was the reason Mr. Bassett decided to fire him.

[19] The Plaintiff argues that he had to expend valuabletime and resourcesto prepare to defend the allegations in the Defendants' pleadings. He also argues that these allegations were very damaging to his reputation, particularly having regard to the close-knit nature of the accounting industry in the Northwest Territories.

[20] Solicitor-client costs should not be awarded exceptin specialcircumstances that justify a departure from the usual award on a party and party scale. It has been said that such costs should be awarded in rare and exceptional circumstances to mark the court's disapproval of the conduct of a party in litigation. *Meek* v. *Northwest Territories* (1992) C.P.C. (3d) 360; *Woodley* v. *Yellowknife Education District No.1* [2000] N.W.T.J. No.8.

[21] Here, the Plaintiff does not seek his full solicitor costs. What he is really doing is seeking an order for costs on an elevated scale. Unlike a claim for aggravated damages, a claim for costs calculated on an elevated scale does not require that actual prejudice be established. The focus is the conduct of the party.

[22] Litigation is a dynamic process. Unforeseen things sometimes arise during a trial that cause a party to adjust its position on some of the issues. However, the scope of the case presented by the Defendants at trial varied significantly from their pleadings in some important respects. The Trial Brief suggested that the Defendants would argue that the termination was for cause. The Amended Amended Statementof Defence filed on the first day of trial maintained that the Plaintiff had been dismissed for cause. It not only maintained allegations put forward in earlierpleadings but added to the alleged causes for dismissal. There is nothing before me that sheds any light on what prompted the change of position that occurred at trial.

[23] Obviously, it was the Defendants' prerogative to modify their position and abandon some lines of defence if they wished. However,the allegationsput forward in their pleadings were serious. They were allegations of gross incompetence, verbal and physical violence, and various fraudulent activities. They called into serious question the Plaintiff's personal and professional integrity, and went far beyond a disputeabout

the terms of the contract or issues about the Plaintiff's performance or even his general competence. These kinds of allegations are always serious, but they can be especially damaging when they are made about someone whose profession entails a high degree of trust. The fact that they were not pursued at trial by way of evidence or submissions does not completely remove their potential harm.

[24] Although my assessment was that the trial evidence fell short of establishingthe Plaintiff's entitlement to aggravated damages, I am satisfied that the allegations in the pleadings warrant a departure from the usual rules governing the calculation of solicitor costs. I find that the Plaintiff should be awarded costs on an elevated basis, corresponding to double the party and party costs under the Tariff.

3. Disbursements arising from counsel not being a resident of the Northwest Territories

[25] The Plaintiff seeks to be reimbursed for costs arising from the fact that he retained counsel resident outside the Northwest Territories. Rule 684(4) of the *Rules of Court* governs this request:

> 684. (...)
> (4) The proper travelling and living expenses of a solicitor who does not reside in the Territories are recoverable (...) only where, in the opinion of the Court,
>
> (a) the expertise required to perform the particular service was not available from those solicitors resident in the Northwest Territories; or
> (b) conflicts of interest prevented solicitors resident in the Northwest Territories from acting in the matter.

[26] The Plaintiff argues that he could not retain counsel in Hay River because they either lacked the experience in employment law or were acting for the Defendants in some capacity. He argues he could not retain counsel based in Yellowknife because there would have likely been conflict of interest issues stemmingfrom the Defendants' business involvement and personal contacts in that City.

[27] I accept that it was not possible for the Plaintiff to retain counsel residentin Hay River. However, there is no basis for me to find that conflicts of interest would have prevented Yellowknife based counsel to take on this case. There is no indication that the Plaintiff made any attempt to retain Yellowknife counsel. There are, after all, a number of law firms in Yellowknife. I do not think I can or should presume that all

resident counsel would have necessarily had conflicts of interest simply because the Defendants' had business activities in the City.

[28] A party is free to choose to retain any lawyer he or she wants, but is not necessarily entitled to have the other party cover the costs arising from that choice. *Seeton* v. *Commercial Union Assurance Co. Of Canada* [1999] N.W.T.J. No.75, at paras 5-7; *Peterkin* v. *Union of Northern Workers* [2006] N.W.T.R. No.73, at para.20.

[29] Under the circumstances I find that the Plaintiff is not entitled to recover disbursements arising from his choice to retain counsel from outside the Northwest Territories. This means he is not entitled to recover travel and living expenses arising from his counsel's travels to Yellowknife for the trial. In my view, he is also not entitled to claim expenses incurred by his counsel to obtain a restricted appearance certificate from the Law Society of the Northwest Territories.

4. Plaintiff's personal expenses

[30] The Plaintiff seeks to be reimbursed for other expenses he incurred to pursue his claim. Those expenses are referred to at Paragraph 6 of the Affidavit of Disbursements sworn May 25, 2007:

> 6. Additionally, Mr. Goodzeck has provided to our office a breakdown of his out-of-pocket expenses detailing the costs that he has incurred, amounting to $18,615.07. Attached hereto and marked as Exhibit "MM" to this my Affidavit is a copy of the Trial Cost Summary breakdown provided by Mr. Goodzeck.

[31] I am not clear as to how Exhibit "MM" is thought to support the claim for $18,615.07. The first page of the Exhibit lists expenses grouped under a number of headings, several of which are addressed elsewhere in the Affidavit of Disbursements. Some discrepancies are of concern: for example, the total listed for legal fees is $104,830.88, whereas the Plaintiff's written submissions allege a total of $97,430.29 in legal fees.

[32] In addition, amounts are listed under the heading of "Reimbursable expenses" for the years 2002 and 2003, without any explanation of what the expenses were. The heading entitled "Out-of-pocket client costs" shows three amounts that are marked with a handwritten asterisk. Those amounts do not add up to the $18,615.07 claimed. The other two pages of the Exhibit show hotel and meal travel expenses which appear

to correspond to one of the three amounts listed as "Out-of-pocket" expenses on the previous page, and include a number of amounts described as "per diem rates".

[33] On the whole, I find that Exhibit "MM" is unclear and of minimal assistance. I would not be prepared to make any order on the basis of that document.

[34] In any event, I question whether a party is entitled to recover personal expenses as part of a costs claim. Costs in civil proceedings are generally intended to provide partial indemnification to the successful party. They are not a means whereby a party can expect to be reimbursed for every single expense incurred in conjunction with the litigation.

[35] The only costs listed in Exhibit "MM" that are recoverable, assuming they are not already included in the calculations for the expert costs or other disbursements, are the costs stemming from Mr. Boone's attendance at the trial in Yellowknife. These costs are recoverable pursuant to Rule 641(vi), referred to at Paragraph 2, *supra*. Therefore, the Plaintiff is entitled to recover the costs of Mr. Boone's airfare and accommodations.

C) NON-COST ISSUES

[36] A number of matters raised in the written submissions are not cost issues. I will address them briefly.

1. Reimbursable Expenses ($12,175.52.00) allegedly incurred by Plaintiff during his employment with the Defendants

[37] This is not a costs issue. It was something that was advanced as part of the Plaintiff's claim at trial. The Reasons for Judgment were filed several months ago. It would be inappropriate for me, at this stage, to re-open any aspect of the claim that formed part of the suit, or to provide additional Reasons for Judgment for having granted or denied certain aspects of the claim. The Plaintiff has recourses if he takes issue with the treatment of any aspect of his claim. Re-arguing a portion of that claim as part of his submissions on costs is not one of them.

2. Pre-judgment interest

[38] In my Reasons for Judgment filed December 15, 2006, I dealt with the question of pre-judgment interests at Paragraph 74:

> The Plaintiff will be entitled to pre-judgment interest on [the amount of the Judgment], in accordance with the terms of the *Judicature Act.* If counsel cannot agree on the calculations, they can bring the matter back before me to make submissions on that issue.

[39] Neither party has asked to have the matter brought back before me to make submissions on the calculation of pre-judgment interest. It appears from the written submissions filed by the parties that the Plaintiff has calculated the amount of pre-judgment interest and that the Defendants do not take issue with those calculations. That being the case, there is nothing for me to decide on that issue.

3. Post-judgment interest

[40] Post-judgment interest arises as a matter of law, pursuant to sections 56.1 and 56.2 of the *Judicature Act*, R.S.N.W.T. 1988, c.J-1 . :

> 56.1 (1) An unsatisfied judgment bears interest from the later of the day the judgment is pronounced and the day money is payable under the judgment, notwithstanding that the entry of the judgment has been postponed by an appeal or another proceeding.
>
> (2) The rate of interest payable under subsection (1) is calculated as follows:
>
> (a) for the first six months of a year, the rate of interest is the prime business rate as at January 1 of that year
> (b) for the last six months of a year, the rate of interest is the prime business as at July 1 of that year.
>
> 56.2 Where a judge considers it to be just to do so in all the circumstances, he or she may, in respect of the whole or any part of the amount for which judgment is given,
> (a) disallow interest under section 56 or 56.1;
> (b) fix a rate of interest higher or lower than the prime business rate; or
> (c) fix a day other than the day determined under subsection 56(1) or 56.1(1) from which interest is to run.

[41] Post-judgment interest is an issue distinctfrom costs issues,but as the partiesare not in agreement about how it should be dealt with, and both have presented submissions on this topic, I will deal with it now to avoid further delays.

[42] Over six months have passed since the Reasons for Judgment have been filed. The parties blame each other for the delays in arriving at a settlementon issues of costs and pre-judgment interest. The Defendants argue that they should have to pay no

more than a nominal amount of post-judgment interest because they have taken all reasonable steps to obtain information from the Plaintiffsto determinethe total amount due under the Judgment. The Plaintiff argues, on the contrary, that the Defendantsare responsible for the delays.

[43] I do not have the benefit of the details of the correspondence and conversations between counsel from December 2006 to April 2007. Based on the submissions filed, I suspect that matters may have been delayed because of a difference in approach. The Plaintiff appears to have been focused on attempting to resolve the costs issues, whereas the Defendants wanted to have the Plaintiff's calculations as to pre-judgment interest so as to know their obligations under the Judgment, quite apart from costs. It appears the various issues became intertwined and the disagreement on the questionof costs prevented the global resolution the Plaintiff was attempting to obtain.

[44] Post-judgment interest is not dependent on the attribution of "fault" on either side. The starting point is that a judgment bears interest from the day it is pronounced, notwithstanding that entry of the judgment may be postponed. There is discretion to depart from this "where a judge considers it to be just in all the circumstances". I do not find there to be any reason to vary the Plaintiff's general entitlement to post-judgment interest as provided in section 56.1 of the *Judicature Act.*

D) CONCLUSION

[45] In summary, with respect to costs, I find the Plaintiff is entitled to solicitorcosts corresponding to double the regular Tariff. I also find he is entitled to recover the disbursements arising from retaining Mr. Boone as an expert, including Mr. Boone's travel costs. He is entitled to recover his legal agent fees and most of his counsel's disbursements. I find the Plaintiff is not entitled to recover travel costs or any other costs arising from the fact that his counsel is not a resident of the Northwest Territories. He is not entitled to recover expert costs related to the firm of Watkinson Hanhart. He is not entitled to recover the "out of pocket expenses" referred to at Paragraph 6 of the Affidavit of Disbursements. Hopefully these parameters will be sufficiently clear for the parties to determine what the total costs figure should be.

[46] The Plaintiff is also entitled to post judgment intereston the sum of $221,250.00 as of December 15, 2006, to be calculated in accordance with section 56.1 of the *Judicature Act*, *supra.*

"Louise Charbonneau"

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
28th day of June 2007

Counsel for the Plaintiff: Wayne C. Petersen
Counsel for the Defendants: Jon P. Rossall, Q.C.

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MEMORANDUM OF JUDGMENT AS TO COSTS OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU