Date: 2010 09 01
Docket: CV-07802

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GLORIA WATSYK

Plaintiff

\- and -

GOVERNMENT OF THE NORTHWEST TERRITORIES
as represented by the Financial Board Secretariat

Defendants

MEMORANDUM OF JUDGMENT

[1] This is an application by the Defendant for dismissal of the action for want of prosecution. The only evidence adduced at the hearing was the affidavit of the Defendant's former counsel. I have also reviewed the pleadings.

A) HISTORY OF THE PROCEEDINGS

[2] The Plaintiff initiated this action for unlawful dismissal by filing a Statement of Claim on July 17, 1998. The Statement of Defence was filed August 25, 1998. The Defendant filed its Statement as to Documents on January 4, 1999; the Plaintiff filed hers on August 16, 1999.

[3] The Examinations for Discovery took place on January 30 and 31, 2003. In February 2003, the parties exchanged correspondence confirming their respective undertakings. In April 2003, counsel sent correspondence to each other providing answers to the undertakings.

[4] In May 2003, the Plaintiff requested to examine a further person, a Mr. Voytilla, as part of the discovery process.

[5] In December 2004, the Plaintiff wrote to the Defendant suggesting that mediation might be appropriate and inquiring whether the Defendant would be amenable to such a process. The letter also reiterated the request to examine Mr. Voytilla in the event the matter was not resolved. The Plaintiff sent follow up correspondence to the Defendant on January 11, 2005.

[6] On January 27, 2005, the Defendant advised the Plaintiff that it did not consider the matter appropriate for mediation, but would be prepared to resolve the matter by way of a mini-trial. In the same letter, the Defendant advised that it refused to produce Mr. Voytilla to be examined. On February 2, 2005, the Plaintiff's counsel acknowledged receipt of that letter and indicated she would soon have a position with respect to the possibility of conducting a mini-trial.

[7] On September 21, 2005, the Plaintiff sent further correspondence to the Defendant. This appears to have been a follow-up to discussions between counsel about the possibility of holding a mini-trial. The Plaintiff inquired as to whether the Defendant had an opportunity to give the matter some consideration.

[8] On February 13, 2006, counsel for the Plaintiff wrote to the Defendant and raised again the possibility of mediation, failing which she indicated she would like to move forward with a mini-trial. She also raised a number of issues that should be addressed in order to have the mini-trial scheduled.

[9] On March 2nd, 2006, the Defendant replied that it had indicated some time before that it was amenable to a mini-trial.

[10] On May 1, 2006, counsel met to discuss issues to be resolved regarding the conduct of a mini-trial. It was agreed that the Plaintiff's counsel would prepare a draft Agreed Statement of Facts and that the Defendant's counsel would prepare a draft Agreed List of Exhibits. Counsel also agreed to meet again two weeks later to see whether these steps placed the parties in a position to agree on the terms of a mini-trial. There is no evidence that the second meeting ever took place.

[11] On September 1, 2006, the Plaintiff sent a draft Agreed Statement of Facts to the Defendant, and inquired about the draft Agreed List of Exhibits. A similar letter was sent to the Defendant on October 19, 2006. There is evidence that messages were left with the Plaintiff's counsel after those letters were received, but no evidence as to what those messages were.

[12] On January 16, 2007, the Plaintiff wrote to the Defendant asking again for comments about the draft Agreed Statement of Facts. The Plaintiff also

suggested that in light of the delays that had been encountered, it might be best to simply set the matter for trial.

[13] On March 6, 2007, the Defendant proposed a number of revisions to the draft Agreed Statement of Facts, and sent the Plaintiff a draft list of Exhibits. The Defendant reiterated that it was prepared to proceed with a mini-trial, but that the matter should proceed to trial if it appeared unlikely that a mini-trial could resolve it. In the same letter, the Defendant asked that the Plaintiff provide an answer to the undertaking that had been made at the Examinations for Discovery. On this topic, counsel wrote:

> If we are going to proceed to trial, I will first require you to complete the undertaking given during Ms. Watsyk's examination for discovery on January 31, 2003. The undertaking was to provide a current resume outlining the positions Ms. Watsyk has occupied since leaving the government, when those positions were occupied, and the salary information for those positions. I have not yet received the salary information. My notes from May 1, 2006 indicate that you were going to obtain and provide this information for me. Could you please complete the undertaking, and identify whom you would intend to call as witnesses?

[14] On May 3, 2007, the Plaintiff wrote back, indicating that certain aspects of the Agreed Statement of Facts would have to be reworded. Counsel also suggested that if the parties could not reach agreement on some aspects of the draft, those matters could be removed from the Agreed Statement of Facts and be the subject of *viva voce* evidence. The Plaintiff indicated she wanted to proceed to trial and asked that certain information be provided so that she could complete the Certificate of Readiness. With respect to the undertaking, the Plaintiff's counsel wrote:

> With respect to completion of our client's undertakings, I note that on April 16, 2003, we forwarded to you the item requested and I enclose a copy of our correspondence in this regard.

[15] On July 9, 2007, the Plaintiff forwarded a further revised Agreed Statement of Facts to the Defendant's counsel, asking whether this version was agreeable to the Defendant, so that a Certificate of Readiness could be filed and a trial date sought.

[16] On July 23, 2007, the Defendant wrote back, making further suggestions for revisions. With respect to the undertaking, the Defendant noted that the Plaintiff's undertaking was to provide, among other things, salary information for the various positions the Plaintiff had held since leaving the government, and that this had not

been provided. The Defendant indicated he could not agree to a Certificate of Readiness until the missing information was provided. The Defendant also inquired as to the Plaintiff's availabilities for trial during the week of October 29 to November 2, 2007.

[17] On February 11, 2008, the Plaintiff sent the Defendant a further revised version of the Agreed Statement of Facts. With respect to the undertaking, counsel wrote:

> As well, could you let me know whether a review of your file material indicated fulfillment of the undertaking regarding the updated resume of our client. In the event that this is still outstanding, I will arrange for her to provide this material.

[18] On February 15, 2008, the Defendant replied that the most recent draft did not reflect all of the comments he had made in his July 23, 2007 correspondence. The correspondence also reiterated that the salary information forming part of the Plaintiff's undertaking had not been received, and that this issue had to be resolved before a Certificate of Readiness could be completed.

[19] The Notice of Motion seeking the dismissal of the action was filed on June 3, 2008. It was originally returnable on June 13, 2008, but was adjourned *sine die*, subject to be heard in Chambers on due notice. The hearing of the motion proceeded on July 2, 2010.

B) ANALYSIS

[20] The Defendant relies on Rule 327 of the *Rules of the Supreme Court of the Northwest Territories.* This Rule sets out both a discretionary and a non-discretionary power for this Court to dismiss actions on the grounds of delay:

> 327 (1) A party may at any time apply to the Court for a determination that there has been delay on the part of another party in an action or proceeding and, where the Court so determines, the Court
>
> (a) may, with or without terms, dismiss the action or proceeding for want of prosecution or give directions for the speedy determination of the action or proceeding; or
>
> (b) shall dismiss so much of the action or proceeding as relates to the applicant, where for five years or more years no step has been taken that materially advances the action or proceeding.

1. Non discretionary dismissal pursuant to Subrule 327(1)(b)

[21] The purpose of Subrule 327(1)(b) is to encourage the expeditious and efficient resolution of civil matters. *Rowe* v. *Rowe* [2007] N.W.T.J. No.83, at para. 5; *Mukpaloo* v. *McKay* [2002] N.W.T.J. No.10, at para.15. It is a mandatory rule: if the Court finds that it has been more than five years since any step has been taken to materially advance the action, the action must be dismissed.

[22] The relevant time frame is the period of five years before the date on which the motion for dismissal is filed. *Kell* v. *Senych Estate* [2003] N.W.T.J. No.74, at para.13. The Notice of Motion was filed on June 13, 2008, so the issue is whether any step has been taken that materially advanced the action between that date and June 13, 2003.

[23] The parties disagree as to what constitutes a "step" for the purposes of this provision. The Plaintiff argues that the discussions about the possibility of holding a mini-trial, which eventually morphed into discussions about an agreement as to certain facts for the purposes of the trial, were steps that materially advanced the action. The Defendant argues that settlement negotiations do not constitute a step contemplated by Subrule 327(1)(b). The Defendant relies on cases where this Court has found that settlement negotiations are not "a step" in this context. *Mukpaloo* v. *McKay*, *supra*, at para.21; *Werner* v. *Hay River (Town)* [2005] N.W.T.J. No 17, at para.8. The Defendant also argues that discussions about possible admissions that never materialized into an actual agreement were also not steps that materially advanced the action.

[24] The Plaintiff argues that the *Rules of Court* provide for various options for alternative dispute resolution. She argues that the modern trend is that parties in civil litigation are increasingly encouraged to use these tools and make every attempt to resolve disputes without going to trial. Given this, she argues that this Court should interpret the *Rules of Court* in a way that will encourage, not discourage, the use of those tools. This, the Plaintiff argues, requires allowing parties to take the time to explore those options without increasing the risk of actions being dismissed by operation of Subrule 327(1)(b).

[25] I agree with the Plaintiff that this Court should do what it can to promote the use of alternative dispute resolution tools. But Rule 330 provides that parties may, by express agreement, exclude or vary the application of the rules that deal with delay. Parties who want to engage in alternative dispute resolutions can use this

mechanism to ensure that, if their resolution efforts fail, a plaintiff's position is not compromised by the operation of Subrule 327(1)(b).

[26] In any event, I conclude that the discussions and exchanges of correspondence that took place between the parties between December 2004 and February 2008 were of two kinds. They were resolution discussions initially, when the possibility of resorting to mediation or to the mini-trial process was being contemplated. But later on, the parties were no longer exploring resolution options: they were preparing for trial and discussing which facts, if any, could be admitted.

[27] I do not need to decide whether the discussions about mediation and the mini-trial "stopped the clock" as far as Rule 327(1)(b) is concerned because in my view, as of May 2007, the focus shifted to getting the matter ready for trial. From that point on, the exchanges about the draft Agreed Statement of Facts were designed to circumscribe the factual issues and make the trial process more streamlined and efficient. Counsel exchanged detailed drafts and suggestions, and were both actively engaged in the process. Their objective was to reduce the number of witnesses to be called, shorten the trial, and avoid unnecessary expenses and inconvenience for witnesses.

[28] It is true that counsel never arrived at an agreement about what facts could be agreed to, but I do not think that it is necessarily determinative. These were detailed, extensive exchanges to streamline the trial process. Under the circumstances, I find that these discussions and exchanges were steps that materially advanced the action. As they occurred well within five years of the Notice of Motion for dismissal being filed, Subrule 327(1)(b) is not engaged.

2. Discretionary dismissal pursuant to Subrule 327(1)(a)

[29] The jurisprudence that developed under the predecessor of Rule 327 set out a three- part test for applications for dismissal of an action on the basis of delay. This test requires consideration of three factors:

(a) whether there has been an inordinate delay in the prosecution of the action;
(b) whether the delay is inexcusable; and
(c) whether the defendant is likely to be seriously prejudiced by the delay.

[30] Subrule 327(4) provides that if inordinate and inexcusable delay has been established, that constitutes *prima facie* evidence of serious prejudice. It is then up to the other party to rebut that presumption.

> *Kell* v. *Senych Estate*, *supra*, at para.15.

[31] The Plaintiff argues that the Defendant is responsible for significant portions of the delay in this case because it was unresponsive to her attempts to move the case forward.

[32] I agree that the evidence demonstrates, in some respects, lack of diligence, at certain points, on the part of the Defendant. For example, the Plaintiff sent correspondence that purported to provide a complete answer to her undertaking in February 2003. Yet, the first time the missing salary information was raised was over three years later, when counsel met to discuss the case in May 2006. It was another year before that concern was put in writing.

[33] In addition, the first version of the Agreed Statement of Facts was sent to the Defendant in September 2006, and it was not until March 2007 that the Defendant sent the first set of proposed revisions.

[34] However, some of the other claims the Plaintiff makes about delay attributable to the Defendant are not entirely supported by the evidence.

[35] For example, the Plaintiff asserts in her brief that:

> The Respondent inquired of the Applicant on May 2nd 2003, as to whether the Applicant would agree to the examination of Mr. Voytilla. And later, whether mediation would possibly result in a resolution of the case. No response was received from the Applicant to this correspondence for nearly two years. A response was received, after several intervening letters on behalf of the Respondent, on January 27, 2005.

[36] The request to examine Mr. Voytilla was made in April 2003. But the possibility of mediation was raised for the first time much later, in December 2004. The response from the Defendant about the mediation suggestion came one month after the proposal was made. As for the request to examine Mr. Voytilla, the Plaintiff did nothing, between April 2003 and December 2004, to follow up in it, and there is no indication that the issue was ever pursued.

[37] The Plaintiff also asserts that she raised the possibility of a mini-trial in September 2005 and did not receive a response about that until March 2006. But the Defendant had already raised the possibility of a mini-trial in January 2005. The Defendant's correspondence from March 2006 simply reiterated a position that had been conveyed more than a year earlier.

[38] Given this, while I agree that the Defendant was responsible for some of the delay, I cannot agree with the Plaintiff's assertion that it amounts to as much as 32 months.

[39] The evidence also shows that the Plaintiff is responsible for significant delays in this matter.

[40] The most striking example relates to the unfulfilled undertaking. While it took a long time for the Defendant to raise this issue, the evidence does not demonstrate that the Plaintiff was diligent about resolving it. The matter was raised at the May 2006 meeting. Written requests for fulfillment of the undertaking were sent by the Defendant in March 2007, July 2007 and February 2008. Yet, even when the motion was heard in July 2010, the information had still not been provided. No explanation was offered as to why.

[41] If, as appears from some of the correspondence sent to the Defendant about this, the Plaintiff was at one point under the impression that the information had in fact been provided, the Defendant's subsequent correspondence should have made it clear that this was not the case. And some 7 years after the undertaking was given, and 4 years after the Defendant raised the issue for the first time, it had still not been fulfilled.

[42] The Plaintiff notes that it would have been open to the Defendant to file a motion to compel compliance with the undertaking. That is true. But the terms of the undertaking do not appear to have ever been in issue. The Plaintiff never indicated that she would refuse to comply with it. Under the circumstances, the Defendant may have simply chosen to avoid the additional costs of a motion to compel an answer, thinking that the information would be provided.

[43] There were other delays. Examinations for Discovery took place over three years after the Statements as to Documents were filed. Two years passed after the Examinations for Discovery before the Plaintiff first raised the possibility of mediation. The Defendant quickly indicated that mediation was not an option, but that a mini-trial might be. The Plaintiff followed-up about the mini-trial possibility

in September 2005, several months later. Several more months passed before counsel met, in May 2006, to set out a concrete plan to determine whether a mini-trial was feasible. And while it appears counsel had contemplated to meet again a few weeks later, it was some four months before the first draft Agreed Statement of Facts was sent to the Defendant.

[44] I realize that beyond the correspondence between counsel, there would have been conversations about this matter at various points in time. But there is very limited evidence about those conversations, and I cannot speculate about what they entailed.

[45] I accept, as I have already stated, that the Defendant was responsible for some of the delay. Other parts of the delay are attributable to the Plaintiff. And some of the delay is attributable to neither party being particularly prompt in following up on things.

[46] The difficulty that the Plaintiff faces on this motion is that she and the Defendant are not on the same footing when it comes to weighing the consequences of the delay attributable to each of them, nor are they on the same footing as far as the consequences of delays "jointly" attributable to them. There is no duty on a defendant to move the action along in the face of delay by the Plaintiff. *Muckaploo* v. *McKay*, *supra*, at para.18. This is the Plaintiff's action, and she had the onus of moving it along. The Defendant had no such onus.

[47] The total time elapsed since the Statement of Claim was filed is now over 12 years. Under the circumstances, that is an inordinate delay.

[48] I also conclude that even on the interpretation most generous to the Plaintiff, a significant portion of that delay cannot be attributed to the Defendant. There is little evidence explaining large portions of the delay. The evidence establishes various communications between counsel at certain times, but also long periods of inactivity where nothing seemed to be happening on this matter. And, as I already mentioned there is no explanation for why the Plaintiff's relatively straightforward undertaking had still not been fulfilled when the motion was heard. Overall, I conclude that the delay is inexcusable.

[49] As the Plaintiff has not adduced any evidence to rebut the presumption of prejudice set out at Subrule 327(4), the third branch of the test is met.

C) CONCLUSION

[50] For those reasons, while I do not find that the dismissal of this action is mandatory pursuant to Rule 327(1)(b), I conclude that the Defendant has met the test to be entitled to the relief it seeks pursuant to Rule 327(1)(a). The Application is allowed, and the action is dismissed for want of prosecution.

[51] Given that there were also laches on the Defendant's part, each party shall bear its own costs on the motion.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
1st day of September, 2010

Counsel for the Plaintiff (Respondent): Katherine Peterson, Q.C.
Counsel for the Defendant (Applicant): Erin Delaney

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