

SUPREME COURT OF NOVA SCOTIA

Citation: Tessier v. NS Human Rights Commission et al, 2014 NSSC 189

Date: 2014-05-27

Docket: Hfx. No. 390961

Registry: Halifax

Between:

Liane Elizabeth Tessier

Applicant

v.

Nova Scotia Human Rights Commission and
Nova Scotia (Attorney General) and
Halifax Regional Municipality

Respondent

Judge:

The Honourable Justice Arthur LeBlanc

**Final Written
Submissions:**

Thursday, March 27, 2014

Counsel:

Angela Walker, for the Applicant

Lisa Teryl, for the Respondent NS Human Rights
Commission

Karen MacDonald, for the Respondent Halifax Regional
Municipality

Introduction

[1] This is a determination of costs following the applicant's successful application for judicial review. Liane Tessier applied for judicial review of the decision of the Nova Scotia Human Rights Commission to dismiss her complaint against her former employer, the Halifax Regional Municipality Fire and Emergency Services ("HRMFES"). Ms. Tessier filed a complaint with the Commission in 2007 alleging discriminatory treatment by her supervisors on the basis of sex and mental disability. The investigation report was released on December 29, 2011, and on February 15, 2012, the Commission adopted the report's recommendation to dismiss the complaint.

[2] Ms. Tessier applied for judicial review of the Commission's decision on a variety of procedural and substantive grounds. In my written decision of February 19, 2014, I found that the Commission's failure to interview the named respondents, Chief Don McLean and DC Doug Burgess, was a breach of procedural fairness: 2014 NSSC 65. I allowed the judicial review and remitted the complaint back to the Commission for reconsideration by a fresh investigator.

[3] Ms. Tessier now seeks costs against the Commission and HRMFES.

Relevant Civil Procedure Rules

[4] Civil Procedure Rule 77 sets out the following principles applicable to cost awards:

(a) Costs are in the discretion of the presiding judge who may make any order that he or she is satisfied will do justice between the parties: 77.02;

(b) Costs of a proceeding follow the result, unless a judge orders otherwise: 77.03;

(c) Party and party costs must be fixed in accordance with the tariffs of costs and fees unless a judge orders otherwise: 77.06;

(d) A judge may add an amount to or subtract an amount from the tariff costs: 77.07;

(e) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award: 77.10;

(f) A judge may award lump sum costs instead of tariff costs: 77.08.

[5] In the normal course, costs of a proceeding for judicial review are to be assessed in accordance with Tariff C. The hearing of this matter took more than half a day but less than a full day. Tariff C provides for costs for this length of hearing in the range of \$1,000.00 - \$2,000.00. Tariff C also provides:

For applications heard in Chambers the following guidelines shall apply:

...

(3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.

(4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending upon the following factors:

- (a) the complexity of the matter,
- (b) the importance of the matter to the parties,
- (c) the amount of effort involved in preparing for and conducting the application.

[6] A successful proceeding for judicial review is an example of an application that is determinative of a matter. Accordingly, if I am satisfied that it is appropriate in the circumstances of this case, I may apply a multiplier to the maximum amount of \$2,000.00 set out in Tariff C.

Positions of the Parties

[7] Liane Tessier recognizes that costs on an application for judicial review would normally be determined pursuant to Tariff C. In the circumstances of this case, however, she says that applying the Tariff would result in a figure that is much too low to do justice between the parties, and a lump sum would better achieve the goal of substantial indemnity.

[8] In the event that the court is disinclined to award a lump sum, Ms. Tessier asks that a multiplier of 4 be applied to the \$2000.00 maximum amount dictated by Tariff C.

[9] The Commission takes the position that no costs should be awarded against it. It cites the general rule that costs are not usually awarded to or against an administrative decision-maker on judicial review unless there are exceptional circumstances warranting such an order. According to the Commission, no such circumstances exist in this case.

[10] HRMFES submits that the award for costs to Ms. Tessier should be in the amount of \$1,500.00 plus her reasonable disbursements and the responsibility for payment should be shared equally between HRMFES and the Commission.

Liability of the Respondents for Costs

[11] Before deciding on an appropriate award, I will address the Commission's argument that costs not be ordered against it. Generally, costs against an administrative decision-maker will only be ordered in unusual or exceptional circumstances. That being said, costs have been awarded where there has been a breach of procedural fairness or other misconduct on the decision-maker's part, or where it has demonstrated a notable lack of diligence: Donald J.M. Brown & John

M. Evans in *Judicial Review of Administration Action in Canada*, looseleaf, Vol. 2 (Toronto: Canvasback, updated to 2013) at 5:2560.

[12] In *Pink v. Davis*, 2011 NSSC 237, the respondents, neighbours of the applicant, appealed a decision of the Municipality of the Region of Queens granting a permit for the applicant's residence. The appeal was heard by the Nova Scotia Building Advisory Committee, which overturned the municipality's ruling. On judicial review of the Committee's decision, Justice Warner held that the Committee clearly breached the rules of natural justice and procedural fairness when it failed to notify the applicant of the appeal and provide her with an opportunity to be heard.

[13] In deciding whether to award costs against the Committee, Justice Warner cited Justice McQuaid's decision in *St. Peters Estates Ltd. v. Prince Edward Island Land Use Commission*, [1991] P.E.I.J. No. 40 with approval:

112 In *St. Peters Estates*, Justice McQuaid concluded that costs should not be awarded by reason only of a loss of jurisdiction but "where that loss of jurisdiction resulted from conduct on the part of the tribunal which can be held to be ... otherwise running contrary to the rules of the natural justice, then, unquestionably, costs should be awarded against it." (para. 14). He added at para. 15: "Where the tribunal has acted in good faith and conscientiously throughout, albeit it resulting in error, the reviewing tribunal would not ordinarily impose costs."

113 The *St. Peters Estates* principles were recently summarized and adopted in *Kelly v. PEI (Human Rights Commission)*, 2010 PECA 6. The Court stated: "... costs should not be awarded ... where a tribunal has proceeded prudently ... On the

other hand, where a tribunal ought to have known or has neglected to properly consider a serious jurisdictional question ... or made a clear breach of the rules of natural justice or procedural fairness ... then costs should be awarded against the tribunal..."

[*Emphasis in original*]

[14] Justice Warner was satisfied that the Committee should be liable for costs “for its significant and unreasonable departure from its duty of procedural fairness”: para. 116.

[15] In *Cowan v. Aylward*, 2001 NSSC 51, this court considered whether to award costs against the Nova Scotia Human Rights Commission following an improper attempt by the Commission to delegate its decision-making powers. Notwithstanding the factual differences, Justice Scanlan’s comments are equally applicable to the case at bar:

19 I am satisfied that there must be a balancing of the interests of the parties and general interests of the public in a case such as this. I am cognizant of the fact that it would be contrary to the interests of the administration of justice to have a tribunal such as the Nova Scotia Human Rights Commission stifled for fear of incurring liability for costs. It would be contrary to public interest in general if administrative bodies failed or refused to act simply to avoid liability for costs. On the other hand it should be recognized that these creatures of statute exercise a great deal of authority. Their decisions can have far reaching consequences for any party who chooses to file a complaint or who is forced to defend a complaint filed with the Commission. The Human Rights Commission must act carefully, taking into account the import of any decision they might make.

...

21 There is a general public interest in having some assurance that individuals are not left alone in defending their rights when a quasi-judicial body exceeds, or worse, abuses their authority. To force individuals to bear the cost of challenging that type of error would place the individual at an extreme disadvantage when asserting their rights as against a publically funded body. The public at large has a vested interest in making sure that individual rights are protected. Protection of individual rights is one of the fundamental purposes for bodies such as Human Rights Commissions to exist. When it is the actions of the commission the individual needs protection from, then it is important not to limit the ability to get that protection by denying the affected individuals the right to recover a substantial portion of their costs. It would be contrary to public interest to leave individuals alone to bear the cost of protecting themselves from the improper actions of a commission such this. ... [Emphasis added]

[16] The Nova Scotia Human Rights Commission is charged with administering the Nova Scotia *Human Right Act*. Its primary role is to provide fair, accessible and cost-effective services to those members of the public who believe their rights under the *Act* may have been violated. Those individuals who file a complaint with the Commission are entitled to expect that their matters will be conscientiously reviewed and investigated in accordance with the rules of procedural fairness and the Commission's own policies. When the Commission fails to exercise due diligence in the investigation process the consequences for a complainant can be profound.

[17] In Ms. Tessier's case, the Commission's conduct left her in a difficult position. She could abandon her complaint entirely, or assume the stress and expense associated with filing an application for judicial review. While the

application was successful, her complaint against HRMFES is no closer to being resolved. Ms. Tessier must now participate in a new investigation, seven years after her complaint was initially filed, and nine years after some of the events described in the complaint. It is reasonable to expect that the cogency of the evidence will be compromised by the passage of time. Memories fade and witnesses may now be unavailable.

[18] I am satisfied that the circumstances of this case are exceptional and bring it outside the general rule of immunity for costs on the part of administrative decision-makers. In my view, it would be contrary to the public interest for the Commission to avoid liability for costs in situations where it has mishandled a complaint to the degree seen in this case. Responsibility for payment of costs and disbursements will be shared equally between the Commission and HRMFES.

Application of the Tariff or Lump Sum?

[19] Party and party costs are intended to represent a substantial but incomplete indemnity for the reasonable solicitor and client costs of the successful party: *Morrison Estate v. Nova Scotia (Attorney General)*, 2012 NSSC 386; *Marsh v. Paquette*, 2011 NSSC 70; *Campbell v. Jones*, 2001 NSSC 139. Where application of the Tariff will not achieve this objective, the court may exercise its discretion

under Rule 77.08 to award a lump sum: *Salman v. Al-Sheikh Ali*, 2011 NSSC 30; *MacIntyre v. Cape Breton District Health Authority*, 2010 NSSC 170; *Halifax (Regional Municipality) Pension Committee v. Nova Scotia (Superintendent of Pensions)*, 2005 NSSC 228.

[20] In *Bevis v. CTV Inc.*, 2004 NSSC 209, Justice Moir helpfully summarized the principles applicable to lump sum cost awards as follows:

13 ... (1) Costs are normally set in accordance with the Tariff. (2) However, the Tariff system serves the principle of a substantial but incomplete indemnity. The Courts do not choose artificial means, such as selection of an artificial "amount involved", in order to make the Tariff serve the principle. Therefore, when reasonable approaches to amount involved or scale under the Tariff fail to produce a substantial but partial indemnity, the Court may resort to its discretion under rule 63.02(a) and order a lump sum. (3) To settle an appropriate lump sum the Court will have regard to the actual costs facing the successful party or the labour expended by counsel, but the Court will seek to settle the amount objectively in conformity with one of the policies of the Tariff, to provide an indemnity that has nothing to do with the particularities of counsel's retention. The Court will attempt to provide a substantial but partial indemnity against what would ordinarily be charged by any competent lawyer for like services. (4) Finally, the Courts have usually avoided percentages. Substantial but partial indemnity is a principle, not a formula.

[21] Ms. Tessier has filed evidence of her legal costs by way of an affidavit sworn by the office manager of McGinty Doucet Walker attaching a copy of a client ledger showing fees and disbursements. According to this evidence, Ms. Tessier has incurred legal fees in the amount of \$18,843.54 and total disbursements in the amount of \$1,017.75 for a total of \$19,861.29. These amounts are inclusive

of HST. She seeks 75% of her legal fees, amounting to \$14,132, plus her reasonable disbursements.

[22] Before I consider awarding a lump sum, I must be satisfied that application of Tariff C will not result in a substantial indemnity. Although evidence of Ms. Tessier's actual costs is of some relevance, it is not determinative. "An exercise of judicial discretion to assess objectively what was a reasonable amount would still be necessary": *Williamson v. Williams*, [1998] NSJ 498 (CA) at para. 26.

[23] As I previously indicated, when awarding costs to the successful party on an application for judicial review, the court has discretion under to apply a multiplier of 2, 3 or 4 to the maximum amount dictated by Tariff C, depending on the following factors:

- (a) the complexity of the matter,
- (b) the importance of the matter to the parties,
- (c) the amount of effort involved in preparing for and conducting the application.

[24] This court has recognized that a proceeding for judicial review is more complex and will generally involve more effort on the part of counsel than an ordinary contested interlocutory motion: *Pink v. Davis, supra; Peach v. Nova Scotia*, 2010 NSSC 207. Ms. Tessier's application, however, was particularly

complex. The Notice of Judicial Review raised seven arguable grounds of review. The record was substantial and poorly organized. With respect to the importance of the matter to the parties, the record reveals that Ms. Tessier invested a great deal of time and effort in pleading her case to the Commission and pursuing a resolution to her complaint. The Commission did not share Ms. Tessier's view of the matter's importance. The initial investigation report was not filed until December of 2011, four years after the complaint was filed, and was based exclusively on materials contained in the file since 2009.

[25] I am satisfied that in the unique circumstances of this case, even the application of a multiplier of 4 to the \$2000.00 figure set out in the Tariffs will not produce a just result. I therefore exercise my discretion to order a lump sum award of \$10,000.00 that will better achieve the goal of a substantial contribution to Ms. Tessier's costs.

Disbursements

[26] Ms. Tessier claims disbursements in the amount of \$1017.75. A successful party seeking to recover disbursements must establish that the amounts claimed were reasonable and necessary for the proper conduct of the litigation. The disbursements recorded by McGinty Doucet Walker are as follows:

- File administration fee - \$35.00
- Copies - \$574.45
- Courier charges - \$40.50
- Faxes - \$16.10
- Postage - \$3.66

These amounts are exclusive of HST.

[27] The following disbursements were recorded by Boyne Clarke, Ms. Tessier's former law firm:

- Prothonotary filing fee - \$200.09
- Law stamp - \$25.00
- Copies - \$5.00
- Faxes - \$10.50
- Courier - \$7.00

These amounts are inclusive of HST.

[28] Counsel has provided no evidence as to the nature of the "file administration fee" billed to Ms. Tessier the day after her initial meeting with counsel. I presume that this fee is applied to every new file opened by McGinty Doucet Walker. Such fees are overhead and are not normally recoverable as a disbursement.

[29] Ms. Tessier seeks \$579.45 for photocopies. There is no information as to the number of copies or the fee charged per copy. Photocopy charges fall within the scope of recoverable disbursements, but only as they relate to materials sent to the court or to the other parties. Copies sent to the client or prepared for internal use are normally not recoverable: *Xceed Mortgage Corp v. Jesty*, 2014 NSSC 51 at para. 11. The materials submitted by Ms. Tessier to the court and the respondents in connection with this proceeding consist of approximately 2200 pages. In the absence of proof of the actual cost of photocopying, the court calculates the actual cost as \$0.10 per copy. I therefore award photocopying costs in the amount of \$220.00.

[30] In the absence of any information concerning the courier and postage expenses, I am unable to determine whether the charges are limited to material sent to the court and the respondents, or include the expenses associated with sending materials to the client. The latter are not recoverable: *Drummond v. Grafton-Connor Property Inc.*, 2014 NSSC 52 at para. 28. In this case, I will reduce the courier and postage expense to \$35.00.

[31] I would not allow the claim for the cost of sending faxes. I have no evidence as to the recipient or the number of pages faxed. In any event, I share the view

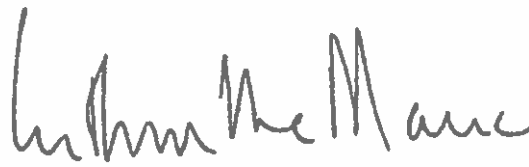
adopted by Justice Murphy in *MacQueen v. Sydney Steel Corp.*, 2012 NSSC 461 that these expenses are more appropriately considered overhead.

[32] Ms. Tessier is entitled to recover the prothonotary filing fee of \$200.09 and the law stamp cost of \$25.00.

[33] Accordingly, I award disbursements in the amount of \$518.34, inclusive of HST.

Conclusion

[34] Ms. Tessier is entitled to a lump sum costs award of \$10,000.00, and her reasonable disbursements in the amount of \$518.34, for a total of \$10,518.34. Liability is to be shared equally by the respondents.


LeBlanc, J.