SUPREME COURT OF NOVA SCOTIA
Citation: *Banfield v. RKO Steel Ltd.*, 2017 NSSC 232

Date: 2017-09-07
Docket: Hfx No. 415476
Registry: Halifax

Between:

Thomas Banfield

Plaintiff

v.

RKO Steel Limited, a body corporate

Defendant

D E C I S I O N

Judge:	The Honourable Justice Glen G. McDougall
Heard:	March 29 and May 29, 2017, in Halifax, Nova Scotia
Written Decision:	September 07, 2017
Counsel:	Kevin A. MacDonald, Esq., plaintiff counsel
	Jack Graham, Q.C. and Michael Murphy, Esq., defendant counsel

By the Court: (McDougall, J.)

[1] By Notice of Motion, counsel for the defendant, RKO Steel Limited ("RKO Steel"), moves for an order to change the trial of this matter from jury to judge alone.

[2] The trial is currently scheduled to begin on Monday, December 4, 2017. A total of twelve days have been set aside to have this matter heard.

[3] The Honourable Justice James L. Chipman is assigned to preside over the trial. It will be his responsibility to instruct the seven-person jury that will be selected to hear the evidence. It is their responsibility to decide if the plaintiff, Thomas Banfield (the "plaintiff"), has successfully proven his claim for damages for alleged constructive dismissal amounting to wrongful dismissal by RKO Steel.

[4] The plaintiff initially sued RKO Steel and Manulife Canada Ltd. ("Manulife"). The plaintiff's claim against Manulife was eventually settled. An order dismissing the plaintiff's claim was issued on October 9, 2015.

[5] The plaintiff filed a request for date assignment conference ("DAC") on April 5, 2016. He elected trial by jury. Counsel for RKO Steel, in its Memorandum For Date Assignment Judge filed on April 20, 2016, acknowledged "the election of trial by jury made by the plaintiff" and further indicated the defendant's disagreement "with that election" and an intention "to move to set aside the jury notice to allow the matter to be tried by a judge alone pursuant to *Rule* 52 of the *Civil Procedure Rules*." This intention was noted in the Date Assignment Conference Memorandum prepared by the DAC judge who, amongst other things, assigned the trial dates previously indicated.

[6] Counsel for the plaintiff had not amended the notice of action to remove Manulife as a named defendant prior to filing the request for DAC. Neither did he amend the statement of claim to remove any reference to his client's claim against the disability insurer. It was, however, noted in the DAC Memorandum that: "[T]he plaintiff agrees to supply the defendant with full particulars of his settlement with Manulife asap."

[7] The motion seeking to have the action converted to judge alone first came before me on Wednesday, March 29, 2017. Instead of proceeding with the hearing that day, the Court suggested that the matter be adjourned to allow counsel for the

plaintiff to file an amended Notice of Action and Statement of Claim removing any reference to Manulife and the claim that was previously settled.

[8] The hearing of the motion was set over to Monday, May 29, 2017. Once the amended documents were filed, the Court also granted permission to allow counsel to file supplementary briefs if it was felt necessary.

[9] The Amended Notice of Action and Statement of Claim were issued by the Court on April 26, 2017. Counsel for RKO Steel filed a supplementary brief along with a supplementary book of authorities on May 23, 2017.

[10] During the course of the hearing on May 29, 2017, counsel for the plaintiff undertook to further amend the statement of claim to withdraw his client's claim for damages based on tort and to set aside a claim for punitive damages. The most recent Amended Notice of Action and Statement of Claim were issued by the court on June 29, 2017. It fulfils the undertaking made by plaintiff's counsel.

[11] After the first amendments were made, counsel for RKO Steel held to his original position maintaining "that these amendments do not impact in any meaningful way the defendant's position as set out in detail in our original pre-hearing submissions." [Reference para. 9 of the defendant's supplementary brief filed on May 23, 2017]

[12] Again, this submission was after the first amendments were made. The second round of amendments prompted a further supplemental brief from the defendant filed on July 5, 2017. It offered further arguments for maintaining the position advanced by counsel in his first two written submissions and in oral argument.

[13] I will discuss in further detail later the reasons advanced by counsel to persuade the Court to order the change requested. But first, I will turn my attention to the relevant legislation, rules and case law that pertains to the issue.

***Judicature Act*, RSNS 1989, c. 240 and *Civil Procedure Rule* 52 – Trial by Jury**

[14] Section 34 of the *Judicature Act* provides under the heading:

> **Trials and procedure**
>
> 34 Subject to rules of Court, the trials and procedure in all cases, whether of a legal or equitable nature, shall be as nearly as possible the same and the following provisions shall apply:
>
> (a) in civil proceedings, unless the parties in person or by their counsel or solicitors consent to a trial of the issues of fact or the assessment or inquiry of damages without a jury, the issues of fact shall be tried with a jury in the following cases:
>
> (i) where the proceeding is an action for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution or false imprisonment,
>
> (ii) where either of the parties in a proceeding requires the issues of fact to be tried or the damages to be assessed or inquired of with a jury and files with the prothonotary and leaves with the other party or his solicitor a notice to that effect at least sixty days before the first day of the sittings at which the issues are to be tried or the damages assessed or inquired of, except that, upon an application to the Supreme Court or to a judge made before the trial or by the direction of the judge at the trial, such issues may be tried or such damages assessed or inquired of by a judge without a jury, notwithstanding such notice,
>
> (iii) where the judge at the trial in his discretion directs that the issues of fact shall be tried or the damages assessed or inquired of with a jury;
>
> (b) in all other cases the issues of fact or the assessment or inquiry of damages in civil proceedings shall be tried, heard and determined and judgment given by a judge without a jury;

[15] *Civil Procedure Rule* 52 deals with trial by jury. The specific parts of this rule that bear on the matter before the Court include:

Jury election

> 52.02 (1) For the purpose of Section 34 of the Judicature Act, the provisions in that Section respecting jury trials and procedure are modified by this Rule 52.02.
>
> …
>
> (3) Parties to an action, to which Part 12 does not apply, must elect trial by judge or trial by jury in the request for a date assignment conference or the memorandum for the date assignment conference judge.
>
> (4) An action must be tried by a judge without a jury, unless a party elects trial by jury in accordance with this Rule 52.02.
>
> (5) An action in which a party elects trial by jury must be tried by a jury, unless another party makes a motion for an order that the action be tried by a judge and satisfies the judge hearing the motion on either of the following:
>
> (a) under a Rule, under legislation, or by operation of other law, the action cannot be tried by a jury;
>
> (b) the action is not for a cause referred to in subclause 34 (a)(i) of the *Judicature Act*, and justice requires trial by a judge rather than by a jury.

[16] There are also a long line of cases from both our Court and the Nova Scotia Court of Appeal that provide direction to trial judges when presented with this type of motion. It is clear from a review of these cases that the right to a jury trial is a substantive right and one that should not be interfered with unless there are sufficient and cogent reasons for so doing.

[17] In *Boutcher v. Clearwater Seafoods Limited Partnership*, [2008] NSJ 29; 2008 NSSC 23, the Honourable Justice Arthur W.D. Pickup, in striking the jury notice, provided a very helpful summary of the law in paras 7 – 12:

> **The Law**
>
> 7 In Nova Scotia, the right of a party to have a civil matter heard by a jury is set out in the *Judicature Act*, s. 34.
>
> 8 Under this provision, a party has a prima facie right to a jury trial. It is well established that this right should not be taken away arbitrarily.

9 In *Barrow v. Keating*, [1985] N.S.J. No. 116, Justice Nunn reiterated this principle at para. 2:

> The right of a party to a trial with a jury is a substantive one. The defendant in this case gave notice of trial by jury, and he is not lightly to be deprived of his right to have the trial proceed in that way. A trial Judge has a wide, and indeed one might say an absolute, discretion as to the mode of trial, but his power to decide whether a case should be tried with a jury or without a jury is one that cannot be exercised arbitrarily or capriciously. It must be exercised in a judicial manner and there must be sufficient reason to deprive a party of the substantive right to trial in the manner chosen by him.

10 A three part test has been developed to assist courts in the exercise of this discretion as to the appropriate mode of trial. In *Lintaman v. Goodman*, [1983] N.S.J. No. 37, Justice Burchell laid out the following three factors to consider, at para. 4 :

> ... (a) where the case involves scientific or technical questions that cannot be conveniently presented to a jury, (b) where the evidence is extensive and (c) where the case involves issues of law rather than issues of simple fact or where the issues of fact are negligible or closely interwoven with the issues of law.

11 In *Desroches v. Di-Carra Inc.*, [1999] P.E.I.J. No. 33 ("Desroches"), the Court set out three exceptions which may support depriving a party of its substantive right to a jury trial:

> (i) the substantive issue being one of law, with respect to which issues of fact are merely incidental; (ii) the issues of law and fact being so substantially interwoven and interdependent as to be virtually inseparable; and/or (iii) the intricacy or complexity of the case indicating that much difficulty might be anticipated or encountered by a trial judge in properly instructing a jury as to the applicable principles of law which it must apply to the decided facts, giving rise to a great probability of error by the jury.

12 A trial judge must provide cogent reasons for striking a jury notice.

[18] I could go on to list numerous other cases that come down on either side of the question. I do not thing it is necessary to do so. My reasons for deciding to deny the defendant's motion should be quite clear.

DISCUSSION:

[19] The defendant primarily argues that the plaintiff's claims "are inextricably interwoven with his claims against Manulife." [Reference para. 41 of the defendant's first brief filed on March 15, 2017]

[20] The argument is further made that:

> There are significant issues of causation, apportionment of liability, and assessment of damages as between the two Defendants that will need to be determined. These difficult questions will be made all the more complicated by the fact that Manulife has already settled this matter with Mr. Banfield, an dis no longer a party to the proceedings.
>
> (see para. 41, *supra*)

[21] I agree that the claims initially made against RKO Steel and Manulife were interwoven. I do not agree that this remains the case now that counsel for the plaintiff has cleaned up the notice of action and statement of claim to remove any reference to Manulife and its alleged wrong doings.

[22] The plaintiff's case is based on the treatment he says he suffered leading up to his departure from RKO Steel in June of 2012. His claim against Manulife was based on events that occurred after the plaintiff says he was constructively dismissed from his job at RKO Steel. The amended statement of claim is not "inextricably interwoven" with post-employment interaction involving the plaintiff and Manulife representatives.

[23] The particulars of Mr. Banfield's settlement (if they have not already been provided to counsel for RKO Steel) with Manulife are to be shared with defence counsel. Should the plaintiff succeed in his claim against RKO Steel the amount paid to him by Manulife will likely go to mitigation. This should not pose any significant challenge to the trial judge when instructing the jury.

[24] The assigned trial judge is not only an experienced and knowledgeable jurist, he also brings to the courtroom the wisdom gained from years and years as a civil

litigator. I am certain that my colleague, the Honourable Justice James L. Chipman will be more than capable of dealing with any challenges that might present at trial.

CONCLUSION:

[25] The plaintiff's right to have his claims dealt with by a jury should not be interfered with in this particular instance. The issues are simply not all that complicated. The plaintiff should not be deprived of his substantive right to have his case decided by a jury.

[26] In light of this decision, I do not think it necessary to deal with the concerns raised by counsel for the plaintiff regarding the use of discovery transcripts and other alleged hearsay evidence offered by the defendant in support of the motion.

[27] I choose also not to decide costs of the motion. I prefer it be left to counsel to deal with it as costs in the cause.

McDougall, J.