SUPREME COURT OF NOVA SCOTIA

Citation: *Welch v Ricoh Canada Inc.*, 2017 NSSC 279

Date: 2017-10-30
Docket: Ken No. 458282
Ken No 458283
Registry: Kentville

Between:

Larry Welch

Applicant

v.

Ricoh Canada Inc.

Respondent

And Between:

Kent Carroll

Applicant

v.

Ricoh Canada Inc.

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	June 15 and 16, 2017 at Kentville, Nova Scotia with
Final Written Submissions:	September 18, 2017
Counsel:	Blair Mitchell Q.C., counsel for the applicants Michael Murphy, for the respondent

By the Court:

[1] This is a cost decision respecting two Applications in Court, heard together on June 15 and 16, 2017.

Background

[2] Both applicants were terminated at the same time without notice or cause on November 30, 2015, after having been employed by the respondent for 26 and 25 years respectively. Mr. Welch was 47 and Mr. Carroll was 59.

[3] On November 30, 2015, each applicant was paid the minimum statutory entitlement of 8 weeks' salary, or about $7,200.00, and offered salary continuation for 44 and 46 weeks respectively (about one year in total), less deduction for some employment income earned in the interim or, alternatively, offered a total lump sum, inclusive of the statutory entitlement, of approximately six months pay in lieu of notice. Neither applicant accepted the offer.

The Applications

[4] One year later, the applicants commenced these Applications in Court.

[5] Between December 2016 and June 15, 2017 (when the matters were heard), offers to settle were exchanged.

[6] In April 2017, the parties filed and exchanged affidavits and in May conducted discoveries.

[7] In their prehearing submissions, the applicant sought 24 months' damages (pay in lieu of notice) based on their basic pay, bonuses, overtime, vacation pay, use of company vehicles and other lost benefits. Welch acknowledged accepting full-time employment on April 1, 2017 (16 months post termination) and offered credit for the salary he was paid thereafter. Effectively, Welch conceded he mitigated his 24-month notice requirement to the extent of his reduced income from new employment after 16 months.

[8] In its prehearing submission, the respondent submitted that each applicant was entitled to between 10 and 12 months pay in lieu of notice, which pay in lieu of notice should be further reduced by their failure to mitigate during the 10 to 12-month period.

[9] During closing arguments, the respondent challenged the inclusion of some of the amounts claimed by the applicants with respect to lost benefits, including the employer's contribution to their RPP and the employer's contribution to their medical and dental coverage, on the basis that, post termination, both applicants failed to make further contributions or get replacement coverage. The applicants stated that this was because they could not afford it.

[10] In an oral decision (released as 2017 NSSC 174), given on June 23, 2017, the court awarded Welch $54,296.88, composed of $4,203.97 per month (inclusive of salary and the lost benefits contested by the respondent) for 16 months, less three months at $3,166.66 per month for failure to take a temporary job he was offered after termination and less $3,466.66 for employment income he earned in March 2017. This award included the statutory minimum eight week pay, paid on November 30, 2015, of $7,244.08.

[11] The court awarded Carroll $73,423.08, consisting of $4,079.06 per month (inclusive of salary and lost benefits contested by the respondent) for 18 months. Contrary to the respondent's evidence and submissions, Carroll was found not to have failed to mitigate his loss of employment income. This figure included the 8-week statutory payment of $7,288.98 made on November 30, 2015.

[12] Based on their pretrial submissions, neither party was successful on the issue of reasonable notice or pay in lieu of notice. The court's awards were in the mid-range between the applicants' claim of 24 months (less, in Welch's case, 8 months of replacement employment) and the respondent's claim of 10 to 12 months.

[13] With regards to the amount of pay upon which the court awarded compensation, the applicants were successful.

[14] With regards to the respondent's claim that the applicants failed to mitigate their loss, the respondent lost in respect of Carroll and was partially successful, to the extent of approximately four months, against Welch.

[15] On the basis of the parties' prehearing briefs and the court's award, the applicants were successful, or at least more successful than the respondent, and would normally be entitled to party-and-party costs.

[16] However, the respondent seeks costs because of the offers exchanged between the parties between December 2016, after the applications were commenced, and June 9, 2017, six days before the hearing commenced.

The Offers

[17] As noted, the respondent's offer on November 30, 2015, was a lump-sum payment of approximately six-months' salary all inclusive or salary continuation for about 12 months, subject to some reduction if the applicants obtained other employment. This offer was woefully inadequate in the context of the applicants' loyal, long-term employment of 25 and 26 years respectively with the respondent. The respondent, as a large national or multinational corporation, must have known this.

[18] On December 19, 2016, after the applications were commenced, the respondent by e-mail responded to an offer by applicants' counsel with a without prejudice offer of 18-months' notice, all in, inclusive of statutory entitlements, plus $750.00 costs. The monthly amount upon which the 18 months was calculated is not set out in the e-mail or evidence before the court.

[19] On March 29, 2017, the applicants' counsel offered by e-mail to settle Welch's claim for 96 weeks (less the statutory eight weeks paid) at $1,021.00 per week and Carroll's claim for 96 weeks (less the statutory eight weeks paid) at $945.00 per week. In reply, the respondent's counsel e-mailed that "the 18 months previously offered is as high as I can go – will your guys entertain anything less".

[20] On March 31, counsel for Carroll offered to settle for 20-months pay in lieu of notice. The respondent countered at 19 months, all inclusive of all statutory amounts, at the bi-weekly rate of $1,811.02.

[21] On June 9, 2017, respondent's counsel wrote by e-mail that while neither applicant was entitled to more than 12 months, it was making a formal offer to Welch of $43,162.64 all in (subject to statutory deductions and hold backs) and $67,156.00 to Carroll (all inclusive, but subject to statutory deductions and hold backs).

Submissions

[22] Counsel for the respondent submits that, on the basis of its realistic and reasonable but unaccepted offers, it is entitled to costs in accordance with Tariff A, Scale 2, against each of Welch and Carroll because there were two applications. In the case of Welch, it claims $12,250.00 on the basis that Welch's claim totaled $100,890.00; and against Carroll $12,250.00 on the basis that his claim totaled $97,897.00. Against each it sought a further $2,000.00 because the hearing lasted

two days. In summary, the respondent seeks costs of $14,250.00 against each of Welch and Carroll, plus disbursements of $1,761.28 plus HST.

[23] The respondent cites:

1. *CPR 77.02* for the rule that costs order is to "do justice between the parties" and that nothing limits the court's discretion in awarding costs;

2. *CPR 77.03*, which sets out the wide options open to the court;

3. *CPR 77.04(2)(b)*, to the effect that one factor for increasing or decreasing tariff costs is an unaccepted, written offer to settle, whether formal or otherwise; and

4. *CPR 10.03*.

[24] The respondent submits, citing case law, that the offer need not be formal and that the offers need only be realistic and reasonable, and not necessarily more favorable than the court's award.

[25] Respondent's counsel notes that:

1. Its December 2016 offer to Welch was $16,000.00 higher than the court's eventual award.

2. Its December 2016 offer to Carroll was $2,316.00 less than the court's eventual award to Carroll.

3. Its counteroffer to Carroll of April 5, 2017, of 19 months was $1,329.00 more than the court's award.

4. Its June 9, 2017 offer to Welch was only $3,856.00 less than the court's award.

5. Its June 9, 2017 offer to Carroll was $1,025.00 more than the court's award.

[26] The respondent does not note that Carroll's offer of March 31, 2017, to settle for 20 months pay in lieu of notice, was close to or only $4,900.00 more than the court's final award.

[27] In response, the applicants appear to make two arguments: First, that each side should bear its own costs; and, alternatively, if the court is considering awarding costs in the basis of the informal offers to the respondent, that the court should give a substantially smaller award than claimed by the respondent.

[28] In the first argument (the parties should bear their own costs), the applicants state that this proceeding was effectively a simple, straight-forward assessment of damages with three issues:

1. The reasonable notice period;

2. Whether the applicants failed to mitigate; and

3. The amount of pay and benefits lost during the notice period.

The court's award was between the positions taken between the parties at the hearing. The applicants acknowledge that the court's reasonable notice period decision was close to the respondent's without prejudices offer to settle.

[29] On the second issue of mitigation, each side had one win and one loss. The respondent failed to prove that Carroll did not mitigate and succeeded in proving some failure to mitigate against Welch.

[30] With respect to the amount of monthly pay upon which the calculation would be found, the applicants were successful.

[31] The applicants submit that the respondent's emphasis upon its informal, without prejudice offers is not warranted. The case law and texts clearly state that common-law damages or pay in lieu of notice are not predictable, except within a wide range. They are affected by many factors that are case specific. There is no easy approach to determine the damages or pay in lieu of notice for 25 and 26 years' employees with unblemished records.

[32] In this matrix, counsel submits the divergence between the parties in their offers to settle are not as significant as the respondent submits. Counsel submits that it was not unreasonable, in the context of the broad range and case-specific determination of reasonable notice, for them to reject the respondent's offers.

[33] Finally, the applicant's counsel submits that the so-called formal offer of June 9, 2017, should not affect the court's analysis. *CPR 10.09*, as acknowledged by the respondent, only applies to Actions and not to Applications in Court.

[34] Furthermore, *CPR 10.09(1)* clearly provides that that provision applies only to offers made "at least one week before trial". The June 9th offer was made only a few days before the hearing commenced.

[35] The second topic upon which the applicants' counsel make submissions is the quantum of costs if the court is considering granting costs to the respondent. The respondent claimed against each applicant $14,250.00 plus one-half of the disbursements of $1,761.00.

[36] The applicants' counsel makes these points.

[37] First, the amount in dispute was not $100,000.00 per applicant. The applicants claimed 24 months' notice, but Welch conceded a set off for the last eight months, based on his new employment, and credit for the statutory eight-week payment. Furthermore, the respondent in its June 9th offer and prehearing brief took the position that reasonable notice was 10 to 12 months. The applicants submit that effectively the amount in dispute in each of their claims was less than $40,000.00.

[38] Second, from their commencement to the end of the proceeding, both applications proceeded as one. They were treated as one matter and took no additional effort or time to advance and defend. For all practical purposes and for the purposes of the costs assessment, they should be treated as one matter.

[39] Third, the issues in dispute were: the length of reasonable notice, whether the applicants failed to mitigate, and the basis for determination of their monthly loss. In the context of their offers to settle, not their prehearing brief position, they were successful on the first issue, but not on the second and third issue.

[40] Fourth, they repeat the argument noted above that the case law and texts suggest that the range of reasonable notice is very broad, case specific and unpredictable. Little emphasis should, in this case, be given to the fact that the respondent made offers as to the length of reasonable notice that were close to the court's decision.

Analysis

[41] *Civil Procedure Rule 77* in its entirety, and the case law applying it, govern this analysis.

[42] The following provisions are particularly relevant:

General discretion (party and party costs)

77.02 (1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.

(2) Nothing in these Rules limits the general discretion of a judge to make any order about costs, except costs that are awarded after acceptance of a formal offer to settle under Rule 10.05, of Rule 10 - Settlement.

Liability for costs

77.03 (1) A judge may order that parties bear their own costs, one party pay costs to another, two or more parties jointly pay costs, a party pay costs out of a fund or an estate, or that liability for party and party costs is fixed in any other way.

…

(3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.

…

Increasing or decreasing tariff amount

77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.

(2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:

(a) the amount claimed in relation to the amount recovered;

(b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;

…

(e) conduct of a party affecting the speed or expense of the proceeding;

[43] The starting point for an assessment of quantum for party-and-party costs is Tariff A and, in this case, Scale 2. The precondition for that assessment is the determination of whether costs should be awarded.

[44] Because both applications were dealt with together at every stage of proceeding, it would be unjust to treat them other than as a single proceeding for the purposes of quantifying costs using Tariff A, Scale 2.

[45] If the fact that the respondent's informal offers were close to the eventual court awards, entitles them to costs against the applicants, I am satisfied that the "amount involved"; that is, the amount in dispute between the parties, based on the parties' prehearing briefs, was around $40,000.00 with respect to each applicant.

[46] If the court were to find that the respondent is entitled to costs, the best that it could reasonable expect is $9,750.00 (being Tariff A, Scale 2 costs for a claim between $65,000.00 and $90,000.00) plus $2,000.00 for day 2.

[47] I have decided, however, that each party should bear its own costs.

[48] First, I accept that offers to settle are relevant to the costs analysis. I accept the respondent's submission, based in part on the analysis of Hallett J., as he then was, in *Curry Estate v Burke*, 1990 CanLII 4178 (NSSC), and Grant J., as he then was, in *Goode v Oursen*, [1991] NSJ No. 669 (NSSC), that parties should be encouraged to make realistic and reasonable offers, even if they are not "more favourable" than the end result and even though they are not formal offers, compliant with what is now *CPR 10.09*.

[49] What counsel for the respondent does not note is that on March 31, 2017, Carroll made an offer to settle for 20 months at a bi-weekly rate of $1,811.02, an amount less than the monthly rate eventually awarded. The offer was close to the court's eventual award. If the respondent is to be given credit for making offers close to the eventual award, so should Carroll.

[50] Mr. Carroll was a 25-year employee of the respondent and its predecessors. His offer was realistic and reasonable, and "close to" the eventual award.

[51] While the e-mail exchanges with respect to the informal offers between December 19, 2016, and June 9, 2017, are not entirely clear on all the terms, the court notes that Mr. Welch's prehearing position was that he was entitled to 24 months, but that he was prepared to give credit for the actual salary he earned from Bio Fuels (from April 1st): effectively, his claim was for about 16-months' notice.

[52] At trial, the court set off a further four months that Welch could have earned, even though at a lesser rate that he was being paid by the respondent at the time of his termination.

[53] Second, it is relevant, in the context of the prehearing submissions of the parties, that the court's award was in the approximate mid-point of the respective parties' positions.

[54] Third, the respondent submits that: "It should receive significant costs – benefits, as a result of its repeated good faith and reasonable attempts to settle this litigation". I agree with this submission with a very important caveat.

[55] The respondent terminated two long-term employees with good work records without notice or without pay in lieu of notice except for the statutory minimum. Its offers on the date of termination were wholly unreasonable by any standard. The court infers that the respondent was aware of this.

[56] The applicants were, on the evidence, in precarious financial positions as a result of their sudden and unexpected termination by the respondent. The respondent is a national or international corporation. The applicants' bargaining position, *vis-à-vis* the respondent, was not close to being equal. Effectively, the respondent kept pay in lieu of notice that it knew or should have known properly belonged to the applicants, even if they did not know what precisely they may eventually have to pay. Only when the applicants sued did the respondent offer to exchange a release for what they put forth as reasonable pay in lieu of notice that was close to the court's awards.

[57] I do not, by this observation, mean that the respondent was legally obligated, once the applications were issued, to pay anything to the applicants. However, its submission of repeated good faith, when it failed to pay its long-term, loyal, but financially disadvantaged, employees what it believed was reasonable, pending the final determination of the appropriate quantum, detracts from its claim of repeated good faith. It is a relevant consideration that only after these proceedings were commenced (a year after termination), did it first made an informal realistic offer that was closer to the court's awards than the applicants' offers.

[58] Fourth, a relevant factor is the fact that the applicants took the most efficient, expeditious and inexpensive route (for all parties) to have their claims adjudicated.

[59] Fifth, applicants' counsel submitted damage assessments of notice claims can be less than precise – "the award rests on a factorial assessment of evidence on broadly stated principles". They quote from an Ontario Divisional Court decision, Boland v APV Canada Inc [2005] OJ No. 510: "it is not always easy to know whether the one is better than the other [sic, offer] because common law damages are not predictable except within a fairly wide range".

[60] This is a relevant consideration in determining whether to put any or much weight on reasonable informal offers that are close to the final result.

[61] This court wrote in *Burns v. Sobeys Group Inc*., 2007 NSSC 363 ("*Burns*"), the following:

> [100] Several text writers enumerate factors and criteria for assessing the quantum of notice or damages in lieu of notice. They included the seminal text by Howard A. Levitt, **The Law of Dismissal**, Third Edition (2003) which lists 105 factors, and **Canadian Employment Law** by Stacey R. Ball (looseleaf) which lists 24 factors.
>
> [101] Geoffrey England's, **Employment Law in Canada**, Fourth Edition, at Chapter 14, categorizes its analysis into 10 criteria.
>
> [102] England's analysis (beginning at Paragraph 14.106) is a comprehensive and clear review of the evolution in different Canadian jurisdictions of the relevant criteria. The multiplicity of factors and desire of employers and employees alike to have some certainty and predictability has lead at some times in some jurisdiction to "rules of thumb". The most common being one month for each year of employment. The Ontario Court of Appeal in *Minott v. O'Shanter Development Co.*, 1999 CarswellOnt 1, rejected the use of "rules of thumb" in Ontario and urged courts to use the more traditional analysis based on *Bardal*.
>
> [103] The *Minott* analysis was endorsed by the Nova Scotia Court of Appeal in *Silvester v. Lloyd's Register North America Inc.,* 2004 NSCA 17, at paragraph 20.

[62] The text **Employment Law in Canada**, cited in *Burns* at para. 14.107 states:

> In the late 1990s, several courts have sought to infuse a greater degree of certainty in the process by adopting as a "rule of thumb" that one month of notice will be

> awarded for each year of prior service with the employer. These courts recognized, however, that such a "rule" should not be applied mechanistically if undesirable consequences would result …
>
> … in 1999 the Ontario Court of appeal delivered a death blow to the "rule of thumb" method in that province.

[63] I conclude that the fact that the respondent's informal offer to settle for a notice period of 18 months after proceedings were commenced, and that the applicants did not accept those offers, does not tip the scale in favour of an award of costs to the respondent, even though their informal offers - depending on what the monthly pay and lost benefits they intended to include, ended up being closer to the court's ultimate finding than the applicants' offers and/or position at the hearing of the applications.

[64] Each party will bear its own costs.

Warner, J.