IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cottrill v. Utopia Day Spas and Salons Ltd.,* 2017 BCSC 1925

Date: 20171026
Docket: S156415
Registry: Vancouver

Between:

Jennifer Cottrill

Plaintiff

And

Utopia Day Spas and Salons Ltd.

Defendant

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff:	Richard B. Johnson
Counsel for the Defendant:	Ritu N. Mahil and Paul A. Kressock
Place and Date of Hearing:	Vancouver, B.C. September 12, 2017
Place and Date of Judgment:	Vancouver, B.C. October 26, 2017

[1] The plaintiff brought these proceedings against the defendant for wrongful dismissal in August of 2015, and at trial sought damages at common law in the amount of $28,280 for 12 months payment in lieu of notice, together with aggravated and punitive damages of $20,000 and costs.

[2] The defendant's position was that the plaintiff was terminated for cause and was not wrongfully dismissed. In the alternative, it submitted that the plaintiff was given three months' notice which is over and above the notice requirements set out in the employment contract that governed the plaintiff's employment. It also submitted that the plaintiff failed to mitigate her losses.

[3] The case proceeded to trial before Madam Justice Harris on June 6–10 and September 23, 2016. In reasons for judgment dated May 1, 2017 and indexed at 2017 BCSC 704, Harris J. described the issues before her as whether the defendant had cause to terminate the plaintiff, if not, what was the period of notice to which the plaintiff was entitled, and whether the plaintiff was entitled to aggravated or punitive damages.

[4] Harris J. found that that the plaintiff had been wrongfully dismissed by the defendant, but that the employment contract was binding. She awarded the plaintiff damages against the defendant for eight weeks in lieu of notice, calculated on the plaintiff’s total weekly wages earned in the last eight weeks of her employment with the company as provided in the *Employment Standards Act*, R.S.B.C. 1996, c.113. In addition, she awarded the plaintiff $15,000 in aggravated damages.

[5] In addition Harris J. awarded costs to the plaintiff “unless there are circumstances which bear of this issue of which I am not aware. In that eventuality, the parties may make arrangements for submissions through Supreme Court Scheduling” (para. 146).

[6] The parties have been unable to agree on the value of the eight weeks earnings; the plaintiff claims that the award for the eight weeks amounts to

$5,876.47, whereas the defendant says the award for the eight weeks amounts to only $4,524.32.

[7] The parties have also been unable to agree as to the plaintiff's entitlement, if any, to costs. Given that Harris J. has retired, I have assigned myself the disposition of the issue of costs in the proceedings.

Discussion

a) Entitlement to Costs

[8] Subrules 14-1(9) and (10) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Civil Rules*] provide that:

> (9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.
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> (10) A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the *Small Claims Act* is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

[9] Subrule 14-1(12) has no application on this application.

[10] The relevant time for the consideration of the application of Rule 14-1(10) is the time when the action was commenced: *Hall-Smith v. Yamelst*, 2016 BCSC 325 at para. 32. The monetary jurisdiction of the Provincial Court under the *Small Claims Act*, R.S.B.C. 1996, c. 430, at the time this action was commenced was $25,000, an amount greater than the amount awarded to the plaintiff.

[11] The term "sufficient reason" was considered by the Court of Appeal in *Gehlen v. Rana*, 2011 BCCA 219 at paras. 36–37 following a reference to its earlier decision in *Gradek v. DaimlerChrysler Financial Services Canada Inc.*, 2011 BCCA 136 as follows:

> [36] The Court ultimately concluded that "sufficient reason" was not intended by the Legislature to be limited to the quantum as assessed at the outset of the claim. However, the Court stated, at paras. 16 and 20:

> [16] The words "sufficient reason" are not defined in the *Rules of Court*. In their ordinary and grammatical sense, they do not suggest a specific limitation in terms of application, although it is clear that "any reason" will not do. The reason has to be "sufficient", but there is nothing in the Rule to suggest that it has to be connected solely to the quantum of the claim. On the other hand, the words do not connote the exercise of a discretion, with its attendant deferential standard of review. That point was made by this Court in *Reimann v. Aziz*, 2007 BCCA 448, 72 B.C.L.R. (4th) 1, at para. 13: ...
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> ...
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> [20] I accept that the narrow interpretation of the words "sufficient reason" advocated by the appellant would provide greater certainty to litigants in knowing the consequences of proceeding in Supreme Court where the matter falls within the Small Claims monetary limit. But I agree with the trial judge that if the Legislature had intended to limit the scope of the words "sufficient reason" to the extent suggested by the appellant, it could readily have done so. While I am satisfied that the words, "sufficient reason" should not be interpreted in an expansive manner, but with restraint, I am also satisfied that they must be read in such a way that a trial judge is not forced to deny a party costs where he is satisfied, as here, that justice can only be achieved as between the parties by an award of costs to the successful party.
>
> [37] As I understand the import of *Gradek*, it is that likely quantum, while perhaps the most important factor for determination of sufficient reason, is not the only factor that may be taken into account. The Court in *Gradek* also accepted that there may be other circumstances that justify bringing an action in the Supreme Court despite the fact that the likely quantum will not exceed the Small Claims amount. Thus, in *Gradek* the Court accepted the trial judge's finding that Mr. Gradek, due to language difficulties, required the assistance of counsel and it would be unjust to require him to bring his claim in the Small Claims Court where he would be denied costs that would partially offset the expense of retaining counsel (para. 18). However, it is clear from *Gradek* that the burden is on the plaintiff to establish eligible circumstances that are persuasive and compelling to justify "sufficient reason".

[12] In *Keuhne v. Probstl*, 2004 BCSC 865 at para. 22, Master Groves, as he then was, set out a number of factors to be considered in deciding whether or not to award costs where the recovery at trial was less than the Small Claims limits:

> [22] Reasons for this could be numerous. The case may be complex, involving a number of documents, and there may be a need for a discovery of document process in order to properly litigate the matter. Such discovery process is generally not available in Provincial Small Claims Court. The

> factual matrix of the case could lead to a bona fide need for examinations for discovery. Plaintiff's counsel specifically argued this in regards to the liability issue in this case. Thirdly, there may be a need for a judgment to be enforceable abroad, and for that reason there is a practice, if not a preference, to have matters brought in the superior court of the province, which has enhanced recognition in other jurisdictions, and for which there are a number of treaties for enforcement. Additionally, counsel may have a bona fide reason for desiring a jury trial or believing they require a jury trial when the matter is first commenced, and the remedy of a jury trial is clearly not available in Provincial Court under the *Small Claims Act*. Another reason may be that the issue is complex legally, and that perhaps the summary trial rules available in Supreme Court may lend itself to an effective resolution under the summary trial procedure. Additionally, the general complexity of the case may suggest that the matter is more appropriately heard in Supreme Court, where matters with complex legal components are routinely argued, and the court has the resources or the ability to allocate significant time to these complex legal issues. These are some reasons why matters could not appropriately have been brought in Provincial Court, and I am sure there may be many more.

[13] The plaintiff asserts that her case was legally and factually complex. I am not persuaded that the factual aspects of the case were complex, but there is some basis for the assertion as to legal complexity as Harris J. referred to 47 different case authorities in her reasons for judgment, and the contractual issue was one that occupied some 25 paragraphs in her reasons for judgment.

[14] More importantly, there was a need for, and difficulty on the part of the plaintiff in obtaining the disclosure of the defendant’s documents in order to properly litigate the matter.

[15] As well, I am satisfied that the parties needed, and used the examination for discovery process that was unavailable in the Provincial Small Claims Court.

[16] In my view, it is also worth noting that both parties availed themselves of procedural entitlements pursuant to the *Civil Rules* that were not available in the Provincial Small Claims Court.

[17] On the other hand, there was no need for the enforcement of a judgment outside of British Columbia, no basis for trial by jury given the prohibition on such a mode of trial in Rule 12-6(2)(g) of the *Civil Rules* where the specific performance of

a contract is in issue, no preference for trial by jury in any event, and no apparent need for access to the summary trial procedure available in this Court.

[18] Having considered all of the factors identified by Master Groves, I conclude that in this case there was sufficient reason for bringing the proceeding in the Supreme Court, and I order that the plaintiff is entitled to recover her reasonable and taxable costs and disbursements of the action from the defendant in this Court.

b) Effect of the Plaintiff's Offer to Settle

[19] Subrules 9-1(5) and (6) of the *Civil Rules* provide:

> (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
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> > (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
> >
> > (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
> >
> > (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
> >
> > (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.
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> (6) In making an order under subrule (5), the court may consider the following:
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> > (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
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> > (b) the relationship between the terms of settlement offered and the final judgment of the court;
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> > (c) the relative financial circumstances of the parties;
> >
> > (d) any other factor the court considers appropriate.

[20] On May 26, 2016, the plaintiff made an offer to settle her claim for the sum of $15,000 together with her taxable costs and disbursements. The offer was open for acceptance only until May 31, 2016. Although an extension of the offer was said to be possible by counsel for the plaintiff, the offer was rejected by the defendant.

[21] While the plaintiff did not have the financial wherewithal that was enjoyed by the defendant, I do not consider that factor to warrant an exception from the usual order of costs at Scale B under Appendix B of the *Civil Rules* for a case of ordinary difficulty, which I find this case to be.

[22] The plaintiff's offer to settle was less than her recovery, but not by a great deal.

[23] In my view, the decisive consideration with respect to the appropriate type and scale of costs in this case is whether the plaintiff's offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served, or on any later date. The offer was one in a series of reducing offers, which differed in some other ways as well. It was made on a Thursday evening, after business hours, and open for acceptance for only about two and a half business days.

[24] In my view, this short term offer was not one that the defendant ought reasonably to have accepted in the limited time that it was available for acceptance. The defendant was successful in its defence that the plaintiff's contractual agreement was binding, and it was only the aggravated damage award that resulted in the plaintiff's recovery exceeding her offer to settle. I conclude that a reasonable person would believe that there was sufficient reason for the defendant to decline the plaintiff's settlement offer and to proceed to trial.

Conclusion

[25] I order that the plaintiff should recover her reasonable costs and disbursements of this action from the defendant on Scale B of Appendix B of the *Civil Rules*, forthwith after the taxation thereof by the Registrar, or the agreement of the parties.

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The Honourable Chief Justice C.E. Hinkson