
CANADA / JUDGMENT

Baiden v. Argent

2009 BCSC 1094

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 1094 Baiden v. Argent

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Baiden v. Argent,

2009 BCSC 1094

Date: 20090811

Docket: S025092

Registry: Vancouver

Between:

Todd Baiden

Plaintiff

And

Officers Argent, Manji, Yamamoto, Fincham, Heard,

Dave Pankratz and John Doe #2, Vancouver Police Department and

The City of Vancouver, the Vancouver Police Board, Raj Aiyathurai

and Monte Cristo Bakery and Café Ltd.

Defendants

Before: The Honourable Mr. Justice Chamberlist

Reasons for Judgment Re: Costs

In Chambers

Counsel for the plaintiff:

A.C. Ward

Counsel for the defendants Officers Argent, Manji, Yamamoto, Fincham, Heard, Pankratz, The City of Vancouver and the Vancouver Police Board:

B. Parkin

Place and Date of Trial/Hearing:

May 15, 2009

Written Submissions regarding Costs received:

May 27, May 29 and June 2, 2009

Place and Date of Judgment:

Vancouver, B.C.

August 11, 2009

INTRODUCTION

- [1] Following the jury's verdict on May 15, 2009, I agreed that I would seize myself of the issue relating to whether or not the plaintiff could claim, as a disbursement in this action, the fees he paid to retain alternative counsel to make submissions to the Workers' Compensation Appeal Tribunal ("WCAT") in relation to an application brought by the defendants under s. 257 of the Workers Compensation Act ("WCA" or the "Act"), R.S.B.C. 1996, c. 492. On this date I advised counsel that I would accept written submissions on the issue.
- [2] The plaintiff, in its submissions dated May 27, 2009, sought to claim the legal fees only in the alternative. The primary ground sought was for an order that the defendant City of Vancouver pay the plaintiff his costs and disbursements thrown away in respect of the defendants' application to amend the statement of defence and adjourn the trial which was originally scheduled for September 25, 2006. That submission was that all costs related to the application to the Workers' Compensation Appeal Tribunal, with costs assessed on a solicitor and client basis, be paid.
- [3] With respect to the primary order sought, the defendants submit that it is inappropriate for the plaintiff to raise this new issue at this time particularly since it had already been dealt with by Madam Justice Gray in her decision of August 10, 2006, when she determined that the applicants would have leave to amend their statement of defence to plead s. 10 of the Workers Compensation Act, and adjourned the trial.
- [4] At paras. 23, 27 and 30 of her reasons, Madam Justice Gray said this:

[23] So I am going to be brief in what I say. I will say that I can see in the material that there was a newspaper article which included the headline, "Man Making an Early Start on Pasta Sauce". It would be possible to conclude from that that the pasta sauce was being made in the course of employment duties for the employer. It seems to be implied that the pasta sauce was for the business. But I am not so confident of the possible conclusion that, for the purposes of this application, I am of the view that there should be an award of costs against the City of Vancouver and the officers for not raising this until immediately after the examination for discovery.

...

[27] The City of Vancouver and the officers also ask that costs be awarded in their favour on the basis that the law is so clear that the matter cannot proceed pending the Appeal Tribunal determination. I decline to make that order. Instead, I am going to make this order.

...

[30] I make no order as to costs.

[5] Based on Madam Justice Gray's decision, I have concluded that the plaintiff does not get a second opportunity to make submissions with respect to costs related to the adjournment of the trial or the application to the Workers' Compensation Appeal Tribunal ("WCAT") with costs on a solicitor and own client basis.

[6] Of particular relevance to the claim for costs on a solicitor/client basis is the fact that such costs would not be appropriate.

[7] In *Leung v. Leung* (1992), 77 B.C.L.R. (2d) 314 (S.C.). Esson C.J., as he then was, discussed the basis for an award of special costs at para. 4:

The concept of special costs was introduced to our rules in the 1990 amendments. It has been held that entitlement to special costs is to be determined on the same principles formerly applied to awarding solicitor-client costs. The test for awarding such costs was stated thus by Lambert J.A. in *Stiles v. British Columbia (Workers Compensation Board)* (1989), 38 B.C.L.R. (2d) 307 (C.A.), at p. 311:

... solicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. The words "scandalous" and "outrageous" have also been used.

There is nothing in the conduct of Mr. Leung in relation to this matter which I would call "scandalous" or "outrageous". But "reprehensible" is a word of wide meaning. It can include conduct which is scandalous, outrageous or constitutes misbehaviour; but it also includes milder forms of misconduct. It means simply "deserving of reproof or rebuke".

- [8] More recently, in *Foundation Co. Of Canada Ltd. v. United Grain Growers Ltd.* (1996), 8 C.P.C. (4th) 354 (B.C.S.C), Brenner J., as he then was, examined the disparity between special costs and ordinary costs. At para. 19, Brenner J. said, in summary:
1. Where ordinary costs fail to meet 50% of special costs, an injustice presumptively arises;
 2. The greater the shortfall below 50%, the grater the presumption that it is unjust not to close the gap;
 3. While it is possible that a particular case could arise in which the shortfall below 50% could be so great that the discrepancy alone will justify increased costs, as a general rule, the judge must consider why the disparity exists to determine whether increased costs should be awarded.
- [9] Applying those considerations to the case at bar it is noteworthy to keep in mind that s. 10 of the Workers Compensation Act is a bar to commencing an action in this court where the right of action has been taken away by the operation of a statute. Section 10 of the Workers Compensation Act allows for either party to raise the issue and apply under s. 257 for a determination by WCAT.
- [10] Just as Madam Justice Gray found in 2006 that she was not prepared to make an order for costs against the City of Vancouver because of when the issue of s. 10 of the WCA was first raised, I am not in a position to say the actions of the defendants were scandalous or outrageous or deserving of rebuke.
- [11] Madam Justice Gray, at para. 6 of her reasons, said that in November 2005 the defendants sought to examine the plaintiff for discovery, but because then counsel for the plaintiff did not provide available dates in a timely way, discoveries did not commence until June 2006, and that within two days the defence advised they would be raising a Workers' Compensation issue, and counsel for the City of Vancouver, indeed, wrote to WCAT the following day.
- [12] As a result submissions were made to WCAT on the worker/worker issue under s. 10 of the Act. Following submissions, vice chair Herb Morten gave his 24 page decision wherein he found all defendant peace officers to be workers within the meaning of Part I of the Act, as well as the plaintiff Todd Baiden, but concluded the injuries suffered by the plaintiff did not arise out of and in the course of his employment within the scope of Part I of the Act.
- [13] I am satisfied that the circumstances of this case and how it progressed once litigation was commenced does not justify increased costs over the allowable costs provided by Scale B.
- [14] I therefore turn to the plaintiff's alternate claim, being an order that the statement of account of Vahan Ishkanian, dated February 4, 2008, in the total amount of \$8,400.00 be recoverable as a taxable disbursement in the within action.

- [15] This, of course, is the one question that I had indicated at the conclusion of the jury trial that I would be seized with.
- [16] I have therefore concluded that the case the plaintiff relies on, being the decision of Melvin J. in *Servos v. ICBC*, October 13, 2005; unreported; 02-1935 Victoria Registry, for full indemnification of legal fees and disbursements relating to the WCAT issue is of no assistance to the facts of this case. I certainly reject the plaintiff's submission that there should be full indemnity "as a result of the defendants' late and unnecessary tactical step".
- [17] Specifically, I find that it was not inappropriate for the defence to wait until they had the plaintiff's sworn evidence as to the circumstances of him being at the café when the incident of March 7, 2002 occurred.
- [18] This was not a case such as found in motor vehicle cases where there is quite often a statement provided by the injured party. While I accept that the Vancouver Sun reported on March 9, 2002 that Mr. Baiden was a cook at the café who had been in the restaurant making a sauce before he fell asleep, one cannot with certainty seek an adjudication under s. 10 of the Act with self-serving evidence that has not been provided under oath or any compulsion, such as the obligations that befall an insured motorist in the Province of British Columbia.
- [19] I therefore turn to the defence position with respect to the issue of the legal fees of Mr. Ishkanian, who appeared before WCAT.
- [20] The defendants' position is set out in paras. 34 to 37 inclusive of their submissions, which are as follows:
34. It is submitted that there is simply no basis in law for the Plaintiff recovering his actual legal fees incurred in arguing the issue.
35. First, it was not necessary that specialist counsel be hired to deal with the WCAT issue. The worker/worker bar is an issue that arises quite frequently in personal injury cases of all types, including motor vehicle accidents and the like. Normally the matter is dealt with by Plaintiff and Defence counsel in the normal course of conducting the action. It is submitted that as experienced plaintiffs' counsel, Mr. Ward was fully qualified to make the submission necessary to the WCAT in this case.
36. Secondly, the WCAT is an administrative tribunal with its own jurisdiction regarding costs. It is submitted that it would have been open to the Plaintiff to seek compensation for costs from the WCAT in relation to the application made to that body.
37. Third, it has been held in analogous cases that a party should not recover as costs the legal fees paid to hire lawyers or others to do work that would ordinarily be performed by counsel of record on a case.

[21] Dealing with the first issue raised by the defence, I am of the view that having reviewed the legislation applicable to hearings before WCAT that this is a situation where it is necessary that specialist counsel be hired to deal with the issue.

[22] The Act discloses, through various sections, that the appeal tribunal is not a court of law like the Supreme Court of British Columbia. For example, s. 246.1, with respect to evidence, provides as follows:

246.1 (1) The appeal tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

[23] And, with respect to decision making, s. 250 of the Act provides:

250 (1) The appeal tribunal may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent.

- (2) The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.
- (3) The appeal tribunal is bound by a decision of a panel appointed under section 238 (6) unless
 - (a) the specific circumstances of the matter under appeal are clearly distinguishable from the circumstances addressed in the panel's decision, or
 - (b) subsequent to the panel's decision, a policy of the board of directors relied upon in the panel's decision was repealed, replaced or revised.
- (4) If the appeal tribunal is hearing an appeal respecting the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker.

[24] These very simple observations exemplify the difference between proceedings in the Supreme Court of British Columbia and proceedings under the Workers Compensation Act.

[25] As a result, I find attendances before the Workers' Compensation Board and WCAT would be quite different from appearing in court and, as such, represent a need for specialization.

[26] I disagree that this case is in any way similar to *Noble v. Wong* (1982), 38 B.C.L.R. 246 (S.C.), where Esson J., as he then was, upheld a decision by a Registrar who disallowed fees claimed for the services of a private investigator where the services were of the kind normally provided by a lawyer. In that case Mr. Justice Esson stated that only those services which are outside the scope of services normally provided by a lawyer can properly be charged as disbursements in a party and party taxation.

[27] Given the statutory exclusions contained in s. 250 of the Act that the appeal tribunal is not bound by legal precedent, it is clear that a hearing before the WCAT is quite different than a hearing before a court in this province.

[28] At para. 4 of *Noble v. Wong*, Esson stated:

. . . any lawyer who feels that he cannot adequately perform that function should, in the best interests of his client, hire someone else to do it rather than do it incompetently. It does not follow that the expenses resulting from such "farming out" should be allowed as a disbursement against the unsuccessful party. That is a matter between the lawyer and the client.

[29] This statement may be applicable to the circumstance where the issue of the plaintiff being a worker was first raised in the statement of defence, but it is not, in my view, applicable in a case such as this where the issue was raised just prior to trial when plaintiff's counsel had been proceeding on the basis that it was not an issue raised by the defence. As I have indicated above, a lawyer may be very competent in Supreme Court where he or she has been taught and practised the importance of legal precedent and is familiar with the rules of admissibility of evidence. Section 246.1 and s. 250 of the Act obviously disclose some of the differences in appearing before WCAT and appearing before the Supreme Court.

[30] In *The Law of Costs*, 2nd Ed., Orkin, page 2-288, under the heading 219.7.2 "Other Lawyers", under party and party costs, the learned author refers to two cases where courts have sanctioned the delegation of some work by a sole practitioner to an outside lawyer as a disbursement in the party and party bill of costs.

[31] While the case cited by Orkin are different from the case at bar, this reference demonstrates that it is not always the case that a disbursement for legal fees paid to another lawyer and reasonably incurred will be disallowed. Experienced litigators should leave nothing to chance. As already indicated, Mr. Ward has never before dealt with WCAT.

[32] This brings me down to the second submission of the defence, namely that WCAT is an administrative tribunal with its own jurisdiction regarding costs. I agree with the defence that if there is a body on which compensation for costs should be dealt with that would be WCAT being the body that dealt with the decision made, which the plaintiff now wishes to have expenses incurred in that decision a taxable disbursement in this action.

[33] There may be merit in this submission but I have regretfully concluded that I do not have enough information in front of me. A review of the Administrative Tribunals Act discloses that under s. 47(1) the tribunal may make orders for payment of costs. Section 47(1) of the Administrative Tribunals Act provides as follows:

47 (1) Subject to the regulations, the tribunal may make orders for payment as follows:

- (a) requiring a party to pay part of the costs of another party or an intervener in connection with the application;
- (b) requiring an intervener to pay part of the costs of a party or another intervener in connection with the application;

(c) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay part of the actual costs and expenses of the tribunal in connection with the application.

(2) An order under subsection (1), after filing in the court registry, has the same effect as an order of the court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken on it as if it were an order of the court.

[34] Regretfully, I have reviewed the Workers Compensation Act and have been unable to find anything with respect to the issue of costs at WCAT level.

[35] Section 100 of the Workers Compensation Act provides as follows:

100 The Board may award a sum it considers reasonable to the successful party to a contested claim for compensation or to any other contested matter to meet the expenses the party has been put to by reason of or incidental to the contest, and an order of the Board for the payment by an employer or by a worker of a sum so awarded, when filed in the manner provided for the filing of certificates by section 45(2), becomes a judgment of the court in which it is filed and may be enforced accordingly.

[36] Regretfully, the definition of 'board' does not include WCAT.

[37] While s. 47(1) of the Administrative Tribunals Act does provide for a tribunal making orders for payment of costs, s. 245.1 of the WCA which sets out the application of various provisions of the Administrative Tribunals Act appeal tribunal proceedings does not make s. 47(1) applicable. It provides as follows:

245.1 Sections 1, 11, 13 to 15, 28 to 32, 35(1) to (3), 37, 38, 42, 44, 46.3, 48, 49, 52, 55 to 58, 60(a) and (b) and 61 of the Administrative Tribunals Act apply to the appeal tribunal.

[38] Because of this, I am unable to agree with the defences' submission that WCAT is an administrative tribunal with its own jurisdiction regarding costs and that it would have been open to the plaintiff to seek compensation for costs through WCAT in relation to the application under s. 10.

[39] The fact is that only after some years that Mr. Ward had been counsel for the plaintiff was s. 10 of the WCA brought into issue. The affidavit filed by the plaintiff discloses that Mr. Ward had never before dealt with the WCAT.

[40] I have reviewed the various submissions made to WCAT as set out in the affidavit of Karin Reinhold, along with the decision of WCAT, and I find that the retention of Mr. Ishkanian to act for the plaintiff before WCAT was reasonably incurred at the time and the account is reasonable.

[41] The sum of \$8,400.00 is allowed as a disbursement in this action.

"Chamberlist, J."

The Honourable Mr. Justice Chamberlist

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