
CANADA / JUDGMENT

British Columbia Teachers' Federation v. Thorne

2011 BCSC 1119

COURT

Supreme Court of British Columbia

DECIDED

17 August 2011

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2011 BCSC 1119 British Columbia Teachers' Federation v. Thorne

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

British Columbia Teachers' Federation v. Thorne,

2011 BCSC 1119

Date: 20110817

Docket: S075936

Registry: Vancouver

Between:

The British Columbia Teachers' Federation

Plaintiff

And

Judith Thorne

Defendant

Before: The Honourable Madam Justice Baker

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff:

Robert W. Taylor

& Laura A. McLeod

Counsel for the Defendant:

Norman Cuddy

& Sarah Hentschel

Place and Date of Hearing:

Vancouver, B.C.

January 6, 2011

Place and Date of Judgment:

Vancouver, B.C.

August 17, 2011

- [1] The trial of the plaintiff's claim and the defendant's counterclaim was heard over a period of 13 days in the spring of 2009. On July 5, 2010, I issued Reasons for Judgment disposing of all issues with the exception of costs.
- [2] In the Reasons issued on July 5, 2010, I gave the parties leave to make further submissions if they were unable to agree on the disposition of costs once they had had an opportunity to consider their positions in light of my Reasons.
- [3] The plaintiff is seeking party-party costs of the action on Scale B of the tariff up to, and including November 27, 2008, and double costs thereafter pursuant to Rule 37(B) of the Rules of Court that were then in effect.
- [4] The defendant is seeking an order that the plaintiff pay the defendant's costs on Scale B; or in the alternative, an order that each party bear its own costs; or in the further alternative, that the costs be apportioned in relation to success on discrete issues raised on the pleadings.

FACTS

- [5] The defendant, Ms. Thorne, is a teacher and was at all relevant times a member of the plaintiff, British Columbia Teachers' Federation ("the BCTF"). Until August 31, 2006, Ms. Thorne was in receipt of long term disability benefits paid by the BCTF. The benefits were terminated by the plaintiff on August 31, 2006. The BCTF sued Ms. Thorne to recover damages equivalent to the benefits that the plaintiff had paid to her during the period September 1, 2005 to August 31, 2006.

[6] Ms. Thorne counterclaimed, seeking a declaration that she continued to be entitled to benefits from and after August 31, 2006. She also claimed general, punitive, aggravated and exemplary damages for breach of contract, mental distress, breach of the duty of good faith and fair dealing, breach of privacy and defamation.

[7] The Reasons for Judgment are lengthy but the result is summarized in very brief terms at paragraph 354:

The plaintiff's claim for damages is dismissed. The defendant's claim for a declaration that she was entitled, at date of trial, to disability benefits retroactive to August 31, 2006 is dismissed. The other claims in the statement of claim and counterclaim are dismissed.

[8] At this costs hearing, counsel for the defendant and for the plaintiff each provided the court with a copy of a settlement offer that had been delivered to the opposing party prior to trial.

[9] Counsel explained, and Ms. Thorne deposed, that at a Judicial Settlement Conference held November 24, 2008, Madam Justice Boyd recommended that the parties attempt to settle their respective claims, following which the parties exchanged settlement offers.

[10] The defendant's proposal is dated first in time, bearing a date of November 26, 2008. The defendant's proposal is said to be made pursuant to Rule 37B of the Rules of Court and the defendant reserved the right to bring the offer to the attention of the court in relation to costs.

[11] The defendant's offer required the plaintiff to reinstate her long term disability benefits retroactive to August 31, 2006; pay arrears of benefits to the date of judgment with interest; provide a public apology and retraction regarding allegations of fraud and overpayment of benefits; pay the defendant's full legal fees (stated to be \$51,319.95 at that date) to date of acceptance of the offer and interest thereafter; pay damages to the defendant for mental distress in the amount of \$50,000; and file a consent dismissal order.

[12] The plaintiff's settlement proposal is contained in a letter dated November 27, 2008, sent by plaintiff's counsel to defendant's counsel, also offering to settle the action pursuant to Rule 37B and expressly reserving the right to bring the offer to the court's attention in relation to the matter of costs.

[13] The offer included a one-time payment by the plaintiff to the defendant of \$25,000; abandonment of the plaintiff's claim for repayment of long term disability benefits paid to the defendant from and after September 1, 2005; an offer to permit the defendant to accrue pension credit from September 1, 2005 to the date of settlement; an offer to pay for and assist the defendant with rehabilitation services; and a general release. In return, the defendant would be obliged to forego any claims for past or future benefits arising out of symptoms similar to those previously claimed to entitle the defendant to benefits; agree to dismiss her action; and execute a general release, including a confidentiality term.

[14] Rule 37B came into force July 1, 2008. Subrule 37(5) is relevant:

37(5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:

- (a) deprive a party, in whole or in part, 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 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 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 of the offer to settle.

[15] Subrule 37(6) provides:

37(6) In making an order under subrule (5), the court may consider the following:

- (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 on any later date;
- (b) the relationship between the terms of settlement offered and the final judgment of the court;
- (c) the relative financial circumstances of the parties;
- (d) any other factor the court considers appropriate.

[16] The defendant filed an affidavit in relation to the issue of costs. Plaintiff's counsel objected to references made in the defendant's affidavit to comments that the defendant attributed to Madam Justice Boyd at the Judicial Settlement Conference. While all communications at such a conference are generally considered privileged, I conclude that it is permissible for Ms. Thorne to depose that she considered the offer she made on November 26, 2008 to be a reasonable position to take in light of events that had transpired at the Judicial Settlement Conference.

[17] Plaintiff's counsel provided the court with draft bills of cost. The first draft bill, based on Scale B costs throughout, totals \$47,981.60 in fees, plus \$91,662.98 in disbursements, GST and PST for total costs of \$139,644.58. The second draft bill, based on Scale B costs to November 27, 2008 and double costs thereafter, plus disbursements, comes to \$83,283.20 in fees, plus the aforementioned disbursements, for total costs of \$174,946.18.

- [18] Attached to Ms. Thorne's affidavit is a draft bill of costs prepared by her counsel. On Scale B, the tariff items total \$52,606.40 plus disbursements and GST of \$36,975.77 for a total of \$89,582.17.
- [19] The plaintiff has not claimed that it will suffer financial hardship if obliged to pay Ms. Thorne's costs; or obliged to bear the costs it has incurred in relation to this litigation without contribution by Ms. Thorne. I recognize, however, that the activities of the plaintiff and in particular, its disability benefits plan is funded by the dues and contributions paid by individual members of the Federation and that the costs of this litigation, as revealed by the plaintiff's draft bill of costs, are significant.
- [20] The evidence establishes clearly and without any doubt that an order requiring the defendant to pay the plaintiff's costs would cause significant hardship to the defendant and, indirectly, to her husband. The defendant would almost certainly lose her home and would essentially be left bankrupt.
- [21] The evidence at trial was that Ms. Thorne's husband accepted early retirement from his management position with a regional health authority in March 2006. Ms. Thorne and her husband had remortgaged their North Vancouver home in October 2005 to purchase a Curves fitness franchise business, pay off debts and provide working capital for the new business. Both Mr. and Ms. Thorne deposed at trial that the business lost money and they eventually sold it.
- [22] Ms. Thorne chose not to attempt to return to the workforce following issue of the Reasons in this trial and instead began to collect her pension from the plaintiff. She deposed in her affidavit filed in relation to this costs hearing that she and her husband had entered into an agreement to sell their home that was scheduled to close in January 2011 and were planning to "downsize" to a town home they had purchased in Langley using mortgage financing. Despite the downsizing, Ms. Thorne deposed that they would require a \$300,000 mortgage to complete the acquisition of the new home.
- [23] Ms. Thorne deposed that although Mr. Thorne had been working at a part-time job he had taken after this lawsuit was commenced, he had stopped working at that job in anticipation of the move to Langley, and as a result of some health problems, including a bout of pneumonia in the summer of 2010. She deposed that she and her husband have debts, including the cost of disbursements related to the trial of this action. Ms. Thorne prepared a financial statement that indicates that she and her husband also have debts owing on several credit cards and bank lines of credit.
- [24] Ms. Thorne deposed that at present she and her husband rely on her teacher's pension, her CPP disability pension, Mr. Thorne's employment pension and his CPP and OAS pensions.

- [25] Ms. Thorne's claim for damages for breach of privacy and part of her claim for breach of the duty of good faith and fair dealing were based on the plaintiff having attached a copy of a medical-legal report authored by Dr. Stewart-Patterson to the Statement of Claim filed by the BCTF on September 4, 2007. I discussed these claims in paragraphs 339 to 353 of my Reasons. I concluded that the claim could not succeed because a party to litigation enjoys absolute immunity in relation to pleadings filed in a court proceeding.
- [26] Ms. Thorne testified at trial about the distress she experienced as a result of contacts from reporters and the articles that appeared in the newspapers referring to information contained in the report that had been attached to the Statement of Claim.
- [27] Ms. Thorne's position is that if the plaintiff is otherwise entitled to costs, it should be denied costs because of its misconduct in attaching the medical-legal report to the Statement of Claim.
- [28] Including the report as an attachment to the Statement of Claim resulted in several breaches of the requirements of the Rules of Court. The Statement of Claim was not as brief as the nature of the case would permit and contained evidence, contrary to Rule 19(1). Attaching the report demonstrated poor judgment and either a careless or callous disregard for the privacy interests of the defendant. The report included not only information that Ms. Thorne had provided to Dr. Stewart-Patterson directly, but also statements attributed to her by other health care professionals who assessed her at the plaintiff's request and details about Ms. Thorne's activities while under video surveillance. In my view, the plaintiff and its counsel ought to have realized that including the report would provoke or heighten media interest in the lawsuit.
- [29] I have concluded that each party shall bear its or her own costs of this litigation. There has been divided success. The defendant was successful in defending against the plaintiff's claim for damages. The plaintiff was successful in defending against the defendant's claim for a declaration of entitlement, and for damages. Although the quantum of damages sought in the counterclaim greatly exceeded the quantum of damages sought by the plaintiff, both parties had their primary claims dismissed.
- [30] I have already said that an award of damages against the defendant would impoverish her and expose both her and her husband to significant hardship.
- [31] Most importantly, however, I have concluded that there was misconduct in the litigation – whether calculated or careless – that should be penalized in costs. While I am not persuaded the misconduct entitles the defendant to payment of her costs, I am satisfied this is an appropriate case to deny costs to the plaintiff.
- [32] Each party shall also bear its own costs of the hearing regarding costs.
- [33] In view of the orders made, I need not consider entitlement to double costs under Rule 37(B).

"W.G. Baker J."

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