Federal Court Cour fédérale

Date: 20240208

Docket: T-133-22

Citation: 2024 FC 216

Calgary, Alberta, February 8, 2024

PRESENT: Madam Justice Go

BETWEEN:

CHELSEA GIFFEN

Applicant

and

TM MOBILE INC.

Respondent

COSTS ORDER AND REASONS

I. Overview

[1] The Applicant, Ms. Chelsea Giffen, sought judicial review of a decision of an adjudicator dismissing her unjust dismissal complaint against the Respondent under subsection 240(1) of the *Canada Labour Code*, RSC, 1985, c L-2 [*Code*].

[2] By a judgment dated December 11, 2023, I dismissed the Applicant's application with costs and invited the parties to file submissions on costs: *Giffen v TM Mobile Inc*., 2023 FC 1666 [*Giffen*].

[3] I have received and reviewed the parties' submissions. The reasons for my costs order are set out below.

II. Summary of the Guiding Principles for Costs Orders

[4] This Court has full discretionary power over the amount and allocation of costs: Rule 400(1) of the *Federal Courts Rules*, SOR/98-106 [*Rules*].

[5] While the Court has broad discretion over costs, the exercise of such discretion is not made arbitrarily: *Pembina County Water Resource District v Manitoba*, 2019 FC 82 [*Pembina*], at para 20. The Court may consider the list of factors set out under Rule 400(3) and, in accordance with Rule 400(3)(h) of the *Rules,* the Court may take into account any other matter that it considers relevant: *Pembina* at para 19.

[6] In *Allergan Inc. v Sandoz Canada Inc.*, 2021 FC 186 [*Allergan*], Chief Justice Crampton summarized the principal objectives underlying an award of costs as follows: "(i) provide indemnification for costs associated with successfully pursuing a valid legal right or defending an unfounded claim, (ii) penalize a party who has refused a reasonable settlement offer, and (iii) sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious:" *Allergan*, at para 19.

[7] As the Chief Justice further explained in *Allergan* at para 25, "[t]he 'default' level of costs in this Court is the mid-point of column III in Tariff B" and "[c]olumn III is intended to provide partial indemnification (as opposed to substantial or full indemnification) for 'cases of average or usual complexity.'"

[8] Also, as Justice Diner explained in *Canadian Pacific Railway Company v Canada*, 2022 FC 392 at para 23:

> Costs customarily provide partial compensation, rather than reimbursing all expenses and disbursements incurred by a party, representing a compromise between compensating the successful party and burdening the unsuccessful party (*Sherman v Canada (MNR)*, 2004 FCA 29 at para 8 [*Sherman*], citing *Apotex Inc. v. Wellcome Foundation Ltd*. (1998), 1998 CanLII 8792 (FC), 159 F.T.R. 233)….

[9] Finally, in recent years, the granting of a lump sum award has become increasingly common, and is frequently preferred to the Tariff "because of its simplicity, the time and effort it saves in not having to prepare and debate the minutiae of items under the Tariff:" *Catalyst Pharmaceuticals, Inc. v Canada (Attorney General)*, 2022 FC 1669 at para 21.

III. Analysis

[10] The parties' positions on costs differ significantly. The Respondent seeks a lump sum costs award in the aggregate amount of $14,000. The Applicant submits that a fixed costs award of $3,500 would be appropriate in all of the circumstances.

[11] The Respondent submits affidavit evidence attaching calculations of the legal costs and disbursements they have incurred. The Respondent prepared bills of costs in accordance with the high range of columns III, IV, and V of the Tariff. The Respondent submits that, with second counsel fees included, and assuming the "best-case" (highest number of potential units) for the Respondent, the amount they would recover under each of the respective columns is as follows:

a. Column III: $9,670 (representing 10.5% of the actual costs incurred);
b. Column IV: $12,071.25 (representing 13.2% of the actual costs incurred);
c. Column V: $14,856.70 (representing 16.2% of the actual costs incurred)

[12] The Respondent submits that the lump sum costs award they request is appropriate and reasonable as it represents 15.3% of the legal costs (including counsel fees and disbursement) incurred.

[13] The Respondent cites a number of additional factors supporting a lump sum award in the amount they seek. I will address each of these factors below.

A. *The Amount of Work Involved*

[14] The Respondent submits that the amount of work involved in litigating this proceeding was greater than would ordinarily have been required in an application for judicial review due largely to the conduct of the Applicant as follows:

a. The Applicant mounted comprehensive arguments on a number of issues that required significant preparation in advance of oral argument;
b. The Applicant's record was 1,817 pages long;

c. The amount of work was substantially increased due to the lack of transcript of the evidence heard by the adjudicator in the decision under review, and the Applicant's mischaracterization of the evidence in the Applicant's affidavit, which led the Respondent to devote significant time and resources to prepare a responding affidavit, and bring a motion to strike inadmissible evidence [Motion];

d. While the Motion was not granted, it was not unnecessary and was brought by the most efficient means available under the Rules;

e. The Motion was concluded by an order dated February 9, 2023, which ordered that costs of the motion shall be in the cause.

[15] I do not find the Respondent's submissions persuasive. The Applicant is not responsible for the lack of a transcript. Further, as the Applicant points out, the Respondent is seeking 7 units (out of a total of 35 sought) for its work on a motion that was largely dismissed. I also note that in dismissing the motion, the motion judge dismissed a number of arguments the Respondent raised, including their argument that an advance ruling would allow the hearing to proceed in a more timely and orderly fashion. I find it equally unpersuasive for the Respondent to now attribute their own decision to bring an unsuccessful motion to the "conduct of the Applicant."

[16] Further, I am not convinced that the arguments the Applicant mounted in the application (save for several to be discussed below) are different from or greater than that can be expected in any other unjust dismissal case with allegations of gender-based discrimination. Finally, the number of pages included in the motion, on its own, is insufficient to warrant a higher cost award.

B. *The Result of the Proceeding*

[17] I agree with the Respondent that they are wholly successful on the merits of the judicial review, but the same cannot be said about the Motion. As my judgment made clear, I did not exclude all the impugned paragraphs in the Applicant's Affidavit, instead, I admitted certain paragraphs while noting the Respondent's disagreement with their content: *Giffen* at para 22.

C. *The Conduct of the Parties*

[18] Further to the above, the Respondent submits a lump sum award would serve the policy objective of forcing litigants to take costs into account when making decisions regarding the conduct of a lawsuit. The Respondent cites a number of additional examples as conduct of the Applicant that would support a higher lump sum costs award:

a. The Applicant's attempt to re-argue her case, rather than devoting her arguments to the sole issue about the reasonableness of the decision under review;

b. The Applicant made frivolous and baseless arguments that expanded the scope of the application;

c. The Applicant changed her position at the hearing, retracting two arguments relating to the use of experience as a criterion to select an employee to lay off, and the calculation of the experience of the Applicant and her replacement;

d. The Applicant's unsuccessful argument with respect to section 209 of the *Code* and had the argument not been made, the Respondent's costs would have been substantially lower;

e. The Applicant's argument about economic justification was frivolous and had no prospect of success, and was an attempt to re-argue the merits of the decision and the law;

f. The Applicant's reliance on case law that was "misplaced," not binding on the Court and distinguishable on the facts;

g. The Applicant's persistence in arguing that she was assigned menial tasks upon her return from maternity leave even though she admitted otherwise in her witness statement;

h. The Court's finding that the Applicant did not provide any legal authority in support of her arguments with respect to *prima facie* discrimination in the context of the *Code*, or in support of the statutory protection with regard to accumulation of seniority under section 209 of the *Code* extends to calculation of on-the-job experience in a given role.

[19] Some of what the Respondent frames as "conduct" issues are no more than pointing out that the Applicant has made unsuccessful arguments. Further, just because the Court rejected the Applicant's arguments does not mean they are "frivolous and baseless."

[20] However, I agree that the Applicant, who is represented by experienced counsel, appeared to have made arguments that were not grounded in the jurisprudence, particularly with respect to her argument on economic justification. While I appreciate counsel may have raised some "novel arguments," counsel did not provide appropriate legal authority to support their position. These arguments, plus the Applicant's changing position at the hearing and insistence on arguing that she was assigned menial tasks upon her return from maternity leave even though she admitted otherwise in her witness statement, did add to the preparation time for the Respondent.

D. *Complexity of Issues Involved*

[21] The Respondent submits that the Applicant raised complex issues, including the interaction between different schemes (labour law and human rights) and disparate provisions under the *Code*, which required "extensive preparation" by the Respondent. But the Respondent also concedes, other than those "novel arguments," the application was not inherently complex and ultimately turned on the straightforward application of established principles of administrative law.

[22] The Applicant asserts that this was a judicial review of normal complexity.

[23] I agree that the application was not inherently complex. However, as noted above, I find some of the Applicant's unsuccessful novel arguments likely have added to the complexity of the litigation.

E. *The Importance of the Issues*

[24] The Respondent submits that the Applicant is not a public litigant and there was no significant public interest in this application that extends beyond the immediate interests of the parties. The Respondent submits that the application turned on its facts and the adjudicator's decision, and the case does not have jurisprudential value that exceeds the interests of the parties.

[25] The Applicant on the other hand submits that the case involves significant issues that very much has a public interest and jurisdictional value, pointing to the issue of how sections 242 and 209 of the *Code* "blend together in an unjust dismissal case" as one that does not affect the Applicant alone.

[26] While I agree with the Respondent that the Applicant is not a public litigant, some of the arguments she made could potentially have a broader impact, however unsuccessfully argued before me.

F. *Other Factors Raised by the Applicant*

[27] In addition to what I have already cited above, the Applicant raises several additional arguments to support their position for a lower lump sum award. I will deal with those that I find relevant to my deliberation.

[28] First, I agree with the Applicant that the type of litigation the Applicant has initiated, and the costs consequences connected with it, are dissimilar from the large scale, patent and commercial litigation that the Respondent references. I acknowledge the Court's policy objective of making litigants consider cost consequences when making decisions about their conduct in a lawsuit. However, the Court should also be mindful of any unintended consequence of an excessive cost award, including in cases involving unjust dismissal claims. Consistent with the objective of promoting access to justice, the Court should take into account the impact of any cost award so as not to discourage individuals from pursuing their rights under the *Code* and other rights and/or benefits conferring legislation that fall within this Court's jurisdiction.

[29] Second, the Applicant challenges specific items in the Respondent's bill of costs, noting, among other things, the 35.7 hours counsel billed for preparing cost submissions after the decision was made, in addition to the 14.9 hours spent in October and November 2023, and the huge disbursement account for photocopying even though the materials were submitted electronically.

[30] Finally, the Applicant submits she should be credited for having defeated the Motion brought by the Respondent.

[31] I agree these are factors that I should take into account when determining the appropriate costs award.

G. *Conclusion*

[32] As noted above in *Allergan*, "the 'default' level of costs is the mid-point of column III in Tariff B." The only factor that may justify some deviation from this default position, in my view, is with respect to some of the arguments the Applicant made. On the other hand, I am mindful of the issues raised by the Applicant which call for a lower costs award than the one the Respondent is seeking. In addition, I am not prepared to award costs for the Respondent's unsuccessful Motion, or the full amount of disbursement sought by the Respondent.

[33] Taking everything into consideration, costs are awarded to the Respondent on a lump sum basis in the amount of $6,500, inclusive of taxes and interest.

ORDER in T-133-22

THIS COURT'S ORDER is that:

1. Costs are and disbursements are awarded to the Respondent in the amount of $6,500.00, inclusive of taxes and interests, and are payable forthwith by the Applicant.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-133-22
STYLE OF CAUSE:	CHELSEA GIFFEN v TM MOBILE INC.
MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*	
COSTS ORDER AND REASONS:	GO J.
DATED:	FEBRUARY 8, 2024

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