Citation: *Joseph v. Canada School of Public Service,2024 ONSC 4063*
Court File No. CV-21-00086837-0000

2024 ONSC 4063 (CanLII)

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ELSA JOSEPH

- And -

CANADA SCHOOL OF PUBLIC SERVICE ET AL.

R U L I N G

REMOTELY BEFORE THE HONOURABLE JUSTICE P. ROGER
on JULY 9, 2024 at OTTAWA, Ontario

<u>APPEARANCES</u>:

E. Joseph	Self-Represented Plaintiff
M. Jones	Counsel for defendants

ONTARIO COURT OF JUSTICE

T A B L E   O F   C O N T E N T S

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LEGEND

[sic] Indicates preceding word has been reproduced verbatim and is not a transcription error.

(ph) Indicates preceding word has been spelled phonetically.

Transcript Ordered:	10 July 2024
Transcript Completed:	16 July 2024
Ordering Party Notified:	19 July 2024

Tuesday July 9, 2024

R U L I N G

ROGER, J. (Orally):

The defendants, represented by the Attorney General of Canada, are bringing a motion seeking to set aside the noting of default.

The plaintiff argues that 20 days was the applicable timeline under the *Rules of Civil Procedure* and that setting aside the noting of default would send the wrong message. She argues that these defendants deliberately chose not to comply with two court orders and should be held in contempt for having done so. She argues that setting aside the noting of default would send the wrong message to litigants about the importance of respecting orders and respecting the rules of this court.

I disagree with the arguments of the plaintiff and will make the orders requested by the defendants with one exception.

Firstly, I find that the *Crown Liability and Proceedings Regulations* is applicable and that under section 5 of that regulation, 30 days was the available timeline for these defendants to file their statement of defence. I arrive at this conclusion from a reading of sections 3, 23, and 27 of the *Crown Liability Proceeding Act* and from section 3 of the *Canada School of Public Service Act*.

I will not respond to the arguments of the plaintiff that 30 days was not applicable because,

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for purposes of deciding this motion, I will assume that 20 days was the applicable timeline and will decide this motion based on that assumption irrespective of my earlier finding. Consequently, for purposes of deciding this motion I will nonetheless assume that 20 days was the applicable timeline.

Assuming that 20 days was the applicable timeline, as is argued by the plaintiff, I find that the interests of justice favour granting the motion and setting aside the noting of default. What follows are my reasons.

Contrary to what is argued by the plaintiff, the moving defendants did not deliberately choose not to comply with previous orders of this court and are not in contempt of court because their actions showed a continued intention to defend this matter and to comply with court orders. The moving defendant pursued their motion to strike, pursued their appeal of that result, and when they were served with the plaintiff's amended statement of claim, indicated to the plaintiff on April 25, 2024, that they had issues with her proposed amended statement of claim and suggested a plan to deal with these to the plaintiff. This showed a continued intention to defend this matter.

Thereafter, the moving defendants moved quickly to set aside the noting in default.

In such circumstances, it is not required to assess the merits of their proposed defence.

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Accepting, as I do and as I stated above, that 20 days was applicable, any delay by the moving defendants was extremely short; only of about three days. Moreover, the moving defendants wrote to the plaintiff and stated their reasons why they were not immediately filing a defence. Their stated reasons are reasonable. They provided an explanation for the delay. Their explanation of seeking to address firstly the content of the statement of claim was a reasonable explanation. It makes sense in these circumstances for the Crown to seek to finalize the content of the statement of claim before defending the matter. It would make no sense to have done it differently. As well, there is not prejudice to the plaintiff caused by such a short delay and there would be considerable prejudice to the moving defendants if the noting in default was not set aside.

Assessing all the relevant circumstances of this case, what is fair and reasonable is to strike the noting of default.

With regards to case management, both defendants' consent and seek case management, but the plaintiff objects to case management and considers it a punishment. However, she has shown that it would be helpful, and a case conference has already been scheduled for August 13, 2024, proving to some extent that case management is useful.

Case management is not a punishment. It is a useful tool in some circumstances to assist parties moving their case forward effectively. Rule 77 and

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particularly rule 77.05 is applicable. Considering the circumstances of this case and the factors outlined at rule 77.05 of the *Rules of Civil Procedure*, it is apparent that when considered all these factors balance in favour of case management. This is a rather complex action with multiple parties and a self—represented plaintiff who thinks that she understands the *Rules of Civil Procedure*, but who has shown, by her conduct, in how she noted these defendants in default and then refused to set this aside, that she does not understand the purposes of the *Rules of Civil Procedure*. Case management will assist the parties to proceed effectively with this matter and should avoid, hopeful in the future, unnecessary motions such as this motion.

On the topic of costs, I find that the conduct of the plaintiff in noting the moving defendants in default was not reasonable. I find as well that the plaintiff's conduct of refusing to set aside the noting in default was also not reasonable. I make these findings because the default was short, and these defendants timely explained what their concerns were and what they wish to do. Their proposed plan was reasonable. What would have been reasonable for the plaintiff would have been to discuss with these defendants and address their concern rather than noting them in default on the 23rd day after service. In the circumstances of this case this was not reasonable.

Nonetheless, I will allow costs on partial indemnity basis because setting aside a noting in default is akin to an indulgence and was sought by

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the moving defendants. I can see no reason why costs should not follow the result of this motion. Occasionally, on such motions, as this is an indulgence, the court does not order costs. However, in this case, under the circumstances of this case, a no costs order would not be an appropriate order because the plaintiff behaved unreasonable.

A costs order is required to send a clear message that reasonable conduct in litigation is required. This requires the parties to discuss issues and attempt to resolve issues between them, when possible, rather than seeking tactical and procedural strategies to gain some tactical advantage but to seek a fair and reasonable resolution of the matter on its merits. As a result, even though I am granting the moving defendants an indulgence, it is appropriate to award them costs on a partial indemnity basis, for the reasons that I have indicated. However, I find that this is a rather simple motion and that what would be reasonable and within the reasonable expectation of the losing party would be that partial indemnity costs for such a simple motion should be in the range of $2,500.

As a result, I will make an order for the plaintiff to pay the costs of this motion to these defendants in the amount of $2,500 all-inclusive within the next 60 days.

Consequently, the following is ordered:

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a) The noting in default of the moving defendants is set aside.

b) The moving defendants are granted 10 days to file their notice of motion seeking to strike the plaintiff's amended statement of claim.

c) This matter is assigned to case management and shall be case managed and the case conference currently scheduled for August 13, 2024, at 2 p.m. shall proceed as a first case conference under this order before an associate judge.

d) Costs of this motion are payable by the plaintiff to the moving defendants within the next 60 days in the all-inclusive amount of $2,500.

I am not making an order that no further steps be taken because this is not necessary. It is not necessary because I have provided clearly that the moving parties have 10 days to file their motion to strike and that the case conference will proceed on August 13 at 2 p.m. as already scheduled. It is not necessary to say anything else. Clearly, it is implied in my reasons and in my orders that the moving defendants do not have to file a statement of defence at this point, not before their motion to strike or before issues with the proposed amended statement of claim are resolved, that is clearly implied, and it is clearly implied that the next step is a motion to strike or the resolution of issues surrounding the amended statement claim. In

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that regard, I strongly encourage the parties to try and resolve the issues around the amended statement of claim. From my perspective, a motion to strike should not be necessary if the plaintiff and the moving defendants can discuss this and come to a resolution of what needs to be addressed for the amended statement of claim to comply with the previous order of this court.

In that regard, I encourage the plaintiff to seek the assistance of a lawyer and to seek legal counsel, at least on a limited retainer basis to assist her in addressing the moving parties' concerns with the amended statement of claim. If that was done, it would likely resolve the motion to strike and allow the moving defendants to quickly file a statement of defence to an appropriately drafted amended statement of claim. In that regard, I wish to make it clear that I am not making any findings relating to the content of the amended statement of claim, only stating that if the moving defendants have concerns, as they do, these concerns would be better addressed if the plaintiff sought legal advice.

DISSCUSSION AMONGST THE COURT...

M A T T E R A D J O U R N E D

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