IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Parmar v. Tribe Management Inc.,*
2023 BCSC 88

Date: 20230119
Docket: S220954
Registry: Vancouver

Between:

Deepk Parmar

Plaintiff

And

Tribe Management Inc.

Defendant

Before: The Honourable Justice MacNaughton

Reasons for Judgment on Costs

Counsel for the Plaintiff:	L. Moody
Counsel for the Defendant:	L. Robinson
Place and Date of Hearing:	Vancouver, B.C. November 23, 2022
Place and Date of Judgment:	Vancouver, B.C. January 19, 2023

[1] In reasons cited as *Parmar v. Tribe Management Inc.*, 2022 BCSC 1675, I dismissed Ms. Parmar's claim of constructive dismissal. She alleged she had been constructively dismissed when she was placed on an unpaid leave of absence for failing to comply with Tribe Management Inc.'s ("Tribe") mandatory vaccination policy ("MVP").

[2] At para. 159 of my reasons, I said that if the parties were not able to agree on a costs order, they could appear to speak to costs.

[3] These are my reasons on costs.

[4] Tribe seeks party and party costs in accordance with Appendix B of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, for all steps taken in this litigation up to and including May 31, 2022, and "double costs" for all steps taken in the proceeding after May 31, 2022.

[5] Ms. Parmar submits that because the primary issue at the summary trial was a novel one, raised in extraordinary circumstances, each party should bear their own costs. Alternatively, she submits that she should not be "penalized" by an award of double costs.

[6] Tribe's claim for double costs is based on an offer to settle it made on May 31, 2022 ("Offer"). Rule 9-1(4) permits the court to consider an offer to settle when exercising its discretion in relation to costs. There is no dispute in this case that the Offer meets the definition of an "offer to settle" in R. 9-1(1). Rule 9-1(5) permits the court to make various costs orders in a proceeding in which an offer to settle has been made:

> (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 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.
>
> (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 served 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.

[7] Tribe specifically relies on R. 9-1(5)(b) and seeks double costs for all steps taken in the litigation from May 31, 2022, onwards.

[8] On May 31, 2022, Tribe delivered the Offer to Ms. Parmar. It offered to settle her claim in exchange for a payment to her of $40,000 (less applicable deductions as required by law) plus taxable costs and disbursements incurred up to and including that date.

[9] The Offer was open for acceptance until June 29, 2022.

[10] Ms. Parmar did not accept the Offer, and this matter proceeded to summary trial beginning on July 12, 2022, and concluding on July 15, 2022.

[11] Tribe's entitlement to its party and party costs for all steps taken in the proceedings is surprisingly contentious. In the usual course, as the successful party, Tribe is presumptively entitled to its costs. Its entitlement to double costs would, in the usual course, depend on the factors under R. 9-1(6) and, in this case, primarily on whether Ms. Parmar should have accepted the Offer.

Novel Issue

[12] I accept that the general rule with respect to costs may be departed from where the action is a test case or in which the issue is novel. In such cases, "where the law is uncertain, it is appropriate to attenuate the litigation chill associated with possible adverse costs consequences": *Fischer v. IG Investment Management Ltd.*, 2014 ONSC 6260 at para. 9, cited in *Pryzk v. Hamilton Retirement Group Ltd. (c.o.b. Court at Rushdale)*, 2021 ONCA 267 at para. 35. However, a departure from the general rule should only be done with "good reason": *Baart v. Kumar*, 66 B.C.L.R. 61 at 66–67, 1985 CanLII 146 (C.A.), citing G. Peter Fraser, John W. Horn & Susan A. Griffin, *The Conduct of Civil Litigation in British Columbia*, 1st ed (LexisNexis Canada Inc., 1978) at 1097, Seaton J. concurring on this point

[13] A novel issue is concisely defined in *Pryzk* at para. 35 as one where "there is uncertainty in the law or where the facts make the guidance provided by prior cases inadequate". This definition is supplemented by the expansive discussion in *Baldwin v. Daubeny*, 21 B.L.R. (4th) 232, 2006 CanLII 33317 (Ont. S.C.), aff'd 275 D.L.R. (4th) 762, 2006 CanLII 32901 (Ont. C.A.), leave to appeal to SCC ref'd, *Baldwin v. B2B Trust and Laurentian Bank of Canada*, 31737 (3 May 2007):

> [19] The rationale for the "novel issue" policy … is that, in novel cases, the plaintiff is "proceeding along a path which is not encumbered by a precedent which would warn him not to proceed further". For an issue to be novel in a way that is legally significant, it might be argued that the issue should not only be one which has not been decided in the factual context in which it now arises … but is also one on which the law in the decided cases does [not] provide adequate guidance as to its resolution (whether … because of conflicts among the cases or a limitation on the appropriate scope of their application or some other factor). Such an issue could properly be regarded as "open".
>
> [20] However, if the law provides adequate guidance for the resolution of the issue, then even though the issue might well not have been previously decided, it would not properly be regarded as "open".
>
> [21] Now, the question is how to decide between these two conceptions of the criterion for a novel issue - i.e., that it has not been decided in the instant context, on the one hand, versus, that it is left open by the decided law, on the other hand. To do so, it is necessary to consider what the purpose of this enquiry is. In the costs context, the purpose of the enquiry must be to decide whether there is good reason for an unsuccessful party to be relieved from the costs rule.

> [22] If the unsuccessful party says that he or she should be relieved from the costs rule because a novel issue was raised, it is not clear why that should be a relevant reason unless that element of novelty goes to the reasonable expectations of the party about the litigation. If the issue is truly open in the sense considered above, the litigant could reasonably say that he or she had no proper reason to expect to fail. But if all that the litigant can say is that there was no decided case directly on the point, that begs the question about reasonable expectations. The litigant in that situation is vulnerable to the response: although there are no decided cases directly on point, the law is clearly against your case, so you should reasonably expect to lose. On this basis, the test for a novel issue based on whether the issue is an open one serves the purpose that would seem fairly to be intended to be achieved by the exception for novel issues in respect of costs awards.

[14] I accept that this is a case of "first impression" (*Williams v. Canales*, 2016 BCSC 1811 at para. 25); there have been no decided court cases with respect to an employer's right to place employees who refused to comply with an MVP on an unpaid leave of absence. I also accept that the Covid-19 pandemic presented an unprecedented challenge for employers. The law is unsettled as to the Covid-19 pandemic specifically, but "not sufficiently unsettled to warrant departing from the normal costs rule": *Greenfield v. Albion Properties Ltd.*, 2007 BCSC 226 at para. 5.

[15] Not all cases of first impression warrant a departure from the general rule: see e.g. *The Consumers' Association of Canada et al. v. Coca-Cola Bottling Company et al.*, 2006 BCSC 1233 at para. 29, aff'd 2007 BCCA 356; *Quercus Algoma Corporation et al. v. Algoma Central Corporation*, 2021 ONSC 4493 at paras. 3–10.

[16] Furthermore, the novelty of this case is tempered by the existing arbitral decisions on MVPs and court decisions on the issue in this case, that is, whether an employer's right to place an employee on unpaid leave amounted to constructive dismissal. There had been a number of arbitral decisions dealing with the implementation of MVPs and which, on balance, upheld employers' authority to implement MVPs requiring unpaid leaves of absence in unionized environments. Some of those are cited at paras. 111, 114, 120, and 123 of my summary trial reasons. It is not unusual for courts to consider arbitral decisions as informative although not binding: see generally *Communications, Energy and Paperworkers*

Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34 at para. 6; *Burley v. Ontario Public Service Employees Union*, 133 L.A.C. (4th) 97 at para. 21, 2004 CanLII 34769 (Ont. S.C.).

[17] In addition, there are a number of court cases regarding an employer's right to place an employee on an unpaid leave of absence for various reasons and whether that amounted to constructive dismissal. They were discussed in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, a case relied on by these parties in argument.

[18] Whether placing an employee on an unpaid leave of absence will amount to constructive dismissal is a highly fact-driven exercise, in which a court must determine whether the changes are reasonable and whether they are within the scope of the employee's employment contract.

[19] In particular, where an unpaid leave or administrative suspension is imposed, it is important that the reasons for it are clearly explained to the employee. Ms. Parmar was aware of Tribe's reasons for implementing the MVP and was given opportunities to consider her position. There was no indication that Tribe was going to terminate her employment, and the MVP was subject to amendment or variation as Covid-related concerns became clearer.

[20] Ms. Parmar's unpaid leave amounted to a substantial change to her employment relationship with Tribe, but it did not amount to a breach of the employment agreement. The essence of the employment agreement is that an employee will work in exchange for pay. I found that Ms. Parmar was not working as a result of her voluntary choice not to comply with the MVP.

[21] Ms. Parmar's analysis of her situation had to focus on the second step of the analysis of whether she had been constructively dismissed, that is, whether, at the time she was placed on administrative suspension, a reasonable employee in the same situation would have felt that the essential terms of her employment contract were being substantially changed.

[22] Ms. Parmar's November 18, 2022, affidavit was filed on this costs application without objection. It asserts that it was "always [her] intention … to have [her] case provide guidance to employees and employers everywhere as to the legal implications of implementing a vaccine policy, since no court had previously provided such guidance". She said:

[23] Ms. Parmar's November 18, 2022, affidavit was filed on this costs application without objection. It asserts that it was "always [her] intention … to have [her] case provide guidance to employees and employers everywhere as to the legal implications of implementing a vaccine policy, since no court had previously provided such guidance". She said:

> 9. Most importantly, however, I believed that by bringing this matter to trial, this Honourable Court would be given the opportunity to provide some much-needed guidance into the implementation of MVPs in the workplace, which in turn would be a significant benefit to everyone. Ultimately, this have (*sic*) never been about pursuing a financial gain for myself as much as it is wanting to do my part in helping thousands of Canadians across the country have what I did not, which is the ability to make a truly informed decision.

[24] Despite her affidavit, Ms. Parmar proceeded with her case as a personal breach of contract claim seeking personal damages. This was a private dispute between the parties, not broader public interest litigation, and it is thus inappropriate to depart from the general rule: *Baglow v. Smith*, 2011 ONSC 6382 at paras. 8–9, citing *Tanner v. Clark; Reimer v. Christmas*, 24 C.P.C. (5th) 68 at para. 4, 2002 CanLII 34779 (Ont. Div. Ct.).

[25] In my view, the law provided adequate guidance for the resolution of the issue. The fact that this case related to the Covid-19 pandemic is not alone determinative of novelty: see e.g. *Gagnier v. Burns*, 2021 ONSC 3183 at paras. 9–11. The risks in proceeding to trial would have been apparent to Ms. Parmar. There were constructive dismissal cases and arbitral cases that allowed Ms. Parmar and her counsel to assess the merits and risks of her claim. There were constructive dismissal cases and arbitral cases that allowed Ms. Parmar and her counsel to assess the merits and risks of her claim.

[26] As a result, I conclude that there should be no departure to the general rule that costs follow the event.

Double Costs

[27] An award of double costs is a punitive measure against a litigant who fails to accept an offer to settle that should have been accepted. In deciding whether to award "double costs" under R. 9-1(5)(b), I must consider whether, at the time the Offer was open for acceptance, it would have been reasonable for Ms. Parmar to have accepted it under R. 9-1(6)(a): *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27, citing *Bailey v. Jang*, 2008 BCSC 1372 at para. 24. This subsection was the primary focus of the parties' dispute in this case.

[28] It is apparent that, under R. 9-1(6)(b), the relationship between the Offer and the result obtained favours double costs. Ms. Parmar did not argue under R. 9-1(6)(c) that double costs should not be awarded in light of the relative financial circumstances of the parties.

[29] The purposes for which the costs rules exist with respect to offers to settle were explained by Justice Frankel in *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 74, citing a number of other cases. They include: deterring frivolous actions or defences; encouraging conduct that reduces the duration and expense of litigation and discouraging conduct that has the opposite effect; encouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases; and serving a winnowing function in the litigation process by encouraging litigants to carefully and ongoingly assess the strength of their cases and discouraging the continuance of doubtful cases or defences.

[30] From Tribe's perspective, if what Ms. Parmar attests to in her affidavit about her intent in bringing the action is accepted, there was no offer it could have made that would have satisfied her. She required a decision. As a result, none of the *Giles* objectives could be met.

[31] Whether an offer to settle is one that ought reasonably to have been accepted is not determined by reference to the ultimate award or outcome of the case: *Hartshorne* at para. 27; *Bains v. Antle*, 2019 BCCA 383 at para. 34.

[32] While both parties appear to have had relative confidence in their respective legal positions in this case, the outcome was uncertain. Nevertheless, both parties knew that as of April 11, 2022, about two months before the Offer was made, Ms. Parmar had secured re-employment in an equivalent position with a competitor, earning more than she had previously earned at Tribe.

[33] The Offer was not a nominal one. It reflected what Ms. Parmar might obtain at trial and ensured that she would be made whole. It included damages and Ms. Parmar's taxable costs and disbursements. It was easy to evaluate and did not come with any tight time restrictions.

[34] I accept that even if Ms. Parmar had established a claim for constructive dismissal, her net wage loss was subject to being determined by reference to what she would have earned had she received the twelve months' notice to which she was entitled under her written employment contract with Tribe, less the amount she actually earned through her mitigation efforts. It was known to Ms. Parmar, when the Offer was made, that in the twelve months after the date on which her leave of absence commenced (December 1, 2021, to November 30, 2022), she expected to earn at least $75,923 as a result of her replacement employment. In the result, her net "loss" would not have exceeded about $35,000.

[35] Although Ms. Parmar did not give this as a reason for not accepting the Offer, she may have proceeded in the hope that, in addition to establishing that she had been constructively dismissed, her award would not need to account for the mitigation income she earned. To succeed, Ms. Parmar would have had to convince the Court to depart from binding authority in *Neilson v. Vancouver Hockey Club Ltd.*, 25 B.C.L.R. (2d) 235, 1988 CanLII 3051(C.A.).

[36] Ms. Parmar alleges that she was constructively dismissed on January 26, 2022, but seeks damages dating back to December 21, 2020, the commencement of her unpaid leave. Based on her replacement earnings for her new employer, if she

was found to have been constructively dismissed on December 1, 2021, she had a loss of income of just over $34,000.

[37] However, if Ms. Parmar was found to have been constructively dismissed on January 26, 2022, the date she exercised her right to accept what she said was Tribe's repudiation of her contract, her gross loss was slightly less than $17,000. These figures informed Tribe's offer and should have informed Ms. Parmar's assessment of it.

[38] In addition to this factor, which was the focus of the parties' arguments, I have also considered, under R. 9-1(6)(d), that the Offer was made relatively early in the litigation and before either party expended the costs associated with drafting and filing summary trial materials, before documentary disclosure was complete, and prior to either party conducting examinations for discovery. Ms. Parmar had not committed too many resources to compromise.

Conclusion

[39] For all the foregoing reasons, I conclude that the Offer ought reasonably to have been accepted by Ms. Parmar when it was made, and Tribe is entitled to its party and party costs in accordance with Appendix B of the *Rules* up until May 21, 2022, and double costs for the steps taken in the litigation thereafter.

"MacNaughton J."