

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
GURUPDESH PANDHER)	
)	Jordan Afolabi, for the Plaintiff
Plaintiff)	
)	
– and –)	
)	
UNIVERSITY OF WINDSOR, ALAN)	Albert Formosa and Phil Wallner, for the
WILDEMAN, DOUGLAS KNEALE and)	Defendants
MITCHELL FIELDS)	
)	
Defendants)	
)	
)	
)	HEARD: November 25, 2024 by
)	videoconference

HEENEY J.:

- [1] There are two motions brought by the plaintiff before the court. In main one, the plaintiff seeks to amend his Statement of Claim and to add two additional defendants. The amendments seek to bring into this action various human rights claims that he had pursued in three separate complaints before the Human Rights Tribunal of Ontario (“HRTO”). Those complaints were dismissed by the HRTO on January 4, 2024 because, the HRTO found, they were duplicative of claims made in this civil action.

- [2] The plaintiff also brings a motion for production of various documents. Argument was not heard on that motion, because the relevance of the documents, or lack thereof, could not be determined until the amendment motion was disposed of.

- [3] The defendant University of Windsor (“the defendant”) brought a motion of its own for costs thrown away in preparing to respond to an injunction motion that plaintiff’s counsel advised he intended to bring, which was scheduled for hearing by the court and a timetable established, but which was abandoned by the plaintiff before a notice of motion was served.

The Leave Issue:

- [4] This action was set down for trial by the plaintiff early in 2023, and a date was set for a pre-trial conference. Thus, pursuant to r. 48.04(1), the plaintiff shall not initiate any motion without leave of the court. The plaintiff was reminded by Justice MacFarlane on October 28, 2024 that leave was required, when these motions were scheduled for hearing. Nevertheless, the plaintiff did not seek leave in his notice of motion, nor did he file any evidence directed toward that issue.
- [5] While the plaintiff's motions could have been dismissed on that ground, the inevitable outcome would have been the filing of a new notice of motion, which would include a request for leave, resulting in further delay. During submissions, counsel for the defendant made it clear that they wanted to get this matter on for trial as soon as possible. After some discussion, counsel agreed that the plaintiff's motions should be heard on their merits, and an order was made, on consent, granting leave to bring the motions.

Overview:

- [6] The plaintiff was employed as a Senior Associate Dean at the University of Windsor from 2012 to 2018. In 2016 he applied for an open Dean position, but was not successful. He alleges that the defendants did not fairly consider his candidacy. After his unsuccessful bid for this position, he alleges that the defendants targeted him with a series of harassing and discriminatory actions. When he submitted complaints in response to the treatment, he alleges that the defendants engaged in various reprisals against him. He filed complaints of unfairness, unethical conduct and discrimination regarding the Dean search to the Dean Search Committee and Faculty Counsel. In response, he alleges that the defendants "racially profiled" him, initiated an investigation against him, and ultimately suspended him from March 20, 2018 to May 31, 2019.
- [7] He commenced this civil action on June 28, 2018, with the assistance of counsel, claiming damages of \$4,500,000 in total for harassment, defamation, intentional infliction of emotional suffering, breach of contract, intentional interference with economic and contractual relations and aggravated and punitive damages, all arising from the sequence of events summarized in the preceding paragraph.
- [8] However, he also, as a self-represented party, commenced a series of applications before the HRTO, on December 29, 2017 (HRTO #1), March 15, 2019 (HRTO #2), and March 14, 2022 (HRTO #3). They claim discrimination based on race, ancestry, ethnic origin and creed, but arise out of essentially the same sequence of events summarized above, although subsequent events are included in the latter complaint.
- [9] On February 11, 2019, the HRTO issued a Notice of Tribunal Intent to Defer, which advised the parties that the HRTO had determined that it may be appropriate to defer consideration of HRTO#1 pending resolution of the civil action. The parties were invited to make submissions as to whether they should or should not defer.

[10] This process arose due to s. 34(11) of the *Human Rights Code*, R.S.O. 1009, c. H-19 (“the *Code*”), which provides as follows:

34(11) A person who believes that one of his or her rights under Part I has been infringed may not make an application under subsection (1) with respect to that right if,

(a) a civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement and the proceeding has not been finally determined or withdrawn; or

(b) a court has finally determined the issue of whether the right has been infringed or the matter has been settled.

[11] In arguing that there should be no deferral, the plaintiff submitted that the civil action and the HRTO claims were “entirely non-overlapping in their causes of action, remedies, jurisdictions and timelines”. He stated that one reason for having two separate proceedings was that the HRTO process will be completed long before the trial of the non-overlapping civil action.

[12] The defendant, on the other hand, took the position that the civil action and HRTO#1 dealt with similar facts and raised the possibility of inconsistent decisions, duplication, prejudice and the potential for double recovery by the plaintiff. Its position was that the civil action was the most comprehensive proceeding, that would offer all parties the full array of procedural protections available.

[13] The HRTO agreed with the defendant. In an interim decision dated March 22, 2019, HRTO#1 was deferred because there was “a possibility of inconsistent decisions on facts or law if the proceedings were to run concurrently” due to the overlap of the subject matter of HRTO#1 and the civil action. The plaintiff was advised that he could seek to reactivate the application if he believed that the civil proceeding did not appropriately deal with the substance of his application, but was also warned that the HRTO has the power, under s. 45.1 of the *Code*, to dismiss the application if the substance of it has been appropriately dealt with in another proceeding.

[14] To understand the reference to s. 45.1, I set it out here:

45.1 The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

[15] On July 31, 2019, another interim decision was made by the HRTO which decided that HRTO#2 contained essentially the same allegations as HRTO#1, and would be deferred for the same reasons.

[16] On May 17, 2023, the HRTO issued a Case Assessment Direction directing the parties to file submissions on consolidation of HRTO#1, #2 and #3, and on whether they were outside the jurisdiction of the HRTO because of the civil action, due to the application of s. 34(11) of the *Code*.

- [17] The plaintiff opposed consolidation, and provided submissions that HRTO#3 dealt with facts that arose between 2019 and 2022, and therefore dealt with different facts than the civil action.
- [18] The defendant's position was summarized at para. 24 of the Decision of HRTO Adjudicator Lavinia Inbar dated January 4, 2024, cited as 2024 HRTO 4:

The respondents submit that the first two Applications and parts of the third Application, should be dismissed due to a lack of jurisdiction under subsection 34(11). The respondents submit that the allegations in first two Applications are virtually identical to the applicant's claims in the civil claim. With respect to the third Application, the respondent submits that "certain allegations" overlap with those in the civil claim and should therefore be dismissed. The respondents describe the overlap as follows:

In the Applicant's Civil Claim, the Applicant makes allegations against the University related to, among other things, the University's failure to address his workplace harassment complaints in December 2016 and January 2017, and the University's exclusion of the Applicant from participating in Faculty Council meetings. The Applicant repeats these allegations in HRTO #3 and requests damages for these allegations. As these allegations are based on the same set of facts and the Applicant requests the same relief in both HRTO #3 and the Civil Claim, these allegations in HRTO #3 should be dismissed.

- [19] At para. 25, the adjudicator noted that she had reviewed all three HRTO applications and the Statement of Claim, and found "substantial overlap" with respect to the allegations, facts, respondents and relief requested. She said:

The crux of the three Applications and the civil claim involves the applicant's complaint about having been denied a renewal of their Associate Dean position and their subsequent alleged ill-treatment by the University. In the civil claim, the Applicant relies on substantially the same facts which ground their human rights claims in the Applications. The same underlying facts would need to be proved in all proceedings, raising a real possibility of duplicative litigation.

- [20] As to the fact that the civil action did not specifically plead *Code* violations, the adjudicator said the following, at pars. 26-8:

Although the applicant did not specifically plead the *Code* or seek an order under section 46.1 of the *Code* in their civil claim, this Tribunal has held that section 34(11) does not require that an applicant include an explicit reference to section 46.1 of the *Code* in their civil claim. See for example, *Beaver v. Dr. Hans Epp Dentistry Professional Corporation*, 2008 HRTO 282, *Jarrett v. Vance*, 2012 HRTO 24 and *Zheng v. G4S Secure Solutions (Canada) Ltd.*, 2019 HRTO 407, affirmed by 2022 ONSC 93 ("*Zheng*").

Rather, the determinative question is whether the civil claim explicitly or implicitly raises *Code*-related interests and seeks remedial redress for those alleged human rights concerns. As the Divisional Court noted in *Visic v. HRTO and University of Windsor*, 2015 ONSC 7162, the purpose of section 34(11) of the *Code* is to eliminate duplicative court and Tribunal proceedings.

I find that the applicant implicitly raises *Code*-related interests and seeks remedial redress in their civil claim. All three Applications and the civil claim involve the University's Dean search and renewal processes, the handling of the applicant's internal complaints, the applicant's alleged harassment at the hands of the respondents, and alleged reprisal.

- [21] Accordingly, all three HRTO applications were dismissed, due to the “substantial overlap in the underlying facts of the civil claim and the three Applications.” (para. 30) She found that “it would be procedurally unfair and an abuse of process to force the University to defend itself against the same applicant on substantially the same set of facts and for substantially the same damages.” (para. 32)
- [22] The plaintiff requested a reconsideration of this decision, and on May 31, 2024, the HRTO dismissed that request. In arguing for reconsideration, the plaintiff said he was prejudiced by the decision because he “would incur large legal expenses in Superior Court and the risk of paying Respondent's costs which is not applicable in HRTO proceedings.” The Tribunal found that to be an irrelevant consideration: 2024 HRTO 778 at para. 22.
- [23] The plaintiff now seeks to amend his Statement of Claim, so as to explicitly plead the *Code*-related claims that were found to have been implicitly raised in his civil action.
- [24] Notwithstanding its clear and repeated submissions made before the Tribunal that the HRTO proceedings dealt with similar facts as the civil action and raised the possibility of inconsistent decisions, and that the civil action was the most comprehensive proceeding to deal with all issues and would offer the parties the full array of procedures available, the defendant now opposes the plaintiff's request for the very amendments that would bring that about.
- [25] The defendant submits that the proposed amendments introduce a list of new causes of action, summarized at para. 43 of its factum as follows:
- General damages for injury to dignity, feelings, self-respect arising out of discrimination and reprisal, contrary to the *Code*;
 - The statutory remedy of reinstatement to the position of Senior Associate Dean, pursuant to s. 46.1 of the *Code*;
 - Misfeasance in public office;
 - Reprisal, contrary to the *Code*;
 - Unlawful means; and,
 - The tort of conspiracy.
- [26] The defendant relies on r. 26.01, which provides as follows:

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

- [27] The defendant argues that it would suffer non-compensable prejudice if the amendments were granted, because the limitation period regarding these new causes of action has long since expired.

Analysis:

- [28] In my view, and with respect, the defendant's submission that the proposed amendments introduce a list of new "causes of action" demonstrates a fundamental misunderstanding of what that phrase means.
- [29] In *Bazkur v. Coore*, 2012 ONSC 3468 (Div. Ct.) at para. 13, the Divisional Court cited with approval the following definition:

In the *Ascent* case [2009 CarswellOnt 4118 (Ont. Master)], Master Dash defined a cause of action as follows:

a cause of action has been defined as a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. The key is whether substantially all of the material facts giving rise to the new cause of action have previously been pleaded or whether new facts are sought to be added that are relied upon to support a new cause of action. A new cause of action is not asserted if the amendments simply plead an alternative claim for relief arising out of the same facts previously pleaded and no new facts are relied upon or amounts simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based.

- [30] Thus, the supposed list of new "causes of action" summarized above are not causes of action at all, but are potential remedies that arise out of a particular factual situation. It is that factual situation that is the cause of action. Having repeatedly submitted before the Tribunal that both the HRTO proceedings and the civil action arise out of substantially the same facts, it is not open to the defendant to now argue that the proposed amendments introduce new causes of action. In my view, the amendments merely introduce new proposed remedies arising out of the same factual situation. This does not give rise to a limitation defence, so the claim of prejudice has no merit.
- [31] Even if a new cause of action was sought to be introduced, an amendment may still be granted if "special circumstances" exist. In *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 at paras. 113-14, Côté J., speaking for the majority, discussed what this phrase means:

In essence, the doctrine allows a court to temper the potentially harsh and unfair effects of limitation periods by allowing a plaintiff to add a cause of action or a party to the statement of claim after the expiry of the relevant limitation period. I hasten to add that, as the Court recognized in *Basarsky v. Quinlan* (1971), [1972] S.C.R. 380 (S.C.C.), and as the word

“special” — or “peculiar” — suggests, the circumstances warranting such an amendment will not often occur.

As an offspring of equity, the doctrine of special circumstances is naturally concerned with fairness to the parties. Indeed, this concern was at the forefront of Lord Esher’s mind in *Weldon*. Unsurprisingly, no exhaustive list of the circumstances that qualify as “special” has been proposed by the courts, and I believe it would be risky and unwise to do so. I note however that, concerned with not prejudicing a defendant, this Court has paid particular attention to whether the facts relevant to the extinguished action were pleaded in the original statement of claim and whether the defendant was aware of them during discovery: *Basarsky*; see also *Dugal*, at paras. 60-68. The factors enumerated by the Ontario Court of Appeal in *Frohlick v. Pinkerton Canada Ltd.*, 2008 ONCA 3, 88 O.R. (3d) 401 (Ont. C.A.), at para. 23, which were reiterated by van Rensburg J. in *IMAX*, are also helpful guides:

As such, “special circumstances” include factors such as: the relationship between the proposed claim and the existing action; the true nature of all of the claims; the progress of the action; and the knowledge of the parties ... [*IMAX*, at para. 71]

- [32] Applied to the facts of this case, the proposed HRTO claims arise out of the same facts as the civil case, the defendant has had full knowledge of these claims and has actively defended against them since they were first lodged with the HRTO.
- [33] Furthermore, since this doctrine is, at its base, concerned with fairness to the parties, it seems to me to be fundamentally unfair to the plaintiff to deny the amendments when what he seeks is precisely the outcome that the defendant repeatedly promoted before the HRTO: defer and ultimately dismiss the HRTO applications so that those claims could be dealt with in one comprehensive civil action. Stated another way, it would be unfair to allow the defendant to benefit from the decision of the HRTO to dismiss the human rights claims on the basis that they are duplicated in the civil action, while simultaneously allowing the defendant to avoid having to deal with those human rights claims in the civil action by arguing precisely the opposite.
- [34] The defendant argues that the plaintiff made the deliberate choice to carefully exclude any mention of things such as discrimination or human rights in the civil action, and submitted to the Tribunal that the HRTO and the civil claims were “entirely non-overlapping”. It submits that the plaintiff should bear the consequences of that decision.
- [35] It is true that the plaintiff now takes a position that is entirely at odds with the submissions it made before the HRTO. The same, however, can be said about the defendant. The difference is that the defendant was actually able to persuade the HRTO that its position was correct, and it was on that basis that the HRTO ultimately dismissed those proceedings and, in effect, directed the plaintiff to seek his remedies for alleged human rights violations in the civil action.
- [36] The plaintiff relies on the decision of *Kanhai v. Toronto Transit Commission*, 2024 ONSC 3986, where Associate Justice Jolley dealt with an almost identical situation to the case at bar. The plaintiff in that case sued the TTC for the wrongful termination of his employment, but also brought parallel proceedings against the TTC before the HRTO

alleging discrimination. The TTC successfully moved before the Tribunal for dismissal of the HRTO proceedings, on the basis that they both concerned the events leading up to the plaintiff's termination. When the plaintiff then moved to amend his Statement of Claim to add a claim for violation of his human rights the TTC, the TTC opposed the motion.

[37] Associate Justice Jolley allowed the amendments, for reasons explained at para. 5:

Having obtained a dismissal of the plaintiff's HRTO complaint on the basis that all issues should be decided in the civil action, the defendant now objects to the plaintiff attempting to do that very thing. It argues that it would be an abuse of process for the plaintiff to amend this parallel proceeding, upon which it relied to obtain a dismissal of the HRTO proceeding, to include the claims that it argued before the HRTO should be heard together. I find it would be unfair for the plaintiff to be denied the opportunity to pursue his human rights damages claim in this action, on the basis of the doctrine of election or on any other basis, when this is the very ground the defendant relied on its HRTO motion - that all issues should be heard in one forum.

[38] Incidentally, Associate Justice Jolley rejected the TTC's claim that the plaintiff was attempting to assert new causes of action for the same reasons I have done so. He said this, at para. 7:

Where a claim already pleads substantially all of the material facts that give rise to the further proposed remedies, amendments that set out an alternative claim for relief arising out of the same general factual matrix previously pleaded are not a new cause of action. (*Galluzzi v Pearllann Consulting Inc.* 2017 ONSC 3298 at paragraph 9).

[39] The defendant, on the other hand, relies on *Robins v. PriceWaterhouseCoopers LLP*, 2017 ONSC 1778 (Div. Ct.). This was a breach of contract claim. Approximately seven years after the Statement of Claim had been issued, and ten years after the events on which the claim arose, the plaintiff sought to amend her claim to advance a claim of gender discrimination under the *Code*. Master Abrams dismissed this aspect of the plaintiff's motion, because the proposed amendment "was based on an entirely new set of facts and theory of liability, which was statute barred..." (para. 2).

[40] On appeal before Nordheimer J. (as he then was), the Master's decision was affirmed. At para. 4, Nordheimer J. ruled as follows:

The reality is that the gender discrimination claim is a new, and factually distinct, claim. If it is not, then the proposed amendments are irrelevant. The "motivation" for the breach of a contract is not a relevant consideration, absent a claim for aggravated or punitive damages, of which there is none in this case. Either the contract was breached or it was not. Why it was breached is of no consequence.

[41] Since the proposed amendments were alleging a new set of facts as a basis of liability, the plaintiff was attempting to advance a new cause of action after the limitation period had expired, which Nordheimer J. ruled she was not entitled to do.

- [42] In my view, *Robins* is distinguishable, because the plaintiff was attempting to advance a “factually distinct” claim from that which was originally pleaded. In the case at bar, the defendant has repeatedly conceded that the claims in the HRTO applications and the claims in the civil action arise out of the same facts. It can hardly be argued, therefore, that the plaintiff is attempting to advance factually distinct claims.
- [43] It is also distinguishable in that no HRTO proceedings were ever advanced by that plaintiff, so that the allegations of violations of the *Code* would have come as a complete surprise to the defendant, 10 years after the fact. In contrast, the defendant in the case at bar has had complete knowledge of the allegations of *Code* violations from the outset, as a result of the proceedings before the HRTO. As I have already noted, a key factor in considering whether special circumstances exist is prior knowledge of the claims.
- [44] I find that *Kanhai* is directly on point, and I agree with it.
- [45] While I am prepared, in principle, to grant leave to amend the Statement of Claim, subject to my comments below, the plaintiff has also requested leave to add two new parties to this action. Clearly, none of the arguments dealt with above apply to the new parties whom the plaintiff seeks to add. Any claims against them have long since been statute-barred. They were never named as respondents in the HRTO proceedings, so these proceedings would come as a complete surprise to them. There are no special circumstances present which would cause me to exercise my discretion to add them as parties despite the expiration of the limitation period that would otherwise bar any claims against them. That aspect of the motion is dismissed.
- [46] For the above reasons, I am satisfied in principle that granting leave to the plaintiff to amend so as to add his *Code*-related claims to the Statement of Claim will not cause prejudice to the defendant “that could not be compensated for by costs or an adjournment”. I am further of the view that compensation in costs to the defendant is a necessary and important condition to an order granting leave to amend.
- [47] It was the plaintiff’s deliberate decision to commence a multiplicity of proceedings. He chose not to include his *Code*-related claims in the civil action because, among other things, he was self-represented in the HRTO proceedings and was not facing any risk of an adverse costs award, whereas if those claims were added to the civil action he would have to pay his lawyer to prosecute them, and would be incurring the risk of having to pay the defendant’s costs if he lost. He persisted to press on with both his HRTO complaints and the civil action despite being repeatedly warned by the HRTO that his complaints were at risk of being dismissed because they were duplicative of his civil action. Now, after the final dismissal of his HRTO complaints for that very reason, and seven years after most of the events in question occurred, he seeks to roll all of his HRTO claims into the civil action.
- [48] In the meantime, the civil action has proceeded, through discoveries that focussed only on the case as then pleaded, without regard to any human rights component. The action has now been set down for trial, by the plaintiff. As a result of the amendments the defendant will be required, to some extent, to start all over in defending this action, including new

pleadings, new Affidavits of Documents, further examinations for discovery, and so on. While both the HRTO proceedings and the civil action arise out of the same factual matrix, the human rights claims add a completely new gloss to those facts, giving rise to a multitude of new questions that will need to be asked, and many new legal issues to be considered.

- [49] The defendant is entitled to be compensated for the costs thrown away in having to do many things over again. These costs will be substantial. The defendant estimates that if the amendments are granted, its costs thrown away amount to \$235,106. Its Costs Outline is filed in the Responding Motion Record, Volume 4, at B-1-1593. However, the quantum of costs was not specifically argued by counsel in the time we had available for this motion, so I am not yet in a position to make a finding in that regard.
- [50] In sum, I find that the amendments will prejudice the defendant, but that this prejudice can be compensated for by an award of costs. Thus, an order will go that the plaintiff shall pay to the defendant its costs thrown away as a result of the granting of the amendments sought, in an amount and in a manner to be determined following the receipt of written submissions from counsel. In that regard, the defendant's Costs Outline appears to claim all costs incurred on this file to date. This is not appropriate, since it is inconceivable that all of the work done on this file to date has been completely wasted. Discoveries, for example, need not cover ground that was explored the first time, but should focus only on any new areas that need to be explored as a result of the amendments.
- [51] The defendant shall file a revised Costs Outline that focusses on costs that have been truly thrown away, which is to say, that relate to work done that has now been rendered worthless and will have to be done over again. This, together with written submissions, shall be filed within 30 days. The plaintiff shall have 20 days to respond, and the defendant shall have 10 days to file any reply submissions.
- [52] Finally, while I have indicated above that I am prepared, *in principle*, to grant leave to amend to add the *Code*-related claims to the Statement of Claim, I am not prepared to sign off on the proposed Amended Statement of Claim in its present form.
- [53] It is a sea of underlined paragraphs, and leaves the initial impression that this is an entirely new lawsuit, as opposed to one that is merely sought to be amended. However, there are also many large blocks of text from the original that have been struck through. On close reading, many of the new, underlined paragraphs are restatements of the original, stricken pleadings, albeit in much greater detail. The additional detail is not entirely surprising, since the amendments amount to a consolidation of claims made in the HRTO proceeding with the civil proceeding.
- [54] However, the proposed pleading is not acceptable in its present form, and requires a considerable amount of work.
- [55] To begin with, the proposed amendments that relate solely to claims against the proposed defendants Professor Berryman and Dr. Weir must be deleted, as they are no longer relevant given the dismissal of the plaintiff's motion to add them as defendants.

- [56] Secondly, I agree with the defendant that the proposed amendments contain extensive pleading of evidence, in contravention of r. 25.06(1), which requires that the material facts be pleaded, but not the evidence by which those facts are to be proven. The defendant does not, however, particularize which paragraphs are problematic in that regard. The proposed amendments also go well beyond pleading material facts, and include “unsolicited particularizations which amount to conclusory character assassination of the various defendants”, as it was described by the defendant at para. 79 of its factum.
- [57] I am not inclined to go through the proposed Amended Statement of Claim that is now before the court, paragraph by paragraph, and tell the plaintiff what needs to be fixed. Instead, having discussed above in general terms how the document is problematic, I will direct the plaintiff to prepare and file a proposed “Fresh As Amended Statement of Claim” that complies with these directions. He shall do so within 30 days. The defendant will have 20 days to respond, with specific comments relating to any aspect of the fresh document that it alleges is inappropriate. The plaintiff will have 10 days thereafter to file responding submissions.

Motion for Production of Documents:

- [58] The plaintiff’s motion for production of documents has been adjourned pending disposition of the motion to amend, since the obligation to produce documents is determined by relevance, and relevance is determined by the pleadings. Thus, this motion is further adjourned for written argument, following finalization of the form of the Fresh As Amended Statement of Claim.

Motion for Costs Thrown Away:

- [59] The only remaining matter to be dealt with is the defendant’s motion for costs thrown away on the plaintiff’s proposed injunction motion.
- [60] A case conference was scheduled for September 25, 2024 before Justice MacFarlane to seek directions on several motions the plaintiff wished to bring, including the motion to amend the Statement of Claim which I have just dealt with, along with others. On September 24, 2024 counsel for the plaintiff contacted opposing counsel to advise the plaintiff now wished to also bring a motion seeking an injunction to stay the arbitration currently underway between the plaintiff and the university. This arbitration was a “Dismissal Proceeding” relating to the university’s intention to terminate the plaintiff’s employment.
- [61] Scheduling of this motion was discussed the next day at the case conference. Given that the opening statements in the Dismissal Proceeding were to commence on October 2, 2024, the parties agreed to an expedited timetable. The motion was scheduled for October 28, 2024 (it was later adjourned to November 25, 2024), and Justice MacFarlane’s endorsement set out the following terms:

- Notice of motion to be served by October 4, 2024;
- Plaintiff’s affidavits and motion record to be served by October 7;

- Defendant's responding affidavits to be delivered by October 11;
- Cross-examinations, if any, to take place October 21 and 22;
- Factums to be delivered by October 23.

[62] On October 4, 2024, the due date for the plaintiff's notice of motion, at just before 5 p.m., plaintiff's counsel sent an email to defendant's counsel advising they were abandoning the injunction motion.

[63] According to the affidavit of Zohaib Ahmed, sworn November 8, 2024, who was present at the case conference as an associate of counsel for the defendant, the defendant had immediately started preparing responding materials following the case conference and, in particular, they began conducting legal research and drafting a responding affidavit. They found it necessary to do so because they would only have four days to deliver a responding motion record after being served with the plaintiff's motion record. It is those costs which have been wasted as a result of the plaintiff's abandonment of the motion, for which they seek compensation.

[64] However, according to the affidavit of the plaintiff sworn November 15, 2024, defendant's counsel, Mr. Formosa, stated that he wanted the notice of motion in order to, at least, know the basis of the injunction motion earlier on, so they could commence work on the reply. He said Mr. Formosa "clearly represented that the Defendants required the notice of motion first, before their work on the reply could commence". Thus, it is argued that the plaintiff's reasonable expectation was that no costs would be incurred until the notice of motion was served, so abandonment on the due date for service should not attract an order for costs.

[65] This affidavit, which was not tested by cross-examination, goes on to allege that plaintiff's counsel expressed disapproval of the shortened deadline, and that it may be challenging for him to produce a motion on schedule due to prior commitments. He did, nevertheless, agree to that schedule.

[66] The plaintiff's affidavit explained that the decision to abandon the motion was made because the constrained timeline significantly reduced their ability to prepare a viable case.

[67] The costs outline filed by the defendant indicates that a total of 9.6 hours of counsel time was expended by Zohaib Ahmed, Al Formosa and Phil Wallner in preparation time, from and including the date of the case conference until October 4 when the motion was abandoned. On a substantial indemnity scale, this amounts to \$4,668.75 plus HST, for a total of \$5,275.69. The defendant claims this amount as costs thrown away.

[68] Rule 37.09 reads as follows:

37.09 (1) A party who makes a motion may abandon it by delivering a notice of abandonment.

(2) A party who serves a notice of motion and does not file it or appear at the hearing shall be deemed to have abandoned the motion unless the court orders otherwise.

(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise.

- [69] The defendant relies on *Beatrice Leaseholds Ltd. v. Shainhouse*, 2013 ONSC 5582 in support of its claim for costs thrown away. In that case, plaintiff's counsel indicated his intention to bring an application to have defence counsel, a Mr. Ross, removed from the record. He set out in writing the basis for that intended motion, including an allegation that Mr. Ross may have violated the Rules of Professional Conduct by knowingly pleading a falsehood. Master Dash concluded that this amounted to an allegation of fraud. Unsurprisingly, Mr. Ross found it necessary to incur the expense of retaining outside counsel to represent him.
- [70] A case conference was held and a timetable was established. A further case conference was also necessary. Two months following the declaration of counsel's intention to bring the application, and on the last day for service of the plaintiff's motion record, plaintiff's counsel sent a fax to counsel and the court indicating that they will not be proceeding with the motion. Counsel for the defence subsequently brought a motion for costs thrown away.
- [71] The plaintiff argued that r. 37.09 had no application because the plaintiff never served a motion, and therefore could not be said to have abandoned it. Master Dash noted that subrule (1) speaks of a party "who *makes* a motion", as opposed to one who serves or files one. He concluded that preparation and service of a formal notice of motion is not always necessary, and gave several examples in that regard. He noted that the plaintiff took several positive steps toward "making" a motion, including sending in a requisition for master to be appointed, setting out in writing the allegations on which the motion would be based, requesting and participating in a case conference and setting a timetable. Master Dash ultimately concluded that, for purposes of r. 37.09(1) the plaintiff had "made" a motion. He similarly concluded that the plaintiff "abandoned" the motion by virtue of the fax sent by counsel, thereby entitling the defendant to an award of costs.
- [72] In the alternative, he relied on his broad jurisdiction to determine costs of any step in a proceeding under s. 131(1) of the *Courts of Justice Act* to award costs thrown away to the defendant.
- [73] There is other authority that similarly holds that the court has jurisdiction to award costs for an abandoned motion even though no notice of motion was ever served: see *Kunzst v. Tulk*, 2003 CanLII 10950 (ON SC).
- [74] Applying the logic of Master Dash, with which I agree, the plaintiff here can be said to have "made" a motion, in that he took positive steps in that regard, including advising both the court and opposing counsel of the intended motion, conducting a case conference wherein the proposed motion was discussed, scheduling an expedited hearing date for the motion, and agreeing upon an expedited timetable for delivery of documents and conducting cross-examinations.

- [75] Given that the plaintiff did “make” the motion, and then abandoned it at the last minute of the last business day by which service of the notice of motion was due, the defendant is entitled to costs pursuant to r. 37.09(3). If I am wrong in finding that this rule applies, directly or by analogy, I would have exercised my inherent discretion under s. 131(1) of the *Courts of Justice Act* to make an award of costs in any event.
- [76] The plaintiff places heavy reliance on the alleged assertion by Mr. Formosa that he needed the notice of motion before he could commence work on the reply. I take that to mean that he could not begin drafting responding documents without having the notice of motion in hand, so he would know precisely what he was responding to. However, it would be unreasonable, in my view, for the plaintiff to have assumed that defence counsel would do absolutely nothing regarding this motion, in view of the extremely tight timetable that had been established. At the very least, it was, or should have been, within the reasonable expectation of the plaintiff that defence counsel would begin researching the applicable law that would apply to a motion of this kind. Given their discussions about the nature of the motion at the case conference, counsel for the defence would know enough about the motion to be able to identify the likely issues and the questions of law that would be at stake, in order to begin conducting meaningful research.
- [77] Furthermore, I am troubled by the fact that counsel for the plaintiff waited until the last minute of the last business day for service of the notice of motion to advise opposing counsel that they would not be proceeding with the injunction motion. It is inconceivable that plaintiff’s counsel only came to the realization that it was not viable to proceed with the motion at that late hour. If they had advised opposing counsel of their intention a few days or even a matter of hours earlier, costs could have been saved.
- [78] I am satisfied that the defendant is entitled to an award of costs, but not on the substantial indemnity scale that it seeks. In *Beatrice*, Master Dash awarded full indemnity costs, but the plaintiff in that case had made what the Master found were allegations of fraud against opposing counsel, which routinely attracts solicitor and client costs. The motion before me contains no indications of impropriety or bad faith on the part of the plaintiff. Furthermore, Mr. Ross was put to the expense of retaining counsel, which distinguishes that case from the one before me.
- [79] I am satisfied that costs should be on a partial indemnity basis only.
- [80] As to the quantum, the defendant has claimed costs of the case conference of September 25, 2024. However, that conference had already been scheduled on September 5 to discuss other issues, outlined in the plaintiff’s Case Conference Brief, and thus it would have happened anyway. Costs are not ordinarily awarded for case conferences, absent extraordinary circumstances.
- [81] In addition, while it is not unreasonable for counsel for the defendant to have begun some legal research, they could not, obviously, begin to prepare any responding affidavits unless and until they were in possession of the plaintiff’s motion record, so that they would know

what factual allegations needed to be responded to. However, their Costs Outline indicates that time was spent on the preparation of an affidavit.

- [82] In my view, an award of costs of \$3,000 all inclusive represents fair and reasonable compensation for the costs thrown away by the defendant. An order will go in that regard, payable within 60 days.

Concluding Comments:

- [83] The parties have been litigating against each other, in two different forums, for almost 7 years now. Enormous sums have been spent in legal fees, by both parties but particularly by the defendant. However, given the amendments requested by the plaintiff, the parties are now as far from having a trial to finally resolve this case as they have ever been. Much more money will be spent, and judicial resources consumed, before this case is over.

- [84] The plaintiff made a choice to bring separate proceedings before the HRTO to litigate his *Code*-related claims, largely because he could represent himself there at no cost, and was at no risk of an adverse costs award against him if he lost. That has proven to be an unwise choice. His *Code*-related claims will now be part of this action, where there are no free rides as far as costs are concerned. There will be a price to pay for the strategy he chose, and a substantial costs award is looming.

- [85] It seems to me that this case cries out for a resolution of some kind that will stop the bleeding and bring it to a quick end. I have assigned counsel on both sides significant work to do over the coming weeks, but before they embark on all of that they would do their clients and the court a service by getting together and making a determined effort to find some kind of resolution.

- [86] If the assistance of a judge might be of some aid in this endeavour, I would be happy to make arrangements for someone to be made available.

T. A. Heeney J.

Released: January 20, 2025

CITATION: *Pandher v. University of Windsor et al*, 2025 ONSC 168
COURT FILE NO.: CV-19-28370

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

GURUPDESH PANDHER

Plaintiff

– and –

UNIVERSITY OF WINDSOR, ALAN WILDEMAN,
DOUGLAS KNEALE and MITCHELL FIELDS

Defendants

REASONS FOR JUDGMENT ON A MOTION

T. A. Heeney J.

Released: January 20, 2025