Date: 20080220

Docket: A-235-04

Citation: 2008 FCA 67

BETWEEN:

SHERIDAN GARDNER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

CANADIAN HUMAN RIGHTS COMMISSION

Intervener

ASSESSMENT OF COSTS – REASONS

Charles E. Stinson
Assessment Officer

[1] The Appellant brought an application (which was dismissed) in the Federal Court for judicial review of a decision of the Canadian Human Rights Commission (the Commission) dismissing her complaint against the Department of Foreign Affairs and International Trade concerning her allegations of discrimination relative to rental housing provided during her assignment at the Canadian Embassy in Tokyo, Japan, from 1992 to 1995. This appeal of the

Federal Court decision was dismissed with costs. I issued a timetable for written disposition of the assessment of the bill of costs of the Respondent, the Attorney General of Canada (the Respondent).

I. The Respondent's Position

[2] The Respondent argued that there was nothing in the conduct of this litigation that would justify a reduction of the maximum amounts claimed for counsel fee items 19 (memorandum of fact and law), 13(a) (preparation for hearing), 22(a) (appearance at hearing) and 25 (services after judgment). The necessity for an assessment of costs warrants Rule 408(3) discretion for an allowance of 3 units ($120.00 per unit) (available range = 2 to 6 units) for item 26.

II. The Appellant's Position

[3] The Appellant argued further to Rules 409 and 400(3)(a) (result) and (c) (importance and complexity and *Shepherd v. Canada (Solicitor General)* (1990), 36 F.T. R. 222 (F.C.T.D.) that the costs allowed should be minimal because her litigation, although unsuccessful, resulted in reductions of the bias in the formula used to set accommodation rental rates for public servants. It would be unjust to penalize the Appellant with costs while some thousands of employees posted abroad after her benefited without having to pay anything. The Appellant argued further to Rule 400(3)(h) (public interest) and *Singh v. Canada (A.G.)*, [1999] 4 F.C. 583 (F.C.T.D.) that assessed costs should be minimal because of the extent of the benefits for others resulting from this litigation. Any costs against the Appellant are punitive and it would be reasonable to assess only an amount generated by the ratio of herself to the number of government employees, posted abroad

since 2001, who have benefited from this litigation's role in amending the rental accommodation formula.

[4] The Appellant argued further to Rule 400(3)(i) (conduct) and *Gee v. Canada v. (Minister of National Revenue – M.N.R.)*, [2002] F.C.J. No. 12 (F.C.A.) that the lack of clarity, which elicited negative comments by both the Federal Court and the Federal Court of Appeal, in the Commission's decision led to unnecessary lengthening of this proceeding. The Appellant should not be penalized for that with costs. The Respondent's request for item 26 costs is unreasonable for the reasons above. The Appellant requested lump sum costs of $50.00 for her disbursements related to this assessment of costs.

[5] The Appellant argued further to Rule 400(3)(b) (amount claimed) and (g) (amount of work) that there is no evidence to justify the claim for item 19. The work to produce the Memorandum of Fact and Law would have been done during the Federal Court proceeding as it largely mirrors the factum used there.

III. Assessment

[6] Paragraph 1 of the Court's decision noted that the Federal Court had "reluctantly dismissed" the application for judicial review. Counsel for the Respondent at the Federal Court hearing indicated that his client would not seek costs. The Commission did not seek costs. The Federal Court directed that there be no order as to costs. The Appellant's notice of appeal sought costs below and costs of the appeal in any event of the cause. One of the asserted grounds of appeal was

that the conduct of the Commission in failing to disclose certain materials resulted in costs thrown away. The Appellant's Memorandum of Fact and Law asserted this position on costs. The Court essentially found (paragraphs 12 to 19 inclusive) that the conduct of the Commission could not be criticized because the subject materials were irrelevant and had never been put to it.

[7] At paragraph 23, the Court described the Commission's reasons as "laconic and … more in the nature of a conclusion than reasons." The Court outlined (paras. 29 to 31 inclusive) the process leading to the Commission's decision and found that it afforded sufficient means for the Appellant to understand the basis for the Commission's decision. Therefore, I find that the Appellant's case law, which addressed the Court's discretion under Rule 400(1) concerning entitlement to costs but not the manner in which they are to be assessed, of little value. That is, the Court asserted no reasons to restrict access by the Respondent, whose role is distinct from that of the Commission, to the ordinary indemnity for costs in the event. I find that there was nothing in the conduct of the Respondent to warrant reduction of costs. I have no jurisdiction in these circumstances to partition costs relative to non-litigants.

[8] In *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2002] F.C.J. No. 1795 (A.O.), I considered the relevance of public interest for assessments of costs and concluded that the application of Rules 409 and 400(3) factors against the interest of successful litigants would require carefully considered discretion. That a judgment for costs does not accord the unsuccessful litigant special consideration relative to costs as a function of public interest does not preclude me from applying Rules 409 and 400(3)(h) to minimize assessed costs. I will not do so

here. The Court's decision (para. 3) noted that the rental formula was not based on the actual accommodation assigned and that said fact was key to the Appellant's assertion of discrimination. The Appellant's submissions before me referenced paragraph 12 of the Court's decision in arguing that her litigation was beneficial to thousands of public servants. With respect, I do not think that the record necessarily supports that conclusion. Paragraph 12 refers to the letter dated March 11, 2002, referring to the Appellant's complaint and forwarding to the Commission a document outlining a new shelter costs formula. This covering letter specifically asserts that "the basic policy of basing rents on salary and family size, rather than on the specific accommodation occupied, has not been changed." The document itself refers to an established ongoing review of Foreign Service directives. I reject the Appellant's position, including her request for Rule 408(3) costs.

[9] I concluded at para. 7 in *Starlight v. Canada*, [2001] F.C.J. No. 1376 (A.O.) that the same point in the ranges throughout the Tariff need not be used as each item for the services of counsel is discrete and must be considered in its own circumstances. As well, broad distinctions may be required between an upper versus lower allowance from available ranges. Certain interlocutory steps were required to perfect the Commission's status as Intervener. There is nothing in the record to suggest that the Appellant's status as a self-represented litigant generated unnecessary work in that area or any other area of this litigation. I find that the issues in this appeal were straightforward but required some effort of counsel. I allow item 19 at 5 units (available range = 4 to 7 units). I allow item 22(a) at the minimum 2 units per hour and item 25 as presented at 1 unit.

[10] In the context of what I perceive as general opposition to the bill of costs, I disallow item 13(a) as this item falls under the subheading 'E. Trial or Hearing'. There is no item with a comparable definition, i.e. preparation for hearing of the appeal, under the subheading 'F. Appeals to the Federal Court of Appeal'. Paragraph 53 (the dissenting opinion) of *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 22 C.P.R. (4th) 177 (F.C.A.) characterized this as an oversight in Tariff B and allowed a fee under item 27. I have held that item 27 can only be used for services not already addressed in items 1 to 26. I presume that the assertion in paragraph 53, i.e. that item 19 for the Memorandum of Fact and Law is a service comparable to preparation for the hearing of the appeal, does not mean that these services are indeed the same. In the circumstances, I allow the minimum unit under item 27 for preparation for the appeal hearing.

[11] I allow the minimum 2 units under item 26 and the disbursements as claimed at $81.67. The Respondent's bill of costs, presented at $2,840.47, is assessed and allowed at $1,960.87.

"Charles E. Stinson"
Assessment Officer

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-235-04

STYLE OF CAUSE: SHERIDAN GARDNER v. AGC

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT OF COSTS: CHARLES E. STINSON

DATED: February 20, 2008

WRITTEN REPRESENTATIONS:

Ms. Sheridan Gardner	FOR THE APPELLANT (self-represented)
Mr. Richard Casanova	FOR THE RESPONDENT

SOLICITORS OF RECORD:

n/a	FOR THE APPELLANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT