

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20090730

Docket: A-182-09

Citation: 2009 FCA 237

Present: LAYDEN-STEVENSON J.A.

BETWEEN:

MOHAMMAD ASLAM CHAUDHRY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 30, 2009.

REASONS FOR ORDER BY:

LAYDEN-STEVENSON J.A.

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REASONS FOR ORDER

LAYDEN-STEVENSON J.A.

[1] The respondent seeks security for costs under Rule 416(f) of the *Federal Courts Rules*. I am satisfied, for the reasons that follow, that this is an appropriate case for such an order.

[2] Rule 416(f) provides:

416(1) Where, on the motion of a defendant, it appears to the Court that ...

(f) the defendant has an order against the plaintiff for costs in the same or another proceeding that remain unpaid in whole or in part,

the Court may order the plaintiff to give security for the defendant's costs.

416(1) Lorsque, par suite d'une requête du défendeur, il paraît évident à la Cour que l'une des situations visées aux alinéas a) à h) existe, elle peut ordonner au demandeur de fournir le cautionnement pour les dépens qui pourraient être adjugés au défendeur :

[...]

f) le défendeur a obtenu une ordonnance contre le demandeur pour les dépens afférents à la même instance ou à une autre instance et ces dépens demeurent impayés en totalité ou en partie;

[3] The respondent asks for an order requiring:

- the applicant to give security for costs in the amount of \$2,970 representing the estimated costs that may be awarded to the respondent if the application is not successful;
- the security to be given by paying \$2,790 into court pursuant to Rule 418(a) within 60 days from the date upon which the applicant receives notice of the order, failing which the application will be dismissed with costs;
- the applicant to provide notice to the respondent when payment into court is made;
- the applicant to pay costs of the motion, payable forthwith, in any event of the cause.

[4] Further, the respondent asks that the applicant be prohibited from taking any further steps in this application until payment of the security has been made and notice has been given.

[5] The applicant was rejected on probation by the employer in 2004. He referred a grievance against his dismissal to the Public Service Labour Relations Board. He additionally filed a complaint under section 23 of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, alleging that he had been threatened with the loss of his job if he filed a grievance. The grievance and complaint were heard together by the board member, sitting as both an adjudicator and a board member under the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2. The applicant was represented by his bargaining agent. The decision dated July 13, 2005 dismissed both the complaint and the grievance.

[6] The applicant filed a judicial review application against the decision with respect to the grievance (the grievance decision). He took no action with respect to the complaint until January 9, 2009, when he submitted a request for reconsideration. On March 25, 2009, the board member dismissed the application for reconsideration. That decision is the subject of this application (the reconsideration decision).

[7] The respondent has provided evidence of certificates of assessment with respect to proceedings in the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada regarding the grievance decision. The amount of \$4,260 assessed on December 4, 2008 in relation

to Federal Court file number T-374-06 remains unpaid. The amount of \$2,100 assessed on December 9, 2008 in relation to Federal Court of Appeal file number A-229-07 (an appeal from F.C. T-374-06) remains unpaid. Demands for payment of both amounts were made by the respondent in December, 2008. On November 13, 2008, the Supreme Court of Canada refused an application for leave to appeal. Costs were taxed and assessed against the applicant in the amount of \$1,408.91. There is no indication that payment has been made with respect to that amount.

[8] There are other matters in the Federal Court and the Federal Court of Appeal where costs have been ordered to be paid by the applicant to the respondent. Specifically, the following amounts remain outstanding:

- \$500 costs - Order of Prothonotary Aalto dated July 11, 2007 (F.C. file number T-702-07);
- \$750 costs - Federal Court judgment dated March 17, 2008 (F.C. file number T-702-07);
- \$500 costs - Federal Court of Appeal judgment dated May 5, 2008 (F.C.A. file number A-489-07).

[9] On the evidence, I am satisfied that the applicant has a history of failing to pay the costs awarded against him. The amount of \$2,500 remains outstanding in relation to this Court alone. Unless the applicant can bring himself within Rule 417, I see no reason to refuse the respondent's request. Rule 417 states that an order for security for costs may be refused in circumstances where an applicant demonstrates impecuniosity and the Court is of the opinion that the case has merit.

[10] Although I have grave doubts regarding the merits of the application, the applicant, in any event, has not demonstrated impecuniosity. The standard in this respect is high. Frank and full disclosure is required and the onus must be discharged with particularity: *B-Filer Inc. et al. v. Bank of Nova Scotia*, 2007 FCA 409, 371 N.R. 292; *Heli-Tech Services (Canada) Ltd. v. Weyerhaeuser Co.*, 2006 FC 1169, 300 F.T.R. 192.

[11] The applicant provides no specificity with respect to impecuniosity. There is a statement in his memorandum of fact and law (rather than in his affidavit) that “the irrefutable evidence of a person’s impecuniosity is his entitlement for Social Assistance.” He claims to have been on social assistance since August, 2005. He acknowledges receipt of a cheque in the amount of \$3,406 from Treasury Board on June 22, 2009. There is nothing further. There is no detail regarding the applicant’s finances (assets, income, expenses, liabilities), his ability to access funds, his prospects for employment, or his efforts in this regard. The applicant has not met the evidentiary burden required to demonstrate impecuniosity.

[12] The only other argument responsive to the motion is that Rule 416 does not apply to the applicant because it relates only to “a third party or a party in a counterclaim.” This ill-conceived assertion arises as a result of Rule 415 which provides that Rules 416 to 418 apply, with such modifications as are necessary, to parties bringing and defending counterclaims and third party claims, to applicants and respondents in an application and to appellants and respondents in an appeal. Rule 415 does not restrict the application of Rule 416 to third parties or parties involved in

counterclaims. Rather, it ensures that, unlike the former Rule 446 (which applied only to actions), Rule 416 applies to all proceedings, actions, applications and appeals.

[13] Turning to the amount of the security for costs that should be ordered, I am not satisfied that the amount claimed in the respondent's proposed draft bill of costs is reasonable. It is not at all certain, if the applicant is not successful, that the respondent will be entitled to costs at the upper end of Column III. I have concluded that the order for security for costs should specify the amount of \$1,670, including disbursements. The respondent will be awarded costs of the motion in the amount of \$300.

"Carolyn Layden-Stevenson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-182-09

STYLE OF CAUSE: MOHAMMAD ASLAM
CHAUDHRY & AGC

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: LAYDEN-STEVENSON J.A.

DATED: July 30, 2009

WRITTEN REPRESENTATIONS BY:

Mohammad Aslam Chaudhry (Self-represented) FOR THE APPLICANT

Mr. Karl Chemsî FOR THE RESPONDENT

SOLICITORS OF RECORD:

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