

Federal Court



Cour fédérale

Date: 20211220

Docket: T-951-20

Citation: 2021 FC 1447

Ottawa, Ontario, December 20, 2021

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ABDALLAH ZOGHBI

Applicant

and

AIR CANADA

Respondent

COSTS ORDER

I. Overview

[1] This order concerns the costs and disbursements payable between the parties as a result of this Court's judgment in *Zoghbi v Air Canada*, 2021 FC 1154 [*Zoghbi*].

[2] This Court ruled in *Zoghbi* that the decision of the Canadian Human Rights Commission [Commission] to dismiss Mr. Zoghbi's human rights complaint as trivial pursuant to s 41(1(d) of

the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA] was unreasonable. The Commission held that, even if Mr. Zoghbi's complaint were well-founded, any meaningful remedy would be foreclosed by the *Carriage by Air Act*, RSC 1985, c C-26 [CAA]. The Court allowed Mr. Zoghbi's application for judicial review on the ground that the Commission had failed to consider whether remedies other than financial compensation, such as measures to redress the alleged discriminatory practice or prevent similar practices from occurring in future, might be appropriate.

[3] For the reasons that follow, costs are payable to Mr. Zoghbi by Air Canada in accordance with the high end of Column III of Tariff B, plus reasonable disbursements. If the parties are unable to agree upon the costs, including disbursements, payable pursuant to this Order, then the matter will be referred to an assessment officer for determination.

II. Positions of the Parties

A. *Mr. Zoghbi*

[4] Mr. Zoghbi received funding from the Court Challenges Program, and says he is contractually obliged to request an award of costs. He seeks costs in the amount of \$177,090.75, and disbursements in the amount of \$11,461.40 (consisting largely of the expert witness fees of Professor Phoebe Okowa).

[5] Mr. Zoghbi argues that the legal issues raised in his application for judicial review were of importance to the broader community, including:

- (a) whether the Commission lacks the power under ss. 53(2)(e) and 53(3) of the CHRA to award damages as a remedy for racial discrimination, because those provisions of the CHRA have been pre-empted by Article 29 of the *Convention for the Unification of Certain Rules for International Carriage by Air*, 2242 UNTS 309 [*Montreal Convention*], incorporated into domestic law by s 2(2.1) of the CAA;
- (b) whether Article 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, Can TS 1970 No 28 [*CERD*], imposes a legal obligation on Canada to provide remedies for racial discrimination in private international aviation, and whether this international legal obligation operates to restrict any effect Article 29 of the *Montreal Convention* might have on the CHRA;
- (c) whether the CHRA, as a quasi-constitutional statute, prevails over the CAA, specifically in the context of civil aviation; and
- (d) whether the CHRA violates s 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] if international aviation is, in effect, carved out as a “human rights free zone”.

[6] Mr. Zoghbi therefore characterizes his application as “public interest litigation”, and says he should be awarded legal fees on a substantial indemnity basis (citing *Jodhan v Canada (Attorney General)*, 2010 FC 1197; aff’d, 2012 FCA 161). Mr. Zoghbi maintains that such an award will help promote access to justice.

B. *Air Canada*

[7] According to *Air Canada*, where a party is the “most successful” it should be entitled to its costs, subject to apportionment to reflect the partial success of the opposing party. This is true even if the party does not succeed in having an application for judicial review dismissed (citing *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 842 at paras 23-26; aff’d, 2013 FCA 220 and *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2020 FC 643 at para 33).

[8] *Air Canada* notes that most of the issues raised by Mr. Zoghbi were held not to be properly before the Court. *Air Canada* goes so far as to say that the Court did not allow the application on the basis of any of the issues, grounds, arguments or remedies advanced by Mr. Zoghbi, but this is an overstatement. Counsel for Mr. Zoghbi pointed the Court to the written submission made by Dr. Gabor Lukacs to the Commission that the *Montreal Convention* does not affect the Canadian Human Rights Tribunal’s broad corrective powers under s 53(2)(a) of the CHRA (*Zoghbi* at paras 14, 45).

[9] Aside from Mr. Zoghbi's unsuccessful attempts to advance novel arguments respecting international law and the Charter, Air Canada argues that this application was not complex but turned on the straightforward application of established principles of administrative law. Air Canada submits that it was unnecessarily put to the expense of defending any and all issues raised by Mr. Zoghbi, including many that were not relevant and not properly before the Court.

[10] Because Prothonotary Kevin Aalto left the admissibility of the experts' affidavits to be determined at the hearing of the application, Air Canada says it was required to obtain a responding expert affidavit or risk the Court admitting Mr. Zoghbi's expert affidavit uncontested. In addition to the expense of obtaining a responding expert's affidavit, Air Canada also incurred the expense of preparing for and attending cross-examinations of both parties' experts.

III. Analysis

[11] The awarding of costs, including quantum, is a matter falling within the Court's discretion (*Federal Courts Rules*, SOR/98-106 [Rules], Rule 400(1); *Canada (Attorney General) v Rapiscan Systems Inc*, 2015 FCA 97 at para 10). In determining an award of costs, the Court is guided by the considerations found in Rule 400(3).

[12] The principal considerations that inform the assessment of costs in this case are the following:

- (a) the result of the proceeding;

- (b) the importance and complexity of the issues;
- (c) the amount of work;
- (d) whether the public interest in having the proceeding litigated justifies a particular award of costs;
- (e) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
- (f) whether any step in the proceeding was:
 - (i) improper, vexatious or unnecessary; or
 - (ii) taken through negligence, mistake or excessive caution; and
- (g) whether the expense required to have an expert witness give evidence was justified given:
 - (i) the nature of the litigation, its public significance and any need to clarify the law; or
 - (ii) the number, complexity or technical nature of the issues in dispute.

[13] Mr. Zoghbi's application for judicial review was allowed, but the Court declined to address many of the arguments he advanced in support of his position. Mr. Zoghbi's expert evidence respecting international law was found to be irrelevant, and therefore inadmissible (*Zoghbi* at para 24). His arguments respecting s 15 of the Charter were held to be unnecessary and insufficiently supported by evidence (*Zoghbi* at para 61).

[14] I nevertheless reject Air Canada's assertion that it was the "most successful" party. As a result of this Court's decision in *Zoghbi*, the Commission must redetermine whether or not to proceed with Mr. Zoghbi's human rights complaint. Many of Mr. Zoghbi's arguments were advanced prematurely in this Court, but this does not mean they were without merit. They will likely be revived before the Commission and, depending on how it chooses to proceed, possibly before the Canadian Human Rights Tribunal as well.

[15] The issues were of moderate importance and complexity. The intersection between the CHRA and the CAA in the context of international air travel was, and remains, a novel question. The amount of work was greater than would ordinarily have been required in an application for judicial review, and the public interest supported having the proceeding litigated.

[16] In granting Mr. Zoghbi's motion for leave to file the expert affidavit of Professor Okowa, Prothonotary Aalto found she was highly qualified to explain the interplay between the *Montreal Convention* and the *CERD*, which he described as a central aspect of the decision under review. Prothonotary Aalto acknowledged that the hearing judge might ultimately decide to give Professor Okowa's affidavit little weight, but noted there were many examples of cases in which the Court had permitted expert opinion evidence on principles of international law. Prothonotary Aalto's Order was without prejudice to Air Canada's right to argue at the hearing of the application that Professor Okowa's affidavit was not admissible. He also granted leave to Air Canada to file a responding expert affidavit if so advised.

[17] Having sought and obtained leave of the Court to file Professor Okowa's affidavit, I am not prepared to find that Mr. Zoghbi unnecessarily lengthened the duration of the proceeding, or that this step was improper, vexatious or unnecessary, or taken through negligence, mistake or excessive caution. Prothonotary Aalto was satisfied that the expense required to have an expert witness give evidence was justified, and I see no reason to revisit that determination.

IV. Conclusion

[18] Mr. Zoghbi has submitted a draft Bill of Costs calculated in accordance with the high end of Column III of Tariff B. Given all of the considerations discussed above, I am satisfied that this is a reasonable manner of assessing costs and disbursements in this case.

[19] Costs are therefore payable to Mr. Zoghbi by Air Canada in accordance with the high end of Column III of Tariff B plus reasonable disbursements, including disbursements pertaining to the expert evidence of Professor Okowa.

THIS COURT ORDERS that:

1. Costs are payable to Abdallah Zoghbi by Air Canada in accordance with the high end of Column III of Tariff B plus reasonable disbursements, including disbursements pertaining to the expert evidence of Professor Okowa.
2. If the parties are unable to agree upon the costs, including disbursements, payable pursuant to this Order, then the matter will be referred to an assessment officer for determination.

"Simon Fothergill"

Judge