Federal Court  Cour fédérale

Date : 20111117

Docket: T-1717-09

Citation: 2011 FC 1320

[ENGLISH TRANSLATION]

BETWEEN:

CANDIAN UNION OF POSTAL WORKERS

Plaintiff

and

CANADA POST CORPORATION

Defendant

REASONS FOR ASSESSMENT

JOHANNE PARENT, Assessment Officer

[1] On February 28, 2011, the Court dismissed with costs the contempt of court proceeding filed by the Canadian Union of Postal Workers under Rules 466 to 469 of the *Federal Courts Rules*. On May 10, 2011, the defendant filed its bill of costs with the Court. Directions were issued on May 13, 2011, informing the parties that the assessment of costs would proceed in writing as well as of the deadlines for filing representations.

[2] To better understand these reasons, I have reproduced below a brief history of the proceedings that have taken place in this matter. On October 21, 2009, a copy of Umpire Andre Bergeron's decision was filed with the Federal Court registry in accordance with section

66 of the *Canada Labour Code*. Following that, a notice of motion to obtain an order to show cause was filed by the plaintiff and in agreement, Beaudry J. signed an order compelling the defendant's director of labour relations to appear on June 11, 2010, with costs in the cause. On the morning of October 21, 2010, Bédard J. heard the plaintiff's evidence on the contempt proceeding. Upon returning from lunch the same day, the defendant brought a non-suit motion, resulting in the principal hearing being adjourned and the Court setting a timetable for said motion to proceed in writing. In a decision dated January 11, 2011, the Court dismissed the non-suit motion without costs, ordering that the hearing should resume on its merit on February 7, 2011. The contempt proceeding then resumed on this latter date and it is in the context of the decision to dismiss the contempt proceeding that costs were awarded to the defendant.

[3] The defendant claims seven units under Tariff B of the *Federal Courts Rules* for the preparation and filing of all its defences, replies, counterclaims and records and materials of the respondents (item 2). In response, the plaintiff submits that item 2 does not apply, as the defendant [TRANSLATION] "did not draft or file any pleadings, documents or records in this matter". In reply, the defendant maintains that it filed pleadings following the plaintiff's motion, for instance: a motion for a non-suit order (November 12, 2010) and a reply to the plaintiff's written submissions (December 3, 2010), as well as a book of authorities. According to the defendant, the time and work required to prepare a solid defence would justify the number of units claimed.

[4] The proceedings that the defendant specifies having prepared under item 2 of Tariff B are a motion for a non-suit order and the reply to said motion. As the plaintiff asserts, these documents do not relate to pleadings within the meaning of item 2 of Tariff B. In the framework of contempt of court proceedings under Rule 467 of the *Federal Courts Rules*, an initial order to show cause must be allowed in order to proceed to the second stage so that the party designated in the order to show cause can appear before a judge and be ready to hear the evidence of the act of which it is accused and to defend itself. The services claimed under item 2 specifically concern the non-suit motion. Following my review of the two decisions by Bédard J. and the arguments of the parties concerning the non-suit motion and the contempt proceeding, I am satisfied that the arguments of the parties, although they may intersect, dealt with different

issues. The principles applicable at the hearing on the merit of the contempt proceeding and those discussed at the assessment of the non-suit motion were different. Moreover, I was unable to identify any argument in the defendant's representations on costs that would confirm the use of materials provided for the non-suit motion in the contempt proceeding. In reading the materials in the record, I do not consider the documents mentioned by the defendant to justify its claim under item 2 of Tariff B as a defence or response to the contempt proceeding, but rather as the preparation and response to a motion for which the Court has already had the occasion to determine the awarding of costs. As no other records or materials of the defendant relating to the documents mentioned in item 2 could be found in the Court record, the claim under item 2 will not be allowed.

[5] The defendant claims seven units for the preparation and filing of a contested motion (item 5). In response, the plaintiff maintains that the non-suit motion filed by the defendant was dismissed by the Court with no costs awarded, thus removing any power of the assessment officer to allow costs. The defendant, for its part, maintains that said motion fell within the scope of the hearing on the motion on the merit. This argument by the defendant is covered in the previous paragraph. Also, I consider the plaintiff's position to be fair: the claim for services in the non-suit motion filed by the defendant cannot be allowed. The case law of this Court is consistent that costs cannot be allowed by an assessment officer unless the Court has expressly done so within the scope of its decision (*Carr v. Canada* 2009 FC 1196 at paragraphs 4 and 5 [*Carr*]). The costs claimed for appearing on this same motion (item 6) are not allowed.

[6] In the context of the defendant's claim for the maximum number of units under item 13 of the Tariff, the plaintiff's response is to maintain that the defendant had only one witness appear and that no subpoena needed to be issued. In reply, the defendant maintains that in order to develop a defence strategy in this matter, an in-depth analysis of the record (twenty days of hearings before the umpire) and case law had to be undertaken. In reading the record and the Court's decision, I consider the body of work provided by the defendant in order to respond to and contest the contempt of court proceeding and for which Bédard J. granted him costs, of real complexity and importance and having required a workload that justifies the number of units

claimed under item 13. Moreover, the units claimed under item 14 for being present in Court are not contested and will be allowed as requested.

[7] The claims under items 8 and 9 of Tariff B (Discovery of documents and examinations) have been withdrawn by the defendant.

[8] Five units are claimed under item 24 for travel by counsel to attend the hearing. As submitted by the defendant, the Court record clearly indicates that counsel had to travel on the two days of hearings in Ottawa. Nevertheless, as mentioned by the plaintiff in its representations, in the absence of a clear direction from the Court, the assessment officer has no jurisdiction to allow costs provided for under item 24 of Tariff B. I point out, however, that in light of *Marshall v. Canada* [2006] FCJ No. 1282 and *Abbott v. Canada* 2004 FC 739 [*Abbott*] the assessment officer still has the discretion to allow travel disbursements in connection with cases where the Court has awarded costs.

[9] The claim under item 25 (services after judgment) is allowed. There in no doubt in my mind that the defendant, following the judgment of the Court, needed to communicate with his clients, if only to explain the scope and impact of the judgment and to see to the next stages.

[10] I can find no justification for the defendant's representations in reference to the claim made under item 27. Just mentioning [TRANSLATION] "costs incurred following the two decisions of the Federal Court" does not allow me to conclude that the units claimed under item 27 have not already been compensated under item 25. Consequently, the three units claimed under item 27 will not be allowed.

[11] With reference to the claim for the maximum number of units under item 26 of Tariff B for assessment of costs, the plaintiff's counsel maintains that the minimum number of units should be awarded to take into account that this assessment raises no complex issues. Reference is also made to *Carr* (above) in which [TRANSLATION] "the assessment officer recognized that in the absence of submissions from the party claiming the costs, if it is a straightforward assessment (for example, a written proceeding without cross-examination) it is

inappropriate to award the maximum under the Tariff." In reply, the defendant maintains that between the preparation of the bill of costs and written representations, case law research and reading had to be carried out. In addition, the defendant submits that it had to re-do some tasks in order to provide explanations for the information requests for which the defendant claims the plaintiff had the requested information and documents. I recognize that the defendant saw to the preparation, serving and filing of the bill of costs, an affidavit and supporting evidence, as well as the written representations. In consideration of the work carried out, yet taking into account the lack of complexity in this assessment, four units will be allowed for the assessment.

DISBURSEMENTS

[12] Referring to the table of internal expenses incurred in this matter and submitted as an exhibit in the affidavit of Heather-Lynn Dare, the defendant claims photocopying costs in the amount of $4,189.13 as assessable disbursements. To back this up, the defendant maintains that:

> [TRANSLATION]
>
> these are disbursements to which it has a right, and that these are necessary and reasonable considering the serious nature of the accusations it faces. The defendant has taken measures to defend its rights. The defendant had to produce seven (7) copies of all the documents it prepared and submitted to the Federal Court and to the parties (1 original and 2 copies for the Court; 2 copies for the plaintiff and 3 copies for the defendant). In addition, the defendant had to copy, among other things, volumes of case law, books of authorities, shorthand notes, exhibits filed with the Court, all the correspondence, several draft copies of the non-suit motion and responses to the plaintiff's claims before arriving at a final version.

In response to the argument raised by the plaintiff that [TRANSLATION] "very few documents were filed in this matter", the defendant maintains that it:

> [TRANSLATION]
>
> is quite normal that the defendant did not provide the Court with all the photocopied documents such as draft motions (before their final versions), the whole of the case law and doctrine not provided, to name just a few examples. These have been nonetheless necessary for preparing its defence against the accusations brought by the plaintiff.

As for the table of disbursements provided by the defendant, the plaintiff maintains that it [TRANSLATION] "contains no explanation". In response, the defendant submits that the report indicates the dates, number of copies, amounts incurred, the name of the file and the names of the persons involved.

[13] The seriousness of the approach undertaken by the defendant to respond to the plaintiff's allegations cannot be questioned. And yet it must be recognized that except for the non-suit motion, very few documents have been filed in the Court record in response to the contempt proceedings. What is more, the majority of the material provided by the defendant concerns a motion for which the Court has not awarded any costs. Disbursements incurred in the context of proceedings for which the Court has not awarded costs are no more recoverable on assessment of costs than the services claimed under Tariff B. Consequently, all disbursements related to the non-suit motion, including photocopying costs, cannot be allowed. It would have been appropriate for this purpose if the photocopies had also been specified in the table of disbursements provided by the defendant. In *Carlile v. Canada* 97 D.T.C. 5284 [*Carlile*], assessment officer Stinson explains the situation the assessment officer finds himself in when faced with incomplete evidence:

> Taxing Officers are often faced with less than exhaustive proof and must be careful, while ensuring that unsuccessful litigants are not burdened with unnecessary or unreasonable costs, to not penalize successful litigants by denial of indemnification when it is apparent that real costs were indeed incurred. This presumes a subjective role for the Taxing Officer in the process of taxation. My Reasons dated November 2, 1994, in T-1422-90: Youssef Hanna Dableh v. Ontario Hydro cite, at page 4, a series of Reasons for Taxation shaping the approach to taxation of costs. Dableh was appealed but the appeal was dismissed with Reasons by the Associate Chief Justice dated April 7, 1995. I have considered disbursements in these Bills of Costs in a manner consistent with these various decisions. Further, Phipson On Evidence, Fourteenth Edition (London: Sweet & Maxwell, 1990) at page 78, paragraph 4-38 states that the "standard of proof required in civil cases is generally expressed as proof on the balance of probabilities". Accordingly, the onset of taxation should not generate a leap upwards to some absolute threshold. If the proof is less than absolute for the full amount claimed and the Taxing Officer, faced with uncontradicted evidence, albeit scanty, that real dollars were indeed expended to drive the litigation, the Taxing Officer has not properly discharged a quasi-judicial function by taxing at zero dollars as the only alternative to the full amount. Litigation such as this does not unfold solely due to the charitable donations of disinterested third persons. On a balance of probabilities, a result of zero dollars at taxation would be absurd.

Since I was missing the details about the photocopies, I reviewed the Court record and the list of photocopies provided by the defendant. Obviously, I was unable to reconcile the number of photocopies claimed with the list provided. Also, I am not inclined to allow the total number of copies claimed by the defendant for itself, the Court and the plaintiff (paragraph 12). I am of the view that a certain number of copies were necessary for filing with the Court and for serving, but this number bears no relation to the number claimed by the defendant. The plaintiff should not be responsible for the defendant's decision that the number of copies incurred exceeded the copies necessary for the Court and for serving on the opposing party. Considering all this and the number of documents that need to be photocopied in the context of responding to contempt allegations, I will allow $550 for photocopying costs.

[14] The defendant claims costs of $2,767.01 for computer research (case law and doctrine) carried out using the search engines Quicklaw, Lexis, Soquij, DCL and eCarswell. The defendant claims that for using a search engine, the average price of a decision and summary varies from $7.65 to $10 in addition to the costs for historical research on citations and costs for each [TRANSLATION] "query of the system". The defendant also maintains:

> [TRANSLATION]
>
> that it had to carry out at least three in-depth searches in this file, for instance: to prepare its initial defence against the contempt of court claim filed by the plaintiff; another search to prepare its defence via the non-suit motion; and, a search for the defendant's response to the plaintiff's submissions on the non-suit motion. In calculating the total amount of disbursements, the average price of one decision including its summary and its citation history (or a doctrine document) – $13 – and at least the three searches carried out, the result is an average of 71 documents (case law and doctrine) per search.

To support its claim, the defendant submitted the internal report of its expenses together with Heather-Lynn Dare's affidavit. The plaintiff maintains in response that this claim is excessive and that the table of disbursements contains no explanation, no more than invoices in support.

[15] I do not question the searches carried out by the defendant in this matter and I would thus disagree with the plaintiff's position that this disbursement should be dismissed in its entirety. On this subject, I share the opinion of my colleague in *Englander v. Telus Communications Inc.* 2004 FC 276:

> A result of nil dollars at assessment would be absurd given that I think the Respondent's counsel had an obligation to carry out research for the assistance of the Court in resolution of the issues. However, the Applicant is not obligated to pay for the costs of irrelevant research.

As I mentioned at paragraph 13, the disbursements incurred in the context of the non-suit proceeding and for which the Court has not awarded costs are no more recoverable on assessment of costs than the services claimed under Tariff B. Consequently, all the research carried out in relation to the non-suit motion, would not be allowed. As mentioned previously, it would have been useful if the table of disbursements put forward by the defendant had contained more explanations and absent invoices, this would have allowed for a better evaluation of the research involved. Just as for the photocopies, the evidence of expenses connected to case law research is incomplete. As in *Carlile* (above), I have used the discretion reserved to me in considering the list attached to Ms. Dare's affidavit in addition to the defendant's argument that a large part of its research was connected to the non-suit motion and its reply. Costs of $920 will be allowed for computer research.

[16] Notwithstanding the billing provided in support of the bill of costs and for the reasons stated at paragraph 13 of this decision, the bailiff costs claimed by the defendant will not be able to be awarded, as related to the serving of the non-suit motion.

[17] Costs of $587.89 are claimed for binding services detailed in the list of disbursements in support of Heather-Lynn Dare's affidavit. The breakdown of these services shows: the date, the narrative "Mail Room, Montreal (binding)", the cost and the name of the employee responsible "Mail Room, Montreal". In the context of these representations in respect of the bill of costs, the plaintiff refers to *Bujnowski v. Canada* 2010 FCA 49, in which the assessment officer makes a distinction between the costs of binding incurred externally (assessable) and internally (not assessable). In response, the defendant maintains that this decision does not apply in this case. It

lays out in its representations on this subject that [TRANSLATION] "the binding service for the defendant's representatives is completely independent of the law office representing the defendant". I am of the view as indicated by the defendant in its representations that binding services may be necessary to facilitate the consultation of the whole record and during the preparation of materials for the Court. In reading the list of disbursements provided for this purpose, I deem that the binding services mentioned therein were provided by a branch of the same law firm representing the defendant. Unquestionably, the binding service offered by the law office is not part of the principal activities of the firm, but is rather a support service, as are photocopying services. Still, in the absence of more substantial justification or billing explaining the services provided, and in light of the fact that the majority of documents in the Court record were related to the non-suit motion for which the Court has not awarded costs, the disbursements for binding will be reduced to $50.

[18] The defendant claims $104.91 in telephone and fax costs. These expenses are specified in the internal report attached to Heather-Lynn Dare's affidavit, justifying the date, amount incurred, telephone number and person involved. In support of its claim, the defendant maintains that these long-distance and fax charges became necessary due to the locations of the parties in Quebec and Ontario. In response, the plaintiff maintains that the table contains no explanation and asks that the amount claimed be reduced. Given the locations of the parties, I am of the view that some costs were incurred. Nevertheless, in light of the lack of detailed explanations concerning the calls and faxes sent, my decision concerning the costs related to the non-suit motion, my review of proceedings in the Court record and the dates of the calls/faxes, I will allow the sum of $35.

[19] Costs of $546.92 are claimed for shorthand notes taken during the October 21, 2010 hearing before Bédard J. The plaintiff contests this claim considering that [TRANSLATION]: "these costs have to do with the transcription of the October 21, 2010 hearing at the conclusion of the non-suit motion". The defendant maintains that these notes [TRANSLATION] "were used not only by Bédard J. of the Federal Court in the context of all the hearings, but also by all the parties". The plaintiff's evidence on the issue of the defendant's guilt was heard at the October 21, 2010 hearing. Following the Court's decision concerning the non-suit motion, this hearing resumed on

February 7, 2011. The hearing on the contempt proceeding thus took place over two days with an interruption of more than three months between the two days. I do not question the defendant's position that Bédard J. or the parties to the record were able to turn to the transcript of the October 21, 2010 hearing during both the non-suit motion and the resumption and conclusion of the hearing on February 7, 2011. Considering the foregoing and the fact that the billing submitted in support cannot be split between what might have been necessary or useful at the non-suit motion and the pursuit of the contempt hearing, I will allow the shorthand costs as claimed.

[20] The defendant claims mailing/courier costs in the amount of $601.82. These expenses are specified in the internal report attached to Heather-Lynn Dare's affidavit, justifying the date, amount incurred, narrative [TRANSLATION] "courier" and person involved. In support of this claim, the defendant maintains that the mailing and courier charges were necessary due to the volume of documents transmitted and the locations of the parties and their representatives in Montréal and Ottawa. In response, the plaintiff maintains that the claim is excessive and that the [TRANSLATION] "table of disbursements" contains no explanation. Detailed explanations concerning the mailing/courier services would have allowed for a better evaluation of these costs. I deem, therefore, that considering the locations of the parties, some costs were inevitably incurred. Nevertheless, the plaintiff cannot be responsible for the defendant's choice of using courier services for all the documents to be disclosed. In my evaluation of the courier costs, I will take into account my decision concerning the costs related to the non-suit motion, my review of the proceedings in the Court record and the dates for the courier services. Mailing/courier costs are allowed in the amount of $320.

[21] In the bill of costs, travel expenses are claimed for the defendant's counsel (accommodations and meals: $832.58), travel ($671) and taxi ($80). Owing to a delay in their internal accounting, the defendant, in the context of representations in response, reduced the amount claimed for accommodations from $832.58 to $416.29 for the night of October 20, 2010 and added $217.69 for the night of February 6, 2011. The per-kilometre reimbursement for travel between Montréal and Ottawa is claimed for the October 21, 2010 and February 7, 2011 hearings, as well as for a meeting with the client in Ottawa on July 13, 2010. Travel costs are also claimed (2 x $25) for the October 20 and 21, 2010. Again because of the internal accounting

delay, the defendant has added parking costs for July 13 ($10), October 21 ($18) and February 7 ($18) in the context of its representations. An amount of $80 is also claimed in the defendant's bill for taxi fares: July 13, 2010 ($18), December 1st, 2010 ($40) and December 2, 2010 ($12 + $10). The plaintiff's representations can be summed up in the arguments advanced in the context of item 24 of Tariff B that, as the Court did not award travel costs, the assessment officer has no jurisdiction to award these costs.

[22] In the context of *Abbott* (above), the assessment officer writes at paragraph 7:

> Item 24 addresses counsel fees, but not disbursements. The discretion reserved to the Court to authorize assessment officers to allow item 24 is exercised independently of the discretion vested in me per Rule 405 and Tariff B1 to address disbursements. There is no implied caveat impeding me from authorizing travel disbursements in the absence of an item 24 direction from the Court for fees for travel by counsel.

As I concur with this decision, which has been upheld time and time again, I will see to the evaluation of the amounts claimed in light of the evidence submitted in support of the bill of costs and the information contained in the Court record. As the Court stipulates in its January 11, 2011 decision at paragraph 6, the non-suit motion was not only submitted on October 21, 2010: it had been submitted once the plaintiff [TRANSLATION] "had concluded his evidence". As the plaintiff supposedly indicated that he was not [TRANSLATION] "able to respond to the motion immediately", a timetable was set by the Court to allow the two parties to proceed on the basis of written submissions. Again, according to the Court record, Bédard J. dismissed the non-suit motion on January 11, 2011, allowing the contempt proceeding to resume on February 7, 2011. As a consequence, two days of hearings took place, that is on October 21, 2010 and February 7, 2011, on the contempt proceeding, with the non-suit motion proceeding in writing. Proceeding to the costs awarded to the defendant in the Court's decision of February 28, 2011, I will then consider the costs associated with these two days of hearings necessary and justified. The amounts claimed for the cost of accommodations and meals are uncontested and will be allowed in the amount of $633.98. The Montréal – Ottawa travel costs incurred for the two days of hearings (2 x 450 km) will be allowed as claimed. As for the travel costs incurred in the days preceding the October 21 hearing and on July 13, 2010, I cannot conclude that these costs were necessary. The evaluation of this bill of costs is provided for under Tariff B and according to

subsection 1(4) of the Tariff, " . . . (n)o disbursement . . . shall be assessed or allowed under this Tariff unless it is reasonable . . . " The plaintiff should not be held responsible for the days surrounding the October 21 hearing any more than the defendant's decision to meet informally with its client three months prior to the audition. The parking costs will be allowed for October 21 and February 7. As for the taxi fares claimed in the bill of costs, no explanation has been provided. I verified the dates and the destinations, where mentioned, and I cannot conclude that they were necessary. Therefore, they will not be allowed.

[23] The defendant's bill of costs is allowed in the amount of $5,874.94.

"Johanne Parent"
Assessment Officer

Toronto, Ontario
November 17, 2011

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1717-09
STYLE OF CAUSE:	CANADIAN UNION OF POSTAL WORKERS v. CANADA POST CORPORATION

ASSESSMENT OF COSTS WITHOUT APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT BY:	JOHANNE PARENT ASSESSMENT OFFICER
DATE:	November 17, 2011

WRITTEN SUBMISSIONS:

Jean-Marc Eddie	FOR THE PLAINTIFF
Mohammed Badreddine	FOR THE DEFENDANT

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