SUPREME COURT OF YUKON

Citation: *Emery v Yukon Association of Education Professionals*, 2026 YKSC 6

Date: 20260127
S.C. No.: 22-A0126
Registry: Whitehorse

BETWEEN:

MICHEL EMERY

PLAINTIFF

AND

YUKON ASSOCIATION OF EDUCATION PROFESSIONALS, GOVERNMENT OF YUKON, ETHAN EMERY, TED HUPÉ

DEFENDANTS

Corrected Decision: The citation of the decision and the text of the decision, at pages 2, 4, 10, and 11, were corrected and changes were made on February 11, 2026.

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff	Jennifer Loeb
Counsel for the Yukon Association of Education Professionals, Ethan Emery, Ted Hupé	William Clement
Counsel for Government of Yukon	I.H. Fraser and Stuart Leary

REASONS FOR DECISION

Overview

[1] This is an application by the defendants Yukon Association of Education Professionals (YAEP), Ted Hupé and Ethan Emery for an order for $15,000 lump sum costs of their successful application to strike the plaintiff Michel Emery's claim for

conspiracy and defamation. The plaintiff opposes, on the basis of the defendants' misconduct, and on the basis of equity, and proposes three alternatives: i) the defendants pay the plaintiff's costs on a full indemnity basis (i.e. solicitor and their own client costs); ii) the defendants pay the plaintiff's costs on the Tariff Scale B; or iii) each party bears their own costs. In the further alternative, if the defendants are awarded costs, the plaintiff argues $15,000 is excessive and should be reduced due to overlap in the tariff items claimed, and the inappropriate claims of disbursements for travel and specialized legal assistance.

[2] The issues are:

i) Should the Court exercise its discretion and deprive the successful defendants of costs in this matter due to their conduct during or leading up to the litigation?

ii) Should the Court exercise its discretion and deprive the successful defendants of costs in this matter on an equitable basis due to the plaintiff's membership in a union and for reasons of financial hardship upon him?

iii) If the defendants are not awarded costs, should the plaintiff be awarded costs on a full indemnity basis, or at the Tariff Scale B, or should each party bear their own costs?

iv) If the defendants are awarded costs, what amount and should it be lump sum or as assessed?

Background

a) The decision

[3] The plaintiff brought a civil action against the defendants on January 6, 2023, in wrongful dismissal, conspiracy, and defamation arising from his removal from an elected position on the executive of the YAEP as Professional Development Chair. The YAEP is the Yukon teachers' professional association and the teachers' bargaining agent for their collective agreement with the Yukon government. The plaintiff's removal from his executive position with the YAEP was a culmination of ongoing difficulties in his working relationship with the defendants that spawned complaints by him to the employment standards office, the Human Rights Commission, Workers' Safety and Compensation Board, the Ombudsman's office, and led to two independent investigations.

[4] The defendants successfully brought an application to strike the plaintiff's claims on the basis that the Court had no jurisdiction to determine the dispute. By the time of the hearing of the application, the plaintiff had withdrawn his claim in wrongful dismissal, leaving only the jurisdiction for the conspiracy and defamation claims to be determined. I found that these claims were related to the disciplinary actions and penalty imposed on the plaintiff in his capacity as a YAEP executive member. The essential nature of the dispute was the plaintiff's alleged unfair, unjust and unfounded treatment in the workplace by the defendants. The claims of defamation and conspiracy were not independent of this treatment which he said led to his removal from the YAEP executive. Instead of through a civil action, the matters should have been adjudicated under s. 85(3)(b) of the *Education Labour Relations Act*, RSY 2002, c 62 (*ELRA*), which

prohibits YAEP and any of its officers, representatives, or persons acting on their behalf from taking disciplinary action against or imposing any form of penalty on an employee by applying standards of discipline in a discriminatory manner. There was no exceptional basis for the Court to exercise residual jurisdiction because the *ELRA* has a broad remedial authority that could include compensation, reinstatement, and a prohibition on the defendants from making further comments to and about the plaintiff.

b) The procedural steps

[5] Approximately five months after the filing of the Statement of Claim, on April 27, 2023, the defendants filed the application to strike the conspiracy and wrongful dismissal claims. On October 27, 2023, the defendants filed an application to strike the defamation claim. On September 24, 2024, the defendants filed and served an amendment related to the Supreme Court of Yukon Rules of Court (the *Rules*) on which they relied, to the first application to strike, and the hearing was scheduled by agreement on October 17, 2024.

[6] The plaintiff agreed on October 2, 2024 to file his response to the amended application the week of October 7. On October 4, the defendants filed and served their outline, and on October 11, the plaintiff sent an unfiled copy of his response to the defendants' amended application. At the same time the plaintiff provided an Amended Statement of Claim. These documents were filed on October 15, 2024.

[7] The defendants requested a Case Management Conference (CMC) to seek an adjournment of the hearing due to the recently received Amended Statement of Claim and late filing of the plaintiff's response. On October 15, 2024, I adjourned the hearing to December 11, 2024, and ordered dates for filing and serving affidavits and outlines.

[8] On November 15, 2024, the defendants' counsel advised plaintiff's counsel that they would no longer be relying on the argument that the defamation claim be struck on the basis of qualified privilege. They confirmed their argument that the wrongful dismissal, conspiracy and defamation claims should be struck for lack of jurisdiction of the court because the dispute was properly within the jurisdiction of the Yukon Teachers Labour Relations Board (the Board).

[9] On November 21, 2024, the plaintiff's counsel requested a CMC to adjourn the December 11, 2024 hearing, citing the defendants' amendment of its application as a reason. The defendants clarified by letter to the Court and at the CMC held on November 22, 2024, that there was no amendment to their application; rather, they had decided not to pursue the argument of qualified privilege in support of the application to strike the defamation claim. At the CMC I denied the plaintiff's adjournment request, gave directions on the content of the defendants' reply outline to address the statement of claim amendments and permitted a plaintiff sur-reply outline on that issue.

[10] Despite this CMC order, the plaintiff filed but did not serve an Appearance Notice on November 25, 2024, for Chambers Day on November 26, 2024, requesting the same relief that was discussed and denied at the November 22, 2024 CMC. I did not permit the Appearance Notice to be heard on November 26, 2024.

[11] On December 11, 2024, the plaintiff renewed his request for an adjournment, and also sought to file a further amended statement of claim, withdrawing his wrongful dismissal claim. The amendment to the statement of claim was permitted, and a partial adjournment was granted. The defendants were directed to proceed with their argument

on December 11, 2024, and the plaintiff was permitted to reply on January 8, 2025. Argument on this application concluded on that day.

[12] In sum, there were four court appearances, inclusive of CMCs, and three adjournment applications - one from the defendants, and two from the plaintiff - of the December 11, 2024 hearing date. During the time the application to strike was brought and remained outstanding, the plaintiff amended its statement of claim twice, the second time on December 11, 2024, the date of the hearing. The defendants amended their application once, before the initial hearing date in October was set, and advised they would no longer be relying on a particular argument a month before the new hearing date.

Legal Principles

[13] Rule 60 of the *Rules* governs the award of costs.

[14] Rule 60(9) provides that costs of and incidental to a proceeding shall follow the event unless the court orders otherwise (and subject to subrule 12 which is not applicable here).

[15] The traditional rationale that costs are awarded to the successful party is three-fold:

> [18] … The first is the compensatory purpose, premised on a belief that the case has a winner and a loser, and the loser pays some of the winner's costs, out of fairness to the winner. The second is the more punitive purpose: to sanction or discourage inappropriate behaviour by litigants in their conduct of the proceeding. To fulfill this purpose, a successful party to the litigation may be denied costs because of their misconduct, or the unsuccessful party may have to pay elevated costs because of their misconduct. The third purpose is to encourage settlement (*Incredible Electronics Inc v Canada (Attorney General)* (2006), 80 OR

> (3d) 723 (SC) ("*Incredible Electronics Inc*") at para. 63, and cases cited therein).
>
> [19] Generally, the policy behind costs rules is the administration of justice and the control of access to justice. The tool of costs awards can encourage the efficient and appropriate conduct of litigation, as well as the ability of less affluent litigants with meritorious cases to access the justice system.

(*Frost v Blake*, 2021 YKSC 62 (*Frost*))

[16] There is no legal right of the successful party to costs, but a successful party has a reasonable expectation of receiving costs, subject to the court's discretion. That discretion to refuse or limit the costs to the successful party is to be exercised if the interests of justice require it and for good reason (*Atkinson v McMillan*, 2010 YKSC 13 at para. 4, quoting *Law of Costs*, 2nd edition, Volume 1, by Mark Orkin at 2-56). In exercising this discretion, the judge may consider the conduct of the party during the course of the litigation, and leading up to it – for example, conduct such as unfair dealings or unreasonable behaviour.

[17] Costs may be awarded on the basis of an assessment set out in the tariff in the rules (Rule 60(2)), or the court may exercise discretion and order them on a lump sum basis (Rule 60(1.3)). The overriding principle in fixing costs, including as a lump sum, is reasonableness (*Frost* at paras. 41-42). In *Frost*, the court stated:

> … [T]he costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant. …

(*Frost* at para. 41, quoting *Zesta Engineering Ltd v Cloutier* (2002), 118 ACWS (3d) 341 (ONCA) at para. 4)

Discussion

i) Was the conduct of the defendant sufficient to deprive them of costs?

[18] The plaintiff raised examples of conduct of the defendants to support depriving them of a costs award.

[19] First, the plaintiff says he was forced to take this matter to court due to misleading or inappropriate advice from the Yukon Government Public Service Commission labour relations advisor and the YAEP employment relations advisor. Neither advisor directed the plaintiff to the potential remedy under the *ELRA*.

[20] I do not agree this is misconduct or inappropriate conduct by the defendants. The Public Service Commission advisor (not a defendant who is seeking costs) clearly described his role to the plaintiff as limited to the provision of advice to the Yukon government in its role as employer, not to a YAEP member in the context of an internal union dispute. Similarly, the YAEP employee relations advisor described his role as the provider of information about events or circumstances relevant to the plaintiff's employment relationship with the Yukon government, not the YAEP.

[21] Both advisors advised the plaintiff of the option to obtain independent legal advice from private counsel. The plaintiff did so on two occasions and was represented by legal counsel in initiating this claim, and in responding to the motion to strike.

[22] The defendants' arguments that this Court lacked jurisdiction and that the dispute may be determined by the Board under the *ELRA*, were clearly articulated to the plaintiff before the hearing occurred.

[23] I agree it was not the role of either advisor to go beyond their defined roles to advise about employer (that is, the Yukon government) and employee matters. While

better practices in future may include YAEP advising its members who provide services to it of recourse to the Board, the absence of that information or advice in this case is not misconduct worthy of a deprivation of costs.

[24] Second, the plaintiff asks that I consider the entire context of the dispute: specifically that some of the other fora (such as the Beharrell Investigation finding of harassment and retaliation related to one of the YAEP bylaws, the Workers Compensation Board finding a workplace injury to the plaintiff from harassment, abuse of authority and retaliation) in which the plaintiff initiated complaints about his treatment by the defendants have sanctioned the defendants and supported the validity of the plaintiff's claims of mistreatment. The plaintiff states he has remained blameless throughout the dispute between him and the defendants. He says these findings of bad behaviour by the defendants vis-à-vis the plaintiff justify the remedy of depriving them of costs.

[25] I disagree that this conduct should be considered in awarding costs on this application to strike. It was unnecessary for me to make any findings related to this conduct in this procedural application. Further, it does not relate to the conduct of the defendants during this litigation, and while it may have occurred during the lead-up to the litigation, the plaintiff's argument requires me to make findings on the merits of the underlying dispute now for the sole purposes of costs.

[26] I have already determined this Court has no jurisdiction to hear the merits. Even if such conduct were relevant to this application, it would be incongruous in the face of the jurisdictional findings to have it influence my decision on costs. This situation is unlike the decisions relied on by the plaintiff (*Petersen v Yukon (Government of)*, 2025

YKSC 33; *Goldstein v Walsh*, 2019 ONSC 3174; *R v Amin*, 2023 YKSC 46) where the costs were considered after a decision on the merits of the case and were directly related to relevant conduct leading up to or during the litigation.

[27] Third, the plaintiff points to post-litigation conduct by the defendants' counsel and in particular its position taken before the Board that the matter was out of time. The plaintiff relies on the *obiter* comment made by me that it would be disingenuous for the defendants to raise the limitations argument before the Board given the position they took in the application to strike that the Board is the proper forum.

[28] I disagree that this is bad conduct sufficient to affect costs. The plaintiff provided no case law in support of post-litigation conduct affecting a costs award. Even if there were some jurisprudential support for this principle, an *obiter* comment is not sufficient to ground a consequential finding of bad conduct. As the defendants' counsel stated, it is ultimately the Board's decision whether or not to waive the limitations defence; the defendants are not precluded by my *obiter* comment from raising the argument, and they were transparent with the Board about my decision. The defendants also noted that by the time the civil claim was initiated the limitations period had long expired.

[29] In fact, in this case, the plaintiff's conduct during the litigation of this application supports the defendants' application for an order for costs.

[30] First, inconvenience to the defendants' counsel occurred as a result of the requirement of the October CMC appearance and forced late adjournment of the October hearing due to the plaintiff's late filing of their response and amendment to their statement of claim. Second, defendants' counsel spent time preparing written materials and oral submissions to strike the wrongful dismissal claim, a significant part of the

plaintiff's claim, only to be told in December 2024 that the plaintiff was withdrawing this part of the claim. Third, the one-day hearing was split into two separate days as a result of the plaintiff's second request for an adjournment, which was partially granted. This increased the defendants' counsel's costs of preparation and added to the inconvenience of not completing the application during the time anticipated.

[31] By contrast, the defendants early amendment of its application, before the hearing date was set, and its decision not to pursue the qualified privilege argument, on notice to the plaintiff well before the hearing date did not result in additional costs or inconvenience to the plaintiff. These changes may have even reduced his costs due to the clarification of argument and reduced grounds of argument.

ii) Are there sufficient equitable grounds to deprive the defendants of their costs?

[32] The plaintiff asks me to exercise discretion and recognize equitable grounds that may justify depriving the defendants of their costs.

[33] First, he says as an ongoing unionized employee with his dues paid, he should not be required to incur legal fees or pay legal costs of any kind in "matters such as unfair or wrongful dismissal". The plaintiff says he is being penalized by any requirement to pay for legal representation or legal costs in this dispute arising out of the workplace, as these costs are normally covered by the union for its members.

[34] I agree with the defendants' counsel that this is a mischaracterization of the benefits of union membership in the labour relations context. The primary purpose of union membership is to provide members with representation in labour relations matters or disputes with the employer. In this case, the employer is the Yukon government.

YAEP continues to represent the plaintiff in any dispute or issue with the Yukon government. The union representation does not extend to representation of a union member in a dispute between the individual and the union. No legal authority either from jurisprudence or internal YAEP bylaws or other documents was provided by the plaintiff in support of a principle requiring YAEP to cover legal costs of a union member in a dispute against YAEP itself. This expectation of the plaintiff is a misunderstanding of the scope of the benefits accruing to him as a union member. Further, he withdrew his claim for wrongful dismissal, making the justification he advanced for this argument inapplicable.

[35] Related to this argument is the plaintiff's reliance on YAEP bylaw 4.7, which provides it will indemnify and save harmless executive members acting in good faith for matters arising from their duties. The plaintiff says this supports his request for a full indemnity costs award.

[36] This also reflects a misunderstanding of the nature and purpose of a costs award as well the applicable scope of the YAEP bylaws. A costs award is to compensate part of the costs of a successful party in a litigation matter. This litigation was not part of the plaintiff's duties as an elected official at YAEP. The bylaw does not apply to good faith conduct within the context of this litigation and is irrelevant to the issue of costs.

[37] Finally, the plaintiff requests that I exercise discretion not to award costs in favour of the defendants due to the financial burden it will impose upon him. While I appreciate that the plaintiff is funding this litigation personally, I also note that the possibility of a costs award is a regular part of the risk assessment in litigation. As noted above, one of the purposes of a costs award is to encourage settlement. The plaintiff was aware of the

defendants' arguments several months before the hearing, and chose to proceed with the hearing, after withdrawing the wrongful dismissal allegation just before the start of the hearing. This was a significant aspect of his original claim, and its withdrawal showed he made some determination of the strength of his case. His choice to proceed in opposing the application meant that he accepted the risk that costs could be awarded against him.

iii) Amount of costs – should each party bear their own costs?

[38] Given my findings that the plaintiff has not satisfied me that I should exercise discretion to deprive the defendants of their costs, it is not necessary for me to decide whether the plaintiff shall receive costs on a full indemnity basis or on the basis of Tariff Scale B.

[39] The plaintiff has not satisfied me that this is a situation in which each party should bear its own costs for the reasons set out above. The case relied upon by plaintiff's counsel in which the Court ordered each party to bear their own costs is distinguishable. In *Gracias v Dr. David Walt Dentistry*, 2022 ONSC 4093, a costs decision after a summary judgment decision, the Court found that both parties had behaved poorly throughout the litigation. Both parties abandoned serious allegations related to human rights violations and dismissal for cause respectively, without substantiating them; the successful party was "dilatory and deleterious" (at para. 2) in her document production obligations and in answering undertakings, and she obtained a damage award within the $25,000 monetary jurisdiction of the Small Claims Court but requested costs of $35,000; and the unsuccessful party failed in its attempts to prove the successful party had fabricated evidence, but still requested reimbursement of

$17,387.88 in costs ‘thrown away’. The judge noted the parties’ “persisting bitter recriminations” (at para. 4) of one another, and described the requests of both parties for costs as “chutzpah piling on top of audacity piling on top of gall” (at para. 2). This characterization of their conduct was the justification for a no costs award.

[40] There is no argument by either party in this case that there was similar conduct here. There are no allegations of misleading the court, high-handed or oppressive litigation tactics, or outrageously unreasonable positions. The extent of concerns expressed about the conduct during the litigation is limited to the defendants noting there was an unnecessary adjournment caused by the plaintiff’s late filings, and the plaintiff noting the defendant changed its position twice. Neither of these circumstances is sufficient to justify a no costs award based on behaviour of the parties during the litigation. No other argument for a no costs award was made by the plaintiff.

iv) Amount of costs the plaintiff should pay to the defendants.

[41] The defendants seek costs and disbursements in the amount of $15,000 as an all-inclusive lump sum. The reason for the lump sum request is for simplicity, to avoid a line-by-line assessment of each item claimed.

[42] Both the defendants and the plaintiff have provided bills of costs. There is no dispute that Scale B in Appendix B of the *Rules* applies to the calculation of costs in this matter. This was a matter of ordinary difficulty.

[43] The defendants’ bill of costs amounts to a total of $11,875 (87 units, inclusive of taxes), disbursements of $4,173.33, GST of $208 for a total of $16,156. The $15,000 lump sum amount requested is a slight discount.

[44] Addressing first the request to award a lump sum amount, I agree to exercise my discretion to do so under Rule 60(1.3). Similar to the situation in *Frost*, counsel made specific submissions on several particular units and disbursements for the litigation activities set out in the assessment forms but did not otherwise argue in detail. The overriding principle in an award of costs is fairness and reasonableness, not a mathematical approach of multiplying the number of hours by an hourly rate in an effort to determine the actual costs. The bills of costs submitted by both plaintiff and defendants, and the objections and explanations provided by counsel, will be a guide to my exercise of discretion in a reasonable way.

[45] The plaintiff objected to some of the items claimed in the bill of costs:

- Items 16 and 17 overlap with item 19 and 19A.
- Item 26 Chambers' Record maximum claim was excessive as the Chambers Record preparation did not justify the maximum units.
- Item 27 overlaps with item 28.
- Item 30 does not apply as there was no trial.
- Travel costs and disbursements are improperly claimed because counsel were granted permission by the Court to appear virtually to argue this application and it was the defendants' counsel's choice to travel in person to Whitehorse.
- The disbursement for professional fees, for the retention of a retired lawyer in association with the defendants' counsel's firm who has an expertise in defamation law, was inappropriate and unreasonable.

[46] I agree with the arguments of plaintiff's counsel's that Items 16 and 17, 27, 30 should be disallowed due to overlap or inapplicability, and Item 26 be reduced by half. I agree with the defendants' submission that I expressed a preference for counsel to travel to Whitehorse and appear in person for this application, but I did not require it. The decision of one of the defendants' counsel to travel to Whitehorse for the first day of the hearing was the defendants' choice, and much appreciated, but the plaintiff should not have to reimburse them for those costs.

[47] With respect to the disbursement for the legal expert in defamation, the test for the incurring of disbursements generally is that they were necessary, proper and reasonable, and not incurred through extravagance, negligence or mistake or through excessive caution or zeal (see *1371737 Alberta Ltd et al* v *37768 Yukon Inc et al*, 2010 YKSC 17, paras. 7, 8, 9). Normally such disbursements are reserved for non-legal experts who assist counsel with non-legal expertise in preparing the case. In this case, the defendants seek to recover the full amount of the lawyer's invoice, that is, solicitor-client costs. I also note that although defendants' counsel advised the lawyer was "mostly retired", his invoice appears on the same letterhead as counsel for the defendants' law firm. I appreciate that defamation is a specialized area of law, but considering that the lawyer is associated with the defendant's law firm, so not truly an independent expert, his full costs are sought to be reimbursed, and the merits of the claim were not being argued in this application, this request is unreasonable and it is disallowed.

Conclusion

[48] Taking into account all of the relevant factors and applying the test of reasonableness, I will award lump sum costs to the defendants in the amount of $8,000.

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DUNCAN C.J.