CITATION: Tetra Consulting v Continental Bank et al., 2015 ONSC 4610
COURT FILE NO.: CV-15-522168
DATE: 20150716

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Tetra Consulting and Lewis Cassar, Plaintiffs

– AND –

Continental Bank of Canada and Continental Currency Exchange Canada Inc., Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Daniel Lublin*, for the Plaintiffs

Michael Horvat, for the Defendant, Continental Bank of Canada

Hugh Christie and Michael Comartin, for the Defendant, Continental Currency Exchange Canada Inc.

HEARD: July 15, 2015

AMENDED ENDORSEMENT

[1] The Plaintiffs move for summary judgment under Rule 20, seeking pay in lieu of notice from the Defendant, Continental Bank of Canada (the "Bank").

[2] The Defendant, Continental Currency Exchange Canada Inc. ("CCEC"), is the owner of a 49% interest in the Bank. The Bank contends that the Plaintiffs were never employed by it, but rather were employed by CCEC.

[3] Another claim was initially brought by the Plaintiffs for $79,100 in unpaid fees and wages in respect of work already performed. That claim has now been resolved by CCEC's payment in full of the outstanding amount.

[4] The Plaintiff, Lewis Cassar, is an expert in the banking sector and in particular in navigating the application process for creating Schedule 1 bank. He owns the Plaintiff, Tetra Consulting ("Tetra"). The Defendants valued this expertise, and retained Tetra in order to put to use Mr. Cassar's expertise in obtaining approval from the federal regulator, the Office of the Superintendent of Financial Institutions ("OSFI"), to operate as a Schedule 1 bank.

[5] Tetra began performing services for the Defendants in January 2013. As the Bank was not yet up and running, Tetra invoiced its consulting fees to CCEC. On December 8, 2013, OSFI approval was achieved.

[6] It was the common intention of all parties that although Tetra would commence its work in a consultant capacity, Mr. Cessar was to become an employee of the Bank once OSFI's approval was achieved. To this end, in the Bank appointed Mr. Cassar as its Chief Compliance Officer ("CCO") and Chief Anti Money Laundering Officer ("CAMLO"). He attended the Bank's board of directors meetings as a senior management employee, used the Bank's email address, worked from his desk at the Bank's premises, was subject to the Bank's code of conduct, and signed an acknowledgment to be bound by the Bank's employee policies and procedures.

[7] In addition, Mr. Cassar was represented to third parties, including to the OSFI, as being an employee of the Bank. He had a business card identifying him as an employee of the Bank. Moreover, the OSFI was presented with an organizational chart on which Mr. Cassar was identified as the Bank's CCO and CAMLO. As part of the regulatory approval process, the Bank advised the OSFI that Mr. Cassar would remain in those positions will into the future.

[8] In anticipation of formally becoming an employee of the Bank's, Mr. Cassar received correspondence from the Bank's legal counsel in January 2015 indicating that his employment contract was in the process of being prepared. However, before the formal contract was completed, the Bank's majority shareholder apparently changed his business plans and the entire venture suddenly came to an end. On January 14, 2015, Tetra and Mr. Cassar were orally advised of their immediate termination by the Bank. At the point of termination, Tetra was still invoicing for Mr. Cassar's services.

[9] As an aside, I observe that the Bank originally pleaded that Mr. Cassar was terminated for cause, but has subsequently abandoned that line of attack. The reason for having abandoned it is that there is not a stitch of evidence to support it. Mr. Cassar was highly successful in the tasks he performed for the Bank, and the Bank's lawyer was in the process of drafting his permanent employment agreement when the Bank ceased its operations. The pleading of termination for cause was, as far as I can tell, nothing more than a cynical tactic deployed by the Bank to discourage this legal action. Mr. Cassar's termination by the Bank was entirely unrelated to his performance.

[10] Throughout the relevant period, Tetra had invoiced for the consulting services provided by Mr. Cassar. In January 2014, Tetra's monthly compensation was increased to $17,500 plus HST, or $210,000 plus HST per annum. The evidence is uncontroverted that Tetra and Mr. Cessar worked exclusively for the Defendants during the entire time from the initial engagement in January 2013 until termination in January 2015. Email correspondence from the Bank's legal cousel to Mr. Cassar specifically refers to his "tenure at the Bank."

[11] Despite a diligent and ongoing search, Tetra and Mr. Cassar have to date not found other work.

[12] Counsel for the Bank submits that this is not an appropriate case for summary judgment as there is an important issue of contention over whether Mr. Cassar was truly an employee of the Bank's. He contends that the invoicing by Tetra until the very end of the relationship signifies that Tetra remained a consultant, and that, alternatively, Mr. Cassar was only an employee of the Bank's for a six week period from early December 2014 when OSFI approval was achieved until his termination in mid-January 2015.

[13] In my view, this is certainly an appropriate case for summary judgment. All of the advantages discussed by the Supreme Court of Canada in *Hyrniak v Mauldin*, [2014] 1 SCR 87 – efficiency for the parties, access to justice, and judicial economy – are applicable here. There may be a contentious issue, but it turns on an interpretation of the email correspondence and other indicia of the working relationship between Mr. Cassar and the Bank. It is not an issue of personal credibility of any witness, and the Bank has not demonstrated that there is a genuine issue requiring a trial: *1870553 Ontario Inc. v Kiwi Kraze Franchise Co.*, 2015 ONSC 1632, at para 33.

[14] The Bank had always agreed that he was to be its employee once OSFI approval came through, and it had instructed its lawyer to document his employee status. The fact that the lawyer did not complete the drafting of the employment contract prior to the Bank closing its operations does not change the fact that Mr. Cassar had become the Bank's employee. The final employment agreement would have merely documented an employment relationship that was already in place at least from December 8, 2014.

[15] Moreover, it is of no discernable consequence whether Mr. Cassar was an employee of the Bank for his entire "tenure" there, as the Bank itself put it, or for only the last six weeks.

[16] Prior to that time, if he was not an employee in substance as opposed to form, then wearing his Tetra hat he was a dependent contractor. The evidence in the record is that he worked exclusively for the Bank for 60-70 hours per week, he had no other employer during the entire period of the relationship, he used the Bank's tools, had an office and email address there, was subject to the Bank's control, and represented himself to third parties as the Bank's employee. These are all indicia of a dependent contractor who is entitled to the same type of reasonable notice of termination as an employee: *McKee v Reid's Heritage Homes Ltd.*, 2009 ONCA 916, at paras 22-25.

[17] Mr. Cassar is 61 years old, held a senior position as an officer and board member in the Bank's organization, had sophisticated knowledge of the Bank's regulatory environment and brought this specialized skill to his job, and earned a correspondingly high salary of $210,000 per annum. Courts have previously observed that older age employees should be granted longer notice periods upon termination, as should those who occupy more sophisticated positions: *Paquette v Terago Networks Inc.*, 2015 ONSC 4189.

[18] Comparable cases of key employees with relatively short terms of employment range from 5.5 months' pay in lieu of notice (see, e.g., *Charles River Consultants Corp. v Coombs*, 2006 NLTD 174), to 18 months' pay in lieu of notice (see, e.g., *Koor v Metropolitan Trust Co. of Canada*, [1993] OJ No 1476). The average for an employee of this nature with an employment or dependent consultant tenure of up to 2 years is somewhere over 8 months' pay in lieu of notice

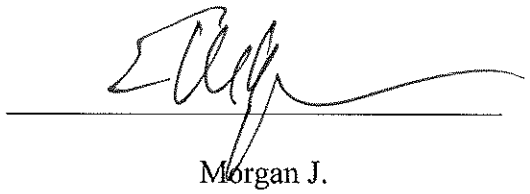
(see, e.g., *Ivanore v Bastion Development Corp.*, [1993] BCJ No 1164; *Heyes v First City Trust Co.*, [1981] BCJ No 1529; *Carrick v Cooper Canada*, [1983] OJ No 2392).

[19] In my view, 8 months is the appropriate notice period for Tetra as a dependent contractor. In addition, Tetra's invoices for its consulting fees that it submitted all along specify an interest rate of 18% per annum.

[20] In the result, the Bank shall pay Tetra 8 months' pay in lieu of notice, or $17,500 x 8 = $140,000, plus HST @ 13% = $18,200, for a total of $158,200 in consulting fees. To this must be added 18% interest since the date of his termination on January 14, 2015.

[21] As of the date of this endorsement, 8 months has not quite passed since the termination. Tetra and Mr. Cassar are obliged to continue efforts to mitigate their damages. In the event that either of them obtains employment before the expiry of 8 months on September 14, 2015, they must account to the Bank to reduce the Bank's obligation to pay Tetra to the extent of moneys earned during the 8 months' notice period. As pioneered in *Correa v. Dow Jones Markets Canada Inc.* (1997), 35 OR (3d) 126, the amounts paid by the Bank to Tetra in satisfaction of the judgment herein shall be impressed with a trust in the event such an accounting becomes necessary.

[22] Counsel may make written submissions on costs, which should be no longer than 3 pages in length. I would ask that counsel for the Plaintiff send his submissions to me within two weeks of the date of this endorsement, that counsel for CCEC send his submissions to me within two weeks of receiving the Plaintiff's submissions, and that counsel for the Bank send me his submissions within two weeks of receiving CCEC's submissions.



Morgan J.

Date: July 16, 2015