

CITATION: Tetra Consulting v Continental Bank et al., 2015 ONSC 6546
COURT FILE NO.: CV-15-522168
DATE: 20151022

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, with written submissions on costs

COSTS ENDORSEMENT

[1] The Plaintiffs were successful in their motion for summary judgment against the Defendant, Continental Bank of Canada (the “Bank”). The claim against the Defendant, Continental Currency Exchange Canada Inc. (“CCEC”) was resolved prior to the hearing before me.

[2] The Plaintiffs do not seek costs against CCEC.

[3] CCEC seeks its costs not against the Plaintiffs, but against the Bank. It argues that the Bank’s position in denying its employer obligations to the Plaintiff is what caused the Plaintiff to bring CCEC into this law suit and necessitated the incurring of legal costs.

[4] I do not agree with CCEC’s position. CCEC owed money to the Plaintiffs and was sued accordingly. That aspect of the claim has been settled. That is the end of CCEC’s involvement. CCEC was not successful in any action against the Bank, and the Bank is not liable for any costs payable to CCEC. There will be no costs awarded for or against CCEC.

[5] On the other hand, the Bank is certainly liable for costs to the Plaintiffs. The Plaintiffs were entirely successful in their claim.

[6] The Plaintiffs seek \$36,139.70 in partial indemnity costs or \$42,394.26 in substantial indemnity costs. These amounts are inclusive of disbursements and HST.

[7] Counsel for the Plaintiffs has presented a very reasonable costs outline. This is particularly the case considering that this was a relatively hard fought piece of litigation. The Bank does not take issue with the amount that the Plaintiffs request as on a partial indemnity basis. The Bank's position is that this amount should be shared between it and CCEC. As indicated, it is my view that the costs to the Plaintiffs are to be borne by the Bank alone.

[8] The only question here is whether the Plaintiffs are entitled to substantial indemnity costs. This claim is based on the Plaintiffs' contention that the Bank took an unduly aggressive position with respect to its allegation of termination for cause, only to drop that position on the day of the hearing. I commented on this aspect of the Bank's litigation strategy in my ruling of July 16, 2015, at para 9 of my Amended Endorsement:

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.

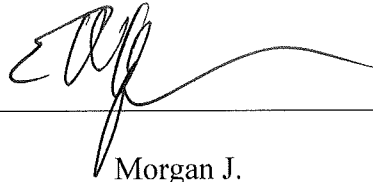
[9] The fixing of costs is a discretionary decision under section 131 of the *Courts of Justice Act*. That discretion is generally to be exercised in accordance with the factors listed in Rule 57.01 of the *Rules of Civil Procedure*. These include the principle of indemnity for the successful party (57.01(1)(0.a)), the expectations of the unsuccessful party (57.01(1)(0.b)), and the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceedings (57.01(1)(e)). The court is required to consider more generally what is "fair and reasonable" in fixing costs, and in doing so is to endeavor to balance compensation of the successful party with the prevailing policy of access to justice: *Boucher v Public Accountants Council (Ontario)* (2004), 71 OR (3d) 291 (Ont CA), at paras 26, 37.

[10] The Divisional Court has advised trial and motions judges to balance the principle of indemnity with the fundamental objective of access to justice: *Anderson v St. Jude Medical, Inc.* (2006), 264 DLR (4th) 557 (Div Ct). This is wise policy and serves as a guide to the exercise of discretion in the award of costs

[11] In the present case, the position taken by the Bank regarding termination for cause was not only aggressive, it was done for no other reason than to make the Plaintiffs' case more difficult than it should have been. It thereby increased the costs of the overall action, which is inevitably a burden on a wrongful dismissed employee.

[12] In my view, the Bank's position in this litigation reflects the type of conduct addressed by Rule (57.01(1)(e)). Moreover, the principle of indemnity and the object of access to justice both align in the Plaintiffs favour. Under the circumstances, the Plaintiffs deserve to be indemnified through an award of substantial costs for the Bank's attempt to impede their access to justice.

[13] In any case, the Plaintiffs' claim for costs on a substantial indemnity basis is rather modest. The Bank shall pay the Plaintiffs costs in the total amount of \$42,394.26.



Morgan J.

Date: October 22, 2015