CITATION: Teljeur v. Aurora Hotel Group, 2025 ONSC 703
LINDSAY COURT FILE NO.: CV-22-00000024
DATE: 20250131

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
JOHN TELJEUR Plaintiff	)	Jessica Nolan, for the Plaintiff
– and –	)	
AURORA HOTEL GROUP; 2476563 ONTARIO INC. operating as PINESTONE RESORT & CONFERENCE CENTRE; and 9407472 CANADA INC. Defendants	)	Michael Gayed, for the Defendants
	)	**HEARD:** October 18, 2024

RULING RE: COSTS

MCKELVEY J.:

Introduction

[1] On December 6, 2021, the Plaintiff was working as the general manager of the Pinestone Report and Conference Centre. On that date his employment was terminated. The Plaintiff then brought a motion for summary judgment. In that judgment, I made the following findings:

1. The Plaintiff was entitled to reasonable notice of 7 months;

2. In addition, the Plaintiff was entitled to a claim for loss of benefits equivalent to ten percent for the time period that benefits were not provided by his employer during the period of reasonable notice;

3. That there was no failure by the Plaintiff to mitigate his damages;

4. That the Plaintiff was entitled to an award of $16,680.03 on account of reimbursement for expenses incurred by the Plaintiff prior to his dismissal;

5. The Plaintiff was entitled to moral damages of $15,000.

[2] The parties have not been able to agree on the amount payable for costs in this action. As a result, this issue remains outstanding.

The Parties' Positions

[3] The Plaintiff seeks substantial indemnity costs. The fees claimed total $22,448.25 plus disbursements of $1,196.00 for a total including HST of $26,718.00.

[4] The Defendants deny that the Plaintiff is entitled to substantial indemnity costs. The partial indemnity costs of the Plaintiff are $18,262.50 inclusive of HST. Further, the Defence argues that the partial indemnity costs should be reduced because of excessive time spent by the Plaintiff on the file. Their main argument is that the second day of hearing should not have been required. The second day of attendance involved the transcription of the termination meeting which had been recorded by the Plaintiff. There were issues as to exactly what was communicated to the Plaintiff at the time of his dismissal. In their submissions, the Defence suggested that the Plaintiff should only be entitled to partial indemnity costs of $11,713.00 all inclusive. This was based on a reduction of the partial indemnity costs to 60 hours of lawyer time and 10 hours of clerk time, plus HST and disbursements, less a further $2,500 to account for the fact that a second day of hearing was required.

[5] For purposes of these Reasons I will address first the scale of costs which I feel are appropriate in this case and then will consider whether any deductions should be taken from the Plaintiff's costs in this matter.

Should the Plaintiff be entitled to partial indemnity or substantial indemnity costs in this action?

[6] The Plaintiff argues that it should be entitled to substantial indemnity costs. There is no basis for the Plaintiff to rely on Rule 49 in support of a claim for substantial indemnity costs. No applicable Rule 49 offers were made by the Plaintiff in the present case. The Plaintiff asserts, however, that substantial indemnity costs should be awarded for the "reprehensible, scandalous or outrageous conduct" of the Defendants. In support of its position that the Defendants' conduct was abusive, the Plaintiff points to the fact that the Defendants contended that the Plaintiff was entitled to 3.5 to 5 months pay in lieu of notice. Despite their position, the Defendants did not pay the Plaintiff any common law reasonable notice of termination until ordered to do so by my Judgment. In addition, the Plaintiff points to the fact that the Plaintiff was not reimbursed for his expenses until ordered to do so as part of my Judgment.

[7] The Plaintiff also refers to the fact that the employer did not comply with their obligations under the *Employment Standards Act, 2000*, within the timeframe mandated under that act.

[8] The Defence argues that there was nothing abusive about the Defendants' approach to this action and there is nothing reprehensible, scandalous or outrageous in the Defendants' conduct. The Defendants assert that they complied with their ESA obligations when ordered to do so. They refer to the fact that the Plaintiff's employment was terminated on December 6, 2021 and an ESA cheque was issued on January 14, 2022. With respect to the timeliness of the payment for out of pocket expenses, the Defendants argue that these expenses were incurred over the course of nearly three years and that the Plaintiff had sought 24 percent interest in relation to these amounts until the eve of the hearing of the motion. With respect to the Defendants' failure to remit any payment in lieu of notice to the Plaintiff, it is asserted that the Defendants were awaiting the Notice of Debt from Service Canada to determine the amount that had to be repaid for EI benefits that the Plaintiff received.

[9] I have concluded that the Plaintiff should be entitled to his substantial indemnity costs in this action for the following reasons. In *Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 771 (CanLII), the Ontario Court of Appeal dealt with a claim for substantial indemnity costs based on the conduct of the Defendant in the action. At para. 31 of their decision, the Court sets out the general rule with respect to costs on a substantial indemnity basis. The Court states,

> The general rule is that costs are awarded on a partial indemnity basis. In some -- generally rare -- circumstances, however, the level of costs may be increased to substantial indemnity or even a full indemnity basis. One of those circumstances is where it is necessary "to mark the court's disapproval of the conduct of the party in the litigation".

[10] In the Ontario Court of Appeal decision in *Net Connect Installation Inc. v. Mobile Zone Inc.*, 2017 ONCA 766 (CanLII), the Court further states,

> While we would not interfere with the costs award made by the motion judge, we would express a cautionary note on this issue. In this case, the motion judge awarded costs on a full indemnity basis. There is a significant and important distinction between full indemnity costs and substantial indemnity costs. An award of costs on an elevated scale is justified in only very narrow circumstances – where an offer to settle is engaged or where the losing party has engaged in behaviour worthy of sanction: *Davies v. Clarington (Municipality)* (2009), 2009 ONCA 722 (CanLII), 100 O.R. (3d) 66 (C.A.) at para. 28. Substantial indemnity costs is the elevated scale of costs normally resorted to when the court wishes to express its disapproval of the conduct of a party to the litigation. It follows that conduct worthy of sanction would have to be especially egregious to justify the highest scale of full indemnity costs.

[11] In *McBride Metal Fabricating Corp. v. H & W Sales Company Inc.*, 2002 CanLII 41899 (ON CA), the Court noted that elevated costs will only be ordered "in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation" where there

is “some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement.”

[12] It is apparent from the caselaw, therefore, that absent a Rule 49 offer, the normal expectation is that a party will only be entitled to its partial indemnity costs. An elevated award of costs may be given where a defendant is guilty of some form of reprehensible conduct either in the circumstances giving rise to the cause of action or in the proceedings which makes costs desirable as a form of chastisement. In the present case there is nothing reprehensible in the proceedings which would justify an award of substantial indemnity costs against the Defendants. However, there was reprehensible conduct by the Defendants in the circumstances giving rise to the cause of action which support a claim for substantial indemnity costs.

[13] In my decision on the merits of the claim, I referred to the fact that there was no evidence before me that the employer gave the Plaintiff notice in writing of his termination as required by the Employment Standards Act. I also referred to the fact that at the meeting on December 6, the Plaintiff specifically asked on at least three occasions for something “in writing”. The employer agreed to do that but did not follow through.

[14] On its own, this failure by the Defendants would not justify an award of substantial indemnity costs. However, it is a factor to be taken into account. The employer also failed to deliver the Plaintiff’s ESA entitlement no later than seven days after the Plaintiff’s employment ended or the next pay day in accordance with s. 11(5) of the *Employment Standards Act*. Again, on its own, I would not view this as a basis to award substantial indemnity costs.

[15] I also noted in my Judgment that the Plaintiff was told at the time of his dismissal that he would receive 8 weeks severance. Despite this assurance, however, the employer limited the amount paid to the Plaintiff to his *Employment Standards Act* entitlement.

[16] Further s. 60(1)(a) of the *Employment Standards Act* provides that during the notice period the employer shall not reduce the employee’s wage rate or alter any other term or condition of employment. It was conceded by the Defence at the hearing of this matter that the amount of $16,680.03 was owed to the Plaintiff on account of reimbursement of his out of pocket expenses which were incurred on behalf of his employer prior to the termination of his employment. These expenses had not yet been paid to the Plaintiff at the time of the hearing of the summary judgment motion. The Defendants argued that the Plaintiff was demanding interest on the sum owed. However, as noted in my Judgment, while the issue of interest might have been a live issue it did not excuse the failure of the Defendants to pay the principal amount. The principal amount in this case represented approximately 23% of the Plaintiff’s annual income and was a very significant financial burden for him to carry since the date of his termination, especially given that he had not been successful in obtaining alternate employment. In the transcript from the dismissal meeting, it is apparent that the Plaintiff was told by his employer that they needed to figure out his credit card expenses so he could get paid out, “before the next week or so”.

[17] It is apparent, therefore, that the Defendants not only breached their obligations under the *Employment Standards Act*, but also the promise which was made to the Plaintiff at the time of his dismissal. I view this issue as a very serious matter. The Plaintiff in its written submissions argued that the Defendants refused to pay amounts they knew the Plaintiff was owed until ordered to do so, "either out of carelessness to Mr. Teljeur or a desire to starve him out". Whether this is the explanation or not, it is clear that the decision to withhold reimbursement of the Plaintiff's expenses was a totally unjustified action by the employer. It is apparent that the employer was well aware of the debt owing to the Plaintiff on account of expenses. I consider the Defendants' actions in this regard to be egregious and deserving of censure by this Court, especially taking into account the other factors outlined in this decision.

[18] Taking all of the above issues into account, I have concluded that the employer was guilty of egregious behaviour in the manner of the Plaintiff's dismissal and that the Plaintiff has established a claim for substantial indemnity costs.

[19] Although not raised by the Defendants as a defence to the claim for substantial indemnity costs, I have considered whether my award for moral damages should preclude an award of substantial indemnity costs. However, in the Court of Appeal decision in *Leenen v. Canadian Broadcasting Corp.* (2001), 54 OR (3d) 612, the Court of Appeal considered whether inappropriate conduct by the defendants could both support an award of aggravated and/or punitive damages and an award of solicitor and client costs. At para. 38 of their decision, the Court concluded that inappropriate conduct could support both an award of aggravated and/or punitive damages and an award of solicitor and client costs. The Court stated,

> The impact on the appellants may be the same but the fact is that the conduct in question may quite properly be the origin of both an award of aggravated and/or punitive damages and an award of solicitor and client costs.

What is the appropriate assessment of substantial indemnity costs in this case?

[20] Rule 57.01 sets out the criteria which a court should consider in awarding costs. The particular factors which appear to be the most relevant in this case are as follows:

(1) The results of the proceeding;

(2) The principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(3) The amount claimed and the amount recovered in the proceeding;

(4) The complexity of the proceeding;

(5) The importance of the issues; and

(6) The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding.

[21] In the present case it is apparent that the Plaintiff was the successful party in the proceeding. This conclusion is not in dispute and was acknowledged by the Defendants in their submissions.

[22] I have also concluded that the issues in this action were complex. Virtually every claim advanced by the Plaintiff was in serious dispute on this hearing. This includes the length of the notice owed to the Plaintiff, his entitlement to an award for lost fringe benefits, his alleged failure to mitigate and the claim for moral damages.

[23] While the Defence takes issue with the number of hours spent by the Plaintiff's counsel, I have concluded that the hours spent were reasonable, taking into account that virtually every issue raised in connection with the Plaintiff's dismissal was disputed by the Defendants and the onus was on the Plaintiff to prove his claim. I would however, not award the Plaintiff any costs for the preparation of the supplementary affidavit which was not admitted by me as evidence on the motion for summary judgment. The costs of preparing this affidavit is not clearly set out in the Plaintiff's Bill of Costs. I propose to deduct two hours or $600 from the Plaintiff's Bill of Costs which I believe is a reasonable estimate of the time needed to prepare this affidavit.

[24] There is, however, another issue raised by the Defence which requires careful consideration. This is the allegation by the Defendants that a second hearing day was required so that a transcript could be prepared of the meeting recorded by the Plaintiff in which is employment was terminated. I was advised during submissions that a copy of the recording formed part of the Plaintiff's productions, but that no one gave any thought to preparing a transcript until I requested one during the course of the hearing. I did this because there were some evidentiary issues which were easily resolved by obtaining a transcript of the dismissal meeting.

[25] The Defendants argue that there was no adequate explanation for the Plaintiff's failure to transcribe the meeting from the outset and the Defendants have requested the costs associated with this second day of attendance.

[26] I agree that it would have been preferable for a transcript to have been prepared in advance of the original hearing. However, I have concluded that both parties must take some responsibility for the failure to have the transcript prepared. The recording itself was in the possession of both parties and both parties could have and, in my view, should have, taken the initiative in preparing a transcript given the credibility issues which arose at the time of the hearing as to exactly what the Plaintiff was told at the time of his dismissal. The fault, in my view, rests not only with the Plaintiff, but also with the Defence. I also accept the Plaintiff's position that the preparation of the transcript was necessitated in large part by the Defendants' refusal to accept what was said during the termination meeting. The transcript from the meeting for the most part supported the Plaintiff's evidence. Recognizing that responsibility for failing to order the transcript from the termination meeting lay with both

the Plaintiff and the Defendants, I have concluded that a reasonable deduction from the Plaintiff's costs should be approximately $1,000.

[27] I have also considered the amount in dispute in arriving at an appropriate figure for costs. The Plaintiff's total recovery in this action was in the area of $78,000, which is a modest figure. The proposed figure for substantial indemnity costs represents a relatively high percentage of the Plaintiff's recovery. Nevertheless, the Plaintiff's claim was vigorously disputed by the Defendants under every heading except for the amount owed for expenses. The Plaintiff followed a streamlined proceeding to have the issues decided by way of a motion for summary judgment which avoided increased costs by way of a trial. I have concluded that the Plaintiff should not have to face a substantial reduction in his costs on the basis of proportionality. In *Aacurate v. Tarasco*, 2015 ONSC 5980, McCarthy J. noted that denying reasonable costs for modest claims would send a message:

> to litigants that it is not worth one's while to pursue legitimate claims in court because one cannot possibly make it cost effective to do so. This is a denial of justice in the most fundamental sense. It tends to encourage those resisting legitimate but modest claims to take unreasonable positions, the logic being that any exposure to costs will be limited because of the size of the claim, regardless of the time and expense necessary to extract a judgment.

[28] I have concluded that only a very modest reduction in costs is appropriate in the circumstances of this case.

[29] Taking all factors into consideration, I have concluded that the Plaintiff's substantial indemnity costs should be reduced to $24,000 and that this figure is a fair and reasonable amount for the unsuccessful party to pay in accordance with the directions set out in *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (ON CA). I therefore order the Defendants to pay to the Plaintiff substantial indemnity costs of $24,000 inclusive of disbursements and HST.

Justice M. McKelvey

Released: January 31, 2025

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Defendants

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