

CITATION: Fernandes v. Peel Educational, 2015 ONSC 5112
COURT FILE NO.: CV-09-03521-00
DATE: 2015-08-13

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: REMY FERNANDES v. PEEL EDUCATIONAL & TUTORIAL
SERVICES LIMITED C.O.B. as MISSISSAUGA PRIVATE
SCHOOL

BEFORE: Lemon J.

COUNSEL: Gary Bennett, Counsel for the Plaintiff

Heather Laidlaw, Counsel for Peel Education
& Tutorial Services Limited

COSTS ENDORSEMENT

[1] On November 12, 2014, I gave judgment for Mr. Fernandes with respect to his claim for wrongful dismissal from the Defendant school. That judgment amounted to approximately \$175,000.

[2] I have now received costs submissions.

Position of the Parties

[3] Mr. Fernandes seeks cost in the amount \$136,777.46 for his successful claim, \$32,792.60 for his defence of the Defendants' counter claim and \$9,381.89 for disbursements.

[4] In response, Peel agrees that costs should be paid but only in the amount of \$75,000 for the claim and counter claim, plus \$9,381.89 for disbursements. Peel also seeks their costs of \$15,000 for an attendance to settle the terms of the judgment on May 15, 2015.

Legal Principles

[5] Rule 57.01 of our *Rules of Civil Procedure* sets out the factors that the court may consider when determining costs. The relevant factors that I should consider here are:

- (a) the result in the proceeding;
- (b) 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;
- (c) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- (d) the amount claimed and the amount recovered in the proceeding;
- (e) the complexity of the proceeding;

- (f) the importance of the issues; and
- (g) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

[6] Modern costs rules are designed to foster three fundamental purposes: (1) to partially indemnify successful litigants for the cost of litigation; (2) to encourage settlement; and (3) to discourage and sanction inappropriate behaviour by litigants: *Fong v. Chan*, 1999 CanLII 2052 (C.A.), 46 O.R. (3d) 330, at para. 22.

[7] Costs awards, at the end of the day, should reflect “what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties”: see *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (C.A.), 71 O.R. (3d) 291, at para. 24.

Analysis

(a) Result

[8] Mr. Fernandes was successful. Although he had prepared to defend the counter-claim, Peel withdrew the counterclaim without any notice at the outset of trial. Mr. Fernandes has been successful in his defence of that claim. He was forced to prove his disability even though the defendants called no medical evidence to contradict his evidence. He is entitled to his costs of the action.

[9] He was not, however, successful with respect to his claim for punitive damages, mental distress and his claim against Gabrielle Bush personally.

[10] He was found to have lied to his employer and to the court.

[11] In his costs submissions, Mr. Fernandes calls it a “convincing victory”. That is an exaggeration.

[12] Mr. Fernandes submits that there were 13 serious issues to be determined; however, he lost on most of them.

[13] Prior to trial, Mr. Fernandes made an offer to settle the case in the amount of \$575,000. While the final decision was in his favor, I’m sure that he does not believe that he was successful.

(b) The Rates Charged and Hours Spent

[14] A review of counsel’s bill of costs shows some rather exaggerated items but overall it evidences a very efficient management of the various issues in this case.

[15] Peel submits that their counsel spent less than half the time than plaintiff’s counsel and that the plaintiff is guilty of “excess lawyering”. I do not agree. The difference will have more to do with the fact that plaintiff’s counsel

was preparing to defend the counterclaim and to prove a disability that apparently required no time on behalf of the defendants. Given those circumstances, the defendants' counsel's hours, in many ways, confirm the appropriateness of the plaintiff's counsel's time.

[16] Peel submits that I should consider taking Mr. Bennett's rate of \$330 an hour and multiplying it by ten hours a day for each day of trial and another ten hour day of preparation for each day of trial. It, therefore, submits that costs of something like \$66,000 would be appropriate. However, Peel refers to case law that confirms that "two, or even three, days in pretrial preparation for every day of trial is not excessive". (See: *TMS Lighting v. KJS Transport* 2014 ONSC 7148.). Using that analysis, and considering two days of preparation for each day of trial, the assessment could be \$99,000.

[17] All told, I find that the rates charged and the hours spent to be reasonable.

[18] The parties agree that disbursements are proper in the amount of \$9,381.89.

(c) Amount of Costs that an unsuccessful Party could reasonably expect

[19] Peel submits that costs payable to the plaintiff for a ten day trial should be in the amount of \$75,000 but the costs for a single day in court - or as defence counsel referred to it, “a half-day of a motion before the trial judge”- should be \$15,000. If \$15,000 for a single day in court is reasonable to the defendant, it is clear that it could reasonably expect to pay far more than \$75,000 for a ten day trial.

(d) Amount claimed and amount recovered

[20] As set out above, Mr. Fernandes was successful in obtaining a judgment for a very large amount of money but much less that he requested.

[21] The counterclaim was for \$117,000. Peel received nothing.

(e) Complexity of the Proceedings

[22] There is no doubt that the action was complex. Perhaps not in the sense of a downtown Toronto commercial action, but there were a number of issues that overlapped and could have been resolved in a number of different ways. The time spent in relation to the documentation involved is reasonable.

(f) Importance of the Issues

[23] The trial issues were obviously significant to both parties.

[24] There was also an attendance on May 15, 2005, to settle terms relating to the judgment and for production of dockets to support Mr. Fernandes' costs claim. Mr. Fernandes was unsuccessful with respect to both issues.

[25] I do not see this event as significant to the overall assessment of costs. The first term related to a payment of \$7,601.60. The second required Mr. Fernandes' counsel to produce dockets. Although the dockets were produced, no submissions followed from Peel with respect to any issues raised by those dockets. Indeed, defense counsel did not produce her own dockets for the \$15,000 item relating to May 15, 2015.

[26] In my view, this attendance is simply part of the trial costs and should not be dealt with as a separate item.

(g) Conduct of the Parties

[27] The counter-claim was withdrawn without notice at the commencement of trial. It does not appear that it had much validity. There was little defence of that action in Peel's costs submissions. The cost of that conduct should fall solely on the party causing it. Mr. Fernandes should have costs on a substantial indemnity basis with respect to that issue.

[28] Mr. Fernandes was found to have lied to his employer and to the court. Had he told the truth, the trial would have been substantially shorter.

[29] Neither side made an offer to settle that impacts on my decision. Both were exceedingly unrealistic or were simply prepared to “roll the dice”. They should not benefit from that conduct.

[30] Except with respect to the defense to the counterclaim, I see nothing that requires the defendants to pay substantial indemnity costs for the defense of the claim. That should be on the basis of partial indemnity.

Result

[31] Taking all of that into consideration, I find that a fair and reasonable amount to be paid by Peel would be \$130,000 inclusive of HST and disbursements.

Lemon J.

DATE: August 13, 2015

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COSTS ENDORSEMENT

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