

**IN THE MATTER OF a Complaint of Alleged Unjust Dismissal under
Division XIV – Part III of the Canada Labour Code**

between

Robert Maticевич (Complainant)

and

Bank of Montreal (Respondent)

Adjudicator: Leonard Marvy

Written Submissions: October 9 & 22, 2020

For the Complainant: Stephen LeMesurier, Counsel

For the Respondent: Robert W. Weir, Counsel

Introduction

1. This decision addresses the legal costs owing from a complaint of unjust dismissal by Robert Maticевич under section 240 of the *Canada Labour Code* (“Code”). By decision dated September 8, 2019 (*Maticевич v Bank of Montreal* 2019 CanLII 83916 CA LA), I dismissed the Bank’s motion, pursuant to s. 242(3.1)(a) of the *Code*, that I was without jurisdiction to hear this complaint. By decision dated July 10, 2020 (*Maticевич v Bank of Montreal* 2020 CanLII 48190 (CA LA), I determined several issues concerning damages. In that decision I remained seized to address legal costs if the parties were unable to resolve that matter. Unfortunately, they were not. This decision determines that issue.

Parties positions

2. Mr. Maticевич (or “Complainant”) submits that his legal costs should be awarded on a substantial indemnity basis in the amount of \$96,390.00, and in the alternative on a partial indemnity basis in the amount of \$73,158.16. In support his position for substantial indemnity the Complainant relies on: *McTaggart and Bank of Montreal, Re* 2013 CarswellNat 4724; *Rosettani v. Bank of Nova Scotia*, 2010 CarswellNat3755; *Bank of Nova Scotia v. Fraser*, 2001 FSC 267 (Fed. C.A.) and *Wilson v. Mowachaht/Muchlat First Nation* [2000] CLAD No. 147.

3. Mr. Maticевич also submits that the amount requested was proportionate to the results achieved; that his last two settlement offers, which were not accepted by the Bank should be factored in, given they were more favourable to the Bank than what occurred at the hearing (*Payne v Bank of Montreal*, CarswellNat 952); that the issue was more important

to him (personally and professionally) than to the Bank and finally that a team approach was important to get the result he did.

4. The Bank submits that there is no basis for substantial indemnity, because in my second decision determining damages I directed the parties to address the issue of costs on a partial indemnity basis and because substantial indemnity would not be appropriate in this matter. For the latter proposition the Bank relied upon the following: *Banca Nazionale Del Lavoro of Canada Ltd v. Lee-Shanok*, 1988 CarswellNat 254; *Thornton v. Toronto Dominion Bank*, 2008 CarswellNat 4519; *Munsee-delaware Nation v. Crystal Flewelling*, 2017 CarswellNat 2976.

5. The Bank also submits that the Complainant's costs were not reasonable or proportionate relying upon *Bell Canada v. Halle*, 1989 CarswellNat 197 and *Howard and Maritime Telephone & Telegraph Co., Re*, 1999 CarswellNat 6668. The Bank submitted that settlement offers on without prejudice basis should not influence whether substantial indemnity costs should be awarded relying upon *LF and Canadian Mortgage and Housing Corp., Re*, 2018 CarswellNat 1888. Finally, the Bank argued that it had acted in good faith throughout and that an award on a partial indemnity basis of \$30,000 would be appropriate.

Substantial or Partial Indemnity

6. In the July 10, 2020, decision I stated at paragraph 64 that this was “not a case justifying an extraordinary award of costs” and that the parties “should address costs on a partial indemnity basis.” Notwithstanding this direction Mr. Maticevic submits that I should award costs on a substantial indemnity basis. I have reviewed the cases provided by the parties and do not find they assist him in altering my view.

7. The Complainant provided the costs decision in *Rosettani v. Bank of Nova Scotia*, *supra* in support of its position. In that decision Adjudicator Noonan wrote:

[9] I respect that caution is called for in granting substantial indemnification for legal costs; they are not to be awarded in all cases to be sure. There has to be something that clearly takes the equities in the case in that direction; something that makes the award appropriate. As noted above, in this case I found that the Complainant was terminated in a capricious manner; and I think my disapproval for the Respondent's conduct was expressed clearly in my January 6, 2010 ruling on the Respondent's preliminary objection. The proceedings were protracted in large measure as a result of the need to address the Respondent's argument that the Complainant was not entitled to access relief under the *Code* because she had chosen to resign; a position that was firmly rejected. Her efforts to discuss an appropriate exit package at the time were ignored by her employer. The facts as determined were that certain of the Respondent Bank's managers/executive developed a strategy in regards to the Complainant, which they hoped would help them avoid the need to pay her severance, having concluded that their decision on the Ottawa transfer had been a poor one.

[10] While the Bank is correct in that I did not find that this was a case where punitive damages were appropriate (and that in any event, I did not have that jurisdiction under the *Code*), I do not agree that this equates with me having found that there was no

exceptional or reprehensible conduct by the Bank in its treatment of the Complainant. There was indeed, in my view, a degree of reprehensible conduct on the part of the Bank in its treatment of the Complainant, such that the facts are in my view different from those considered by the court in *National Bank of Canada v. Lajoie*, [2007] F.C. 130 (Fed Ct); a case relied upon by the Respondent in its costs submissions. [emphasis added]

In this case I found no exceptional nor reprehensible conduct by the Bank in its treatment of the Complainant. I did not find that the Bank's termination of Mr. Maticivic's employment was carried out in a capricious manner. The proceedings were not protracted in any way by the Bank, which acted in good faith throughout the proceedings.

8. I agree with adjudicator Snow in *Munsee-delaware Nation and Flewelling, Re, supra* when he stated that when an adjudicator awards costs "the authorities make it clear that an adjudicator under the *Code* should do so on a partial indemnity basis (sometimes referred to as party and party costs) in all but exceptional cases" [para. 42]. To be clear, I found no reprehensible conduct by the Bank in the circumstances that gave rise to Mr. Maticivic's termination or during the proceedings. This was not an extraordinary or exceptional case. Therefore, I find that costs in this matter should be awarded on a partial indemnity basis.

Reasonable Costs

9. Having found that costs should be awarded on a partial indemnity basis the remaining issue is whether the Complainant's costs are reasonable. Mr. Maticivic's total costs are \$121,567.36 (inclusive of HST and disbursements), which is based on 257.5 hours of work, mainly by one counsel. The Bank's legal fees were \$43,952.26 (inclusive of HST and disbursements). Unlike the Complainant the Bank did not provide a detailed bill of costs so I am unable to set out the exact hours they spent on this matter.

10. In support of his position for costs the Complainant states that the amount is proportionate to the results achieved, that I should consider the two settlement offers made by the Complainant (which were less than he received by my order), that the issue was more important to him than the Bank and that a Team approach was appropriate. Finally, the Complainant submits that since the Bank did not release a detailed summary of their billable time, their criticisms of the Complainant's costs as being excessive should be taken with a grain of salt, given it prevents the Complainant from having the opportunity to review the hours claimed to show why they appear low.

11. The Bank submits that the Complainant's costs were not reasonable. The Bank compares their costs of \$43,952.26 to the Complainant's legal costs of \$121,657.36 and submit it was not reasonable or foreseeable for Complainant's counsel to spend so much more time on the matter than the Bank's, that the issues in the matter were neither novel nor complex, that both parties proceeded through all the same steps and that the proceeding only lasted 2 ½ days with limited witnesses. On the matter of the impact of settlement offers, the Bank argues that pursuant to *LF and Canadian Mortgage and Housing Corp., Re, supra* Adjudicator Noonan clarified that cost recovery risks exist when "offers of settlement have been made, and where parties have made clear their intent to rely upon

them at the costs stage of the proceeding.” [para. 12]. The Bank stated such intention was not made clear by the Complainant to the Bank and accordingly, this can not be used to support more favourable cost consequences. The Complainant did not refute this assertion in its reply submissions and this is not a factor I will consider.

12. In *Munsee-delaware Nation v. Crystal Flewelling*, *supra*, Arbitrator Snow wrote this concerning an approach to calculating costs:

[52] So what is partial indemnity, or party and party costs as it is referred to in *Banca Nazionale*? I must say that it is difficult to extrapolate from the Federal Court rules on costs any helpful approach to calculating costs for this unjust dismissal adjudication. The Ontario Court rules are only marginally more helpful. I have reviewed all the authorities cited by the parties. Those cases lead me to the conclusion that, in the absence of any rules as in this case, costs are a form of rough justice. What is fair? What is reasonable? The Employer submitted that the overriding consideration in cost awards should be "reasonableness, fairness and proportionality" relying upon *Barbour Estate*, above. I agree, but the application of these considerations is not nearly as easy as asserting them. Considering all the factors, and given that it is clear that costs are at my discretion as the decision maker and are to be what I find to be "equitable" under Section 242 (4) (c), I conclude that a partial indemnity cost award in this case should be in the area of 60% of the costs. As with all discretionary matters, that amount is, of course, subject to possible modification.

13. I agree with adjudicator Snow that the application of the overriding considerations of “reasonableness, fairness and proportionality” are not easy to apply. In considering what is reasonable, fair and proportionate, I agree with the Bank that the case was neither novel nor complex. The hearing lasted 2 ½ days and written submissions were made by the parties to address the issues of damages for the second decision.

14. I have considered the detailed Cost Outline submitted by the Complainant and the costs submitted by the Bank. Having reviewed the Complainant’s detailed costs and his submissions I find that the costs submitted are somewhat disproportionate to the type of case this was. I think it is reasonable and fair to reduce the partial indemnity by 10% to \$57,834.00, plus HST (\$7518.42) and disbursements (\$544.36) for a total award of \$65,896.78.

Determination

15. The legal costs owing by the Bank are \$65, 896.78.



Leonard Marvy, Adjudicator
November 10, 2020