COURT OF APPEAL FOR ONTARIO

CITATION: Giacomodonato v. PearTree Securities Inc., 2024 ONCA 437
DATE: 20240603
DOCKET: COA-23-CV-0749

Harvison Young, Sossin and Gomery JJ.A.

BETWEEN

Davide Giacomodonato

Plaintiff (Appellant/
Respondent by cross-appeal)

and

PearTree Securities Inc. and PearTree Financial Services Ltd.

Defendants (Respondents/
Appellants by cross-appeal)

Jonathan G. Bell, Nina Butz and Marshall Torgov, for the appellant/respondent by cross-appeal, Davide Giacomodonato

Paul-Erik Veel, Aoife Quinn and Militza Boljevic, for the respondents/appellants by cross-appeal, Peartree Securities Inc. and Peartree Financial Services Ltd.

Heard: May 21, 2024

On appeal from the judgment of Justice Robert Centa of the Superior Court of Justice, dated May 29, 2023, with reasons reported at 2023 ONSC 3197, and from the costs order dated October 5, 2023, with reasons reported at 2023 ONSC 5628.

REASONS FOR DECISION

[1] The trial judge held that Davide Giacomodonato ("Mr. Donato") was wrongfully dismissed by PearTree Financial Services and PearTree Securities Inc. (collectively, "PearTree"). He awarded Mr. Donato compensatory and punitive

damages totaling $671,765, including interest, as well as partial indemnity costs of $830,761.75, including disbursements and HST. Mr. Donato appeals the damages award, while PearTree cross-appeals seeking to vary the costs award.

Mr. Donato's appeal

[2] Mr. Donato is a successful investment banker particularly experienced in the mining sector. He was recruited by PearTree to serve as President and co-head of banking in early 2016. The trial judge found that the parties entered a binding employment contract in April 2016. They subsequently negotiated and agreed to a second employment contract in July 2016. PearTree terminated Mr. Donato's employment without cause in January 2018.

[3] Mr. Donato contends that the trial judge erred by calculating the wrongful dismissal damages owed to him based on the terms in the second contract rather than the first contract. To succeed on this ground of appeal, he would have to persuade us that the trial judge made a series of errors of law and mixed law and fact in finding that the second contract was valid, binding, and enforceable. He has not done so.

[4] The trial judge did not err in finding that there was fresh consideration for the second contract. He correctly recognized that employers do not have the right to alter a contract unilaterally unless something "new and of benefit" (beyond continued employment) flows to the employee in exchange for their agreement to

the amended terms: *Techform Products Ltd. v. Wolda*, (2001), 56 O.R. (3d) 1 (C.A.), at para. 24, leave to appeal refused [2001] S.C.C.A. No. 603; *Holland v. Hostopia Inc.*, 2015 ONCA 762, 392 D.L.R. (4th) 650, at paras. 51-55; *Hobbs v. TDI Canada Ltd.* (2004), 246 D.L.R. (4th) 43 (Ont. C.A.), at para. 32, citing *Francis v. Canadian Imperial Bank of Commerce* (1994), 21 O.R. (3d) 75 (C.A.). As the trial judge also correctly observed, however, courts are concerned with the existence, rather than the adequacy, of consideration: *Loranger v. Haines* (1921), 50 O.L.R. 268 (C.A.); *Stott v. Merit Investment Corp.* (1988), 63 O.R. (2d) 545 (C.A.), citing *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726.

[5] The trial judge found that there was fresh consideration for Mr. Donato's agreement to the second contract: a $40,000 payment by PearTree to Mr. Donato to cover his costs of severing his contract with his previous employer, and an entitlement to two weeks additional paid vacation time. We are not persuaded that the trial judge erred in finding that the $40,000 payment formed part of the negotiations for the second contract. Although the trial judge mistakenly stated that PearTree made the payment in 2016 as opposed to 2017, his reasoning was premised primarily on the fact that the parties referenced this payment in discussing the second contract. In any event, the trial judge found that the additional vacation entitlement by itself constituted fresh and non *de minimis* consideration.

[6] Mr. Donato cites no authority for his contention that the trial judge was required to do a comparative analysis of the overall advantages and disadvantages of the first and second contract in assessing whether there was fresh consideration for the latter. We also reject his suggestion that the trial judge disregarded the power imbalance between the parties. The trial judge recognized that consideration is particularly important in the employment context due to the inequality of bargaining power between the parties and the vulnerability of an employee who depends on the remuneration they receive: *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at pp. 1002-1003; *Hobbs*, at para. 42. He found that the power imbalance was mitigated in the circumstances of this case for various reasons, including Mr. Donato's access to information about PearTree's operations; his experience in negotiating contracts; and his representation by counsel through the negotiation of the terms of the second contract, which lasted over a month.

[7] Our conclusion that the judge did not err on the consideration issue is sufficient to dispose of Mr. Donato's main argument on appeal.

[8] Mr. Donato sought to raise an additional argument premised on an inconsistency between the termination clause in the second contract and O. Reg. 288/01 to the *Employment Standards Act, 2000*, S.O. 2000, c. 41. This argument was neither pleaded nor advanced at trial, and PearTree had no

opportunity to develop an evidentiary record with respect to it. We accordingly decline to consider the argument for the first time on appeal.

PearTree's cross-appeal

[9] PearTree has not established that it should be granted leave to appeal the trial judge's costs award.

[10] Costs awards are highly discretionary. This court will not set aside an award unless it is based on an error in principle or is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27; *Apotex Inc. v. Eli Lilly Canada Inc*., 2022 ONCA 587, at para. 56. Leave to appeal a costs order will not be granted in the absence of "strong grounds upon which the appellate court could find that the judge erred in exercising his discretion": *Brad-Jay Investments Limited v. Village Developments Limited* (2006), 218 O.A.C. 315 (C.A.), at para. 21, leave to appeal refused, [2007] S.C.C.A. No. 92. As held recently in *Canadian Tire Corporation, Limited v. Eaton Equipment Ltd*., 2024 ONCA 25, at para. 13:

> This test is designed to impose a high threshold because appellate courts recognize that fixing costs is highly discretionary and that trial and motion judges are best positioned to understand the dynamics of a case and to render a costs decision that is just and reflective of what actually happened on the ground: *Algra v. Comrie Estate*, 2023 ONCA 811, at para. 48.

[11] PearTree's proposed grounds for appealing the costs award are not strong.

[12] PearTree contends that the trial judge erroneously concluded that its settlement offer could not attract r. 49 cost consequences solely because it was inclusive of costs and interest. We do not agree. The trial judge did not express the view that an all-inclusive offer to settle could never attract cost consequences. He found that PearTree's all-inclusive offer to settle lacked the certainty and precision required for a valid r. 49 offer. This finding is consistent with the reasoning in decisions such as *London Eco-Roof Manufacturing Inc. v. Syson*, 2020 ONSC 3101, at para. 84, which the trial judge cited, and is well-grounded on the record.

[13] The trial judge followed the correct principles and took appropriate factors into account in fixing costs. He made many findings unfavourable to PearTree. He found that PearTree unnecessarily increased the costs of the proceeding, that it did not comply with its discovery obligations in a timely way, and that its counterclaim, including its claim for punitive damages, was "obviously meritless". The trial judge concluded that, having invited the litigation, PearTree conducted it in "an unforgiving, scorched earth, and bare-knuckle manner", missing "no opportunity to malign Mr. Donato". These findings amply justify the partial indemnity costs award.

Disposition

[14] Mr. Donato's appeal is dismissed with $30,000 in all-inclusive costs to PearTree. PearTree's motion for leave to appeal is dismissed, with $15,000 all-inclusive in costs to Mr. Donato.

"A. Harvison Young J.A."
"L. Sossin J.A."
"S. Gomery J.A."