

# Court of King's Bench of Alberta

**Citation: Pawlicki v Black Diamond Group Limited, 2023 ABKB 492**

**Date:** 20230828  
**Docket:** 1901 12785  
**Registry:** Calgary

Between:

**Marek Pawlicki**

Plaintiff

- and -

**Black Diamond Group Limited**

Defendant

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**Endorsement (Costs)  
of the  
Honourable Justice M.H. Hollins**

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[1] Mr. Pawlicki sued his former employer, Black Diamond Group Limited, after the termination of his employment. At trial, there were a number of claims, including for unpaid commissions, disputed calculation of his notice period and various unpaid bonus amounts. Mr. Pawlicki obtained judgment for \$158,191.91, after some adjustments to the judgment amount which counsel agreed were appropriate.

[2] The parties have been unable to agree on the costs disposition of this matter. Mr. Pawlicki wants something in the range of \$78,000-\$79,000. Black Diamond says the appropriate costs award is approximately \$30,000.

[3] The discrepancy between them arises from their differences on these issues:

- (a) In assessing the Plaintiff's degree of success, should I take into account amounts which were paid by the Defendant to the Plaintiff prior to trial?
- (b) Is the Plaintiff entitled to increased costs by virtue of pre-trial settlement offers?
- (c) Is the Plaintiff entitled to increased costs based on the Defendant's conduct?

### **Costs Generally**

[4] There are some general rules which apply to the determination of an appropriate costs disposition. Under Rule 10.29 of the Alberta Rules of Court, we begin with the assumption that a successful party is entitled to his costs from the unsuccessful party, subject to the Court's discretion.

[5] However, even if we accept that proposition here and agree that Mr. Pawlicki is entitled to an award of costs, the Court retains discretion on what the proper amount should be. In exercising that discretion, I may consider any number of factors set out in Rule 10.33.

### **Court considerations in making costs award**

#### **10.33(1) In making a costs award, the Court may consider all or any of the following:**

- (a) the result of the action and the degree of success of each party;
- (b) the amount claimed and the amount recovered;
- (c) the importance of the issues;
- (d) the complexity of the action;
- (e) the apportionment of liability;
- (f) the conduct of a party that tended to shorten the action;
- (g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

- (a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;
- (b) a party's denial of or refusal to admit anything that should have been admitted;
- (c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;
- (d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;

- (e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;
- (f) a contravention of or non-compliance with these rules or an order;
- (g) whether a party has engaged in misconduct;
- (h) any offer of settlement made, regardless of whether or not the offer of settlement complies with Part 4, Division 5.

[6] In this case, the particular factors that are relevant to the costs determination are the degree of Mr. Pawlicki's success, the amount claimed versus the amount recovered, the complexity of the action, the conduct of the parties within the litigation and settlement offers exchanged by the parties prior to the trial.

[7] The Rules include a Schedule "C", which is a tariff of suggested fee amounts for various steps taken in typical litigation. While I am not allowed to simply default to that Schedule (*McAllister v Calgary (City)*, 2021 ABCA 25 at para.27), it remains a tool for assessing reasonable costs, albeit it an out-of-date tool. It is now suggested that a costs award should, *prima facie*, aim to indemnify the successful party for approximately 40-50% of its actual costs paid; *McAllister* at para.41.

### **1. Degree of Success**

[8] As mentioned, there is statutory presumption that the successful party is entitled to costs and that is not contested here. However, the parties disagree about the degree of success represented by the judgment.

[9] Certainly, the amount recovered is far less than what was claimed in the original Statement of Claim. However, both parties conceded various issues prior to trial. The Defendant agreed to pay some of the individual claims being advanced. The Plaintiff abandoned some of his claims before trial. All of this obviated the need to adjudicate those issues and thus made the trial more time and cost-efficient. However, each party now argues that his/its concessions were more valuable in that regard than the concessions of the other.

[10] I decline to review in fine detail the settlement negotiations of the parties in the years prior to the trial. The challenge is to acknowledge the impact of the parties' pre-trial positions on the eventual conduct (and thus costs) of the trial while resisting second-guessing every piece of advice given, taken or rejected by the parties over years of litigation, in circumstances the Court cannot fully know or appreciate.

[11] The Plaintiff has vehemently insisted that the amounts paid by the Defendant prior to the trial should be counted in the measure of his success because, as the argument goes, he had to sue to recover those amounts too. However, that cannot be the proper approach. If it were, what incentive would any defendant have to settle isolated issues where the remaining issues were bound for trial?

[12] Further, as pointed out by the Defendant, the Plaintiff was at liberty to make revised offers of settlement following these payments to reflect the amounts he still believed he would recover at trial.

[13] The phrase “the amount claimed and the amount recovered” is broad enough to include general consideration of the initial positions of the parties, the evolution of those positions before the trial and the eventual outcome based on what issues remained for trial.

[14] In this case, Mr. Pawlicki was found to be entitled to a longer notice period than what Black Diamond was prepared to give him. That finding then gave rise to significant additional commissions owed to him, all of which had been withheld excepting small amounts paid voluntarily prior to trial. Mr. Pawlicki was also successful on the largest remaining claim, approximately \$68,000 for the Odin project commissions.

[15] If we compare his final judgment to his last offer of \$199,281 made in December of 2019, he recovered about 80% of that offer. While not besting the offer – addressed below – that is substantial success.

[16] Another way of measuring the degree of success in litigation is to look at how many isolated issues were won by each party. While it would not be appropriate to do that without consideration of the total recovery or the trial time consumed by individual issues, it is yet another way of looking at this calculation.

[17] In this case, Mr. Pawlicki included a number of claims that, in my view, were not causally connected to his termination at all but rather, a complete tally of his complaints against his employer stretching back to the beginning of his employment. Not only did that consume trial time but undoubtedly made pre-trial settlement more difficult. On the other hand, of the issues remaining for trial, Mr. Pawlicki “won” on the biggest issues, namely his notice period, his commissions and his bonus.

[18] In light of all of these considerations, Mr. Pawlicki was substantially successful and his costs award should reflect that.

### **Offers to Settle**

[19] There were many offers to settle exchanged and yet the parties could not resolve their issues without trial.

[20] As mentioned, the lowest offer of the Plaintiff was \$199,281, made in December, 2021. His position now is that payments made by the Defendant prior to trial ought to be included when we assess whether he “bettered” his offer. For all the reasons discussed above, that position is untenable.

[21] The Defendant paid the amounts it did precisely to avoid the adverse costs that would be associated with losing on those points at trial. Further, and as mentioned above, the Plaintiff was free to recalculate subsequent offers that took the amounts already received into account. This is a neutral factor in my opinion.

### **Defendant’s Conduct**

[22] The bad blood between these parties that was evident throughout the trial unfortunately continued through the post-trial communications.

[23] The Plaintiff accuses the Defendant of being slow to calculate and pay the judgment and of withholding more than the proper tax rate withholding in bad faith. The Defendant says the

timelines have been reasonable, given that some prior payments had to be recalculated. On the tax withholding, it acknowledges that error but says that was corrected as quickly as possible.

[24] It is always discouraging to see parties continue to spend money arguing after the Court has rendered decision. I can accept that the Defendant continued to be a bit obstinate about payment, given what both parties have told me, albeit not to a degree that will significantly impact my costs decision.

### **Conclusion**

[25] This is a situation where I do not believe that Schedule “C”, at least single Column 2, is fair or appropriate to use. Rather than put the parties to the additional work of drafting and arguing over more draft Bills of Costs, I am awarding Mr. Pawlicki a lump sum of \$35,610 in costs, approximately 45% of his solicitor-client costs. That is payable forthwith.

Heard on the 10<sup>th</sup> day of April, 2023.

**Dated** at the City of Calgary, Alberta this 28<sup>th</sup> day of August, 2023.

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**M.H. Hollins**  
**J.C.K.B.A.**

### **Appearances:**

Ravi Jadusingh  
for the Plaintiff

Matthew L. Vernon  
for the Defendant