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ALBERTA COURT OF APPEAL OVERTURNS $1.6 MILLION AWARD FOR INJURY TO REPUTATION AND GOODWILL

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On Friday, August 27, 2010, the Alberta Court of Appeal issued a decision that will be of interest to employers across Canada.

Facts:

The respondent Soost was a high-performing investment adviser with a book of business valued between $70 and $80 million. After approximately three years of employment, Soost was summarily dismissed from his position as a financial advisor with the defendant Merrill Lynch Canada Inc. It took Soost about three weeks to find a new job with a less prestigious firm. Many of his former clients did not follow him to the new firm, causing a significant drop in revenue.

At trial the judge awarded Soost one year's pay in lieu of notice in the amount of $600,000. The trial judge also awarded $1.6 million for damage to Soost's reputation and book of business or goodwill. Only this second award was appealed to the Alberta Court of Appeal.

Issue:

According to the Court of Appeal, the issues were as follows: "Can a trial judge can award significant damages for the mere fact of an employee's dismissal, or for the stigma that that dismissal brings? Or for the employer thereafter competing with the ex-employee for the clients, before the ex-employee has got a new job?"

DAVIS LLP's Employment & Labour Law Practice Group provides innovative strategic advice, dispute resolution and negotiating expertise to management and government in all aspects of business employment relations.

Our lawyers who practice in this area have diverse backgrounds in labour and employment and related areas such as employee benefits and pensions, executive compensation, governance, human rights and privacy.

Decision:

The Court of Appeal found that there was no basis, either in fact or in law, for the $1.6 million award. The fact of dismissal alone will not be enough to create a separate head of damages; in order for additional damages to flow, there must be some kind of actual loss suffered by the plaintiff and the loss must be attributable to the defendant.

As a starting point, the Court of Appeal noted that in ordinary circumstances, damages for wrongful dismissal cannot exceed what pay in lieu of reasonable notice would have been. There is only one exception to this rule, which the Supreme Court of Canada recently clarified in *Keays v. Honda Canada* (*Honda* damages).

The mere fact of dismissal does not trigger *Honda* damages. In order to be entitled to *Honda* damages, it must be shown that the employer was acting maliciously or with blatant disregard for the employee. In addition, the Court of Appeal confirmed that even in such circumstances, *Honda* damages are limited to compensating actual loss, and are not punitive.

On the facts of this case, Soost was not entitled to *Honda* damages. The trial judge found that Merrill Lynch had acted in good faith when alleging just cause for dismissal, even though the grounds relied upon were ultimately found to be inadequate to justify dismissal. The Court of Appeal rejected the notion that there can be compensation for the "stigma" attached to dismissal. A dismissed employee is entitled to compensation if the employer fails to provide reasonable notice or pay in lieu, but the employee is not entitled to damages for any prejudicial effect (even on reputation) simply because he or she was dismissed.

In addition, the Court of Appeal held that any concern that Soost would be undercompensated by the $600,000 award was inappropriate. An employee who is employed under an indefinite term contract has no right to keep his or her job, only a right to reasonable notice or pay in lieu. While it may have been arguable that the loss of many of Soost's customers flowed from his dismissal, the dismissal itself was not a wrong and there could be no compensation for it. The wrong in this case was Merrill Lynch's failure to provide reasonable notice and the $600,000 award fully compensated Soost for that wrong.

The Court of Appeal expressly noted that when an employee whose livelihood relies on sales is dismissed, some of that employee's future earning potential will disappear, at least for a time. If that reduction continues beyond the notice period, the discrepancy is not compensated. In addition, the Court of Appeal identified elements of "double counting" in the $1.6 million award, which could not be justified on the facts.

A final argument was that the $1.6 million award was a response to Merrill Lynch unfairly competing against Soost by setting up the manner and timing of his dismissal in order to retain his clients. This argument failed at law and on the facts. In law, Soost had failed to prove the necessary elements of the torts of interference with contractual relations, conspiracy, or intentional infliction of harm. Furthermore, absent a restrictive covenant, an employer and employee are free to compete with each other once they part ways. The Court of Appeal also identified 12 findings of fact that made a claim of unfair competition untenable, including that Merrill Lynch did not contact any of Soost's clients prior to his dismissal, that industry regulations required the Merrill Lynch to contact the clients once Soost was dismissed, and that Merrill Lynch's staff contacted the clients in a fair way, simply saying Soost had left.

Practice Points

Employers can take the following practice points from this decision:

- Employers are only liable for wrongs they have caused. In a wrongful dismissal context these wrongs can take the form of either: (a) a failure to provide reasonable notice; or (b) damages relating to the manner of dismissal, such as where an employer acts in a manner that is malicious or excessively insensitive. The employer will not be liable for other losses suffered by the employee in relation to the dismissal.

- Good faith matters. Courts will be more forgiving where an employer genuinely believes they are acting with justification, even if that belief is mistaken.

Our Employment & Labour Practice Group

Davis LLP's Employment & Labour Law Practice Group is able to provide the following services:

- We appear as advocates before labour boards and arbitrators, human rights tribunals and other statutory tribunals and the court in both the federal and provincial jurisdictions
- We advise on personnel reorganization programs, employment contracts, employment termination procedures and wrongful dismissal litigation
- We advise on employment and human resources policies
- We represent clients in all aspects of human rights
- We advise on compliance with Employment Standards, Workers' Compensation and other labour legislation
- We negotiate and advise on administration of collective agreements
- We assist with the negotiation, conciliation and arbitration of strikes and lockout situations
- We provide a full range of services in employee benefits including representing pension advisors and acting on insurance and disability issues
- We advise on privacy and confidential information issues relevant to employers

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