

WORKWISE

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LIMITS ON DAMAGE AWARDS: THE ALBERTA COURT OF APPEAL WEIGHS IN



GEOFFREY HOPE

Alberta's Court of Appeal recently reviewed the bases for damages in wrongful dismissal cases when it handed down its decision in *Merrill Lynch Canada Inc. v. Soost*. Damages of \$1.6 million, awarded in addition to \$600,000 pay in lieu of notice, were overturned on appeal.

The background

Kurt Soost was a 41-year-old stockbroker employed by Merrill Lynch. He had been recruited by Midland Walwyn in 1998, which Merrill Lynch had subsequently purchased. While at Merrill Lynch, Soost was paid on straight commission. His book of business was worth about \$150 million at the time of his termination and had roughly doubled during his employment.

Merrill Lynch terminated Soost in May 2001, making a number of allegations regarding Soost's conduct that it alleged amounted to just cause. It alleged Soost had failed to get approval for private placements, and then when asked had twice failed to disclose that he had made those placements. It also alleged that Soost had solicited clients to make certain purchases after having been directed not to, had failed to supervise his staff, had inappropriately contacted other investment dealers, and had engaged in discretionary trading.

The lower Court award

At trial, Justice Brooker found the company failed to prove it had just cause to dismiss Soost. It had failed to consistently apply and enforce the private placement policy, and had not given Soost a reasonable opportunity to comply. Justice Brooker awarded Soost \$600,000, or the equivalent of 12 months' pay in lieu of notice. As well, calling the employer's action "both unfair and insensitive", Justice Brooker noted that Soost's dismissal had a significant

detrimental effect on Soost's reputation, his ability to retain clients and to recruit new ones, and that Merrill Lynch must have been aware of the likelihood of such consequences of this type of termination at the time of Soost's hiring. According to Justice Brooker, the damage done to Soost's reputation and book of business could not be compensated with an award of damages in lieu of notice, and so he awarded Soost an additional \$1.6 million in damages. Merrill Lynch appealed the additional award.

Justice Booker's \$1.6 million damages award for damage to reputation and goodwill was somewhat unusual when considered in the context of two Supreme Court of Canada ("SCC") decisions. In 1997, the SCC released its decision in *Wallace v. United Grain Growers* ("Wallace"), in which the court held that the notice period could be extended where the employer exercised bad faith in the manner of dismissal. However, in 2008, the SCC varied that approach in *Honda v. Keays* ("Honda"), deciding instead that employees should be compensated for conduct during the course of dismissal that was unfair or in bad faith by an award that reflected the actual damages.

The Court of Appeal offers guidance on damage awards

On appeal, Justice Côté, writing for a unanimous Court of Appeal, held that the \$1.6 million award had no basis in law, and quashed the award. He agreed with Justice Brooker, however, that Merrill Lynch had not proven they had just cause to dismiss Soost without notice, and agreed that 12 months' notice was reasonable.

Justice Côté began by reviewing the legal effect of employment contracts. He stated where the length of employment is indefinite, each party has the right to terminate the employment contract at any time, and it is an implied term



LEAH ANAKA

of the contract that the party terminating without cause will give a reasonable period of notice. An employee cannot be awarded damages for the prejudicial effect of dismissal, because dismissal itself is not independently a wrong. Consequently, damages for failure to give reasonable notice will not ordinarily exceed what the pay and benefits would have been during the notice period. While dismissed employees are likely to suffer losses as a result of dismissal, due to a bad economy or the age of the employee, for example, losses that continue beyond the notice period are not compensable.

However, Justice Côté did note one exception to this limit on damages. Based on the SCC’s decision in *Honda*, an employer has a duty not to use methods that are unduly unfair or insensitive when dismissing an employee, and to do so will attract what he referred to as “*Honda* damages” for the method of dismissal. Justice Côté emphasized that an employer’s “real and sincere motive for dismissal”, or honest belief, bars *Honda* damages for alleging cause, and stressed that awards for bad faith in manner of dismissal are compensatory, not punitive. He also cautioned against double counting; the trial judge’s award compensated for lost future income as well as the present capital value of future income, when instead all losses should be determined using an income-based calculation.

Justice Côté also rejected Soost’s argument that the award was based on “unfair competition”, since in the absence of confidential information or a restrictive covenant, once an employer and employee have parted ways, they are free to compete for clients.

The decision further clarifies that dismissal itself is not a wrong, even without cause, and so an employee cannot be compensated for the fact of dismissal alone. However, an employee can be compensated for two wrongs that may arise from the dismissal: either the employer’s failure to give reasonable notice, or for the employer’s “unduly unfair or insensitive manner of dismissal”. While Justice Côté never referred to “mental distress” in his decision, it is clear that these damages are awarded to compensate for such suffering, and employers should appreciate the Court’s caution in this regard.

Justice Côté’s decision is also useful for the limits it places on the two heads of damages. Justice Côté makes clear that damages for lack of notice should not exceed what the pay in lieu would have been for the notice period. Secondly, the decision acknowledged that dismissed employees can and will suffer losses that are not compensable. An employer must engage in more than “[m]ere sloppy conduct” before an employee will be compensated with extra damages. ▲

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Kevin Feth in Edmonton 780-423-7626
or
Frank Molnar in Calgary 403-232-1782

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