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ONTARIO COURT OF APPEAL CLARIFIES FAILURE TO WARN IS NOT BAD FAITH WHERE TERMINATION OF EMPLOYMENT IS ON WITHOUT CAUSE BASIS

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In the recently reported decision of *McNevan* v. *AmeriCredit Corp* & *AmeriCredit Financial Services of Canada, Ltd.*[1], the Ontario Court of Appeal considered and overturned a decision of the Superior Court in a wrongful dismissal action.

In *McNevan*, the Plaintiff was a 44 year old Assistant Vice-President of Collections with 46 to 60 people reporting through to him. At the time of termination, he had 13 months of service and was earning $62,500 annually. While the company felt that the Plaintiff had not demonstrated the necessary skill-set it felt was required of an Assistant Vice-President, it elected to terminate his employment on a without cause basis and offered him three months' salary in return for a full and final release, rather than providing him with feedback about their concerns.

At trial, the employee was awarded damages equal to six months of notice plus two additional extensions of the notice period of three months each, for a total of twelve months.

In assessing reasonable notice, the trial judge considered not just the employee's age, salary, position and years of service, but also the fact that in a corporate culture that claimed to be one of sharing information, promoting open communication and providing regular performance feedback, it was reasonable for the employee to assume that his position was secure given the experience he brought to the position and the successes he had brought to the company. As a result, the trial judge found that a notice period of six months was justified.

The court extended the notice period by an additional six months on the basis of a finding of bad faith on the part of the employer in the manner in which the dismissal was handled. The trial judge held that the bad faith justifying an extension of the notice period under a *Wallace* claim included:

- A failure to warn the employee of his perceived management failings, combined with the abruptness of his dismissal, which the trial judge found to be misleading and insensitive;
- The termination letter contained no offer to assist the employee in finding new employment, and no offer to provide a letter of reference;

[1] The case was successfully argued by Douglas Best of our Toronto Office.

- The offer of three months salary in lieu of notice was conditional on the employee signing a release in respect of any claims whatsoever and indicated no willingness to attempt to negotiate a mutually satisfactory resolution;

- That the employee's belongings were damaged when returned to him due to the company's failure to pack the items with care;

- The inefficient level of performance by the company's human resources department, resulting in the mishandling of payment of vacation pay and delay in issuing his Record of Employment and his T4, which the trial judge found to have increased the level of indignity suffered by the employee.

On appeal, the Court of Appeal agreed that the factors of age, years of service, salary and position are not exhaustive in determining reasonable notice, and that depending on the case, the court can consider other factors. However, the Court of Appeal found that absent an express or implied term in the employment contract to provide feedback, positive or negative, as a necessary precursor to dismissal without just cause, a failure to warn an employee about dissatisfaction in job performance is not a relevant consideration for determining the appropriate notice period where no cause for termination is alleged.

As a result, while noting that the 6 month notice period was generous, the Court of Appeal found it was within an acceptable range and refused to interfere with that part of the award. The employee was 44 years old, and notwithstanding his short service, had held a responsible management position. He was looking for work in a small urban area where the job opportunities to match his skills and experience were scarce.

The Court of Appeal found, however, that the company's actions did not constitute bad faith to support *Wallace* damages and struck down the extended notice. The Court found that:

- A failure to warn in the context of a without cause dismissal is not, on its own, bad faith;

- An employer is not under a legal obligation to offer a reference letter or offer assistance in a job search. In this regard, the court noted that the employee had never requested assistance or a letter of reference;

- Making an offer conditional on signing a release was not only standard practice, but wise corporate practice;

- There was no evidence that after the termination of his employment, the company engaged in conduct towards the employee that was "untruthful, misleading or unduly sensitive" with respect to the delivery of his belongings or the delay in issuing his vacation pay, T4 or the Record of Employment. These errors were neither high-handed nor "unduly" insensitive.

It is of note that this appeal was heard prior to the Supreme Court of Canada releasing its decision in *Keays v Honda,* which held that even where it is appropriate to award damages for bad faith, an extension of the notice period is inappropriate; damages for bad faith are compensatory and must be assessed based on the actual damages the employee suffers as a result of such bad faith actions. See our July 2008 Communique for a thorough review of the Keays v. Honda decision. http://www.millerthomson.com/docs/Labour_and_Employment_Communiqu233_-_Ontario_July_2_2008.pdf In this case, in light of the Court of Appeal's finding that the evidence did not support a finding of bad faith, it was not necessary for the court to determine whether or not the court should consider the decision in *Keays v Honda*.

A B O U T T H E A U T H O R :

Adrienne Campbell is a member of our Labour and Employment Group in Toronto. She provides legal services and advice to a wide range of clients in the private and public sectors.

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