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COURT OF APPEAL REJECTS "DOUBLE COUNTING"

Most employers understand a claim for damages for wrongful dismissal as arising from the termination of an employee's employment without adequate cause or notice. It can be argued that this in fact reflects a misconception of the nature of the employment contract. Except in certain limited cases of federally-regulated companies, there is no right of an employee to retain a job. The British Columbia Court of Appeal recently stated, an "employee neither has tenure, nor is indentured". In other words, both parties to the employment contract have the right to end the contract, subject to the entitlement of one party or the other to compensation for losses occurring as a result.

As the Supreme Court of Canada phrased it in a 1997 decision, the employer can terminate employment without any reason, as long as the employer gives the employee sufficient advanced notice of that termination, or pays the employee the amount of money she would have earned during that period of reasonable notice. The question has often arisen whether the employee has the right to insist on being allowed to work out her notice period (often referred to as "working notice"). However, except in limited situations of employees in federally-chartered companies, there is no right to insist on working notice.

The question faced by the trial judge in this case was whether an employee could claim damages arising solely from the act of dismissal and the harm to the employee's reputation that often results from such dismissal. The Alberta Court of Appeal took up this issue in a decision released on August 27, 2010 in *Soost v. Merrill Lynch Canada*. In this case, the Court of Appeal

considered there had been an expansion of damages for wrongful dismissal since the seminal decision of the Supreme Court of Canada in *Keays v. Honda*. Based on that decision, an employer is not liable for harm arising solely from "sloppy conduct" in the manner of dismissal. Rather, the employee must show "malice or blatant disregard for the employee" for punitive damages to be imposed.

The trial judge in the *Soost* case had assessed $1.6 million in damages, with $1 million of that attributed to loss of reputation and to the loss of the plaintiff's book of business. The Court of Appeal, relying on the decision in *Keays*, set aside the damages for loss of reputation on the basis that such damages did not flow from the actionable wrong − i.e. the failure to give adequate notice. Based on *Keays*, the Court of Appeal held that a dismissed employee is not entitled to damages to compensate him for the effect of the dismissal on his future job prospects.

It is interesting to note that the Court of Appeal rejected awarding damages for the loss of the plaintiff's book of business, as this loss did not arise from the failure to give adequate notice, but from the dismissal itself. As the trial court had awarded damages for failure to give adequate notice, the court found that granting damages for what was essentially a compromise of the plaintiff's ability to generate income such damages in fact represented double counting. The Court of Appeal therefore set aside the $1 million award for loss of the book of business and compensation for loss of future job prospects. As the $600,000 award for wrongful dismissal was not challenged, it was not interfered with.

This decision is consistent with a number of recent judgments out of both the appeal courts and the trial courts which have restricted to some degree the scope of wrongful dismissal damages. Judges seem to be focusing more narrowly on the losses actually sustained by an employee due to absence of notice, and refusing to grant damages which arise from the act of dismissal itself. It seems that the courts have recognized that dismissal is, in fact, a part of employee life, and should not attract compensation.