Lessons from the Bench – Recent Wrongful Dismissal Outliers

In the last month, the Courts have issued three decisions that are outliers worthy of mention. The first involves a notice period in excess of the 24-month upper limit. The second, a case where an employee commenced a lawsuit and ended up owing the employer money under a counterclaim. The third is an example of an employer counterclaim gone wrong. In this article, we summarize each of these cases.

a) Pushing the Limit on Reasonable Notice

- ***Milwid v. IBM Canada Ltd.***

On October 23, 2023, the Ontario Court of Appeal upheld the award of a 27-month notice period for a management level employee.

IBM Canada appealed and argued that the motion judge made an error in finding there were "exceptional circumstances" warranting going above the standard 24-month notice period.

The employee worked with IBM for 38 years and was 62 years old at the time of dismissal. The additional notice in excess of the 24-month standard was justified on the basis that the employee's skill set was non-transferrable as he had only ever worked on IBM products. The Court also found that the timing of the dismissal during the pandemic justified a further one month increase in the notice period.

The Court of Appeal agreed that the employee's non-transferrable skills were an exceptional factor. The Court also found that the motion's judge's finding regarding pandemic also being an exceptional circumstance deserved deference. This case, along with a prior Court of Appeal case in *Currie v. Nylene Canada Inc*. suggest that "exceptional circumstances" will be liberally interpreted.

b) Alternative Paths to Punitive Damages

- ***Breen v. Foremost Industries Ltd***

Recently, the Alberta Court of King's Bench found an employee *personally liable* for damages to the employer and dismissed his wrongful dismissal

claim. The case is factually complex and spans over 500 paragraphs. The following provides a very high-level overview.

The plaintiff, Patrick Breen, was President and Chief Executive Officer of Foremost Income Fund ("FIF"). After he was terminated for cause, he commenced a wrongful dismissal action against his employer. In response, Foremost Industries Ltd. ("FIL"), the employer, commenced a counterclaim alleging, *inter alia*, that Breen breached duties owed to the company, including his fiduciary duty and his duty of loyalty and good faith. The employer alleged that Mr. Breen's breaches of duty and misconduct caused them significant financial losses.

As CEO, there were limitations upon his authority. He had to obtain Board of Trustee (the "board") approval for:

- Authorizing expenditures above his $100,000 limit;
- "Red Flag" contracts;
- Anything that was unusual and
- Compensation

Mr. Breen violated the limitations placed on him on numerous occasions. Despite being explicitly instructed by his superiors, he authorized transactions that exceeded his $100,000 limit. Alternatively, he would split larger transactions into multiple payments to avoid seeking authorization. He also repeatedly failed to advise the Board about 'red flag' or unusual contracts. Lastly, he was involved in receiving financial 'gifts' amounting to tens of thousands of dollars. The court found his acceptance of 'gifts'—which passed through many hands before ending up in his pocket—both troubling and dishonest.

All this led to the employer losing trust in Mr. Breen, and their confidence in him was irreparably damaged. The final straw for the employer came when it learned that a significantly large Russian contract for $11,500,000.00 was authorized without prior due diligence, legal review, or board approval, and without appropriate protective language in the contract. This ultimately cost the employer a significant amount to rectify. Mr. Breen became aware that the contract had been approved but chose not to notify the board. He was challenged on cross-examination about his failure to communicate this to the board:

Q And there are a lot of things we can disagree but if in fact you did not [know] that it was an unauthorized contract being signed and you find out about it on January 15th. There is no rational explanation for not informing the board.

A That's your opinion sir.

Q Because you knew you had an obligation to inform the board.

A I did.

Q And you chose not to.

A I did.

Q And that's a serious transgression.

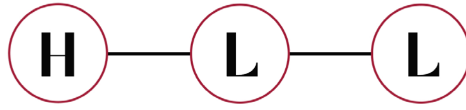
A I chose to take an alternative path.

Ultimately, Mr. Breen's alternative path led to the termination of his employment.

The misconduct was so egregious that the court found the employer had cause to terminate Mr. Breen. The court specifically considered Mr. Breen's attempts to hide his misconduct from the employer and the duties and obligations associated with his position as CEO. Therefore, the wrongful dismissal action was dismissed.

With regards to the counterclaim by his employer, the court found Mr. Breen personally liable for:

- The "gifts" received in the amounts of $25,974.89 USD, $30,000 USD, and $110,250 CAD;
- The fraudulent transactions he knew or ought to have known were fraudulent in the amounts of $78,000 USD and $35,000 USD;
- $200,000 CAD for the damages the employer experienced when he breached his fiduciary duty causing the delay in the protection on the Russian contract.
- Punitive damages totaling $50,000



This case is unusual due to the finding of liability against the employee. Commencing a wrongful dismissal action is not without risk when there is actual misconduct warranting dismissal. It's noteworthy that the employer commenced its counterclaim against Mr. Breen only after he filed his wrongful dismissal action.

c) The Cost Consequences of an Ill-Advised Counterclaim

- ***Giacomodonato v. PearTree Securities Inc.***

This case stands in direct contrast to the *Breen* case above. Here, the employer incurs significant costs because of a decision to counterclaim against a dismissed employee.

After the employee commenced a wrongful dismissal action, the employer brought a counterclaim for $1,599,000 for alleged breach of a restrictive covenant and $1 million in punitive damages. The alleged breach occurred when the employee began working for a competitor nine months after his termination. Three days before the end of the trial, PearTree abandoned both its claims for general and punitive damages. Instead, it requested that Mr. Donato be required to disgorge all his employment income earned for the two years following PearTree's termination of his employment.

Upon the conclusion of the 10-day trial, the employee was awarded $10,000 in punitive damages on top of the award for wrongful dismissal. Justice Centa also found that the restrictive covenant was unenforceable.

The parties were unable to agree on costs, which brought them back before Justice Centa. Justice Centa considered, inter alia, the costs the plaintiff employee had to bear in defending himself against a million-dollar damages claim, which was abandoned during the trial, and the conduct of the employer during the trial, such as producing additional disclosure a month before trial. Justice Centa found that the employer should pay costs on a partial indemnity basis in the amount of $830,761.75.

Justice Centa commented on the employer's litigation strategy finding the counterclaim to be completely without merit:

> [28] Fifth, this is an appropriate case to award costs to discourage frivolous and strategic claims. In my view, PearTree's counterclaim, including its claim for punitive damages, was obviously meritless.

> Employers who owe money to employees should be discouraged from engaging in tactical litigation designed to discourage employees from pursuing their rights and entitlements.

In *Breen* the court set an example for employees who bring unfounded wrongful dismissal claims when they themselves had engaged in serious misconduct. In this case, the employer paid a penalty in costs having "invited this litigation" and conducting the litigation in an "unforgiving, scorched earth, and bare-knuckle manner".

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