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EMPLOYMENT NEWS

THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

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SUPREME COURT OF CANADA DECLARES AMBIGUITY IN EMPLOYMENT CONTRACT TO BE RESOLVED IN FAVOR OF EMPLOYER

In a decision released earlier this year, the Supreme Court of Canada interpreted two contradictory provisions in an employment contract to determine the appropriate approach for assessing damages.

The 36 month contract provided that the employer could terminate the agreement in several ways, including, without notice if the employee "acts in a manner which is detrimental to the reputation and well being" of the employer, or without notice to the employee effective after the commencement of the 19th month of the term upon three months notice.

The employer terminated the employee 16 months into the contract without notice or pay in lieu thereof.

The Court referred to the principal that "where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff and the least burdensome to the defendant." The correct approach is not to restore the non-breaching party to the position they would have been in but for the repudiation, but rather the position they would have been in had the contract been performed.

Having found that the employee had not engaged in any act "detrimental to the reputation and well being of the employer", the employer had breached the contract. However, the Court refused to restore the decision of the trial judge, who awarded to the employee the balance of the 36 month term.

The Supreme Court held that the employee was entitled to three months notice upon expiry of the 18th month, being the minimum guaranteed benefit under the contract because one is entitled to assume that the employer would follow the least expensive course of action available.

FORMER DIRECTOR LIABLE FOR TRIAL COSTS OF FORMER EMPLOYEE

The Honourable Madam Justice Backhouse has found the former CFO of an employer liable to reimburse a former employee for his entire costs associated with the trial of his action against the employer. This arose as a result of the failure of the CFO to advise the Court or the plaintiff that the defendant employer had been wound down, had no officers or directors, and was under the direction of its parent company also with no directors or officers or assets by which it could pay a judgment.

The employee successfully sued his former employer for wrongful dismissal. However, he was unable to collect upon the judgment. The former CFO had been the corporate representative on behalf of the employer at the trial of the action and had never mentioned the status of the employer. The employee then commenced a second action alleging liability of another corporation under the common employer doctrine, as well as seeking recovery against former directors personally. Backhouse J. wrote: "In my view, this constitutes unfairly prejudicial or oppressive conduct and the plaintiff's interests as a creditor were unfairly disregarded." The employee was awarded costs incurred by the first trial, plus prejudgment interest.

This decision, while under appeal, implies some level of duty on persons in these situations to advise plaintiffs of the lack of potential recovery prior to engaging in a full blown trial.

There was further liability upon other former directors for certain wages and commissions pursuant to s.131 of the *Ontario Business Corporations Act* which holds directors liable for up to six months wages under certain circumstances, which amounted to the entire judgment from the prior action.

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