

Employment Law Update – January 2016

In the last few months of 2015 there were six decisions that considered issues relevant for those practicing employment law. A decision from our Court of Appeal reviewed the principles applicable to determining whether an employee is a fiduciary, what the duty of fidelity is comprised of and the remedies available for breach of this duty. A British Columbia Supreme Court decision provided an example of how breach of the implied duty of fidelity and good faith can be used to establish just cause. The remaining four decisions, all from the BCSC, considered the law with respect to entitlement to bonus during the period of notice, a claim by an employee for bad faith damages and for damages for breach of the *Privacy Act*, the principles applicable to terminations during probationary periods of employment and whether damages are a potential remedy absent a wrongful dismissal.

Breach of duty of fidelity as basis for cause

The British Columbia Court of Appeal considered an allegation by an employer of breach of fiduciary duty by an employee and the remedies available for breach of an implied obligation of fidelity in its decision in *Zoic Studios B.C. Inc. v. Gannon*¹. This was an appeal by the employer from a finding by the trial judge that the employee was not a fiduciary and the refusal to order an equitable accounting for breach of fidelity and loyalty. The Court of Appeal found that the trial judge did not err in finding that the employee was not a fiduciary, although she was a “near fiduciary”. The Court of Appeal also held that in appropriate circumstances the court may order an equitable accounting when damages are not an adequate remedy for breach of contract.

The dismissed employee was one of two senior employees at the BC location of the employer. The case revolved around efforts that she had made to recruit work for her personal benefit along with another employee of the defendant. In assessing whether the dismissed employee was a fiduciary, the trial judge began with the principles enunciated in *Frame v. Smith*². Those principles from the dissenting reasons were as follows:

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

The trial judge concluded that the plaintiff was not a fiduciary. The employer appealed that decision with their main assertion being that the trial judge focused on whether the employee had the authority to bind the employer and/or whether her authority was unfettered, and failed to consider whether she exercised discretionary power to affect the employer’s practical interests. The Court of Appeal dismissed this

¹ 2015 BCCA 334

² [1987] 2 S.C.R. 99 at para. 60

aspect of the appeal stating that the question of the existence of a fiduciary obligation is primarily a question of fact and that the facts found were supported on the evidence.

The second ground of appeal related to the failure of the judge to award an equitable accounting for the breach of the duty of fidelity and loyalty. No appeal was taken from the finding that the employee had breached the duty of fidelity and good faith. In describing the duty of fidelity and good faith the trial judge held that employee owed various duties to their employer, stating as follows:

[186] It is trite law that every employee owes his or her employer an implied contractual duty of fidelity, good faith and loyalty. The content of this duty was outlined by Fisher J. in *McMahon v. TCG International Inc.*, 2007 BCSC 1003 at para. 51:

[51] The implied duty has been held to include the following:

- (1) To serve his employer faithfully;
- (2) Not to compete with his employer;
- (3) Not to reveal confidential information;
- (4) Not to conceal from his employer facts which ought to be revealed;
- (5) To provide full-time service to his employer.

The allegations against the dismissed employee were that she breached her obligations to the employer by competing with the employer, recruiting employees and misusing confidential information. With respect to damages for breach of fidelity, the trial judge stated the applicable law as follows:

[365] To be awarded damages for the [respondents'] breach of contract, the [appellant] must prove on a balance of probabilities that the [respondents] caused their loss: *Martel Building Ltd. v. Canada*, 2000 SCC 80 at para. 201. The [respondents] must be the "effective or dominant" case of the loss: H.G. Beale et al. eds., *Chitty on Contracts*, 30th ed. vol. 1 (London, UK: Sweet& Maxwell, 2008 at 1617)

The trial judge concluded that the dismissed employee did not cause the loss of a particular contract and went onto consider whether they caused a loss of opportunity. Quoting from the decision in *Pan-Asia Development Corp. v. Smith* (1996)³ at para. 61:

Where the plaintiff proves that, but for the defendant's conduct, the plaintiff had a reasonable probability of realizing an advantage of real monetary value, the court must attempt to estimate the value of the lost chance and award damages on a proportionate basis, by discounting the value of the chance by the improbability of its occurrence.

Applying these principles the judge awarded damages for loss of opportunity valued at 5% of the potential damages. The respondents appealed this finding. The Court of Appeal found no error in the

³ 31 C.C.L.T. (2d) 82 (B.C.S.C.) at para. 61

analysis conducted by the trial judge, quoting from the decision of Mr. Justice Thackeray, then of the British Columbia Supreme Court in *Graybriar Industries Ltd. v. Davis & Co.*⁴ where he stated:

I find that the law is clear and that I must make an award if it is established that the claim is not merely “fanciful” but establishes as a possibility that there is a loss of a chance to benefit.

These comments were expressly adopted by the Court of Appeal in *Trinden Enterprises Ltd. v. Ramsay*⁵.

The trial judge concluded that the defendant had been unjustly enriched by their actions but notes that any damages that would be received for the unjust enrichment will not be substantial, noting that neither the detriment suffered by the employer or the benefit experienced by the employee was significant. The basis of the employer’s appeal was in part that the judge erred in refusing to order an equitable accounting for the employee’s breach of the duty of fidelity and loyalty. The employer asserted that the issue was not whether its loss was caused by the employee’s conduct but “whether it was just and appropriate, in all the circumstances, to order an accounting given the nature of the relationship between the parties and the character of the misconduct.” They further alleged that the employee was a near fiduciary and that they had been allowed to retain “virtually all of the benefit of violating their employer’s trust.” They said that an accounting was required to determine the amount of the benefit so that it can be disgorged.

The Court of Appeal began its analysis with a review of *Strother v. 3464920 Canada Inc.*⁶ in which the court discussed the purposes of equitable remedies in the context of a breach of fiduciary duty. Those purposes are two-fold. Prophylactic, the purpose of which is to dissuade fiduciaries from acting in their personal best interests by requiring disgorgement, and restitutionary which seeks to ensure that the beneficiary is given the benefit it lost by the breach. The Court of Appeal held that in appropriate circumstances the court may order an equitable accounting when damages are not an adequate remedy for breach of contract. Two previous decisions of the Court of Appeal⁷ were noted to support this proposition with the principle being that an accounting should be ordered to prevent a wrongdoer from profiting from his actions. The Court concluded that the judge erred in failing to exercise her discretion in considering whether to order an accounting. The case was remitted to the trial judge for consideration of whether an equitable accounting should be ordered due to the respondents’ breach of the duty of fidelity and loyalty by competing with the appellant.

Breach of the duty of fidelity and good faith as a basis for termination was also considered in *Meszaros v. Hendry, Swinton, McKenzie Insurance Services (Westshore) Inc.*⁸. In this case Mr. Justice Macaulay considered the claim for damages for wrongful dismissal of the dismissed employee. The employer alleged that it dismissed the plaintiff for cause, specifically relating to the plaintiff referring clients to rival brokerages. The court found that the conduct of the employee did constitute just cause, noting that he breached his common law duty of good faith and fidelity to his employer, an implied term of every contract of employment. Mr. Justice Macaulay referred to *McMahon* noting that an employee violates the duty of fidelity where he or she reveals confidential information or assists a competitor during the term of employment.

⁴ (1990), 46 B.C.L.R. (2d) 164 (S.C.) affirmed 72 B.C.L.R. (2d) 190 (C.A.)

⁵ 2009 BCCA 125 at para. 22.

⁶ 2007 SCC 24

⁷ *Joslens Canada Ltd. v. Gibsons Studios Ltd.*, 1999 BCCA 273; *Smith v. Landstar Properties Inc.*, 2011 BCCA 44

⁸ 2015 BCSC 1423

The employer also alleged that other aspects of the plaintiff's conduct raised concerns about his honesty or integrity. The court noted that the duty of fidelity imports into contracts of employment the notion that an employee will serve his employer honestly. In concluding that the employer had met the burden of establishing just cause for the termination of the plaintiff Mr. Justice Macaulay noted as follows:

[255] Some of the incidents discussed above, specifically Mr. Meszaros' participation in the mortgage kick-back scheme, his failure to disclose that scheme to the adjuster investigating the Dosanjh insurance claim, and his omissions or misrepresentations in the course of his referrals of Ms. Harnett and Mr. Roberts tarnish his integrity. That discreditable conduct also violates the plaintiff's trust relationship with and duty of fidelity to HSM, since the conduct relates to or arose in the course of Mr. Meszaros' employment with the defendant.

Mr. Justice Macaulay's conclusions were as follows:

[256]...In the course of referring clients to Ms. Paulsen, in particular, and contrary to the terms of his employment, Mr. Meszaros forwarded confidential HSM information without the knowledge or permission of his employer and, in some cases, forward client information without first obtaining permission from the client. He actively assisted Ms. Paulsen in brokering deals. As well, contrary to Mr. Meszaros' duty of good faith and fidelity, he acted dishonestly in a manner that placed his own interests ahead of his employer.

This decision provides an example of how the implied duty of fidelity and good faith can be used to formulate the basis of a with cause termination.

Entitlement to Bonus during period of Notice

The decision in *McLeod v. Lifelabs BC LP*⁹ highlighted the difficulty faced by employers when trying to limit entitlement to bonus during a period of notice following termination. The plaintiff in *McLeod* had been employed in various capacities with the defendant over a period of approximately 25 years. At the time of her termination her role involved providing supervisory and management support to managers. She had no direct reports. She was 50 years old at the time of termination. The plaintiff's employment was on Vancouver Island and despite the limitations that this placed on her ability to find alternate employment it was the plaintiff's goal to remain on the island and she had therefore restricted her job search to the island. The trial judge found that reasonable notice in the circumstances was 18 months.

A component of the plaintiff's compensation was an annual bonus. The plaintiff's salary at the time of termination was just under \$110,000. Historically her bonus was approximately 10% of her salary and in particular in the year prior to her termination it was just over \$11,000. The employer argued that the plaintiff was not entitled to any compensation during the period of notice for the loss of the bonus, relying on the wording of their STIP contract. That contract provided as follows:

TERMINATION OF EMPLOYMENT

In the case of termination of employment due to voluntary resignation up to and including the pay-out date in January 2015, all rights to the STIP award will be forfeited. In case of

⁹ 2015 BCSC 1857

termination of employment due to retirement or involuntary termination, the STIP award will be prorated based on the actual number of full months working during the 2014 fiscal year, provided the participant had completed at least three (3) full months of employment during the 2014 fiscal year. An employee who is terminated in the 2014 fiscal year will have no eligibility for a STIP award in any future fiscal year.

The plaintiff argued that this wording did not eliminate her right to compensation for the lost bonus during the period of notice. The plaintiff argued that if the defendant intended that the entitlement to STIP should end with a wrongful termination, the language had to be clear and unambiguous and leave no doubt that a wrongful termination extinguished the right to a bonus. The plaintiff argued that in the absence of express language ousting the presumption that the plaintiff is entitled to whatever benefits she would have received during the proper notice period, she should receive her future STIP benefits.

The trial judge accepted the plaintiff's argument and found that the language of the plan was not clear enough to eliminate the plaintiff's entitlement to whatever benefits she would have received during the proper notice period. She then went on to consider whether the plaintiff should receive the bonus during the notice period based on a determination of whether the bonus was an integral part of the plaintiff's compensation. He referred to the decision in *Gillies v. Goldman Sachs Canada Inc.*¹⁰ in which the following four factors were used to determine whether the bonus was an integral part of the plaintiff's compensation:

1. A bonus was received each year although in different amounts;
2. Bonuses were required to remain competitive with other employers;
3. Bonuses were historically awarded and the employer had never exercised his discretion against the employee;
4. The bonus constituted a significant component of the employee's overall compensation.

Madam Justice Duncan found that the facts in the plaintiff's case established that according to these factors the bonus was an integral part of the plaintiff's compensation and awarded her damages based on the average of the last five years bonus.

Claim for Bad Faith Damages and Breach of Privacy Act

Madam Justice Flemings considered a claim for bad faith damages as well as one for damages for breach of the *Privacy Act* in the case of *TeBaerts v. Penta Builders Group Inc.*¹¹ This case involved the termination of an 11 year employee for cause. At the time of her termination the plaintiff was a project consultant and account manager for the defendant. The defendant based the at cause dismissal on the following:

1. The plaintiff intentionally deleted files from the employers servers out of malice towards the employer and her desire to prevent them from being able to access or use them;
2. The plaintiff was then dishonest about the reasons for the deletions and the plaintiff occupied a position of great trust within the company. Her actions not only destroyed the trust of the

¹⁰ 2000 BCSC 355

¹¹ 2015 BCSC 2008

employer in her but also the harmony necessary for the running of a small company with few office employees; and

3. That the plaintiff breached the duty of loyalty and good faith that she owed to the company by advising her mother to seek a recruiter for her father, another employee of the defendant, to help him find alternate employment.

The defendant alleged that there was no alternative to dismissal given the seriousness of the misconduct and its impact. Madam Justice Fleming disagreed with the employer and found just cause to not exist. She found the employer's decision to summarily dismiss the plaintiff to be significantly disproportionate to her conduct, pointing to the following factors:

1. The defendant's decision to not investigate its concerns about the plaintiff's conduct, or to consider any disciplinary measures short of dismissal;
2. The plaintiff's long term employment;
3. Her unblemished employment record;
4. The defendant's recent recognition of her valuable contribution to the company through performance bonuses and a special bonus; and
5. The continuation of the employment relationship and the plaintiff's engagement in critical accounting tasks for several days after the events the employer says destroyed his trust in the plaintiff.

The employer had discovered the second basis alleged for the cause termination by reviewing emails on the plaintiff's work computer. This led to the claim by the plaintiff for breach of the Privacy Act. The claim was based on section 1 of that Act which provides in part as follows:

- (1) It is a tort, actionable without proof of damages, for one person, wilfully and without a claim of right, to violate the privacy of another.
- (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.
- (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

Madam Justice Fleming noted that the *Privacy Act* did not provide for an absolute right to privacy, rather the nature and degree of privacy that is protected is "that which is reasonable in the circumstances, giving due regard to the lawful interests of others". To determine if there has been a breach of privacy, the "nature, incidence and occasion of the act" and the "relationship between the parties" must be considered. She went on to note that the case law dealing with this statutory tort is not well developed. She concluded that the *Privacy Act* was not breached after considering the plaintiff's subjective expectation of privacy, that the employer owned the computer and workplace practices which involved other employees being on the plaintiff's computer in the past.

The analysis of the claim for bad faith damages and punitive damages confirmed that application of the principles enunciated in *Honda*¹² continue to guide the analysis. Madam Justice Fleming confirmed that there is no longer a distinction between moral or bad faith damages and aggravated damages. An employer has an obligation of good faith and fair dealing in the manner of dismissal and where they fail to act in accordance with this obligation, an award of aggravated damages may be appropriate. However, a plaintiff must also demonstrate that the employer's unfair or bad faith conduct caused a loss that should be compensated, such as mental distress or psychological damage beyond the normal distress and hurt feelings resulting from any dismissal. She also confirmed that punitive damages are only awarded in exceptional cases where the conduct at issue is "harsh, vindictive, reprehensible and malicious" as well as "extreme in its nature". She declined to award the damages in the circumstances of this case.

Termination During Probationary Period of Employment

In a termination during a probationary period of employment different considerations apply to determine whether the termination is wrongful or not. In the decision of *Langford v. Carson Air Ltd.*¹³. Chief Justice Hinkson had the opportunity to review the applicable principles. The self-represented plaintiff in *Langford* had been hired as a pilot with the defendant. During the probationary period of her employment she was terminated. The employer took the position that the plaintiff failed to fit in with other employees and that the plaintiff failed to take responsibility for difficulties that arose during her employment as the basis for her termination during the probationary period. The employer was not critical of the plaintiff's skill or abilities as a pilot. Chief Justice Hinkson conducted a thorough review of the law regarding dismissal of probationary employees, concluding that the defendant made a reasonable business decision to terminate.

Chief Justice Hinkson's review of the law regarding terminating probationary employees began with the decision of Madam Justice Rowles in *Jadot v. Concert Industries Ltd. (1997)*¹⁴. The decision of the trial judge was upheld as was the reasoning behind it. The trial judge concluded that during the probationary period the employer has an implied contractual right to dismiss a probationary employee without notice and without giving reasons provided the employer acts in good faith in the assessment of a probationary employee's suitability for the permanent position. She quoted the portion of the trial judge's decision concluding that the employee was not wrongfully dismissed. That portion of the judgment was as follows:

The purpose of a probationary period is not simply a time to consider the technical skills of a potential permanent employee. It is an opportunity for the employer to assess the character of the applicant and determine if the employer [sic] will work in harmony with the organization if hired permanently...

The court found that it was not bad faith to have not given the dismissed employee an opportunity to respond to general concerns about her compatibility with the employer's organization and concluded that the defendant took reasonable steps and reached the opinion in good faith that the plaintiff was not compatible with the organization.

¹² 2008 SCC 39

¹³ 2015 BCSC 1458

¹⁴ [1998] 44 B.C.L.R. (3d) 327 (C.A.)

In applying this decision Chief Justice Hinkson stated that the termination of a probationary employee during his or her probationary period can be based on a decision that the employee is unsuitable for the job. Such a conclusion must be a reasonable one and properly motivated, reached only after the employee has been given a fair opportunity to demonstrate his or her suitability.

No Damages without Wrongful Dismissal

The court considered an application for summary judgment in the case of *Damani v. Stuart Olson Construction Ltd.*¹⁵. The case involved the without cause termination of an employee. The employee had complained of overtime hours and the failure to compensate for the overtime hours worked and shortly thereafter was terminated. The plaintiff had brought separate proceedings under the *Employment Standards Act* for payment of the overtime hours. A hearing had taken place and the Tribunal reserved judgment. In the Court action the plaintiff claimed that she was not limited to the notice provided for in the contract of employment and in addition claimed aggravated and punitive damages.

Madam Justice Bruce reviewed the law with respect to the ability of an employer and employee to contract out of the requirement to provide reasonable notice. She reviewed the decision of *Brown v. Utopia Day Spas and Salons Ltd.*¹⁶ where the principle that absent unconscionability an employer may displace the presumption of reasonable notice in an employment contract. She quoted from *Brown* as follows:

The common law presumes that a contract of employment runs for an indefinite term, terminable on reasonable notice of termination. A contract that clearly specifies some other period of notice which [sic] either expressly or impliedly rebuts the presumption. *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at 998 – 999 [*Machtinger*] as cited in *Miller v. Convergys CMG Canada Limited Partnership*, 2013 BCSC 1589, at paras. 39 and 42.

Absent unconscionability, an employer can make contracts with employees that “referentially” incorporate the minimum notice periods in the *ESA*. Such contractual notice provisions are enough to displace the presumption that the contract is terminable without cause only on reasonable notice. *Machtinger* at 1004 – 1005. See also: *University of British Columbia v. Wong*, 2006 BCCA 491[*UBC*]

Madam Justice Bruce found the clause in the plaintiff’s employment contract limiting the severance payable to be enforceable. She noted that although the notice clause was long, it was not ambiguous. The clause clearly limited the amount payable as severance and addressed the claim for loss of benefits and bonus.

With respect to the plaintiff’s claim for aggravated and punitive damages she reviewed the principles applicable to the claim, summarizing the decision in *Honda Canada Inc. v. Keays*¹⁷. At para. 22 she stated as follows:

¹⁵ 2015 BCSC 2322

¹⁶ 2014 BCSC 1400 at paras. 16 - 17

¹⁷ 2008 SCC 39

[22] Aggravated and punitive damages arising out of a dismissal flow from the cause of action for wrongful dismissal which is based on a failure to give the required notice or pay in lieu of notice... Damages that flow from the wrongful dismissal may thus include compensation for the manner of the dismissal if the employer engages in conduct that is unfair or amounts to bad faith: *Honda Canada* at para. 57. This is because an employer owes a duty of good faith and fair dealing to its employees in regard to the manner of dismissal: *Honda Canada* at para. 58.

However in the plaintiff's case, as there was no proven breach of contract there can be no aggravated damages awarded for breach of the duty to act in good faith in respect of the alleged breach of contract. Madam Justice Bruce notes the possibility of an allegation that the employer breached the duty of good faith in the employment relationship independent of any wrongful dismissal stating that "there may be an implied duty of good faith in the employment relationship that provides an independent cause of action based on breach of contract." In this case the evidence did not support such a claim.

Conclusion

These decisions demonstrate what appears to be a new trend in focusing on the duty of fidelity and good faith in attempting to establish just cause for terminations and that *Honda* continues to be the law in considerations of claims for aggravated and punitive damages. The review of the principles applicable for termination of probationary employees by Chief Justice Hinkson is of great benefit and the Court of Appeals analysis of the potential for equitable remedies in employment law matters should be kept in mind by all facing similar circumstances. In terms of how these decisions may impact the way in which lawyers deal with employment law cases, the focus on breach of fidelity and good faith may change the manner in which just cause is plead and if it is plead counsel should remember to plead the equitable remedy. The *Damani* decision may lead to creative counsel finding ways to establish an entitlement to aggravated or punitive damages absent a wrongful dismissal.