


Another Victory

The kids are back in school, the mornings are nippy and the leaves are turning - autumn has arrived!

Recently Juliet Knapton won her first significant victory. The case, which was widely reported in the media, involved a real estate agent who failed to make full disclosure to her clients.

Mediation allows parties to a litigation to resolve their issues in a friendlier and more cost effective manner. Paul Muirhead has begun offering his services as a mediator. For more information please see page 2. Also feel free to contact Paul for information about this method of alternative dispute resolution and to find out more about his mediation services.

Over the last little while, the Supreme Court of Canada has ruled in several cases involving wrongful dismissal. Two of the key issues considered by the Court are an employee’s duty to mitigate his/her damages (see page 2) and how damages should be assessed in situations where the employer has acted in bad faith in the dismissal of an employee (see page 3). 

Complete Disclosure in Real Estate is Key

Our lawyers continue to do very well in their pursuit of justice. The most recent legal victory belongs to Juliet Knapton, who successfully defended her homeowner clients against Royal LePage.

The Facts

Temple and Donovan listed their Ottawa home with Royal LePage. The couple had completed substantial renovations, which according to their real estate agents, the Lindsays, had increased the house’s value to between \$338,000 and \$340,000.

Despite this initial assessment, this same agent recommended that the house not be listed for more than \$330,000. The sellers reluctantly agreed to list the house for \$329,500.

Two weeks after the house was listed, and after rejecting lower offers, the real estate agent informed the owners that she had “a serious offer” and that “the home could be sold that night.”

The real estate agent presented the offer of Paul Williams. The offer was \$315,000, an amount that the sellers had rejected earlier. A heated discussion ensued. After about an hour and a half, the real estate agent phoned Kelly, the buyer’s real estate agent. The agents agreed to a selling price of \$325,000, which was not in accordance with the sellers’s instructions. More heated discussion ensued.

At 11:00 p.m., the sellers finally acquiesced and sat down to sign the many pages involved in the agreement. Their real estate agent quickly handwrote in the following: “The buyer, Paul Williams is the spouse of Kelly Williams - the Royal LePage team realty representative”. In response to the sellers’ question to this addition, their agent said that “she did not know Kelly Williams” but that she thought she might work for another Royal LePage real estate representative.

The homeowners did not have any con-

cerns about the fact that the buyer was married to a real estate representative and proceeded to sign the documents.

What later came to light was that Kelly Williams was the agent actually handling the purchase on behalf of her husband and that she in fact worked with the Lindsays in their Ottawa office.

The Real Estate Council of Ontario’s Code of Ethics and the Real Estate Business Brokers Act require disclosure of any interest that an agent may have in a sale. The interest must be disclosed “at the earliest practicable opportunity” and “in writing” and “prior to any offer being submitted”. This was not done in this case.

At the crucial moment of deciding whether or not to accept the offer, all of the cards were not on the table. The disclosure was ambiguous at best and made too late - well after the crucial decision moment had passed.

The Fiduciary Duty

The fiduciary duty is one of the most important legal relationships that exist. In

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New Mediator in Town: Paul Muirhead

A mediator assists the people involved in a dispute to communicate and negotiate with each other in a constructive manner. The Ottawa legal system has benefited from mandatory mediation for 10 years. Statistically, well over 90% of Ontario lawsuits settle before the trial stage.

Recently, one of our litigators, Paul Muirhead, completed the certification process to act as a rostered mediator with the Mandatory Mediation Program.


Paul has a unique set of skills to bring to the mediation table. Paul's law practice is diverse. He has extensive trial experience, both jury and non-jury, with over 50 trial

and appeal appearances at the Superior Court of Justice. He also has experience conducting appeals at the Court of Appeal and Divisional Court.

One of Paul's key attributes is his ability to effectively communicate difficult points.

Paul has lectured at Algonquin College, at the University of Ottawa's Law School and its School of Management and at the Law Society of Upper Canada's former Bar Admission's Course. He has also written and lectured on medical ethics both locally and nationally. He obtained his Master of Laws degree with a Specialization in Medical Ethics from McGill University.

Paul is an experienced litigator and has "fought it out in the trenches" but he has also stepped back from the battles to study and analyze the legal process.

Anyone who has worked with Paul knows that he is thoughtful, fair and pragmatic. He has the ability to see through a conflict and craft a resolution. With his training, experience and after participating on hundreds of mediations, Paul understands people, he understands the law and he knows that it is the approach and the skills of the mediator that will facilitate the parties in coming to a mediated agreement. 

How Far Must an Employee Go to Mitigate?

An employer who decides to terminate the services of an employee, except in cases where there is just cause, must provide the employee with a reasonable notice period or damages in lieu of that notice period.

It is not uncommon for an employee to be terminated without having been paid damages by the employer or having been paid insufficient damages. In such cases, the employee will have to consider suing the former employer for wrongful dismissal. In addition to any legal action the employee may decide to take, the employee does have an obligation to make a reasonable effort to mitigate his or her damages by finding an alternate source of income.

An interesting question that was recently answered by the Supreme Court of Canada is whether this duty to mitigate includes returning to work for the employer who fired you.


Evans had worked as a business agent for the employer for more than 23 years. Following the election of the employer's new executive, Evans was sent a letter of termination. The two sides then entered into negotiations for a compensation package for Evans. Five months later, the employer requested that Evans return to his employment to serve out the balance of his 24 month notice period. Evans agreed to return but only if the employer rescinded its termination letter, something the employer was not prepared to do.

The Court of Appeal found that Evans had failed to mitigate his damages by not accepting the employer's job offer. The Supreme Court of Canada agreed with this finding stating, "...the courts have correctly determined that in some circumstances it

will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to re-employment, requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and *not* to penalize the employer for the dismissal itself."

The barriers to re-employment would include such things as whether the working atmosphere would be one of hostility, embarrassment or humiliation. Other elements which must be considered include any stigma and loss of dignity, the nature and conditions of employment and whether those conditions are substantially different, that the personal relationships involved are not acrimonious, the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or after the termination.

The Supreme Court recognized that an employee may find it difficult to continue working for the employer. However, the Court also recognized that "it is an accepted principle of employment law that employers are entitled (indeed encouraged) to give employees working notice and that, absent bad faith or other extenuating circumstances, they are not required to financially compensate an employee simply because they have terminated the employment contract."

In Evans' case, the Court found that the relationship between he and his employer was not seriously damaged and the terms of employment were the same. Therefore it was not objectively unreasonable for him to return to work to mitigate his damages. 

Wrongful Dismissal Damages Revisited

Recently, Canada's top court clarified and redefined some important aspects of the law of damages in the context of wrongful dismissal. The case was *Honda Canada Inc. v. Keays*, 2008 SCC 39. Earlier, this case had made headlines because of the \$500,000 punitive damage award allowed by the trial judge who heard the case.

The Facts

The case involved Kevin Keays, who had spent his adult years working for the Honda plant in Alliston, Ontario. In 1997, after 11 years with Honda, Keays was diagnosed with chronic fatigue syndrome. He stopped working and began receiving disability benefits. After a year, the benefits were discontinued, since the insurer felt that Keays was ready to return to work.

Upon his return to work he was placed into a program that Honda had instituted for employees who needed to absent themselves from work on a regular basis because of disability. However, when Keays began to miss work more frequently, his employer became concerned and asked him to meet with their occupational medical specialist. Despite his initial willingness to do so, Keays ultimately refused on the advice of his lawyer.

Keays subsequently missed a week of work. When he returned to work, he was given a letter by the employer summarizing their earlier meeting with him, requesting that he see their specialist and indicating that his employment would be terminated if he did not. When he continued to refuse they terminated his employment. Keays sued for wrongful dismissal.

The Lower Court Decisions

The trial judge concluded that Keays had been wrongfully dismissed and that he had been entitled to 15 months notice. Based on what he described as the "egregious bad faith displayed by Honda in the manner of this termination and the medical consequences flowing therefrom" the trial judge increased the notice period by an additional nine months, to 24. In addition, the trial judge found that Honda was part of a con-

spiracy to interfere with Keays' medical treatment and on this basis awarded punitive damages in the amount of \$500,000.

The Ontario Court of Appeal essentially upheld the trial judge's findings and award. It did however, reduce the punitive damage award to \$100,000.

The Supreme Court of Canada

Although the Supreme Court agreed that Keays had been wrongfully dismissed, they found that the trial judge had made a number of significant overriding and palpable factual errors, such that most of the award could not be supported.

As mentioned above, this case provided Canada's highest court with the opportunity to address some of the key issues which should be canvassed in a wrongful dismissal case.

The Notice Period

They addressed was the factors which should be considered in determining the length of the notice period including:

- Character of the employment.
- Length of service.
- Age of the employee.
- Availability of similar employment, having regard to the experience, training and qualifications of the employee.

The Court also reiterated that no one factor was more significant than another and therefore none should be given any disproportionate weight.

Damages for Bad Faith Conduct

The second point involved the "Wallace damages". Wallace was a 1997 Supreme Court of Canada decision that set out the principle that an employee is entitled to additional compensation if there is bad faith conduct in the manner of dismissal. Since that decision, Canadian courts have been awarding Wallace damages by simply extending the amount of notice a dismissed employee is entitled to. The Court in the Honda case referred to this method of cal-

culating damages as "an arbitrary extension of the notice period."

The Court has now clarified that if the employee can prove that the manner of dismissal caused him/her mental distress and that this was in the contemplation of the parties, those damages will be compensated through an award that reflects the actual damages suffered. In other words, rather than simply increasing the notice period, bad faith conduct should be compensated in the same way as other damages.

The Court went on to provide some examples of what would constitute bad faith conduct, including:

- attacking the employee's reputation by declarations made at the time of dismissal,
- misrepresentation regarding the reason for the decision, or
- dismissal meant to deprive the employee of a pension benefit or other right.

Punitive Damages

A third issue canvassed by the Court was in respect of when punitive damages should be awarded. The Court had this to say, "Damages for conduct in the manner of dismissal are compensatory; **punitive damages are restricted** to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own." (Emphasis added.) The Court further stated that courts should resort to punitive damages only in exceptional cases.

With respect to a punitive damage award, the court also indicated that one must ask whether "the allocation of punitive damages was necessary for the purposes of denunciation, deterrence and retribution," in cases where damages for conduct in dismissal are awarded.

The Decision in Honda

The Supreme Court agreed that Keays had been wrongfully dismissed and that the award of 15 months notice should be maintained. However, the evidence did not sup-

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port the trial judge's findings that Honda had behaved egregiously when it dismissed Keays. Rather, its request for a meeting between Keays and its medical specialist was normal in the circumstances. For this reason, the additional nine months was disallowed. For similar reasons, the punitive damage award was also disallowed.

The Lessons

This case demonstrates that in situations where an employee's health concerns must be accommodated, that all parties

must participate. Therefore, if you are an employee who is experiencing a period of disability it is important to cooperate with your employer's reasonable requests for medical information.

If you are an employer you should always strive to treat your employees fairly and with dignity. This does not mean, however that a proactive approach to getting employees back to work will be seen negatively by the courts.

If you require assistance or further information concerning employment law please contact our firm. 

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such a relationship, the fiduciary owes a duty of extreme loyalty to his or her principal. The fiduciary must not put his or her personal interests before the duty owed to the principal.

The Supreme Court of Canada set out the characteristics of a fiduciary relationship in the case of *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

"Relationships in which a fiduciary obligation has 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 Realtor seller relationship is one where a fiduciary duty arises. In fact, the Ontario Court of Appeal has specifically recognized that "... listing agents and brokers,...are fiduciaries."

The Decision

The trial judge in this case indicated that he had no hesitation in concluding that a fiduciary relationship existed between the sellers and their real estate agent. He went on to find that the disclosure made by the real estate agent in the agreement of purchase and sale was too ambiguous, since it did not reveal that Kelly Williams was the agent making the offer on behalf of her husband. The Real Estate Council of Ontario came to a similar conclusion after conducting an investigation of the complaint lodged against the two real estate agents. The Council found that the disclosure was not properly made in accordance with its policies.

The trial judge further found that had the sellers known that the agent making the offer worked out of the same office as their own agents and was seeking to purchase the property for her husband, they might have chosen to seek independent advice. Since the facts not disclosed were material facts, whether the sellers would have done anything differently was irrelevant.

The result of this breach of their fiduciary obligation was that the sellers' real estate agents were forced to forfeit her entire commission.

Royal LePage has appealed the decision. The appeal will be heard in November. 



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