

# Dismissal itself is not unfair

## *Unfairness or bad faith in the manner of dismissal is required in order to receive an award of aggravated damages*

BY RONALD MINKEN

**AGGRAVATED DAMAGES** from the termination of employment do not arise just because the employee is upset about the dismissal — there needs to be unfairness or bad faith in the manner of the dismissal. This was the notion that was upheld in the recent British Columbia Court of Appeal case, *Lau v. Royal Bank of Canada*.

Marco Lau worked as an account manager for the Royal Bank of Canada (RBC) and was sponsored by Royal Mutual Funds (RMFI) to sell mutual funds. After a client complained about Lau not following instructions, RBC launched an internal investigation. What it found was that Lau had been incorrectly tracking his sales in order to increase his sales numbers. In addition, RBC determined that Lau had lied about the details of his meeting with the client who complained.

After an investigation, RBC terminated Lau's employment for cause. He was dismissed during a meeting with his branch manager and the regional vice-president, in which he was provided with a termination letter. Lau was offered an employee assistance program for three months, which he declined. He was also given the opportunity to clear out his desk at a later time but he chose to do so right away.

In response, Lau brought a wrongful dismissal action against both RBC and RMFI.

The trial judge found that Lau was wrongfully dismissed and ordered damages in lieu of notice and aggravated damages for mental distress arising out of the manner of dismissal. RBC and RMFI appealed

the award of aggravated damages.

### **Wallace and Honda tests**

The Court of Appeal followed the leading Supreme Court of Canada decisions *Wallace v. United Grain Growers Ltd.* and *Keays v. Honda Canada Inc.* in holding that aggravated damages should be awarded when:

- The employer breaches its duty of good faith and fair dealing in the manner of dismissal
- The employee suffers damage as a result of that breach.

In *Honda*, the Supreme Court gave examples of unfair or bad-faith dealing in the manner of dismissal as conduct that is “untruthful, misleading or unduly insensitive.”

The appeal court remarked that in both *Wallace* and *Honda*, “the courts noted that the ordinary psychological impact of termination is not compensable because the contract of employment is, by its very terms, subject to cancellation on reasonable notice.”

Lau claimed he was entitled to an award of mental distress for aggravated damages in regards to his manner of termination. However, during the trial Lau presented no evidence from friends, family, or medical experts relating to the impact of the termination on his mental state. There was only his own testimony that he experienced a “horrible feeling, “disappointment,” and felt “lost.” On its own, Lau's testimony was not enough evidence for the Court of Appeal to find an award for aggravated damages.

While expert testimony is not required for a determination of

damages for mental distress, it is certainly helpful. In support of this principle, the appeal court applied the Supreme Court decision *Saadati v. Moorhead*, where the top court specifically rejected the notion that legally compensable mental injury must rest on the claimant proving a recognized psychiatric illness. Rather, the claimant must prove a “serious and prolonged disruption that transcended ordinary emotional upset or distress.” Although Saadati is a tort decision, the appeal court determined that it is applicable in contract cases that deal with proving mental injury.

Lau also argued he was entitled to aggravated damages for the intangible effects of his bad-faith termination. However, he did not present any evidence to demonstrate that there were intangible effects or there was a connection to the manner in which he was terminated.

In order to get an award for aggravated damages for intangible effects, the employee must demonstrate that not only was there harm — such as the loss of reputation — but that the harm was related to the manner of dismissal. The general difficulty associated with finding a new job after a termination is not considered harm for aggravated damages since the difficulty is compensated through the reasonable notice period, re-employment being one of the factors considered when the courts determine the amount of notice to award.

Lau's final argument for an award of aggravated damages was the fact that RMFI filed a Form 33, Notice of Termination, with the British Columbia Securities Commission,

which is a regulatory requirement. Lau was concerned that the Notice of Termination would prevent him from finding a job in the financial sector. However, there was no evidence that RBC or RMFI informed any prospective employer about the Notice of Termination. Consequently, the appeal court did not find anything regarding how the Form 33 was filed to give rise to an award of aggravated damages.

### **Lessons for employers**

As an employer, if you wish to terminate the employment of an employee, you should ensure the termination is done in good faith and the employee is dealt with fairly. In *Wallace*, the Supreme Court defines good faith in the manner of termination as: candid and forthright; honest, truthful and not misleading; fair and reasonable; and sensitive. Some examples of bad-faith dismissal are outlined in *Honda* where: the employer makes declarations that result in an attack on the employee's reputation at the time of the dismissal; the employer misrepresents the employee's reason for leaving; and the dismissal is meant to deprive the employee of a pension benefit or other right, such as permanent status.

### **For more information see:**

- Lau v. Royal Bank of Canada*, 2017 CarswellBC 1838 (B.C. C.A.).
- Wallace v. United Grain Growers Ltd.*, 1997 CarswellMan 455 (S.C.C.).
- Keays v. Honda Canada Inc.*, 2008 CarswellOnt 3743 (S.C.C.).
- Saadati v. Moorhead*, 2017 CarswellBC 1446 (S.C.C.).

Ronald S. Minken is a senior lawyer and mediator at Minken Employment Lawyers, an employment law boutique in Markham, Ontario. Ron gratefully acknowledges Aneasha Lewis for her assistance in preparation of this article. For more information please visit [www.MinkenEmploymentLawyers.ca](http://www.MinkenEmploymentLawyers.ca).