

Member's Quarterly

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Feature

Warning to Employees

Wrongful dismissal cases don't always work in your favour



Tom Ross
K.C.
Partner,
McLennan Ross LLP

Terminated employees often think there is little downside to filing a wrongful dismissal lawsuit. At worst, the employer may refuse to settle and the employee may lose some time and legal fees, and that it is often felt that most employers are prepared to pay something to avoid the risk and expense of a lawsuit. A recent case we were involved in shows how dangerous this assumption can be for employees.

In *Breen v Foremost Industries Ltd.*, the CEO of a group of companies sued for termination pay and accrued bonus under his Executive Employment Agreement. He had been employed over 13 years and was terminated for dishonesty and breach of policy in respect to entering a contract worth \$11.5 Million in Russia without authorization.

Upon learning of the unauthorized contract, the employer initially decided it would not renew the CEO's contract at the end of the year. Although the employer thought it had just cause to terminate, it preferred to preserve the CEO's relationships with customers and employees and allow for a managed transition rather than an abrupt termination. However, in trying to negotiate transition terms, the CEO changed his story about what happened with the Russian contract. While he had initially confirmed that he authorized the contract, he later denied it and denied even saying he had authorized the contract. This "earthquake" disclosure removed all trust in the CEO and he was immediately terminated for just cause.

The CEO sued for over \$800,000. While dealing with his claim, the employer uncovered evidence of significant improper conduct by the CEO, including the authorization of secret "agency fees" to sham corporations in Cyprus and Panama. The employer counterclaimed against the employee for over \$1.3 Million.

It was difficult for the employer to determine exactly what happened with the secret agency fees. Court applications were required in Cyprus to obtain banking records of the agent corporations, which the CEO fought. The CEO also had to disclose his own banking records.

At trial, the CEO defended his receipt of 3 "gifts" worth over \$160,000 from a subordinate employee, which were paid out of bonuses awarded by the CEO to the subordinate.

After 9 years and a 5-week trial, the Alberta Court of King's Bench dismissed the CEO's wrongful dismissal case and found the CEO liable to his former employer for over \$1.5 Million (including punitive damages and a costs award of over \$877,000). In making this decision, the Court made a number of very positive findings for employers:

1. The employer did not condone the CEO's initial misconduct when it initially decided not to renew his contract. While it is usually best to terminate for just cause promptly, the Court here accepted the valid practical reasons to not immediately terminate for cause. It also helped that the employer had initially communicated its belief that it had just cause.
2. The CEO argued the employer could not rely upon past performance issues and warnings because they had been condoned. However, the Court accepted that employers can rely upon past misconduct

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if new misconduct arises. Old faults may be added to new faults in assessing misconduct. The past misconduct was also relevant to show the CEO knew the employer's expectations.

3. After-acquired cause (particularly the secret agency fees) was permitted because the employer did not know of it before termination and it warranted termination.
4. The CEO was held to a high standard of honesty and loyalty. His lack of forthrightness over the Russian contract, his misrepresentations to the Board of Trustees, his massive conflict of interest regarding the so-called "gifts", his exceeding his authority, and his general dishonesty significantly breached his fiduciary duties to the employer. He was guilty of embezzlement, misappropriation and defalcation. There was just cause.
5. The CEO claimed for accrued bonuses as an earned entitlement under the *Employment Standards Code*. The Court denied it, saying that deferred and contingent incentive pay was not earned until the contingency was satisfied. In this case, termination for just cause ended the contingent entitlement.
6. The CEO had to repay the monies he had received as "gifts" (over \$160,000).
7. The CEO had to pay \$113,000 USD for monies he authorized to be paid to a sham agency company even though he did not personally receive the monies. However, he was not liable for monies paid to companies the employer could not prove he knew were a sham.
8. The CEO had to pay \$200,000 for his incompetence in failing to disclose a foreign exchange risk on the Russian contract and failure to implement a currency hedge. This is significant because courts are often reluctant to make employees pay for poor business decisions. Here, the Court accepted the failure was a breach of contract that produced financial damages.

In the end, this case was a giant loss to the CEO's finances and reputation. It is an outcome that should remind employees there may be something to lose in pursuing a questionable case.

Tom Ross is a partner with McLennan Ross LLP in Calgary and can be reached via email at tross@mross.com.