Dismissing High Earners is High Risk

Peter Bowal and Jane Ballegooyen

Introduction

In the last employment law column, we profiled the dismissal-for-cause decision of *Poliquin v. Devon Canada Corporation* (2009 ABCA 216). In that case, the supervisor's firing was upheld by the Alberta Court of Appeal, on the basis that the employee had violated the workplace Code of Conduct regarding computer use and taking benefits from the employer's suppliers. The Court accepted these admitted facts to be transgressions for which firing was clearly an appropriate legal response.

Yet, the definition of cause for firing is rarely so clear. To illustrate that point, this column highlights another recent dismissal case, *Merrill Lynch v. Soost* (2009 ABQB 591) where arguably the grounds for firing were even stronger and more numerous – and the economic stakes frighteningly higher due to the authority and role of the employee – but the same Alberta courts at the same time found no sufficient legal cause to fire. The wrongful dismissal damages were considerable.

The *Soost* case is a powerful reminder for employers to have a plan in place to carefully manage dismissals. One can never rely upon a judge later agreeing on the seriousness of employee non-compliance with internal policies and procedures.

The High Earning Employee

It is not often that a high earning financial advisor's employment dismissal suit against his employer plays out in public. These straight commission earners effectively operate fast-paced mini-firms on high levels of client loyalty, yet within the institutional frameworks of national brokerage houses. With strong track records of financial performance and bulging books of client business, they have uncommon bargaining power to negotiate and optimize the terms of their employment. They can afford lawyers to protect their interests up front.

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Soost

Kurt Soost rose from Vice-President at RBC Dominion Securities Inc. to Senior Vice President and Director of Merrill Lynch Canada in Calgary when the companies merged. In only seven years in the industry, Soost and his team served an enviable asset base of loyal clients, and he earned substantial commissions.

After seven years of combined experience at both merged companies, he was fired for what Merrill Lynch thought was sufficient legal cause on numerous instances of non-compliance with internal employer or industry rules. Soost's team was given a week off with pay, his clients were assigned to other financial advisors and letters were sent to them advising that Soost was no longer employed at Merrill Lynch.

Soost was fired in 2001 when he was 33 years old. He found a new (lesser) job within three weeks but his income took a hit because many of his former clients did not follow him given the manner in which they were notified and reassigned. Soost was only able to transfer $10 million of his $150 million book of business to his new firm. Despite his best efforts, he could no longer maintain his performance and earnings. He sued Merrill Lynch for damages arising out of his wrongful dismissal.

Legal Cause for Dismissal?

Over the last 15 years, judges have been increasingly reluctant to find conduct of employees sufficiently egregious to justify their immediate termination. This is partly due to the recognition that all work presents strains on workers which entitles them to the occasional bad day. Moreover, employers are expected to engage in progressive discipline of wayward workers, starting with warnings, reprimands and suspensions, accompanied by performance management plans, counselling and other support.

It is not surprising, then, that the employer asserted some seven grounds for Soost's dismissal, which singly or cumulatively it claimed justified summary termination. The Table below sets out each of these employer grounds and the trial judge's response.

Employer Ground	Judicial Response
Soost failed to get approval for his private placement activities	Obligation lacked clarity and employer previously enforced this only inconsistently
Soost failed to make full disclosure as he was repeatedly requested to do, once the breach of this policy was brought to his attention	Soost did not have reasonable opportunity to comply before he was fired
Soost did not make appropriate disclosure of his outside interests	other employees also failed to do that
Soost did not comply with employer mandates, especially where he solicited clients to purchase certain shares after having been specifically prohibited by Merrill Lynch from doing so	Merrill Lynch had warned Soost that he would only lose his commissions for this, not his job
Soost's inappropriate use of margin accounts	serious but insufficient cause to justify firing
Unlicenced staff under Soost's direction were not adequately supervised on at least one occasion while Soost was out of town	insufficient cause to justify firing
Soost's questionable contact with other investment dealers and his criticism of another corporation's research	allegations of improper discretionary trading were not sufficiently proven

Overall, the trial judge concluded that the employer, Merrill Lynch, did not establish sufficient legal cause for Soost's firing. According to the 'all cause or no cause' principle, Soost was entitled to damages for wrongful dismissal.

This outcome came as a surprise to some who remember Nick Leeson, the rogue trader who single-handedly brought down 233-year-old Barings Bank, Britain's oldest merchant bank, within two years. In 2007, Jerome Kerviel lost $8 billion for Société Général by unauthorized trades.

This is not to say, of course, that Soost was a Leeson or Kerviel, but financial institutions and brokerage houses might have sound business reasons – if not legal duties – to strictly monitor their brokers' practices and insist upon precise, detailed compliance with protocols. With industry regulation, the extraordinary high financial stakes and the history of massive institutional failures that can occur with a few non-compliant trades, one might expect a judge to defer more to the employer's judgment in such matters.

Honda damages will be awarded only where the circumstances attending the dismissal are unduly unfair or insensitive, not for the actual dismissal decision itself. The Court of Appeal said damages will not be given "for the mere fact of an employee's dismissal, or for the stigma that that dismissal brings."

Damages Awarded

The trial judge awarded Soost money damages in two categories. The first was loss of income at the upper end – one year – which in this case amounted to $600,000. This amount was paid and never appealed.

The second category related to the harsh manner in which Soost was dismissed. This is called *Honda* damages (from the Supreme Court of Canada's 2009 decision in *Honda Canada Inc. v. Keays*). Under this category, Soost was awarded the value of his business, which was $1.6 million. The reasons? Merrill Lynch had originally pursued Soost because he was a successful financial advisor with a healthy business that he would bring with him. By summarily dismissing Soost, the judge said Merrill Lynch knew (or should have known) Soost would suffer significant injury to his reputation in the industry. His ability to retain his old clients and to attract new ones would be impaired. Merrill Lynch ought to have been more sensitive to Soost's loss of business that would likely ensue when it fired him.

Appellate Decisions

Merrill Lynch chose not to appeal the wrongful dismissal ruling or the $600,000 pay in lieu of one year notice decisions. It only appealed the *Honda* damages of $1.6 million. In 2010, three judges of the Alberta Court of Appeal (2010 ABCA 251) unanimously disagreed with the trial judge on this issue. They found no bad faith by Merrill Lynch in dismissing Soost and overturned the $1.6 million *Honda* damages.

Honda damages will be awarded only where the circumstances attending the dismissal are unduly unfair or insensitive, not for the actual dismissal decision itself. The Court of Appeal said damages will ***not*** be given "for the mere fact of an employee's dismissal, or for the stigma that that dismissal brings." An employer's honest belief that it possesses sufficient grounds to fire an employee will not attract *Honda* damages, even if the court ultimately concludes that sufficient cause for firing was absent.

Soost's appeal on this question to the Supreme Court of Canada was denied leave in April 2011. He has since started his own investment banking firm.

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Conclusion

Firing an employee for cause is a major risk on the part of the employer, especially where high-performing, high-income professional employees are involved. The legal doctrine of *cause* for firing an employee may be alive for the most egregious safety-sensitive scenarios, or secretly taking benefits from the employer or its contractors, or viewing and storing pornographic images on corporate-owned computers (*Poliquin*).

For less obvious cases of wrongdoing, such as the *Soost* facts, it is best for employers to give working notice or pay in lieu. At the end of this case, the employer probably wished it had offered him a severance package instead of firing him. It spent an exorbitant amount on legal fees. It lost a decade managing this case in the courts. And Merrill Lynch aired its "dirty laundry" ultimately in a losing cause.

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