mcmillan

Employment and Labour Bulletin

January 2018

Aggravated Damages Awarded by BC Court As Denunciation of Employer's Disingenuous Offers and Aggressive Defenses

A recent BC Supreme Court decision, *Ensign v. Price's Alarm Systems (2009) Ltd.* 2017 BCSC 2137, provides a stark reminder to employers that the use of "aggressive and unmeritorious defence tactics" may well not lead to the hoped for result of persuading a terminated employee to accept an unreasonable settlement, but rather lead to an award of $25,000 aggravated damages and to the "denunciation" of the Court.

Mr. Ensign was employed as a Medical Alert Adviser for Price's Alarm Systems in Victoria. After 12 years service, he was terminated at age 63. Mr. Ensign was given a termination letter providing eight weeks' working notice. The letter stated that his position was being eliminated due to changing business practices and technology, and also stated that there were "other sales opportunities" if Mr. Ensign was interested.

Mr. Ensign inquired about the other sales opportunities during his working notice. He was informed that the sales opportunity was a "…contractor position – so you work for yourself and go find customers… No monthly bonus, no fuel, no base and no leads." Mr. Ensign did not pursue this opportunity. Instead, he retained counsel who wrote to Price's Alarm Systems suggesting that a wrongful dismissal action would likely result in an award representing 14 to 18 months remuneration and made a without prejudice settlement offer.

Instead of countering with a reasonable severance proposal, Price's Alarm Systems offered re-employment, but on terms which the Court found were "radically different" from his previous employment, and included the threat that a failure to mitigate defence would be advanced if the offer was refused.

The provisions in the offer, which the Court found to be objectionable and justified Mr. Ensign in refusing it, included the express acknowledgement that he had resigned all previous employment, imposed a three month probationary period during which Mr. Ensign's employment could be terminated for any reason or no reason, included provisions contrary to the *Employment Standards Act* or the *Human Rights Code*, contained extensive restrictive covenants, including confidentiality, non-solicitation, and non-compete provisions, some of which the Court stated were unenforceable as a matter of law, included a term which permitted termination for any reason or no reason without cause on provision of the minimum notice required by the *Employment Standards Act*, and included the imposition of sales quotas and required hours of work, neither of which had been requirements during Mr. Ensign's employment. This second offer was also declined by Mr. Ensign.

Price's Alarm Systems subsequently made a third offer of re-employment. The Court found this offer removed many of the objectionable features contained in the previous offers. However, the offer was made some 4 ½ months after Mr. Ensign's employment had terminated and did not contain any offer to compensate him for the lost wages from the date of termination to the date of the offer. This third offer of re-employment was also rejected by Mr. Ensign.

In the strongly worded decision, the BC Supreme Court held that Mr. Ensign had no obligation to accept any of the offers of re-employment in order to meet his legal duty to mitigate. The Court stated that it had "no hesitation" in concluding that Mr. Ensign's distrust of his former employer was well-founded and that the rejection of re-employment was objectively reasonable. In particular, the Court found that Mr. Ensign's wariness about a "trap" lying in the proposed written employment agreements was well founded and that Mr. Ensign was justified in refusing those offers, which if accepted, the Court stated, would have the potential to

significantly compromise any entitlement to the wrongful dismissal damages that he had otherwise accrued.

The Court concluded that Mr. Ensign was entitled to 12 months' notice given his duties, age, and length of service. This aspect of the decision is not particularly noteworthy. Of more significance is the decision of the Court to award $25,000 in aggravated damages to compensate Mr. Ensign for the financial stress and worry caused by the conduct of the employer in refusing to offer any severance beyond the statutory mandated eight weeks working notice or to offer "an alternative position with appropriate encouragement, training, and remuneration top ups or guarantees".

This case is an important lesson that courts do not take kindly to employers who refuse to treat employees fairly on a without cause termination. Where a contract of employment does not contain any provision limiting the employee to minimum notice or pay in lieu as provided for under the applicable employment standards legislation, the employer should offer reasonable notice or pay in lieu as determined at common law, settle the case, and move on. Alternately, if the employer wishes to offer reinstatement as an alternative to paying severance, it is essential that the offer of reinstatement be fair, offer compensation for the period of time between the date of termination and the date of any re-employment, and that the terms of the re-employment, if accepted, not require the employee to compromise his or her existing legal entitlements.

by N. David McInnes and Hilary D. Henley

For more information on this topic, please contact:

Vancouver	N. David McInnes	604.691.7441	david.mcinnes@mcmillan.ca
Vancouver	Hilary D. Henley	604.893.7640	hilary.henley@mcmillan.ca