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EMPLOYERS SUING EMPLOYEES

by

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The last decade has seen an expansion in the types of actions taken by employers against employees and in the types of damages awarded. In addition to the standard actions of breach of fiduciary duties, fraud, conspiracy to defraud and breach of contract, employers are now successfully pursuing actions against employees to recover damages caused by poor performance, unfair practices, negligence and breach of implied terms of the employment contract. An overview of these suits against employees will be presented.

Breach of Fiduciary Duty

An employee owes a fiduciary duty to the employer where the employee has a sufficient degree of control over the employer's enterprise to place the employer in a vulnerable position vis-à-vis the employee. The leading Supreme Court of Canada case, *Canadian Aero Service Ltd. v. O'Malley*[1] provides the framework for a fiduciary and its duties in the employment context. Laskin J. stated:

> " … a fiduciary relationship ... in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self interest. Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer is precluded from obtaining for himself, either secretly or without the approval of the company…any property or business advantage either belonging to the company or for which it is negotiating."

In the absence of an employment agreement, a former employer can only restrain a former employee from competing where there had been a misuse of confidential information or breach of fiduciary duty. This principle was articulated by Potts, J in *Diladex Communications Inc. v.*

[1] *Canadian Aero Service Ltd. v. O'Malley*, (1974) S.C.R. 592.

Crammond[2]:

> "… upon cessation of employment, an employee, including one in a top management position, may immediately go into competition with his former employer and solicit the former employer's customers so long as there is no misuse of confidential information such as trade secrets or lists of customers ... A former employee, including one in a top managerial position, may make use of his skills, general knowledge and any personal goodwill acquired during the course of his employment in competing with his former employer ... It is not a theft of a corporate opportunity if a party who had an ongoing business relationship with a former employer decides to deal in the future with a former employee ...
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> For competition by a former employee to be in breach of fiduciary duty where there is not misuse of confidential information, there must be acts committed before the cessation of employment which formed at least part of the wrongful conduct complained of. There must also be the acquisition of a business opportunity or advantage which was available to the employer and not readily available to the employer's competition…"

In determining the extent of a fiduciary duty, there is now authority for the proposition that the context surrounding the termination of an employee's employment is a relevant factor. Laskin J. first enunciated this principle in *Canaero* when he said that one of the factors at play was "the circumstances under which the relationship was terminated, that is by retirement or resignation or discharge". A recent case has elaborated on this principle.

In *Zesta Engineering Ltd. v. Cloutier*[3], David Cloutier was terminated from his position as a Vice President and Assistant General Manager of Zesta Engineering. After 21 years of service, Zesta alleged that there was just cause to terminate Mr. Cloutier's employment when it thought Mr. Cloutier was plotting to leave and start a competitive business. However, at trial Mr. Cloutier was able to convince the judge that he was not plotting to

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[2] [1987] 57 OR (2d) 746.

[3] [2001] O.J. No. 621 (Ont. S.C.J.); a new trial was subsequently ordered by the Court of Appeal upon admission of fresh evidence not available at trial; findings of law remain unchanged, [2002] O.J. No. 3738 (Ont. C.A.)

leave Zesta but rather, he had concocted an elaborate plan to make it look like he was going to do so in order to entrap another employee whom Mr. Cloutier thought was plotting to leave and start a competitive business. In an ironic twist, the employee advised the owner of the company of Cloutier's 'plans', who in turn terminated Cloutier for just cause. After considering a tangled web of witness evidence, the court quoted approvingly from an article by Peter Wardle[4] as follows:

> "The result … suggests that a termination without cause and without compensation in lieu of notice would have an effect on the scope of the fiduciary's obligations after termination. Certainly the balancing of interests referred to earlier comes down more heavily in favour of the employee's right to unhampered mobility of his labour in such a situation. *In addition, it should be remembered that fiduciary obligations are imposed by equity, not by law, and are subject to the more general rule that a person who seeks an equitable remedy must come to the court with clean hands. It appears therefore unlikely, except in the rarest of circumstances, that an employer who dismisses a fiduciary without cause will have any remedy if that person subsequently solicits his customers* (emphasis added)."

Justice Wright went on to conclude that any fiduciary duties Cloutier may have had did not survive his wrongful dismissal. [5]

Breach of Duty of Fidelity

While it is clear that only a select few employees will be determined to owe their employers a fiduciary duty, all employees owe their employers an implied duty of good faith or a duty of fidelity.

a) Just as the court considered the context of an employee's termination in *Zesta* in determining the extent of the employee's fiduciary duty, such context is also relevant in

[4] *Post-Employment Competition – Canaero Revisited,* (1990) 69 Can. Bar Rev. 233 at pp. 271.
[5] See also *Bonair Cargo Systems v. Over* [2003] No. 2473 (Ont. S.C.J.).

determining an employee's duty of fidelity. In the case of *Gertz v Meda Ltd.*[6], Mr. Gertz's job title was Assistant Vice President with Meda Ltd. which was a temporary placement agency. In effect, Mr. Gertz worked as account manager, fulfilling clients' staffing requirements. Mr. Gertz's employment was terminated after he made several recommendations to his employer about how to improve morale among certain employees who had been placed at Chrysler. Meda gave Mr. Gertz the minimum amount of notice required by the *Employment Standards Act*, after which Mr. Gertz commenced employment with a competitor of Meda, Accu-Staff. Accu-Staff ultimately succeeded in landing Chrysler as an account. When Mr. Gertz sued for wrongful dismissal, Meda counterclaimed for breach of fiduciary duty, and added Accu-Staff as a party. Upon a lengthy analysis, Justice Heeney concluded that, notwithstanding the lofty title, Mr. Gertz was nothing more than a 'mere employee' to whom a fiduciary duty did not attach.

However, Justice Heeney then considered whether Mr. Gertz had breached his duty of fidelity by making unfair use of confidential information he gained at Gertz[7].

In determining first whether the information was confidential, Justice Heeney applied the test cited in *International Corona Resources Ltd. v. LAC Minerals Ltd.* [1989] 2 S.C.R. 574: was the information conveyed confidential; was it communicated in confidence and was the information misused by the party to whom it was communicated. Justice Heeney concluded that bid prices, mark-up rates and general industry information used in preparing the quote Accu-Staff submitted to Chrysler was not confidential.

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[6] [2002] O.J. No. 24 (Ont. S.C.J.)

[7] This duty was first articulated in *Alberts v. Mountjoy* (1977) 16 O.R. (2d) 682 (Ont. H.C.) at p. 689:

> "… Thus we have a principle … to the effect that the ex-employee is not entitled to make 'an unfair' use of information acquired in the course of his employment, nor may he use confidential information so acquired to advance his own business at the expense of that of his former employer."

In determining whether certain information was put to unfair use, Justice Heeney echoed the principle articulated in *Zesta* that the circumstances under which the employment relationship was terminated ought to be considered. Justice Heeney stated:

> "The cases relied upon by Mr. Shulgan all share a common theme. An employee or employees work for an employer with an established business for a period of time, gaining a thorough knowledge of his business and his customers. The employee or employees then resign, set up shop across the street, as it were, and embark upon a campaign to steal away every customer of the former employer. In such circumstances, it is not difficult for one to conclude that it is unfair. The employees used the former employer by working for him long enough to acquire an intimate knowledge of his business, and then engaged in a willful attempt to appropriate his business for themselves without paying for it. In cases such as these, the former employer has clearly been taken advantage of.
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> However, the picture changes completely when, as here, the employee is wrongfully dismissed. Mr. Gertz had a family to support, and needed to obtain gainful employment as quickly as possible following his abrupt termination. His knowledge, education and experience is in employee placement, and that is how he earns a living. A thorough knowledge of markup rates charged to customers in the course of employee placement is an inseparable part of that knowledge, and it would be difficult or impossible for him to work in this field without making use of that knowledge.

In this case, the former employer has not been taken advantage of. *It was Meda's own action in wrongfully dismissing Mr. Gertz that created the need for Mr. Gertz to go into competition with them.* It would have been open to them to negotiate terms of separation that protected their customers, but instead they chose to pay the statutory minimum in severance pay. *Left to fend for himself, there is nothing unfair in Mr. Gertz going into direct competition with Meda for the business of his former customers, and in making use of the skills and knowledge he gained while servicing those customers in the process* (emphasis added)." [8]

[8] If a prospective employer is involved with the employee's breach of these duties, such employer may be liable for inducing breach of an employee's duty not to compete unfairly. See *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.* [2003] B.C.J. No. 2700 (B.C.S.C.). See also *Danka Canada Inc. V. Huntingon* [2003] S.J. No. 860 (Sask. Q.B.) for another case of a former employer suing an employee's new employer.

b) An employee's duty of fidelity also includes a guarantee to have the skills, abilities and expertise that a prospective employee proclaimed to possess when the employee was hired[9]. If the employee does not have the necessary capabilities, he or she may be summarily dismissed. In doing so, most judges require employers to act fairly and with a degree of proportionality in summarily dismissing employees for inadequate job performance[10]. This principle of proportionality dictates that summary dismissal will not be for "just cause" unless the employee's level of performance falls so short of expectations that it can be characterized as "gross incompetence"[11].

However by the time the threshold for gross incompetence has been met, serious loss to the employer may have been incurred. As a result, there have been an increasing number of cases in which employers have decided to sue the employee in order to recover damages for losses flowing from the employee's breach of this duty. The concept originated in cases where employers sued employees for negligence. For example, in *Overmyer Co. v. Wallace Transfer Ltd.*[12] the court considered a case in which Mr. Pringle, a 30-year-old high school graduate, had been hired for his first managerial position. Mr. Pringle had negotiated a lease on behalf of his employer which required 30 days' notice to terminate the tenancy. The employer wanted to terminate the tenancy at a particular time, however, due to the oversight of Mr. Pringle, who was dealing with a sick parent, notice was not given in a timely fashion. As a result, the employer became liable for one extra month's rent, and consequently decided to sue the employee for that amount.

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[9] England, Christie & Christie, *Employment Law in Canada, 3rd edition,* (Butterworths, 2000) at 11.58.
[10] *Ibid.*
[11] See, for example, *Lee v. Parking Corp. Of Vancouver* (1999), 39 C.C.E.L. (2d) 135 at 146 (B.C.S.C).
[12] (1975), 65 D.L.R. (3d) 717.

The British Columbia Court of Appeal held that the employer's claim should be allowed as the employee's failure to give the notice in proper time was considered negligence. In failing to comply with his job requirements, Mr. Pringle did not exercise his managerial duties with reasonable care and skill and as a consequence was liable for the loss suffered by his employer.

In the case of *Dominion Manufacturers Ltd. v. O'Gorman*[13], Mr. O'Gorman was a registered industrial accountant with many years of experience as an accountant and comptroller. He had been hired on the express understanding that he was capable of performing all the functions for which he was hired, one of which was to make appropriate payroll deductions and remittances. When he failed to remit such payroll deductions on a timely basis, penalties were assessed to the employer in the amount of $13,000. The plaintiff sought to recover this amount from the employee.

Justice Lissaman reviewed the leading House of Lords decision, *Lister v. Romford Ice and Cold Storage Co. Ltd.*[14]. He stated that *Lister* stands for the proposition that a skilled employee will be liable to indemnify an employer for any damages the employer has to cover due to being held vicariously liable for the employee's negligence. Justice Lissamen stated:

> "…the defendant should be liable to the plaintiff … if I can imply as a term of the contract of hiring that the employer would be indemnified for the losses caused by the acts or non-acts of the employee. I do find that the contract contained an implied term of indemnification with respect to such claim."

[13] [1989] O.J. No. 485. (Ont. Dist. Ct.).
[14] [1975] A.C. 555 (H.L.).

In *Petrone v. Marmot Concrete Services Ltd.*[15], an employer who was sued for wrongful dismissal counterclaimed against the employee for costs incurred in repairing a concrete job that had to be re-done due to the employee's poor workmanship. This claim by the employer was based on the alleged breach by Petrone of his representation that he was capable of performing the duties of a contract supervisor in the construction industry.

As there was no express term of indemnification in this case, the Court also relied on Mr. Justice Seaton's reasoning from *Overmeyer*. In his decision, Mr. Justice Fraser stated that knowledge by Petrone of the correct form to be used in the pour of concrete was a skill which he expressed to the employer that he had, by virtue of his experience. Based on that representation and the fact that Marmot relied on it when he hired him, it can and should reasonably be implied in his contract that he would use reasonable care to see that the work was done properly. That term would require him to supervise the work carried out by his subordinates, check to see that the right form was used by them and correct any errors when noticed. Petrone's failure to carry out these responsibilities resulted in a major error. He was therefore liable in damages for breach of the implied obligation to supervise the work of his subordinates and solely responsible for the $45,000.00 in damages incurred by his employer.

In *Ferguson v. Allstate Insurance Co. of Canada*[16], the court considered a counterclaim for damages made against an employee for poor performance and negligence. Mr. Ferguson was employed by Allstate as a sales representative. Allstate became concerned with the plaintiff's performance due to his serious problems relating to customer service

[15] (1996), 18 C.C.E.L. (2d) 208 (Ont. Gen. Div.).
[16] (1991), 35 C.C.E.L. 257 (Ont. Gen. Div.).

and late remittance of business. Mr. Ferguson was eventually dismissed when it was discovered that he incorrectly completed certain insurance applications which resulted in substantial loss to Allstate. Mr. Ferguson sued for wrongful dismissal and Allstate counterclaimed for damages caused by Mr. Ferguson's sloppy and careless work.

The court held that Mr. Ferguson was dismissed for just cause and held him liable for Allstate's losses. In being sloppy and careless and fabricating some of the information recorded on the insurance applications, Allstate was induced to issue policies it should not have. As a result, Allstate was awarded judgment for $124,308.90, the amount it was required to pay out on a policy it would have never issued were it not for Mr. Ferguson's misrepresentation.

Although the foregoing cases appear to indicate that employees can be sued for damages that were caused by inferior work performance, the case of *Aichelle v. Jim Pattison Industries Ltd.*[17] throws a wrench in the mix. In that case, Mr. Aichelle was dismissed during his probationary period as General Sales Manager. He sued for wrongful dismissal and his employer counterclaimed for damages estimated at $10,000 arising from Mr. Aichelle's absence during the last day of a major sale and for motor vehicle sales said to be made at favourable prices to his family members.

Mr. Justice Benner held that after hearing the evidence, the employer did not suffer any real losses as a result of Mr. Aichelle's actions. However, Mr. Justice Benner dismissed the defendant's counterclaim on another ground. He stated:

[17] (1992), 44 C.C.E.L. 296 (B.C.S.C.).

> "Unless the servant was guilty of deceit, fraud or the like, it would in my view, be a precedent of some danger to hold that a master can recover from his servant an amount representing profits he may have enjoyed had the servant been that dedicated and efficient worker for which the master was searching."

In this case, the counterclaim had to be dismissed considering the conduct of the plaintiff did not amount to "deceit, fraud or the like". This view does not however, accord with the general principles of contract law which do not recognize any such limitation on the right to sue for non-repudiatory breaches of contract or with the previous cases cited which permitted damages despite the lack of deceit or fraud involved.

Further, while the courts have expressed a willingness to award damages in situations where it could not have been expected that certain behaviour by an employee would occur, an employer's claim for damages against an employee will be dismissed where an employee's error happens to be a known risk of the trade. For instance, in *Cole v. Lockhart*[18], the employer brought a negligence action against an employee who worked on his ranch. The employer alleged that the employee caused one of his elks to die by failing to remove all the baler twine from the hay which he fed to the elks.

The court dismissed the employer's action since he knew or ought to have known of the hazard of an elk choking on baler twine. In addition, this slight error by the employee was said to be one of the risks of the enterprise that the employer accepted. No employee is infallible and the employer should have allowed for that. He should have taken it into account when her insured, and when he supervised the employee and when he estimated

[18] [1998] N.B.J. No.377 (N.B. Ct Q.B.).

his costs[19]. It is for these reasons that small errors on the part of an employee will not result in liability to one's employer.

In *Billows v. Canarc Forest Products Ltd.*[20], the plaintiff was a lumber trader employed by Canarc Forest Products who brought an action against Canarc for wrongful dismissal and unpaid commissions. Canarc counterclaimed against Mr. Billows for breaches of his employment contract and his duty of fidelity and confidentiality. Canarc claimed that while working, Mr. Billows violated Canarc's instructions not to exceed inventory limitations by making major purchases of inventory without his superior's approval. Mr. Billows told his superior that he would not adhere to the limitations, and would quit if they did not like the way he did business. When Mr. Billows was told that his resignation was accepted, his response was that he did not quit, but would have to be fired.

After leaving Canarc, Mr. Billows started his own business in direct competition with Canarc. Canarc claimed that Mr. Billows' practice of purchasing excessive quantities of lumber adversely affected their line of credit and that he breached his duty not to use confidential information belonging to Canarc to solicit clients.

The Court held that Mr. Billows' conduct during his employment constituted willful disobedience, insubordination, dishonesty, and a breach of the bond of trust essential to the employment relationship. As a result, Canarc was justified in terminating his employment without notice. Furthermore, Mr. Billows breached his duty of fidelity to Carnac after his departure by leaving Carnac in a disadvantageous and vulnerable position because of his practices. He then used that vulnerability to his advantage in

[19] *Ibid* at 4.
[20] [2003] B.C.J. No. 2064 (B.C.S.C.)

soliciting clients. The court awarded Carnac $30,550 for damages caused from the loss of part of its business which Mr. Billows has been able to acquire.

c) Competition with an employer during the course of employment will in almost all cases constitute a breach of fidelity[21]. This principle was most recently considered in *Restauronics Services Ltd. v. Forster* [2004] B.C.J. No. 430 (B.C.C.A.). In that case, the employee, Erlinda Nicolas had worked for some years for her employer's predecessor, Forster Food Services Ltd. She left at one point to operate her own consulting business, but returned to resume her employment while continuing with her consulting business with Forster's consent. When Restauronics purchased Forster, Ms. Nicholas received permission to continue with her consulting business. However, a few months later Restauronics demanded that Ms. Nicholas sign a non-competition and non-solicitation agreement which would have prohibited her from operating her consulting business. When Ms. Nicholas refused to sign the agreement, her employment was terminated. During the notice period, Ms. Nicholas incorporated another company and successfully bid on a contract that Restauronics also bid on. Restauronics sued for breach of contract and breach of fiduciary duty. The British Columbia Court of Appeal held that as Ms. Nicolas never informed her employer that she accepted its repudiation of the employment agreement by giving her insufficient notice of termination of employment and thereby elect to bring the contract to an end, she continued to work and remained bound by her duty of fidelity during the notice period, even though she only remained employed in order to mitigate her damages. The court rejected the trial judge's finding that Ms. Nicolas merely established a competing business which may not have necessarily been a

[21] *Cariboo Press (1969) Ltd. v. O'Connor,* [1996] B.C.J. No. 275 (B.C.C.A.), *Woodrow Log Scaling Ltd. v. Halls* [1997] B.C.J. No. 140 (B.C.S.C.).

breach of her duty of fidelity, and found that she had indeed placed the bid while still employed.

Notwithstanding the court's finding of liability, damages were only assessed at $500 because, while Restauronics had been able to prove Ms. Nicolas breached her duty of fidelity by competing with it during her employment, it could not prove that she used any of its confidential information or trade secrets in doing so. As well, it was determined that Restauronics lost the bid as a result of a low score based on certain omissions from its proposal and it could not be shown that Restauronics would necessarily have won the bid if Ms. Nicolas had not. Thus "aside from the effrontery of Ms. Nicolas' bid, there is nothing that Restauronics can complain of in this case." In the court's view Restauronics had not proven that it was entitled to anything more than nominal damages.

A benefit to the employer for bringing an action for damages is that the employee's conduct need not be as repudiatory in nature as that needed to justify summary dismissal[22]. This means that even if an employee can establish their case for wrongful dismissal, the employer's counterclaim for damages may nonetheless succeed. If employers continue to be successful with their claims for damages against employees in such cases, this may provide a disincentive for employees to attempt to sue for wrongful dismissal, where competence is at issue.

Fraud and Conspiracy to Defraud

Where fraud by employees can be proven, courts easily conclude that there has been both a breach of fiduciary duty and a breach of the employment contract. In *Standard Life*

[22] *Supra* note 16 at 11.59.

Assurance Co. v. Horsburgh[23], the employer discovered that several of its sales representatives were taking unauthorized commissions by signing up existing clients under different plans and forging their signatures. Once exposed, Standard Life pursued a claim of conspiracy to defraud against all of the defendants and claimed breach of fiduciary duty and breach of employment contract against the personal defendants.

The British Columbia Supreme Court held that because the basis of all the plaintiff's claims was fraud, they all turned on the same fraud charge. That is, if Standard Life proved the conspiracy claim, it would also prove the claims of breach of fiduciary duty and breach of employment contract. In order to prove this aspect of their claim, the court looked to whether the defendants agreed to act together unlawfully, knew or ought to have known that their actions would cause Standard Life damage and whether Standard Life had suffered damages as a result of the Defendants' combined actions. The Court held that the defendants did conspire to defraud Standard Life and awarded damages to Standard Life equaling the amount of the commissions plus interest that Standard Life chose to repay its clients. The defendants were held to be jointly and severally liable for the loss which was set at $446.471.40.

In the case of *International Commercial Bank of Cathay (Canada) v. Chen*[24], the British Columbia Supreme Court had to determine damages for a much more serious case of deceit and fraud by an employee. The defendant was the General Manager of the Bank of Cathay who made several large unauthorized advances to various customers of the bank. He did so by honouring cheques which were NSF, releasing bills of lading and

[23] [2003] B.C.J. No.2321 (B.C.S.C.).
[24] [2003] B.C.J. No. 2463 (B.C.S.C.).

invoices which should not have been released without payment, and granting loans or the extension of loans without inquiry. The defendant responded to these allegations by claiming that what he had done was in the best interests of the bank and its customers and that the problem stemmed from the difficulties which clients were facing due to the "Asian crisis".

The Court held that at all times the defendant was in a fiduciary relationship with the plaintiff and was in flagrant breach of that relationship. The court found that the defendant had concealed his actions an acted contrary to his authority and fraudulently. The court noted that the proper approach to damages for breach of fiduciary duty is restitutionary, and awarded the Plaintiff $3,842,305.82 U.S. and $3,613,513.23 Canadian. The court further found and held that as the defendant's conduct was high-handed, deliberate and persisted over a relatively lengthy period of time, and it could inferred that the defendant must have profited from his misconduct, the Plaintiff was awarded punitive damages of $100,000.00.

Interference with Economic Relations

In the employment context, the tort of interference with economic relations emerges when an employee or former employee intentionally employs unlawful means to interfere with the business relationship or business expectancy.[25] This tort may be alleged in addition to inducing breach of contract, where the breach of a contract is uncertain, or is

[25] *61122 Ontario Ltd.* v. *Sagaz Industries Canada Inc.* (1998) 40 O.R. 3d 229 (Ont. Gen. Div).

not the sole damage suffered. Unlike the tort of inducing breach of contract, this tort does not require proof that an existing contract has been impaired.[26]

In looking at an action for interference with economic relations, the following elements must be proven:

i) an intention to injure;

ii) interference with the plaintiff's business by illegal or unlawful means; and

iii) consequential economic loss.[27]

Case law has varied in its interpretation of the scope of action required to support this tort. The narrow view is that an illegal or unlawful act is an act(s) prohibited by law or by statute. The broader view extends the narrow meaning to an act without legal justification.[28]

Reach M.D. Inc. v. *Pharmaceutical Manufacturers Association of Canada et al.*, ("*Reach*")[29] involved a trade association that directed its members not to advertise in a calendar distributed by a non-member, which proved fatal to Reach's business. The court found an unlawful interference with economic means and held that liability depended on showing that the association committed an unauthorized act and that the act satisfied the elements of the tort. The Court found that to satisfy the first element of the tort, the association's maneuver must have been targeted against Reach even though its predominant purpose might well have been to advance its own interests thereby rather than to injure Reach. In terms of the second element, the court found that an 'unlawful

[26] *Daishowa* v. *Friends of the Lubicon* (1996), 27 O.R. (3d) 215.
[27] *Reach M.D. Inc.* v. *Pharmaceutical Manufacturers Association of Canada et al.,* [2003] 65 O.R. (3d).
[28] *Ibid.*
[29] *Ibid.*

act' extends illegal or unlawful means to an act the association 'is not at liberty to commit'. The court found that the association's letter directing members not to advertise in the calendar was an unlawful act. For the third element to be satisfied, the court stated that the association must have suffered some economic loss.

Wrongful Resignation

It has been firmly established that the employee is impliedly obliged under the employment contract to give reasonable notice of resignation where there is no express term governing the notice period. This is because the objective of providing reasonable notice of resignation is to afford the employer adequate time either to hire a replacement or to otherwise adapt operations to the employee's absence. Resigning without reasonable notice will be considered a breach of the employment contract and could subject the employee to an action in damages, though in practice, employers were ordinarily content with being rid of the employee and foregoing any action, or resorting to an easier remedy of withholding wages owing. However, recently courts have shown a willingness to award damages to employers for their losses.

The case *Lower Mainland Better Hearing Centres Inc. v. Zhang*[30], is an example of a case of wrongful resignation. In this case, Ms. Zhang, had signed an employment contract for a period of two years to work with Lower Mainland as an audiologist. After approximately 8 months of work, she submitted a letter of resignation claiming that the differences between her and her employer were so great that a productive working relationship was no longer possible. Ms. Zhang gave one month's notice and agreed to work for that time.

The court held that there was no evidence to justify Ms. Zhang's termination of the employment contract on the ground that a productive working relationship had become

[30] [1996] B.C.J. 90 (B.C.S.C.).

impossible. Rather, she withdrew her services for no good reason, either contractual or medical, and was therefore in breach of the agreement.

The court accepted that the employer had lost the benefit of commissions and increased business it expected from Ms. Zhang and awarded $10,000 in damages plus interest.

In a similar case, *Bradley v. Carleton Electronic Ltd.*[31], the Ontario Court of Appeal upheld a trial judge's decision to award an employer $10,000 for breach of contract by a key employee who quit without providing proper notice. However, the Court of Appeal held that the employer was only entitled to the costs incurred as a result of the employee's failure to give proper notice and not the costs incurred as a result of his leaving the company.

In *171817 Canada Inc. v. Foris*[32], an action was brought by the employer, Arctic Sunwest, against a former employee, Foris, for damages for breach of contract. The employer operated an aircraft charter service and hired Foris by way of a verbal agreement. The employer paid for all of the employee's moving, relocation and training expenses. The employee acknowledged that he was aware that the high cost of training was the reason why the employer required a two year commitment. Within less than a year, the employee quit and accepted another job with a different charter company. The employer brought an action against the employee for the moving and training expenses it had paid.

[31] [1998] O.J. No 3050 (Ont C.A.).
[32] [1998] N.W.T.J. No. 165 (N.W.T. Sup. Ct.).

The court held that the employer was entitled to receive a proportionate share of the moving and training expenses incurred, as it received the benefit of the employee's services for ten months of the two year term. Although the employee did not specifically promise as a term of the verbal agreement to reimburse the moving and training expenses incurred by the employer if he were to quit before the two years were up, the Court felt that a reimbursement was the appropriate remedy.

The above three cases seem to show a willingness by the Court to force highly skilled employees to honour their employment contract. Compelling the employee to honour his or her contract will likely be warranted where the employer needs more time to find a replacement or if the Courts perceive the employee to be acting opportunistically by quitting unlawfully in order to get better pay elsewhere[33].

In *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*[34], the court recently considered an employee's obligation to provide 'reasonable notice' of resignation in an industry standard where departing employees give very little if any notice. The court held that such an industry norm does not reflect the standard of reasonable notice but rather, a reflection of economic and other realities of litigation and that reasonable notice will still be required.

[33] *Supra* note 16 at 13.9.3.
[34] [2003] B.C.J. No. 2700.