Opportunity Knocks: Court Awards Damages for Loss of Opportunity in Wrongful Dismissal



Wrongful dismissal claims generally attract three types of damages: compensation in lieu of notice, general damages (including aggravated and punitive damages); and special damages (which can include items such as mitigation expenses). However, a recent decision from the British Columbia Court of Appeal in *Ojanen v. Acumen Law Corporation*, 2021 BCCA 189 reminds employers that additional damages can be awarded for "lost opportunity" where a dismissal deprives an employee of an opportunity they would have had but for the wrongful dismissal.

What happened?

The plaintiff was an articling student at a Vancouver law firm known as the Acumen Law Corporation. Four months into her articling term, Ms. Ojanen's employment was terminated for cause after the employer made unfounded allegations of plagiarism and disclosure of confidential information. At trial, the plaintiff successfully proved that the employer did not have cause to terminate her employment. She was awarded damages for breach of contract of $18,934, as well as aggravated damages of $50,000. The employer then appealed the finding of a wrongful dismissal. The plaintiff cross-appealed, seeking additional damages for lost opportunity in addition to the damages awarded at trial. Specifically, the plaintiff sought damages for the loss of income that she suffered as a result of not being able to become a lawyer at the end of her articling term.

What did the Court of Appeal Decide?

The Court of Appeal noted that a wrongfully dismissed employee would normally only be awarded damages based on the employer's failure to give adequate notice. However, the Court of Appeal held that, in certain circumstances, a wrongfully dismissed employee may be entitled to damages for loss of opportunity. A wrongful dismissal is a breach of a contract, meaning that damages are intended to place the parties in the position they would have been had the breach not occurred.

In this case, the termination of Ms. Ojanen's articles delayed her career as a lawyer and that delay greatly diminished her earning potential. Since her employment was for a defined period, after which the plaintiff would have been admitted to the bar, the

Court of Appeal held that the plaintiff inability to earn a lawyer's income as a result of the employer's breach of contract was reasonably foreseeable when the employment contract was formed. As a result, there was a factual basis for awarding the plaintiff "loss of opportunity" damages.

In calculating the amount of damages, the Court of Appeal acknowledged that loss of opportunity is inherently uncertain and that a court must do its best to calculate the likely loss. The Court of Appeal also held that any award must account for both positive and negative contingencies. In *Ojanen*, the Court of Appeal looked at Ms. Ojanen's positive performance reviews and evidence that her salary would significantly increase upon completion of her own articles, once admitted to the bar. The court concluded that she had likely suffered a loss of income as a result of her wrongful dismissal.

Ultimately the Court awarded the plaintiff an additional $100,000 in damages for loss of earning power. In addition, the Court awarded her $25,000 in punitive damages, in addition to compensating her for her traditional losses during the reasonable notice period. In total, she was awarded $193,944.

Takeaways

Ojanen serves as a reminder for employers that liability for wrongful dismissal may not necessarily be limited to only pay in lieu of notice. If a wrongful dismissal results in employee missing out on an opportunity, such as an accreditation or licensing, and that lost opportunity delays or hinders an employee's career, a court may be inclined to award damages for those special losses suffered by the employee as a result. Employers would be well advised to take this into account in managing terminations.[i]

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