

Alberta Court of Appeal Sets Aside Award of Aggravated Damages and Upholds (but reduces) Award of Punitive Damages in Wrongful Dismissal Action

In the recent Alberta Court of Appeal decision, *Elgert v. Home Hardware Stores Limited*, 2011 ABCA 112 [<http://www.albertacourts.ab.ca/jdb/2003-/ca/civil/2011/2011abca0112.pdf>], the Court heard an appeal of a Jury Trial decision in which a dismissed employee had been fired for cause as a result of allegedly sexually harassing a subordinate employee. In particular, the male Plaintiff reassigned a female subordinate because she was spending too much time speaking to and following her boyfriend. The subordinate employee apparently said she was "going to get him", in reference to the Plaintiff. The subordinate employee then told her father, who was a senior manager in the organization, that the Plaintiff harassed her by "belly-bumping" her some four months earlier. The complaint of sexual harassment was poorly investigated, resulting in the Plaintiff's suspension and subsequent dismissal for just cause without the Plaintiff ever being advised of the specific allegations against him.

The Plaintiff sued the employer for wrongful dismissal, and sued the subordinate employee and another person who had also claimed harassment by the Plaintiff for defamation. The matter was heard by trial by jury. The jury concluded that the employer had wrongfully dismissed the Plaintiff. The jury awarded him two years' pay in lieu of notice, \$200,000 aggravated damages, \$300,000 punitive damages, interest, and costs. It concluded that the individuals had defamed the Plaintiff and awarded damages against them of \$50,000 and \$10,000, respectively.

The Court of Appeal upheld the award of two years' pay in lieu of notice. The Court set aside the aggravated damages award on the basis that aggravated damages need to be based on actual measurable losses as a result of the employer's improper conduct (based on the Supreme Court of Canada decision in *Honda v. Keays*, and the Alberta Court of Appeal decision of *Soost v. Merrill Lynch*). Here, the Court found that the evidence of the Plaintiff's actual damages was not sufficient to support a claim for aggravated damages. The Court upheld the award of punitive damages, noting that the bad faith conduct of the employer justified punishment, but determined that a quantum of \$75,000 was sufficient to accomplish that purpose. Finally, the Court upheld the defamation damages award, noting that the individuals who had made the harassment complaints had done so falsely and maliciously.

Some lessons for employers from this case:

- be sure that your investigation is conducted properly and thoroughly before any decision is made – for serious matters you may consider bringing in an independent, trained outside investigator to do your investigation;

- be sure that the alleged harasser is given a full opportunity to answer the allegations against him or her as part of that investigation;
- be aware of the possibility of ulterior motives in employees who make harassment complaints; and
- just cause is almost always extremely difficult to uphold at trial.

If you have questions or would like further information on this or on other related topics, please contact any member of the Spectrum HR Law LLP Labour and Employment practice group:

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