EMPLOYMENT UPDATE

Rose Keith graduated from the University of Saskatchewan Law School in 1992 and was called to the Bar of the Province of British Columbia in 1993. Ms. Keith's practice has focused on personal injury and employment law. She is an active member of the Trial Lawyers Association of British Columbia, a member of the American Association for Justice since 2006, and chair of the Advocacy Committee of Lupus Canada.

BY ROSE KEITH
ROSE KEITH LAW CORPORATION
@rakeith

In the past few months three employment law cases in particular provide guidance for employment law practitioners in handling their wrongful dismissal files. These cases are of assistance not because the are establishing any new principles, but rather because they are summarizing the law or providing clarification of the manner in which principles will be applied. The cases that will be reviewed in this column are the following:

1. The Court of Appeal decision in *Pakozdi v. B & B Heavy Civil Construction Ltd.*[1] regarding length of notice for short term employees, treatment for mitigation purposes of second job income and entitlement to benefits during the period of notice;
2. The Supreme Court decision in *Westpac Solutions Ltd. v. Morgan*[2] reviewing the principles relevant to the enforceability of a non-competition covenant; and
3. The Supreme Court decision in Bailey v. Service Corporation International (Canada) ULC[3] providing a review of the principles to be applied in assessing a claim for aggravated and punitive damages.

PAKOZDI V. B & B HEAVY CIVIL CONSTRUCTION LTD.

This case involved an appeal by an employer relating to the length of notice awarded by the trial judge for a short-term employee as well as the trial judge's refusal to deduct second job income as mitigation. The employee cross appealed the denial of a claim for RRSP contributions during the period of notice.

A. Assessment of notice for short term employees

This case provided the Court of Appeal the opportunity to once again comment on appropriate notice for short term employees as well as to provide comment on the role that ill-health can play in the length of notice. Those following employment law cases may have noted that recently awards of notice for short term employees have appeared to have significantly increased, in some cases to more than six months. This decision will likely change that trend. The employee had worked for about a year prior to his termination. The trial judge awarded him 8 months notice. After reviewing the circumstances and authorities she concluded that in light of his experience, age and length of employment the applicable notice period is five months. However she increased the period of notice by an additional three months to eight months in total on the basis that his physical and medical condition would make it more difficult for him to obtain new employment and accordingly, he was "in a position of vulnerability that was known to his employer". The Court of Appeal disagreed with this approach to determining notice, noting that it raised two issues:

1. Whether a notice period of eight months is within the range of reasonableness for an employee of 12 months in the circumstances of this case; and
2. Whether the approach of adding on an amount in respect of the respondent's medical condition is correct.

On the first issue, Mr. Justice Hunter writing for a unanimous bench noted that the notice period of two to three months for a short-term employee of a year or less has been established as being in the range of reasonableness. In support of this proposition, the Court referred to three prior decisions of the Court of Appeal, specifically *Saalfield v. Absolute Software Corporation*[4], *Hall v. Quicksilver Resources Canada Inc.*[5] and *Cabott v. Urban Systems Ltd.*[6] The Court quoted the following comment from the decision in *Saalfield*:

> [15]…Absent inducement, evidence of a specialized or otherwise difficult employment market, bad faith conduct or some other reason for extending the notice period, the B.C. precedents suggest a range of two to three months for a nine-month employee in the shoes of the respondent when adjusted for age, length of service and job responsibility…

The Court concluded that the trial judge's assessment of the notice period of five months was within the range of reasonableness, though perhaps on the high side. They concluded however that adding three months to this for the respondent's vulnerability took the notice period outside the range of reasonableness unless there were very special circumstances that could support this assessment. The Court did not agree that an employee's medical condition provides a basis for increasing the notice period beyond the period assessed by reference to the *Bardal* factors, particularly

in circumstances where the employee did in fact work during the notice period. In support of this, the Court quoted from the decision of Mr. Justice Goepel in *Waterman v. IBM Canada Limited*[7] in which a similar argument had been made for increased notice. In that decision Mr. Justice Goepel said as follows:

> [23] Mr. Waterman's health is not a factor to increase the notice period. In that regard, I adopt the comments of McLachlin J. (as she then was) in *Nicholls v. Richmond (Township)*(1984), 52 BCLR 302 (SC) at 309-10 in which she held that the employee was not entitled to an increased notice period due to ill health.

This decision provides support for both an argument that the reasonable period of notice for short-term employees is in the range of two to three months and also that the health of the dismissed employee is not a factor to be taken into account in assessing reasonable notice.

B. Deductibility of second job income for mitigation purposes

Mr. Pakozdi while working for B & B continued to generate an income doing independent consulting. This consulting work was done with the knowledge of B & B. Subsequent to his termination, Mr. Pakozdi continued consulting and in fact increased his consulting earnings substantially. At trial, the trial judge declined to deduct any of this income for the purposes of mitigation, relying on *Redd's Roadhouse Restaurants Ltd. v. Randall*[8] for the proposition that where the employer was aware that the employee would be working at two jobs, it was proper to exclude from the calculation of damages the post termination income from the second job. The Court of Appeal found this to be an error.

The Court of Appeal provided a succinct summary of the mitigation issue in employment law cases, stating as follows:

> [36] In the assessment of damages for breach of contract, mitigation can arise in one of two ways. First, it can be argued that the claimant could have reduced the loss by taking reasonable steps to replace the lost income through new employment. This is somewhat awkwardly referred to as the "duty to mitigate" but would be more accurately expressed as the principle that the party not in breach cannot recover for avoidable loss.
>
> [37] Avoidable loss is not an issue in this case.
>
> [38] The second way in which principles of mitigation can lead to a reduction in damages for breach of contract arises when the party not in breach does in fact reduce the loss by replacing the income with new income that would not have been earned if the employment relationship had continued. This is termed "avoided loss" and is the issue raised by B & B in this appeal.

The Court highlighted that the issue is whether it is avoided loss, with the question being whether the new income is replacement income, regardless of the source of the income or a continuation of supplementary income being earned prior to dismissal. The evidence at trial was that Mr. Pakozdi earned more from his consulting job in the months following his dismissal, than he would have earned with B & B. The Court of Appeal held that the proper approach in the circumstances was to make an assessment of how much of the post termination income is to be considered replacement or substitute income, and therefore deductible from his damage claim, and how much is to be considered supplementary income that he could have earned if his employment with B & B had continued, and therefore not deductible from his damage claim.

C. Entitlement to benefits during the notice period

The final aspect of this appeal was a cross appeal by Mr. Pakozdi for the loss of opportunity to benefit from the company's RRSP matching program. At trial the trial judge declined to make any award for this loss of opportunity on the basis that there was no evidence that Mr. Pakozdi was making RRSP contributions during the notice period and therefore it is not compensable. The trial judge relied on *Matusiak v. IBC Canada Ltd.*[9] in support of this position. This was an application by the trial judge of the principle from *Wilks v. Moore Dry Kiln Co. of Canada*[10] to the effect that a plaintiff cannot recover for fringe benefits that would have been paid by the employer unless the employee has in fact incurred the expense during the notice period. The Court of Appeal held that this principle does not apply to fringe benefits such as matching expenses as the employee cannot make the expenditure that would trigger the employer match once he has been dismissed.

The Court held that the applicable principle to the assessment of this claim is that damages in a wrongful dismissal action are assessed on the basis of the plaintiff's entitlement to benefits throughout the period of reasonable notice. The Court applied the rationale from its earlier decision in *Hawkes v. Levelton Holdings Ltd.*[11] in which it was held that a plaintiff is entitled to compensation for the loss of opportunity to share in whatever pecuniary benefits would have flowed from being an employee during the notice period and awarded the dismissed employee the contributions that would have been made by the employer during the period of notice.

WESTPAC SOLUTIONS LTD. V. MORGAN

The principles reviewed in *Westpac* are not new, but they do provide a good review of the enforceability of non-competition agreements. The case originated with Westpac bringing an application to restrain the defendant Morgan, its ex employee, from directly or indirectly competing with their business in the Metro Vancouver area through his new employment. The terms of the employment agreement that were relevant to the application before the Court included:

a. A non-competition covenant requiring Mr. Morgan to not be engaged in any business that competes with the business of Westpac in the Metro Vancouver area of British Columbia for a period of 12 months following the termination of

his employment;

b. A confidentiality covenant, requiring Mr. Morgan to not disclose Westpac's confidential information; and

c. A non-solicitation covenant, requiring Mr. Morgan to refrain from soliciting any of Westpac's clients or employees for a period of 12 months following termination of his employment.[12]

During Mr. Morgan's approximately two years of employment with Westpac, he held various roles from sales and customer service rep to equipment and chemicals specialist which was his position at the end of his employment. In all of his positions, Mr. Morgan gained knowledge of Westpac's customer base and suppliers, and its pricing and costing. Ten days after his resignation, Mr. Morgan began working for a competitor. At the outset of the application the parties filed a consent order agreeing that Mr. Morgan would be restrained for a period of 12 months from directly or indirectly soliciting any customers that were customers, clients, suppliers or consultants of Westpac during his employment with Westpac, to transfer the business from Westpac and from directly or indirectly trying to persuade or entice any person who was an employee of Westpac during his employment with them, to leave Westpac's employment. Mr. Morgan also agreed to destroy any confidential information in his possession or control, as did his new employer. The only matter left for resolution on the application was whether an injunction should be granted on an interlocutory basis to restrain Mr. Morgan's employment with his new employer.

The Court started its analysis of whether the injunction should be granted by reviewing the well settled test for an interlocutory injunction. To be successful, the applicant must show that:

a. There is a serious issue to be tried;

b. The applicant will suffer irreparable harm if the relief is not granted, and

c. The balance of convenience favours granting the relief.

As the application involved a restrictive covenant, the court imposes a higher threshold on the first branch of the test, requiring Westpac to show a *prima facie* case that the non-competition covenant is enforceable, and the defendant's ongoing conduct is in breach of the non-competition covenant. The parties agreed that the non-competition agreement will be found to be presumptively void as a restrain of trade unless the restraint is:

a. Protective of a legitimate proprietary interest of the employer;

b. Reasonable between the parties in terms of temporal length, spatial area covered, the nature of activities prohibited and overall fairness;

c. Governed by terms that are clear, certain and not vague; and

d. Reasonable in terms of the public interest with the onus on the part seeking to strike out the restraint.[13]

The Court then reviewed the reasons for careful scrutiny of non-competition agreements in employment contracts quoting from the decision in *Quick Pass Master Tutorial School Ltd. v. Zhao*[14]

> Generally, courts scrutinize restrictive covenants in employment contracts more closely than restrictive covenants in contracts for sale and purchase of a business for two reasons. First, the inequality of bargaining power between an employer and employee is greater than that between other contracting parties. Second, a purchaser of a business generally pays for the business's goodwill whereas an employee is not paid for this: *Safron v. KRG Insurance Brokers (Western) Inc.,* 2009 SCC 6 at paras. 21 – 22. However, the appropriate degree of scrutiny must reflect the reality both of the parties' relative bargaining power and of the bargain struck.

The Court also quoted from the decision in *Phoenix Restorations Ltd. v. Brownlee*[15] where the court found:

> A restrictive covenant is enforceable only if it is reasonable between the parties and with reference to the public interest. The test of reasonableness must be applied in the particular circumstances of each case, based upon an overall assessment of the clause, the agreement within which it is found and all of the surrounding circumstances: *Elsey v. J.G. Collins Insurance Agencies Ltd. Estate,* [1978] 2 SCR 916 at 923 – 924.

In determining whether Westpac has established a strong *prima facie* case that the non-competition covenant will be found to be enforceable at trial, the Court considered the following:

1. Whether the restrain on Mr. Morgan's current employment is necessary to protect Westpac's proprietary interest in its information relating to its business, including client lists, employee directories, costing information, equipment list and pricing information.
2. Whether the terms of the employment agreement are clear, certain and not vague;
3. Whether the terms are reasonable between the Parties in terms of temporal length, spatial area covered, the nature of activities prohibited and overall fairness.
4. Whether the terms of the employment agreement are reasonable in terms of the public interest.

In declining to grant the interlocutory order the Court noted that the geographic area covered by the agreement, coupled with the restraint on employment, were not reasonable. The Court noted that if the employment agreement were enforced, the impact on Mr. Morgan would be unreasonable and unnecessary in light of the protections agreed to by the defendants. to protect Westpac's proprietary interest in its information relating to its business, including client lists, employee directories, costing information, equipment list and pricing information.

BAILEY V. SERVICE CORPORATION INTERNATIONAL (CANADA) ULC

In this decision Madam Justice Griffin provides a concise sum-

mary of the principles that govern claims for aggravated damages. Mr. Bailey went off work on disability that ultimately was found to be stress related. His applications for disability benefit either through WorkSafe or through the company's disability benefit plans were not accepted and ultimately SCI took the position that Mr. Bailey had abandoned his employment and that it therefore had just cause for the termination. Mr. Boyle's employment was terminated while he was away from work, retroactively to the last day worked. SCI did not communicate the termination to Mr. Boyle, rather Mr. Boyle found out about the termination when his wife made a claim for reimbursement of medical expenses. At the time of his termination Mr. Bailey was 60 years old and had been employed by SCI for 17 years.

Madam Justice Griffin found that the Company's position that they had cause was not sustainable on the evidence finding rather that his time off work was approved by SCI, relying on the steps that the SCI took to process the leave and the R.O.E. forms that were completed by the SCI. She went on to consider what the true reason for the termination was concluding that Mr. Bailey's manager, Mr. Boyle, had learned that Mr. Bailey was critical of his management style. Email communications between Mr. Boyle and SCI's Human Resources Department identifies that Mr. Boyle was looking for an excuse to terminate Mr. Boyle's employment, and despite not talking to Mr. Bailey, wanted to treat him as though he had abandoned his job.

Madam Justice Griffin also found that Mr. Bailey's entitlement to notice was limited to eight weeks due to a valid employment agreement, despite the fact that Mr. Bailey was a 17-year employee who was 60 years old at the time of his termination. This limitation became relevant in her discussion of punitive damages.

In assessing the claim for aggravated damages, Madam Justice Griffin summarized the Court of Appeal decision in *Lau*[16] and the principles that emerge from that decision applicable to the analysis of a claim for aggravated damages in the context of an employment case. Those principles are as follows:

1. A person's work is a significant aspect of a person's life, key to self-worth.
2. Employers have an obligation of good faith and fair dealing in the manner of dismissal of an employee. This includes refraining from conduct that is untruthful, misleading or unduly insensitive.
3. When the employment relationship ends, the employee is vulnerable, and some upset can be expected. Norman upset that can be expected is not compensable. However, aggravated damages resulting from the manner of dismissal are available if they result from conduct that is unfair or in bad faith.
4. Examples of facts which can give rise to aggravated damages include but are not limited to conduct that is untruthful, misleading or unduly insensitive. Other conduct in which aggravated damages may be awarded include maintaining wrongful allegations of dishonest conduct, misrepresenting the treason for the termination, and firing an employee who is on disability leave.
5. Aggravated damages are compensatory based on foreseeable injury for breach of the duty of good faith and fairness. Because of this there must be some evidence that the manner of dismissal (as opposed to the mere fact of dismissal) is the cause of damaging effects on the dismissed employee, whether mental distress or intangible effects such as damage to reputation.
6, Medical evidence is not necessary to award aggravated damages based on mental distress caused by the manner of dismissal but there must be some evidence that transcends ordinary upset or distress. This can include evidence from the employee or from family members or friends.

Madam Justice Griffin concluded that SCI's manner of termination breached the employers duty of good faith in a variety of ways, including failing to take into account his long period of service to SCI, firing him when he was known to be sick and wanting to continue on the company's extended medical plan, not giving him a chance to respond to the unfair assumption that he had abandoned his employment, not telling him that he was dismissed and falsely alleging and maintaining the allegation that there was cause for dismissal. Madam Justice Griffin noted that the cause allegations carried with them the suggestion that Mr. Bailey was dishonest, suggesting that he was not ill when he claimed to be, that he was working full time as a real estate agent at the same time as he was seeking disability benefits and suggesting that he had repeatedly been asked to return to work but had refused. Taking all of these factors into consideration Madam Justice Griffin concluded that an appropriate award of aggravated damages was $25,000.

With respect to the claim for punitive damages, Madam Justice Griffin quoted the test established by the Supreme Court of Canada in *Honda*[17] as follows:

> …this Court has stated that punitive damages should "receive the most careful consideration and the discretion to award them should be most cautiously exercised" (*Vorvis*, at pp. 1104 – 5). Courts should only resort to punitive damages in exceptional cases (*Whiten,* at para. 69). The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be "harsh, vindictive, reprehensible and malicious" as well as "extreme in its nature and such that by any reasonable standard is deserving of full condemnation and punishment? (*Vorvis,* at p. 1106)

Madam Justice Griffin's conclusions regarding the conduct of SCI are found at paragraphs 217 and 218 where she said the following:

> [217] I have little difficulty in concluding that the

> conduct of SCI was harsh and reprehensible. I find that Mr. Boyle's motives were also malicious and vindictive. Mr. Boyle was upset that Mr. Bailey had made a claim attributing some of his stress to Mr. Boyle's management style. Mr. Boyle was the person responsible for making the decision to terminate Mr. Bailey's employment. He was not honest about the reason for termination, persisting in trying to find cause for termination.
>
> [218] SCI knew it had a sick employee who was suffering mental distress, and rather than dealing sensitively with him, chose to treat him cruelly. He was 60 years old and had given 17 years of his life to this company, working in the stressful environment of selling products and services to bereaved persons.

The goal of punitive damages are retribution, deterrence and denunciation but it is also important to avoid a situation of double punishment where aggravated damages are also awarded. In those situations, an assessment of whether the aggravated damages awarded will achieve the goal of retribution, deterrence and denunciation.[18] After taking into consideration the amount that she had awarded for aggravated damages, Madam Justice Griffin concluded that this was one of those exceptional cases where punitive damages are necessary and just.

Madam Justice Griffin concluded that in order to effectively deter SCI from this type of malicious and callous conduct in the future an award of $110,000 was appropriate. She then comments that the combined damages that SCI had to pay taking into consideration the punitive damages award, the aggravated damages award and the damages under the employment contract which were limited to eight weeks, SCI was still paying less than they would have had to pay if Mr. Bailey had been entitled to common law damages for notice. She relies on this fact as evidence that the award of punitive damages at $110,000 is not excessive or disproportionate. V

1 2018 BCCA 23
2 2018 BCSC 976
3 2018 BCSC 235
4 2009 BCCA 18
5 2015 BCCA 291
6 2016 YKCA 4
7 2010 BCSC 376, aff'd on other grounds 2013 SCC 70
8 2014 BCSC 1464
9 2012 BCSC 1784 at para 118 - 119
10 (1981), 32 BCLR 149 (SC)
11 2012 BCSC 1219, aff'd 2013 BCCA 306
12 *RJR-MacDonald v. Canada (Attorney General),* [1994] 1 SCR 311
13 *National Bank Financial Inc. v. Cannaccord Genuity Corp.,* 2018 BCSC 857 at paragraph 59 and *Shafron v. KRG Insurance Brokers Western Inc.,* 2009 SCC 6 at paragraph 16
14 2018 BCSC 683 at para 34
15 2010 BCSC 1749 at para. 26
16 2017 BCCA 253
17 *Honda Canada Inc. v. Keays,* 2008 SCC 39
18 *Vernon v. British Columbia (Liquor Distribution Branch)* 2012 BCSC 133

cmi
canadian magnetic imaging

Immediate Access to High-Field, Wide-Bore MRI

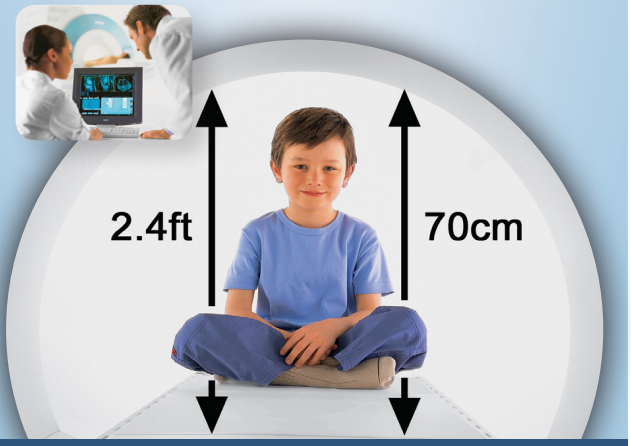
No Wait Times: Same/next day appointments.

Litigation MRI: Objective Evidence For Liability Claims
CMI offers MRI scans to all accident claimants on a contingent basis so, if the patient does not recover damages from their insurer, their scan is free.

Teaching Hospital Based Radiologists:
Our team of multi-disciplinary, teaching hospital based radiologists specialize in the area of the body being scanned.

Traumatic Brain Imaging:
CMI offers a highly sensitive brain trauma protocol featuring Susceptibility Weighted Imaging (SWI), which is a critical tool for imaging Diffuse Axonal Injury.

Patient Comfort: Our large, wide-bore, open design (2.4 feet) provides twice the head space of traditional, vertical field systems.



Hycroft Centre: Suite 18 – 3195 Granville Street (at 16th Ave.)
Vancouver, BC **Tel:** 604.733.5563 **Fax:** 604.733.4424
Toll Free: 1.877.268.8530 - www.canmagnetic.com