

## MERRILL LYNCH GORED BY TERMINATED FINANCIAL ADVISOR

### Alberta Court Sees Red, Awards Damages of \$2.2 Million

In a stunning October decision, the Alberta Court of Queen’s Bench awarded damages of \$2.2 million to a terminated financial advisor and, in the process, re-opened the issue of whether damages resulting from the manner of termination should be available where the employer engaged in bad faith conduct. Kurt Soost was a “star” financial advisor in Calgary who was recruited away from RBC Dominion

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Securities by Merrill Lynch in 1998. By 2001, his book of business had grown to \$150 million and he was recognized as one of the employer’s top five performers nationally. However, Soost had participated in private placements without receiving approval from the firm’s compliance department, and created a “concentration problem” for the firm when he and his clients purchased a substantial amount of a speculative biotech stock. Following a meeting in April 2001, the firm determined that Soost was “out of sync” with the firm’s policies and direction, and he was terminated for cause. He was told not to return to the office, and his clients were assigned to other financial advisors. Although he found employment elsewhere, Soost lost the vast majority of his clients, and was forced to leave the industry.

At the trial, which commenced in January 2008, the employer argued that Soost breached industry and firm policy by, among other things, failing to receive approval for his private placement activities, failing to use margin in an appropriate manner, and engaging in discretionary trading. Soost replied that the firm’s policies were inconsistently applied, and that he was terminated in order to allow Merrill Lynch to address its concentration problem.

The court eventually sided with Soost, finding that there was confusion about the application and enforcement of the private placement policies, the manner in which Soost managed his margin accounts was not sufficient on its own to justify his termination, and the firm did not prove the existence of discretionary trading.

After awarding Soost 12 months’ pay in lieu of notice, which amounted to \$600,000, the court considered the issue of damages resulting from the manner of termination, and concluded that both parties knew that if Soost was terminated without notice, he would suffer damages far greater than the loss of income during the notice period. In an industry where reputation means everything, a sudden departure raises suspicions and prevents a financial advisor from maintaining a book of business. Accordingly, the firm’s actions in purporting to terminate Soost for just cause “were both unfair and insensitive”, such that Soost would be “woefully under-compensated for his true loss”

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unless additional damages were awarded. Taking “a conservative approach”, the court reviewed Soost’s gross trailing commissions, and awarded him an additional \$1.6 million.

In light of this decision, employers should be extremely cautious when considering the termination of employees who rely on a book of business to earn an income. ■

## SUPREME COURT OF CANADA ALLOWS WAL-MART TO SAVE MONEY, LIVE BETTER

### Refuses to Roll Back Decision to Close Unionized Store

In two related decisions released on November 27, 2009, the Supreme Court of Canada denied remedies to employees that were dismissed by Wal-Mart Canada Corp. when it closed its first unionized store in North America.

The complex and lengthy matter began in August 2004, when the United Food and Commercial Workers Union was certified as

the bargaining agent for employees at the Jonquiere, Quebec store. In February 2005, after negotiations for a collective agreement proved unsuccessful, the union applied to the Minister of Labour to appoint an arbitrator. On the day the Minister accepted the union’s application, Wal-Mart decided to close the store for “business reasons”, and ultimately did so in April, 2005, resulting in the dismissal of all 190 employees.

Over the years, several legal proceedings were initiated by the union and certain employees in the wake of the closure, which was regarded by the union as only one step in a larger strategy of intimidation and union-busting.

In one proceeding, Gaetan Plourde claimed that he lost his employment as a result of his union activities, and sought an order for reinstatement under the Labour Code. However, the SCC concurred with earlier decisions in which the closure, now proven to be genuine and permanent, constituted “good and sufficient” reason to justify Mr. Plourde’s dismissal.

In a related proceeding, three employees claimed that they too lost their employment as a result of their union activities, and sought orders for reinstatement under the Labour Code. There, the SCC found that it would be “a waste of the parties’ time and money”

## TRIBUNAL FINDS DISCRIMINATION ALIVE AND WELL AT CARE FACILITY

The British Columbia Human Rights Tribunal recently decided that a long term care facility discriminated against a male care aide when it refused to hire him for a vacant position.

Mr. Morrison was a 54 year old care aide program graduate who applied for a vacant position with AdvoCare. Despite his qualifications, Mr. Morrison’s application was unsuccessful. As the position remained open, Mr. Morrison called the employer in order to determine why he had not been hired. He also applied a second time, but the employer opted to hire female care aides for the vacant position instead.

Mr. Morrison complained to the Tribunal, and argued that he was not hired into a position that was dominated by females simply because he was male. In response, AdvoCare explained that it refused to hire Mr. Morrison because certain “red flags” had been raised during the interview and reference process, and because it considered Mr. Morrison’s repeated calls to be harassing in nature.

After considering the evidence, the Tribunal found that AdvoCare did not hire Mr. Morrison because its representative felt uncomfortable with

him, and intimidated by his follow up telephone calls. In the Tribunal’s view, this interpretation of the calls contained “the scent of stereotypical gender-related presumption” that Mr. Morrison was aggressive and unsuitable for the position.

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Ultimately, the Tribunal concluded that AdvoCare did not have a non-discriminatory reason for its refusal to hire Mr. Morrison, and ordered the employer to pay almost \$12,000.00 in damages, including \$3,150.00 in lost wages, \$3,773.02 for gas and lodging expenses, and \$5,000.00 for injury to his dignity, feelings and self-respect.

to remit the matter to the Commission des Relations du Travail to order reinstatement, since the store is closed and “the outcome would not be in doubt”.

Despite these findings, the SCC confirmed that employees may still have a remedy against an employer who closes a store or workplace for anti-union reasons, under different sections of the Labour Code, even if the employees were not involved with, or opposed to, the union’s activities.

For example, in a September 2009 arbitration case, the union argued that Wal-Mart’s store closure violated section 59 of the Labour Code, which provides that no employer may change conditions

**The SCC concurred with earlier decisions in which the closure constituted “good and sufficient” reason to justify dismissal.**

of employment after certification and before a lockout, strike or arbitration award. The arbitrator determined that

Wal-Mart did not prove that it made its decision in the normal course of its operations or in the absence of discriminatory considerations, and could not refer to vague “business reasons” in order to justify its actions. Having declared the terminations illegal, the arbitrator retained jurisdiction to impose remedies if the parties were unable to reach an agreement.

Wal-Mart immediately announced that it would apply for judicial review of the arbitrator’s decision, and maintains there was “no way” the store could meet the union’s demands. ■

## DENTIST ATTEMPTS MINOR LAYOFF PROCEDURE, GETS DRILLED IN COURT

### But Offer to Return Employee to Position Numbs the Pain

In a recent decision, the British Columbia Supreme Court determined that a dentist wrongfully dismissed a receptionist when he laid her off temporarily, despite following the provisions of the Employment Standards Act.

The dentist, Dr. Arthur Machner, purchased an existing dental practice in September 2007 and continued to employ two receptionists, including Dawn Besse, a valued employee who had worked with the previous dentists for 18 years. When business

softened following the change in ownership, Dr. Machner looked to reduce his costs. He proposed a system of split shifts to the two receptionists, but Ms. Besse refused to accept the proposal.

In response, Dr. Machner contacted the B.C. Employment Standards Branch, and was provided with information to the effect that an employer can lay off an employee for a period not exceeding 13 weeks, without providing notice, or pay in lieu of notice. Accordingly, Dr. Machner laid Ms. Besse off for 12 weeks and 6 days, and advised her that she could return to work at the conclusion of that period.

Unfortunately, although Dr. Machner followed the temporary layoff provisions of the legislation, he did not realize that at common law, a temporary layoff constitutes a constructive dismissal, which is a unilateral change to a fundamental term of the employment agreement. When he received a letter from Ms. Besse’s lawyer, and learned of his error,

**Although Dr. Machner followed the temporary layoff provisions of the legislation, he did not realize that at common law, a temporary layoff constitutes a constructive dismissal.**

Dr. Machner wrote to Ms. Besse and offered to return her to her position immediately, with full pay and benefits. Ms. Besse rejected the offer, and sued for wrongful dismissal.

At trial, the court confirmed that in the absence of a provision in the employment agreement which permits an employer to lay off an employee, the temporary layoff provisions of the Employment Standards Act are not relevant, and determined that the layoff constituted a constructive (or wrongful) dismissal. It was irrelevant that Dr. Machner did not intend to terminate Mrs. Besse’s employment, or that he imposed the temporary layoff on the basis of an incorrect understanding of his obligations as an employer.

However, the Court also determined that Ms. Besse failed to mitigate her damages by refusing to accept the dentist’s offer to return her to her position. As a result, her damages were limited to the wages that she would have earned during the five weeks between the date she was laid off temporarily and the offer to return her to her position. ■

### RECENT WRONGFUL DISMISSAL AWARDS

Case	Position	Salary	Age	Service	Notice
Adams v. Fairmont Hotels	General Manager	\$150,761.00	41	12 yrs.	15 mos.
Chapple v. Umberto Management Ltd.	Restaurant Manager	\$50,112.50	38	13.5 yrs.	15 mos.
Jamieson v. Finning International Inc.	Millyard Systems Manager	\$84,000.00	53	20 yrs.	19 mos.
Koos v. A&A Customs Brokers Ltd.	Brokerage Agent	\$50,000.00	39	10 yrs.	10 mos.
Marshall v. Old Meets New Furniture	Furniture Store Manager	\$57,044.00	46	7 yrs.	8 mos.
Pereira v. The Business Depot Ltd.	General Manager of Store	\$58,000.00	38	7 yrs.	10 mos.
Smith v. Centra Windows Ltd.	Vice-President, Marketing & Development	\$82,000.00	50	13.5 yrs.	15 mos.

### CP NOTES

Paul Pulver will be speaking at the upcoming 2010 BC Human Resources Management Association Conference – New World, New Ideas on May 5 -7, 2010, as part of a panel discussion on the law in the workplace. For more information, email Paul at [ppulver@cplaw.ca](mailto:ppulver@cplaw.ca) or visit [www.bchrma.org](http://www.bchrma.org).

Tom Beasley will be speaking at the 5th Annual Insight Western Canada Labour Relations Conference on January 21 – 22, 2010 on the topic of Accommodating Employees with Mental Illness. For more information, email Tom at [tbeasley@cplaw.ca](mailto:tbeasley@cplaw.ca) or visit [www.insightinfo.com/labourrelations](http://www.insightinfo.com/labourrelations).

We are pleased to welcome Diane Climie to our staff. Diane brings considerable experience to her role as assistant to Tom

Beasley and Alexis Kazanowski. We trust that you will find her to be as friendly and helpful as we do.

Alexis Kazanowski recently celebrated her one year anniversary with the firm, as did Evelyne Blais, assistant to Paul Pulver and Jim Carwana.

Coutts Pulver LLP is a proud supporter of the Canadian Athletes Now Fund, which assists our athletes as they prepare to represent Canada at the Winter Olympics in February 2010 and beyond. For more information, visit [www.CanadianAthletesNow.com](http://www.CanadianAthletesNow.com).

*To all of our clients and friends, we wish you a very happy holiday, and a healthy and prosperous new year.*

The Labour and Employment Law Report contains general information and commentary and is not intended to provide legal advice. For legal advice on a specific matter, please contact Paul Pulver at [ppulver@cplaw.ca](mailto:ppulver@cplaw.ca). If you wish to provide us with your comments or questions, be added to or removed from our circulation list, update your address, or receive the Report by email, please contact Evelyne Blais at [eblais@cplaw.ca](mailto:eblais@cplaw.ca) or by telephone.