Case In Point

Ontario Court Finds Investment Firm Liable for Defamation in a Notice Of Termination Filed with IIROC and Orders Correction

Date: February 23, 2018

The Ontario Superior Court has found that an investment firm defamed one of its former traders when it filed a Notice of Termination (NOT) with the securities regulator indicating the trader's employment had been terminated for failing to follow trading policies and engaging in unauthorized trading. The Court concluded that there was no cause for the termination and that the firm was "either being untruthful in its filing or was reckless with regard to the truth when making the filing."

In *Hampton Securities Limited v. Dean*, Dean commenced work in March 2008 as a proprietary trader buying and selling securities for Hampton. On April 3, 2009, she resigned and effectively claimed constructive dismissal after Hampton required her either to increase her reserve account by $50,000 within 24 hours because her trading losses exceeded her existing reserve, or to face termination. Later the same day, Hampton provided her with a letter stating her employment was terminated for cause.

After the termination, Hampton filed the NOT on the National Research Database maintained by Hampton's regulator, the Investment Industry Regulatory Organization of Canada (IIROC). The NOT stated that Dean was terminated for cause for failing to follow trading policies and engaging in unauthorized trading.

Hampton later brought an action against Dean claiming that she owed it money arising out of losses she incurred as a trader. Dean counterclaimed for, among other things, damages for constructive dismissal, defamation, mental distress and punitive damages.

The Court rejected Hampton's claim that Dean owed it any amounts under the employment contract.

Moreover, the Court held that there was no evidence to substantiate the cause termination: the evidence failed to establish that Dean did not follow trading policies or engaged in unauthorized trading, and Hampton's CEO had in effect testified that Dean's employment was terminated "because she did not increase her reserve account, not because she engaged in unauthorized trading." There was also nothing in Dean's employment contract which required her to increase her reserve within 24 hours or face termination. The Court stated that "[i]f an employer intends to impose dire consequences upon employees … those consequences should be clearly set out in the employment agreement at the outset."

Dean had counterclaimed for defamation in light of the NOT filing, stating among other things that the NOT severely impeded her ability to obtain employment in her field as all prospective employers have access to that information. In light of the CEO's testimony, the Court stated that Hampton "was either being untruthful in its filing or was reckless with regard to the truth when making the filing." It found that the filing "exceeded the legitimate purposes of reporting to a regulator. The purpose of reporting to a regulator is to alert the regulator to potential risks that registered individuals may create. Dean could not have been said to create any risk of unauthorized conduct when [the CEO] was perfectly content to accept the conduct, provided she increased her reserve account."

As a result, the Court found that Hampton's statements in the NOT were defamatory. The defences of justification and qualified privilege were rejected because of the factual findings described above, and Dean was awarded $25,000 for defamation. Hampton was also ordered to file a notice of correction of the NOT with IIROC in a form acceptable to both parties.

Finding there was no cause for the termination, the Court considered the issue of whether reasonable notice was owing. It rejected Hampton's argument that the employment contract limited any payment upon termination to minimum standards only, on the basis that the applicable provision in the contract did not refer to benefit continuation and therefore did not comply with the *Employment Standards Act, 2000*. The Court awarded four months' notice plus an additional two months for Hampton's conduct of filing knowingly false information with its regulator which made it "impossible" for Dean to find equivalent employment.

Finally, the Court awarded Dean $25,000 in punitive damages on the basis that Dean's conduct represented a marked departure from the ordinary standards of decent behaviour. However, it declined to award "*Wallace* damages" for mental distress as: (i) mental distress damages are normally only awarded where an employee has sought medical attention, professional assistance or some form of therapy; and (ii) the Court was concerned mental distress damages would overlap with damages for defamation.

Take-Aways

This case is a stark reminder to employers in highly regulated industries to ensure that any information they are required to file with their regulators regarding an employee's change in status is fully accurate and prepared with diligence. The fact that a regulated firm could be assessed these kinds of damages *and* ordered to correct a regulatory filing (which is rare) underscore this reminder.

On a related noted, where cause is alleged, employers should consult with legal counsel as to whether the evidence substantiates the allegations in order to minimize the risks that a court may find otherwise.

Editor's Note: *On March 2, 2018, the* Court of Appeal denied an injunction *to Hampton, which sought to stay the order to correct the Notice of Termination pending the outcome of an appeal of the lower court decision.*