

# The HR Space

Your weekly e-bulletin on labour and employment law issues

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## Employers Beware: Keays Principles Lead to Large Damage Award against Employer

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In our [first edition](#) we looked at the extent to which courts are following the principles established by the Supreme Court of Canada in [Honda v. Keays](#) to awarding bad faith and punitive damages. Last month, an Alberta Court was once again put to the test.

On October 13, 2009, the Alberta Court of Queen's Bench released its reasons in [Soost v. Merrill Lynch Canada Inc.](#) where it followed the Supreme Court's principles, although this time against the employer.

### Factual Background

Kurt Soost, a financial advisor, was recruited by Midland Wallwyn (later becoming Merrill Lynch) in August 1998 from RBC Dominion Securities. Mr. Soost brought with him his book of business, valued at approximately \$70 to \$80 million. He was also offered a forgivable loan for \$870,000 as part of the incentive to move to Merrill Lynch.

During his employment with Merrill Lynch, Mr. Soost continued to obtain new clients and add to his book of business – eventually valued at \$150 million.

Mr. Soost was fired for cause in May 2001. Merrill Lynch alleged that Mr. Soost violated his employment contract and refused to comply with industry standards for personal financial conduct and trading in client accounts.

Following his termination, Mr. Soost was able to find new employment as a financial advisor. But only \$10 million of his book of business followed him. After experiencing a major drop in income, he was forced to leave the industry at the end of 2001. Mr. Soost sued Merrill Lynch for wrongful dismissal, and claimed that Merrill Lynch's allegations of cause resulted in the loss of his book of business.

### The Trial Court's Decision

The judge agreed with Mr. Soost and decided that Merrill Lynch's allegations of cause were unsubstantiated. As such, Mr. Soost was wrongfully dismissed. The court went on to find that, given Mr. Soost's performance and reputation in the financial industry, it was foreseeable that his termination would have the effect of "mortally wounding" his ability to successfully carry on as an investment

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advisor. And Merrill Lynch knew or ought to have known of such effect. Furthermore, Merrill Lynch could have provided Mr. Soost with an opportunity to fix any problems, could have let him go with some minimal notice or even allowed him to resign.

Despite these findings, Merrill Lynch was free to compete with Mr. Soost for clients upon his termination. Indeed, the court said that Merrill Lynch had a responsibility to contact clients to ensure that their financial affairs were being looked after and to provide continuity of service. As such, Merrill Lynch did not intentionally interfere with Mr. Soost's economic relations.

In total, Mr. Soost was awarded damages of \$2.2 million, plus interest and costs:

- 12 months notice, amounting to \$600,000. Although Mr. Soost was only employed by Merrill Lynch for three years, the judge took into account his seven years in the industry;
- \$1.6 million for the manner in which Merrill Lynch terminated Mr. Soost and to compensate for his inability to compete fairly and reasonably in maintaining his client base after he was terminated;
- no separate damages for Mr. Soost's loss of his book of business, as this would have resulted in double compensation; and
- no repayment of the balance of an \$870,000 forgivable loan which he received as part of the recruitment effort to switch brokerages in 1998.

### The Application of *Keays* to *Soost*

Despite being a large number, the award of damages in *Soost* is consistent with the Supreme Court's approach to awarding damages as set out in *Keays*. Although damages took into account the unfair and insensitive conduct of Merrill Lynch, the damages

were not awarded through an arbitrary extension of the notice period. Instead, compensation was awarded to Mr. Soost for:

- the actual damages he suffered post termination;
- the effect of having lost his ability and standing in the industry; and
- having to compete for and maintain his book of business and client base.

Also consistent with the concept from *Keays* that punitive damages should only be awarded in limited circumstances, Mr. Soost received no punitive damages.

Although some comfort can be taken in the fact that the courts are following the principles from *Keays* consistently with respect to damage awards based on actual, compensable damages, the employee-friendly outcome in *Soost* demonstrates that the pendulum can easily swing the other way where employers make unsubstantiated allegations of cause.

### Lessons from *Soost*

In summary, the decision in *Soost*:

- reinforces the concept that there is no ownership in a client. *Soost* has reiterated the fine line which exists between the brokerage and financial advisor when competing for the business of a client;
- highlights the implications of the way in which brokerages compensate financial advisors when enticing them from other firms;
- has followed other courts in again rejecting the automatic extension of the notice period in order to compensate for an employer's bad faith;
- confirms that punitive damages should only be awarded in limited circumstances; and

- demonstrates that employers must be cautious in alleging cause against an employee if those allegations cannot be adequately supported.

For more information on the subject of this bulletin, please contact the authors.

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