

COURT OF APPEAL FOR ONTARIO

CITATION: Hampton Securities Limited v. Dean, 2018 ONCA 901
DATE: 20181109
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Lauwers, Hourigan and Pardu JJ.A.

BETWEEN

Hampton Securities Limited

Plaintiff
(Appellant)

and

Christina Nicole Dean

Defendant
(Respondent)

Sara Erskine and David Barbaree, for the appellant

Christopher Somerville and Daphne Hooper, for the respondent

Heard: November 7, 2018

On appeal from the judgment of Justice Markus Koehnen of the Superior Court of Justice, dated February 7, 2018, with reasons reported at 2018 ONSC 101.

REASONS FOR DECISION

[1] Christina Dean was employed by Hampton Securities Limited (“Hampton”) as a proprietary trader. On April 2, 2009, Ms. Dean met with Hampton’s C.E.O., Peter Deeb. During that meeting, Mr. Deeb took the position that Ms. Dean owed Hampton money as a result of certain trading losses and that Ms. Dean was

required to post an additional \$50,000 to her reserve account, failing which she would be suspended from trading.

[2] The next day, Ms. Dean resigned from Hampton, citing constructive dismissal. Shortly thereafter, Hampton filed a Notice of Termination (“NOT”) on the National Research Database maintained by its regulator, the Investment Industry Regulatory Organization of Canada (“IIROC”). In that filing, Hampton stated that Ms. Dean was terminated for cause for failing to follow trading policies and engaging in unauthorized trading.

[3] Hampton commenced this action seeking repayment from Ms. Dean of amounts alleged to be owing as a result of trading losses. Ms. Dean counterclaimed alleging constructive dismissal and defamation. The trial judge ruled that Ms. Dean owed no monies to Hampton, that she was constructively dismissed and was entitled to six months’ notice in lieu of salary, that she was entitled to damages in the amount of \$25,000 for defamation, and that she should receive \$25,000 in punitive damages. In a subsequent written endorsement on costs, the trial judge awarded costs on a full indemnity basis to Ms. Dean in the total amount of \$248,144.94.

[4] Hampton appeals all of the foregoing findings and the costs award. In our view, the arguments advanced by Hampton, which will be considered below, are entirely without merit.

[5] There is no basis to interfere with the trial judge's interpretation of Ms. Dean's employment contract with respect to trading losses. The trial judge provided thorough and compelling reasons why Ms. Dean is only required to reimburse Hampton for 60 percent of such losses. That analysis is entitled to deference from this court: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 50 - 55. In any event, we are of the view that the trial judge's analysis was correct.

[6] We also see no error in the trial judge's conclusion that Ms. Dean was constructively dismissed and was entitled to six months' notice. There can be no serious argument that Ms. Dean was not constructively dismissed when Mr. Deeb took the position that she would be suspended from trading if she did not pay an additional \$50,000.

[7] The trial judge found that the termination clause in Ms. Dean's employment contract was not enforceable on the basis that it excluded Ms. Dean's entitlement to benefits under s. 60(1)(c) of the *Employment Standards Act, 2002*, S.O. 2000, c. 41. In doing so, the trial judge relied on *Wood v. Fred Deeley Imports*, 2017 ONCA 158, 134 O.R. (3d) 481. In our view, the trial judge correctly analogized the termination clause in Ms. Dean's employment contract to the termination clause in *Wood*. Both clauses provide for pay after termination without cause but exclude further compensation. The trial judge did not err in finding that the clause

in Ms. Dean's employment contract excluded benefit contributions and thereby did not comply with s. 60(1)(c) of the *ESA*.

[8] The primary submission made on the defamation claim is that the defence of qualified privilege applies. There are two limitations to the qualified privilege defence established in *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 and re-articulated by this court in *RTC Engineering Consultants Ltd v. Ontario* (2002), 58 O.R. (3d) 726. These authorities hold that the defence will be defeated: (1) if the dominant motive for publishing is malice, or (2) if the statement exceeds the limits of the duty giving rise to the privilege.

[9] In our view, leaving aside the issue of malice, the trial judge was correct to find that the defence of qualified privilege did not apply on the basis that Hampton's statement exceeded the legitimate purposes of the duty to report all internal discipline matters to IIROC. The trial judge, relying on ample evidence, found that the information submitted in the NOT was untrue and wholly unsubstantiated. Providing misleading statements to IIROC clearly exceeded the scope of the duty to report all internal discipline matters or the duty to warn of potential risks that registered individuals may create.

[10] We are also of the view that the award of punitive damages was perfectly appropriate given the conduct of Hampton, including the independently actionable breach of the duty of good faith in Ms. Dean's employment contract.

Such an award was necessary to sanction Hampton for its marked departure from the ordinary standards of decent behavior.

[11] Contrary to the submission made by Hampton, there is no overlap in the damages awarded. The damages were modest and do not come close to fully compensating Ms. Dean for the devastating consequences of Hampton's conduct.

[12] Finally, there is no basis to interfere with the costs award. Ms. Dean made repeated generous offers to settle the case that were rebuffed or ignored by Hampton. It is clear that Hampton took a hardline, no compromise position in this litigation. That is a tactic that comes with costs consequences; it does not fall to this court to relieve Hampton from those consequences.

[13] The appeal is dismissed.

[14] The respondent seeks costs on a substantial indemnity scale, arguing that the appeal was a continuation of the abuse she has suffered at the hands of Hampton. We would not give effect to this submission. The appellant raised some arguable issues on appeal. While those ground were weak, we cannot say that the appeal was abusive. We order the appellant to pay the respondent her costs of the appeal on a partial indemnity scale in the amount of \$35,500.

"P. Lauwers J.A."
"C.W. Hourigan J.A."
"G. Pardu J.A."