Personal liability of a corporate director for employment damages

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A recent Alberta Court of Queen's Bench decision held that directors may be personally liable for wrongful dismissal damages in certain cases. In *Wisser v CEM International Management Consultants Ltd*, 2022 ABQB 414, the Court used the oppression remedy to tie personal liability to directors of a corporation after the directors transferred the assets of the corporation, ceased options, and then commenced a new business under a different corporation.

What you need to know

- In 2007, James Wisser commenced work with CEM International Management Consultants (CEM).
- In 2009, Wisser signed an independent contractor agreement with CEM.
- In 2011, Wisser signed an employment agreement with CEM.
- In 2015, Wisser was terminated without cause and he was provided 4 weeks' severance in lieu of notice.
- By the fall of 2016, CEM (having since been rebranded as Forefront Performance Inc. (Forefront)) ceased operations and the directors incorporated a new company called 1994992 Alberta Ltd. (199 Alberta).
- 199 Alberta provided near-identical services to CEM, largely employed the same staff, and received assets that had been transferred from CEM.
- By the time that Wisser commenced litigation, CEM had no assets and would not have been able to satisfy any judgement against it.

Decision

At trial, the two main issues considered by the Court was: (i) whether the severance was inadequate, and (ii) who was liable for Wisser's damages?

As far as the severance, CEM argued that Wisser was only an employee from 2011 to 2015 as he was previously engaged as an independent contractor. In determining the length of service, the Court held that prior to being employed by CEM, Wisser was a "dependent" contractor, rendering his service continuous. As a result, the Court held

that Wisser's length of service was 7 ½ years and the reasonable notice period was 10 months.

As far as liability, Wisser argued that CEM and its affiliate 199 Alberta were carried on in a manner that was oppressive and unfairly prejudicial to Wisser. In determining whether Wisser was entitled to relief under the oppression sections of the ABCA, the Court held that Wisser was a "complainant" as he was a creditor of the corporation. The Court also held that even though avoiding Wisser's claim may not have been the driver for the restructuring, the only thing the directors gained from the restructuring was evading liability.

In considering whether the directors had personal liability for the oppressive conduct, the Court reviewed the law and held that personal liability under the oppression remedy can be found if, at the complainant's expense, the directors personally benefitted from their conduct. The Court noted that evidence of bad faith was not required. By simply acting to further the oppressive conduct, a director can be personally liable.

In this case, the directors were acting in their capacity as directors and shareholders when they ceased operations, transferred assets away from CEM, and started a new business. Without considering Wisser's interest in CEM, the directors were enjoying 199 Alberta's profitability. Ultimately, the Court granted judgment held that the directors were personally liable for Wisser's damages.

Takeaway

This case makes it clear that the closure of a business may not always avoid having to pay an employee severance.

In certain cases, the oppression remedy can be applied to tie personal liability to directors. In particular, if a director has personally benefitted from the oppressive conduct, they may be personally liable. Directors should consider potential liability prior to making similar decisions in order to avoid reaching into their own pockets to compensate employees who have been wrongfully dismissed.

If you have any further questions about a director's potential personal liability, please reach out to any of the authors or key contacts listed below.

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