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"A Wolf by the ear": dismissed employee ordered to pay employer's legal costs

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A recent case demonstrates that, in some circumstances, employers defending wrongful dismissal actions may be able to recoup a significant portion of their legal expenses from the plaintiff employee. The decision in *Mesgarlou v. 3XS Enterprises Inc.* (January 2, 2003) dealt with the awarding of costs flowing from a case reported previously in *FOCUS* (see "Clause limiting wrongful dismissal damages to *Employment Standards Act* minimum upheld by Court" on our What's New page).

Readers may recall that, in *Mesgarlou*, the plaintiff employee had sued for common law reasonable notice damages but, due to the language of his employment contract, the court limited his notice entitlement to one week, the minimum available to him under the *Employment Standards Act*. This left the plaintiff, Mesgarlou, with only $2,477, a sum that hardly justified his decision to go to court.

Having failed to agree on the apportionment of legal costs, the parties returned to court to settle the issue. In support of its argument that Mesgarlou pay a substantial amount of its legal costs, the employer pointed out that it had made two substantial offers – one of $30,000, and another of $22,123 – to settle Mesgarlou's claim before trial. Mesgarlou had spurned both offers, and declined to make a counter-offer, thereby requiring a four-day trial, in which he was awarded only a small fraction of the lower settlement offer.

LEGAL FEES OF $33,500 "NOT UNREASONABLE"

The employer presented evidence that it had been billed $33,500, of which some $23,000 related to services rendered and disbursements incurred after the employer's first offer to settle the case. While these figures were disputed by the plaintiff as inflated, the court observed that, because the employer was defending a claim of $200,000, as well as an unspecified sum for aggravated damages, costs of $33,500 were not unreasonable.

Mesgarlou also argued that it would be unfair to saddle him with the employer's legal costs, given that he had been terminated without cause after a year of largely successful service to the employer and had yet to pay off his own substantial legal fees. While the court sympathized with Mesgarlou's plight, it sided with the employer, quoting an English maxim on the risks of going to court to pursue a claim: "He that goes to law holds a wolf by the ear".

> "[Mesgarlou] pursued a largely unsuccessful action against the defendant through to judgment after four days of trial, and did so notwithstanding successive offers of settlement in the weeks before the trial which would have left him far better off and would have avoided large amounts

> of the costs now being billed from having been incurred. The awarding of costs in civil actions is intended to compensate the successful party for some of its legal costs. Given the result at trial and the offers to settle, there can be no doubt that the defendant is the successful litigant. The degree to which such compensation is awarded may be increased where it appears that the unsuccessful party has proceeded to trial in the face of a *bona fide* offer to settle which would have been to his ultimate advantage."

With these principles in mind, the court awarded the defendant employer costs of $22,750, consisting of $3,000 for the period up to the first offer to settle, $19,000 for the period from the settlement offer to the end of the trial, and $750 for the costs hearing.

In Our View

Although , ultimately, this decision was favourable to the employer, it should be noted that the principles stated by the court could also operate to an employer's detriment. If a plaintiff employee makes an offer to settle that is declined by the employer, and then succeeds at trial, it is the employer who will bear the costs burden, if acceptance of the employee's offer would have been to the employer's advantage. Therefore, while this decision offers a degree of comfort to employers forced to defend against employee claims, it should also serve as a reminder of the perils of proceeding to trial when the outcome is uncertain and an offer to settle has been made.

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