Contractual damages must be proven, new Supreme Court ruling shows

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Ruling in Atlantic Lottery Corp. Inc. v. Babstock could lead to changes in employment law

The Statue Ivstitia – representing justice – overlooks Ottawa from in front of the Supreme Court of Canada. (mbruxelle/Adobe Stock)

Under traditional contract law principles, in order to be compensated, an aggrieved party is required to prove a financial loss caused by a breach of contract.

Despite this general rule, courts in Ontario and elsewhere have not followed it in wrongful dismissal cases when an employee asserts a claim arising from a loss of enrolment in a benefits plan.

In those cases, if no greater damages are proven, a court will often award damages in an amount equal to the premiums saved by the employer due to the employee's disenrolment from the plan.

In other words, the amount of damages is not connected to the actual loss,
if any, suffered by the employee.

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A recent contract law case in the Supreme Court of Canada gives reason to revisit this anomaly.

What happened in *Atlantic Lottery Corp.*?

In *Atlantic Lottery Corp. Inc. v. Babstock,* a class proceeding was brought on behalf of users of video lottery terminals in Atlantic Canada, on the basis the terminals were unfairly operated. Breach of contract was one of a number of causes of action relied upon by the plaintiff, Douglas Babstock.

Babstock's damages claim was advanced in an unconventional way.

He did not allege actual loss resulting from a contract breach. Rather, he sought the remedy of "disgorgement," which if granted, would require the Atlantic Lottery Corp. to pay back all of its profits realized from Babstock's gambling.

The Supreme Court of Canada stated that the remedy of disgorgement for breach of contract *may* be appropriate, as an alternative to the conventional requirement to prove an actual loss — but only in *exceptional circumstances* which, at a minimum, required that other remedies be inadequate.

The court dismissed Babstock's breach of contract claim because he had not established other remedies to be inadequate or that there were any "exceptional circumstances."

This is in line with other decisions of the Supreme Court of Canada such as the well-known wrongful dismissal decision, Honda v. Keays.

In that decision, the court overruled a line of decisions in which bad faith alone had been sufficient to create a presumption of damages (known as the "Wallace bump").

In *Keays*, the Supreme Court re-affirmed that wrongful dismissal claims were founded on the law of contract; accordingly, damages could not be presumed, but were required to be proven.

How might this apply to a claim for lost benefits?

A damage award based on a loss of benefits plan can be doctrinally sound. However, compensation seems questionable when an employee does not show any financial loss.

For example, following termination of employment, an employee might not have incurred any drug expenses or purchased alternative insurance. Yet courts tend to require an employer to compensate such an employee in an amount equal to the premiums saved by the employer due to the employee's disenrolment from the plan.

Compensation for loss of benefits, even if no financial loss has been suffered, seems akin to awarding the remedy of "disgorgement," which the Supreme Court of Canada has now rejected in the absence of other remedies being inadequate and exceptional circumstances.

In light of this new decision, it can be anticipated that employers will argue the high court has effectively overruled prior case law awarding disgorgement in any claim for benefits. Adequate alternative remedies are available for such a claim, including, for example, compensation for actual loss (if any).

Perhaps this new decision will lead to a change in this important area of the law for employers.

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