



Employment Agency Liable for Not Checking References

BY [MICHAEL I BINETTI](#), AFFLECK GREENE ORR LLP.

Earlier this year, the Ontario Court of Appeal affirmed a trial decision awarding damages against an employment placement agency for not checking the references of an employee who would later go on to defraud her employer of more than \$263,000. In *The Treaty Group Inc. v. Drake International Inc.*¹ the Court of Appeal considered whether it was appropriate for the lower court judge to have awarded the plaintiff, a manufacturer of leather bracelets, 50% of a damage award it had already obtained against the employee placed by Drake. In agreeing that this award was indeed appropriate, the Court of Appeal held that Drake was responsible for half of Treaty Group's damages because Drake had breached its contract by failing to provide any meaningful reference-checking of the employee.

Prior to joining Treaty Group, the employee in question had twice been criminally convicted of fraud against previous employers. After joining Treaty Group's accounting department, the employee walked away with an additional \$263,000. When Treaty Group discovered the fraud, it reported the matter to the police and the employee was convicted criminally. Treaty Group thereafter obtained a civil judgment against the employee and, in a separate action, Treaty Group sued Drake as a severally liable tortfeasor. At trial, Treaty Group was successful against Drake, although its damages award was reduced by 50%, given Treaty Group's own negligence in failing to put into place appropriate internal financial controls to prevent the loss.

At the heart of the appeal was whether Treaty Group was barred from bringing an action against

Drake as it had already obtained judgment against its ex-employee. Also at issue was whether the lower court judge erred in the apportionment of 50% of the damages against Drake.

On its appeal, Drake argued that as a result of not suing both Drake and its ex-employee in the same action, Treaty Group now stood to collect more than 100% of its damages from both parties, or "double recovery." The Court of Appeal rejected this argument and agreed with the trial judge that where a plaintiff elects to pursue a claim against one of severally liable defendants, there is no legal principle that precludes a plaintiff from pursuing a second action. Further, it is not a damage award that bars a second action but actual *collection* of the damages awarded. Treaty Group could therefore collect 50% of its damages from Drake and provide an undertaking not to collect more than the \$263,000 from both the employee and/or Drake.

Drake also argued that Treaty Group was responsible for more than 50% of the loss and that the lower court judge erred in not apportioning more of the liability to Treaty Group. The Court of Appeal rejected this assertion as well. Drake had raised what the Court of Appeal considered to be the "last clear chance" doctrine, where liability is apportioned to a much greater degree to the party who had the last opportunity to avoid the loss. The last clear chance doctrine was rejected by the Court of Appeal in *Snushall v. Fulsang*² in 2005 because of the overemphasis the doctrine places on the plaintiff's conduct rather than the entirety of both parties' tortious acts. The doctrine was also rejected because it does not reflect tort law's primary

objective of restoring the plaintiff to the position it would have enjoyed but for the negligence of the defendant. The Court of Appeal also noted the very high standard of deference that is owed to a trial judge's apportionment of liability in refusing to interfere with the result below.

¹ Available online at

<http://www.canlii.org/en/on/onca/doc/2007/2007onca450/2007onca450.html>

² Available online at

<http://www.canlii.org/en/on/onca/doc/2005/2005canlii34561/2005canlii34561.html>



For more information contact:

Michael I. Binetti, Affleck Greene Orr LLP

Tel: 416-360-0777

Email: mbinetti@agolaw.com