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Workplace Law E-ssentials

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Wrongful Resignation - Reasonable Notice Works Both Ways

In fact, the Employment Standard Act does not require an employee to provide a minimum notice of resignation.

With respect to the courts, they generally require an employee to provide their employer with reasonable notice of resignation. If an employee fails to provide reasonable notice of resignation and the employer has incurred damages as a result, then the employer is able to seek to recover these damages against the employee.

Normally, an employer will bring this kind of claim when an employee has resigned, started working for a competitor (or started their own competing business), and the employer is also suing the employee for breaching his or her fiduciary duties and/or his or her contractual non-solicitation obligations.

The Case

The issue of notice of resignation was recently addressed in *GasTOPS Ltd. v. Forsyth*, in which the employer developed its technology largely through contracts with two clients. Four employees resigned and almost immediately started a competing business which targeted the employer's customers. None of the software programs developed by the employer's competitors at that time were as sophisticated or as extensive as the employer's product line.

The employer sued the employees for:

- Breach of contract. The employer claimed that the employees failed to provide reasonable notice of resignation
- Breach of Fiduciary Duty
- Misappropriation and unauthorized or unlawful use of confidential information
- Misappropriation and unauthorized or unlawful use of trade secrets
- Misappropriation of corporate opportunities
- Breach of confidence

The employees argued that the two weeks' notice of termination provided was reasonable. The trial judge disagreed and suggested the employees should have provided 10 to 12 months notice of resignation. The Ontario Court of Appeal did not have to decide this issue but did state: "we should not be taken to agree with the 10-12 months suggested by the trial judge or the factors he considered in reaching that period." This suggests to us that the Court of Appeal believed that the 10 to 12 months notice requirement suggested by the judge was too long in this case.

Meet Our Newest Lawyer - Michael Stitz!

Michael Stitz B.A.(Hons), JD, received his Juris Doctor degree from the University of Windsor Faculty of Law in June of 2011 and was called to the Bar in Ontario in June of 2012.

While in law school, Michael had the opportunity and pleasure to work on a number of significant projects, which included acting as a Research Assistant to a renowned Ontario labour arbitrator in the update of his principal arbitration text, as well as acting as a Tutorial Leader for first year law students.

In addition, Michael received the CCH Legal Writing prize for attaining the highest grade in Windsor's Legal Research and Writing course, as well as the Blakes Scholar Award, for academic excellence upon recommendation of the Dean.

Prior to law school, Michael received an Honours Degree in Criminal Justice and Public Policy from the University of Guelph.

Outside of the office, Michael is a struggling chef who loves a good bottle of wine, spending time with his family and avidly follows all forms of sport.

The employees were ordered to pay the employer over $12,000,000 in damages plus over $4,000,000 in legal costs. The trial took 295 days. It would not be a surprise to see this case is appealed to the Supreme Court of Canada.

The Lessons

1. An employee may be required to provide an employer with considerably more than two weeks notice of resignation.

2. An employer must prove that the employee's failure to provide notice of resignation has caused damages.

3. An employer and an employee can agree on a specific notice of resignation period in an employment contract and thereby agree on what is "reasonable" notice of resignation.

Our News

On September 20, 2012, Natalie MacDonald will co-chair the Law Society of Upper Canada's Conference: New Lawyer Practice Series - Employment Law.

Termination Clauses and the Duty to Mitigate - Yes or No?

Meaning, seek out alternate, comparable employment, and any new income earned over that contractual notice period would be deducted from their pay in lieu of notice. For example, if an employee were terminated pursuant to a 12-month termination clause, the employer would be well within its rights to pay the amount over time, and require the former employee to immediately disclose any new (replacement) income over that 12-month period, and deduct that projected new income from the remaining severance payments.

That has now changed. The Ontario Court of Appeal in *Bowes v. Goss Power Products*, 2012 ONCA 425, ruled that there is no duty on a departing employee, receiving severance via a termination clause, to mitigate their damages.

In effect, the court has stated that an employee who receives contractual pay in lieu of notice, is not obligated to find another job or deduct future earnings from their severance if they find work before the agreed upon period lapses; assuming the contract is silent on the issue.

We should be clear that this does not impact the current state of the law concerning reasonable notice at common law when an employee sues for breach of contract. However, if an employer seeks to minimize its liability by agreeing to a pre-determined period of notice or pay in lieu, it must expressly state in the contract that those severance monies are subject to mitigation or a claw back.

Some may see this as the court permitting double dipping if the former employee quickly finds new employment. However, the court responded to that argument as follows:

- When parties contract for a specified period of notice or pay in lieu they are choosing to opt out of the common law approach, which includes mitigation. The parties are contracting for certainty, rather than uncertainty due to mitigation;

- Employment agreements are drafted primarily, if not exclusively, by the employer and there is nothing unfair about requiring employers to be explicit if they intend to require an employee to mitigate what would otherwise be fixed or liquidated damages; and

- What is unfair is for an employer to agree upon a fixed amount of damages, and then, at the point of dismissal, inform the employee that future earnings will be deducted from the fixed amount.

Of course, it should be noted that this issue is moot in the event the termination clause provides only for the employee's statutory or employment standards minimum, as there is no duty to mitigate on statutory minimums.

That said, the lesson to be drawn is quite simple: in order for an employer to minimize liability on termination, the contractual termination clause is only step one. The next step is to include a duty to mitigate requirement so that in the event new income is secured sooner rather than later, there will be some savings flowing back to the employer, which in these challenging economic times, is never a bad thing.

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