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Employer entitled to 10 months' notice: Court

Employees must pay $11.4 million for no notice of resignation and violation of fiduciary duties

BY RONALD MINKEN

EMPLOYERS OFTEN find they are on the hook for a significant amount of reasonable notice when dismissing an employee, while often employees only need to provide two weeks' notice if they are quitting. However, a group of Ontario employees who quit and started a competing business found out they were responsible for a lot more notice of resignation because of their importance to their employer.

In *GasTOPS Ltd. v. Forsyth*, four employees resigned from their positions with GasTOPS, a supplier of control and condition assessment systems for industrial machinery based in Ottawa. Each employee provided two weeks' notice of the decision to leave. When two of these employees provided the employer with their two weeks' notice, the employer told them to leave the workplace immediately. Following their resignations, these two employees set up a competing business and shortly thereafter solicited 12 other GasTOPS employees, who subsequently resigned from their positions with GasTOPS to join the competing company.

GasTOPS commenced an action against the four employees, claiming they were in breach of their fiduciary duties for misappropriation of confidential information, trade secrets and corporate opportunities. Additionally, and most noteworthy, GasTOPS claimed the four employees failed to give reasonable notice of their intention to resign.

The employees argued GasTOPS had waived its entitlement to a longer notice period when it demanded the resigning employees immediately vacate the workplace. However, the Ontario Superior Court of Justice not only found the employees had breached their fiduciary duties, but also the employees had not provided the employer with reasonable notice of their intention to resign from their employment.

REASONABLE NOTICE

Notice must give employer time to hire and train replacement

"Failure of an employee to provide adequate notice will entitle the employer to an award of damages. Generally, reasonable notice is meant to give the employer time to hire and train a replacement… In determining the time required to hire and train a new employee, one must look at the nature of the employee's position and the area of work that the employer was competing in," said the court.

"(The employer) attempted to persuade the employees to either withdraw their letters of resignation or in the alternative provide more reasonable notice. In my view, (the employer) was entitled to accept as it did the breach of the employment contract by (the employees) and ask them to immediately leave the premises. It appears

Continued on page 6

In This Issue

ASK AN EXPERT Long-term medical absences • Age requirement for management	2
CASES AND TRENDS: EMPLOYMENT CONTRACTS: Paranoid employer goes too far	3
CASE IN POINT: ACCOMMODATION: Safeway snubs sick spouse	4
YOU MAKE THE CALL The case of the disappearing employee	8

Video of injured worker shows injury not so bad

AN ONTARIO employer had just cause to fire an employee who was videotaped performing actions contrary to medical restrictions while on medical leave, the Ontario Arbitration Board has ruled.

Sherry-Ann Curling, a packaging operator with Ready Bake Foods in Mississauga, Ont., experienced problems with her shoulder in February 2008. She gave Ready Bake a doctor's certificate in May 2008 that said she was "unable to perform repetitive above shoulder activities" and she was on medication that made her dizzy, drowsy and susceptible to headaches. Ready Bake tried to accommodate her disability, but the nature of packaging operator work required substantial lifting and arm movement and it couldn't find appropriate work for her.

Ready Bake asked Curling for confirmation from her doctor whether she

Continued on page 7

Two weeks' notice isn't sufficient in every case

...continued from page 1

(GasTOPS) probably paid (the employees) to the end of the notice period," said the court.

Finally, the court found that the employees should have provided the employer with ten months' notice of their intention to resign.

"If (the employees) had given 10 months' notice, which would have been reasonable, the (employees) would have continued to owe to (GasTOPS) a duty of loyalty and good faith which would have prevented them from establishing their own company and competing with (GasTOPS) in the area of aviation maintenance software," said the court. "I have no doubt that the (employees) resigned when they did in order to have an opportunity to compete for the GE and the U.S. Navy opportunities that were almost at the point of fruition for (GasTOPS)."

For the employees' breaches of fiduciary duty and lack of reasonable notice for resignation, the court awarded GasTOPS $11.4 million in damages.

Employer and employee both have notice obligation

Although providing reasonable notice is commonly associated with the duties of an employer, *GasTOPS* clearly shows there are instances when providing reasonable notice is also the employee's responsibility. For this reason, the decision rendered by the Ontario Superior Court of Justice in *GasTOPS* should not be taken lightly by either employees or employers. Both parties to an employment relationship should be aware of this decision and its potential application in the employment context. More specifically, it should not be assumed by either employees or employers that the usually acceptable two weeks' notice of resignation will be sufficient in every case. It must be determined whether the position from which the employee is resigning is one in which the employer would have difficulty finding a relatively quick and reasonable replacement. If so, then it may be the case that a more reasonable amount of notice of resignation is required. See *GasTOPS Ltd. v. Forsyth* (Sept. 25, 2009), Doc. Ottawa 98-CV-5929-000 (Ont. S.C.J.).

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ASK AN EXPERT

...continued from page 3

discrimination.

While discrimination provisions are different across Canada, all prohibit age discrimination. In Alberta and Ontario, age is defined as being "18 years or older," limiting the protection to some extent. In British Columbia, the age is 19 or older.

Exemptions from the age discrimination provisions also vary from jurisdiction to jurisdiction. The B.C. code expressly protects a bona fide scheme based on seniority. The Manitoba Human Rights Code provides that the general prohibition against age discrimination does not prevent an employer from following provincial legislation regulating the employment or occupation of persons under the age of majority.

The first step in assessing the legitimacy of a policy is to determine whether there is any express authorization for the kind of discrimination in the policy in the applicable human rights legislation. It is likely the policy would stand or fall on the basis of whether it could be shown that the standard — attainment of the age of 21 — was a bona fide occupational requirement for a management position within the company.

The Supreme Court of Canada established a three-part analysis to test the legitimacy of such requirements in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights*. Under this analysis, an employer must prove:

- It has adopted the standard for a purpose rationally connected to the job.
- The standard was adopted in an honest and good faith belief that it was necessary to the fulfillment of that purpose.
- The standard is reasonably necessary to accomplish that legitimate purpose.

Even though a policy may have been adopted for the legitimate purpose of ensuring management staff have the requisite education, experience, maturity and leadership skills to succeed in a management role, it is doubtful it would hold up at the third stage of the analysis. While youth and inexperience may typically co-exist, the company's purpose could be easily achieved by focusing on employees' actual management attributes rather than their age. It is this focus on actual attributes instead of stereotypical assumptions that anti-discrimination legislation hopes to achieve.

For more information see:

- *Wightman Estate v. 2774046 Canada Inc.*, 2006 CarswellBC 2376 (B.C. C.A.).
- *Dragone v. Riva Plumbing Ltd.*, 2007 CarswellOnt 6177 (Ont. S.C.J.).
- *Lippa v. Can-Cell Industries Inc.*, 2009 CarswellAlta 1900 (Alta. Q.B.).
- *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CarswellBC 2730 (S.C.C.).

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