

\$20 million award upheld by appeal court

4 workers should have provided employer with 10 months' notice of resignation

Ontario's highest court has upheld nearly \$20 million in damages against four key workers who quit with only two weeks' notice.

The employees worked for GasTOPS, an Ottawa-based supplier of control and condition assessment systems for industrial machinery. When two of them provided two weeks' notice, the company told them to leave the workplace immediately.

Following their resignations, the employees set up a competing business and, shortly thereafter, solicited 12 of their former co-workers, who subsequently resigned from their positions at GasTOPS to join the competing company.

GasTOPS sued four key employees claiming they were in breach of their fiduciary duties for misappropriation of confidential information, trade secrets and corporate opportunities. Additionally, the employer 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 the employees had not provided the employer with reasonable notice of their intention to resign from their employment.

Trial court decision

In a 1,596-paragraph decision, the Ontario Superior Court of Justice found in favour of GasTOPS, determining the four employees were to provide 10 months' notice.

"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," said the trial judge in reaching this conclusion. "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."

"(GasTOPS) attempted to persuade the



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

Finally, the employees should have provided 10 months' notice of their intention to resign, found the court.

"If (the employees) had given 10 months' notice, which would have been reasonable, the (employees) would have continued to owe to (the employer) a duty of loyalty and good faith which would have prevented them from establishing their own company and competing... 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 (the employer)."

For the employees' breaches of fiduciary duty and lack of reasonable notice for resignation, along with pre-judgment interest and trial costs, the court awarded GasTOPS more than \$19.5 million — consisting of damages of \$12.3 million, pre-judgment interest of \$3 million and costs of \$4.2 million.

Appeal court's decision

The employees appealed the Ontario Superior Court of Justice's decision arguing:

- two of the employees did not owe a fiduciary duty to GasTOPS
- the "accounting period" to determine the damages should not have been 10 years
- certain amounts should not have been included in calculating the amount of damages
- the employees should not be held jointly and severally liable for the damages awarded
- trial costs should not have been awarded on a full indemnity basis.

After reviewing each of the issues raised by the employees, as well as the employer's cross-appeal seeking the employees be permanently restricted "from using the information taken in breach of confidence or should be required to disgorge (the employees') profits," the Ontario Court of Appeal found no reason to interfere with the trial judge's decision and dismissed both the appeal and cross-appeal on all fronts.

What employers should know

Although providing reasonable notice is commonly associated with the duties of an employer, this decision clearly shows there are instances when reasonable notice is also the employee's responsibility.

So the decision should not be taken lightly. Both parties to an employment relationship should be aware of this decision's potential application in the employment context.

It should not be assumed by either employees or employers 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 for which the employer would have difficulty finding a relatively quick and reasonable replacement. If so, a more reasonable amount of notice of resignation may be required.

Furthermore, the decision by the Court of Appeal reinforces that employees who violate this responsibility knowing their actions will harm the employer may be held financially accountable by the courts, and such amounts can be extreme.

It will be interesting to see whether this decision is appealed to the Supreme Court

of Canada and, if so, whether it will uphold the decision, reduce the award against the employees or overturn it completely.

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