

No implied duty to mitigate: Court

Appeal court overturns ruling, says terminated worker who found job after only 2 weeks allowed to keep 6 months' pay in lieu of notice

The Ontario Court of Appeal has underscored the importance of clear and specific language in employment contracts after it ruled a worker who found a job only two weeks after being terminated without cause was entitled to the full six-month notice period stipulated in his contract.

In *Bowes v. Goss Power Products Ltd.*, the appeal court provided further clarity with respect to an employee's duty to mitigate where the employee is bound by a termination clause that provides for a fixed notice period upon a termination without cause, and which is silent as to the obligation to mitigate.

The Court of Appeal determined a termination clause providing for a fixed period of notice displaces the employee's common law duty to mitigate. Further, the fixed period of notice becomes a contractual term that must be complied with and cannot be reduced by the employer as a result of early mitigation by the employee during the notice period in question.

Accordingly, despite the fact the employee in *Bowes* found comparable employment less than two weeks into the six-month notice period contemplated by the termination clause, the balance of the notice period remained owing to the employee and was not subject to any implied duty to mitigate.

Background

Peter Bowes was employed by Goss Power Products pursuant to a written contract of employment. The contract contained a termination clause that stipulated he would receive six months' notice or pay in lieu thereof if his employment was terminated without cause.

The clause confirmed the notice would be calculated on the basis of Bowes' base salary only. However, it was silent as to whether the notice would be paid in lump sum versus salary continuance as well as with regards to his duty to mitigate over the prescribed notice period.



LEGAL VIEW

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On April 13, 2011, the employer terminated Bowes without cause, offering him salary continuance and a car allowance for six months, subject to his mitigation efforts.

Specifically, the termination letter indicated that throughout the six-month notice period, Bowes was "required to seek out and locate alternate employment and advise (the employer) immediately should (the employee) secure alternate employment prior to the end of the notice period."

The employer subsequently issued a record of employment (ROE) confirming the provision of six months' notice payable by salary continuance.

Less than two weeks after his termination, Bowes commenced comparable employment at a new employer, prior to the expiry of the three-week statutory pay in lieu of notice period, pursuant to Ontario's Employment Standards Act, 2000.

After becoming aware of Bowes' new employment, Goss Power Products proceeded to provide him with the balance of the three-week statutory notice period. However, it stopped the remainder of the salary continuance payments on the basis Bowes had successfully mitigated his losses arising from termination, thereby discharging the employer from any further obligation to provide him with notice pursuant to the terms of the employment contract and termination clause therein.

Bowes subsequently commenced legal proceedings by way of application against Goss Power Products, seeking a determination of his rights pursuant to the employment contract and payment of the balance of the six-month notice period prescribed in the termination clause.

Trial court's decision

At the application, Justice Whitaker applied the decision in *Graham v. Marleau, Lemire Securities Inc.*, stating specifically "the mere fact that the parties have agreed on the period of reasonable notice does not mean that the obligation to mitigate is ousted by agreement" to the facts at hand.

On the basis of the *Graham* decision, Justice Whitaker interpreted the employment contract in favour of the employer, finding the fixed term notice period prescribed in the employment contract was subject to Bowes' duty to mitigate and that as a result of his successful mitigation, no further notice was owing.

Appeal court's decision

The Court of Appeal concluded the trial judge erred in determining Bowes had an implied duty to mitigate regardless of the fixed period of notice presented in the termination clause, despite the fact the clause was silent on the mitigation issue.

By way of contrast, the Court of Appeal determined that when an employment contract contains a fixed period of notice, the parties have agreed to displace the common law period of "reasonable notice" and, as a result, there is no longer an implied duty to mitigate as there would be under common law principles because mitigation does not apply to liquidated damages or contractual amounts and no deductions should be made for any earnings.

The fixed period of notice becomes a contractual term between the parties and, thereby, a contractual right of the employee upon a termination without cause.

The *Bowes* decision highlights the need

for clear and specific language in employment contracts and termination clauses to ensure both parties understand their rights and obligations.

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