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No implied duty to mitigate: Court

Terminated worker who found job after 2 weeks allowed to keep 6 months' pay in lieu of notice

BY RONALD MINKEN

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.

EMPLOYMENT CONTRACTS

In *Bowes v. Goss Power Products Ltd.*, the appeal court provided further clarity with respect to an employee's duty to mitigate where there is 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 due to early mitigation by the employee during the notice period.

Accordingly, despite the fact the employee in Bowes found comparable employment less than two weeks into the six-month notice period stipulated 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.

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 during the notice period.

On April 13, 2011, the employer terminated Bowes without cause, offering him salary continuance 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."

Less than two weeks after his termination, Bowes began comparable employment at a new employer, prior to the expiry of the three-week statutory pay in lieu of notice period.

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

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Employee absent for years still owed termination pay: Arb.

AN EMPLOYEE whose termination ended due to frustration of employment is entitled to termination pay, even if the employee hasn't worked in years, an Ontario arbitrator has ruled.

Calvin Wright was a truck driver for Ricci Trucking and Communications, a lumber road and trucking company in Dryden, Ont. In November 2007, Wright was injured in a motor vehicle accident and was unable to return to work.

Wright obtained Workplace Safety and Insurance Board (WSIB) benefits for his loss of income and, in 2009, he entered the WSIB's labour market reentry program. Ricci Trucking deemed Wright's employment to be terminated when he finished the program in November 2011.

Wright filed a grievance for termination and severance pay, as he hadn't received anything from the employer.

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Agreement on fixed notice replaces common law

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him with notice under the employment contract and its termination clause.

Bowes subsequently commenced legal proceedings 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.

Justice Whitaker of the Ontario Superior Court of Justice referred to 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."

On the basis of the *Graham* decision, 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, 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 contractually fixed period of notice, 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. 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, said the appeal court.

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

For more information see:

- *Bowes v. Goss Power Products Ltd.*, 2012 CarswellOnt 7721 (Ont. C.A.).
- *Graham v. Marleau, Lemire Securities Inc.*, 2000 CarswellOnt 333 (Ont. S.C.J.).

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ASK AN EXPERT

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•The condition must be a recognized and diagnosed mental disorder under the DSM-IV.

•The condition must not have been caused by a decision of the employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

WorkSafeBC policies placed additional limitations on the type of event that could give rise to a successful claim, requiring that the traumatic event be severely emotionally disturbing — such as a horrific accident — actual or threatened physical violence, or a death threat.

The B.C. provisions were challenged under the equality provisions of the Canadian Charter of Rights and Freedoms by a worker who was denied compensation for post-traumatic stress disorder that developed after a natural gas pipeline rupture at his workplace. In *Plesner v. British Columbia Hydro and Power Authority*, the B.C. Court of Appeal found that certain provisions of the manual violated the charter when read together with the Workers' Compensation Act. Specifically, provisions that established an objective test for mental stress and a requirement that an event be horrific in nature in order to be considered traumatic were found to be of no force and effect. The provisions treated those with mental disabilities differently than those with physical disabilities, extending significantly less access to compensation to the former.

In November 2011, the B.C. government introduced Bill 14 — the Workers' Compensation Amendment Act, 2011 — in response to *Plesner*. The legislation, which significantly expands coverage for mental disorders, was passed in the spring. It allows for compensation to be awarded upon proof of one or more traumatic events arising out of and in the course of employment or a significant work-related stressor, or a cumulative series of significant work-related stressors. WorkSafe BC is in the process of drafting policy changes to accommodate the amendments, but it seems clear that the restrictive approach to mental stress claims has been cautiously abandoned.

It remains to be seen whether other provinces with restrictive legislation will follow suit.

For more information see:

- *W. (D.) v. New Brunswick (Workplace Health, Safety & Compensation Commission)*, 2005 CarswellNB 389 (N.B. C.A.).
- *Logan v. Nova Scotia (Workers' Compensation Appeals Tribunal),* 2006 CarswellNS 312 (N.S. C.A.).
- *Children's Aid Society of Cape Breton-Victoria v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2005 CarswellNS 76 (N.S. C.A.),
- *Plesner v. British Columbia Hydro and Power Authority*, 2009 CarswellBC 1095 (B.C. C.A.).

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