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CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS

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\$19.6 million award against employees upheld

*Employees may owe more notice
if they're difficult to replace: Court*

| BY RONALD MINKEN |

AN AWARD ordering former employees of an Ontario company to pay their former employer almost \$20 million for failing to provide reasonable notice of resignation and starting up a competing business has been upheld by the province's Court of Appeal. On March 1, 2012, the appeal court upheld the Ontario Superior Court of Justice's decision that four employees were to provide 10 months' notice of their resignation.

Four employees of GasTOPS, a supplier of control and condition assessment systems for industrial machinery based in Ottawa, resigned from their positions. Each employee provided two weeks' notice of the decision to leave. When two of these employees provided the employer with their two weeks' notice, GasTOPS told them to leave the workplace immediately. Following their resignations, these two employees set up a competing business and shortly thereafter solicited 12 of their former co-workers, 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, the company 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 court not only found the employees had breached their fiduciary duties, but also that the employees had not provided the employer with reasonable notice of their intention to resign from their employment.

Employer entitled to adequate notice to replace employees: Trial court

In a lengthy decision, the Superior Court of Justice found in favour of GasTOPS.

"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 court. "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."

The court also found that GasTOPS was entitled to accept the employees' breach of their employment contract and ask them to leave immediately, though it still "probably paid" them until the end of the two-week notice period they gave.

Finally, the court found that the employees should have provided

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Criminal associations not good for CSC officer

TERMINATION of employment was an appropriate level of discipline for a corrections officer who associated with criminal figures, a labour adjudicator has ruled.

Martin Lapostolle was a corrections officer at an institution in Saint-Annes-Plaines, Que. He was assigned to the regional reception centre, which was a maximum-security facility that receives inmates who are being assessed for placement in other institutions. This facility specifically handled offenders who could not be integrated into the general prison population, including dangerous offenders such as criminal biker gang members. As a result, security in the facility was sensitive and at a high level.

On Nov. 3, 2007, Lapostolle was found in a limousine with several individuals who had ties to criminal ventures. Corrections Canada (CSC) suspended him for one day and

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Time to find replacement and nature of job are factors

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GasTOPS with 10 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, along with pre-judgment interest and trial costs, the court awarded GasTOPS \$12,306,495.00, plus pre-judgment interest of \$3,039,944.00 and costs of \$4,252,920.24, for a total of \$19,599,359.24.

Ontario Court of Appeal decision

The employees appealed the trial court's decision, arguing that two of them did not owe a fiduciary duty to the employer, that the "accounting period" to determine the damages should not have been 10 years, that certain amounts should not have been included in calculating the amount of damages, that the employees should not be held jointly and severally liable for the damages awarded, and that the trial costs should

not have been awarded on a full indemnity basis.

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

Points of interest

Although providing reasonable notice is commonly associated with the duties of an employer, the decision recently upheld by the Court of Appeal of Ontario in GasTOPS clearly shows there are instances when providing reasonable notice is also the employee's responsibility. For this reason, this decision should not be taken lightly. 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.

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

It will be interesting to see as to whether this decision will be appealed to the Supreme Court of Canada, and, if so, whether the highest court in the country will uphold the decision, reduce the award against the employees, or overturn the decision completely. See *GasTOPS Ltd. v. Forsyth*, 2012 CarswellOnt 2539 (Ont. C.A.).



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