

PAY NOW, MITIGATE LATER: COURT AWARDS 27 MONTH NOTICE PERIOD AND REQUIRES EMPLOYER TO "TRUST" EMPLOYEE WILL MITIGATE DAMAGES DURING NOTICE PERIOD

Posted on July 22, 2015

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Generally, in a wrongful dismissal action, the principal legal issue before the court is the determination of the reasonable notice period (or pay in lieu) the employee should be awarded. Once determined, the court will assess whether the notice period should be reduced by either the employee's failure to make reasonable efforts to mitigate his or her damages or the earnings the employee received from alternative employment during the notice period.

Typically, by the time an action is heard at trial, the notice period has elapsed so the court can assess the employee's mitigation efforts. However, in a recent decision, the Ontario Superior Court of Justice (the "Court") was tasked with the question of how to award damages to an employee when the trial occurred before the expiration of the notice period and the employee had yet to either mitigate or undertake reasonable efforts to mitigate damages.

The Facts

In *Markoulakis v. SNC-Lavalin Inc.*, the Court heard a motion for summary judgement, brought by the Plaintiff, who claimed that he was wrongfully dismissed by the Defendant, his former employer. At the time of his dismissal, the Plaintiff was 65 years old, had been employed by the Defendant for just over 40 years, held the position of Senior Civil Engineer, and earned \$129,272 annually.

While the Defendant provided the Plaintiff with 34 weeks of compensation in lieu of reasonable notice, the Plaintiff claimed that, in the circumstances, the reasonable notice period was 30 months. After a review of the case law, the court determined that a 27 month reasonable notice period was appropriate.

The Findings

The court found that when considering how to award damages before the expiration of the reasonable notice period, there are three approaches used by Ontario courts:

1. The Trust Approach: the Plaintiff must account for any mitigation earnings and a procedure is designed for a potential return to Court in the event of disputes;
2. The Partial Summary Judgment Approach: the parties return at the end of the notice period to determine the adequacy and success of the Plaintiff's mitigation efforts; and
3. The Contingency Approach: the Plaintiff's damages are reduced by a contingency for re-employment.

In this case, the Court found the "Trust Approach" to be most appropriate as "[t]he employee's right to a determination of the appropriate period of reasonable notice ha[d] been satisfied and the employer's right to challenge the employee's mitigation efforts ha[d] been preserved." The Court ordered the Defendant to pay the Plaintiff in lieu of notice on a monthly basis for the balance of the notice period, during which time, the Defendant could challenge the mitigation efforts of the Plaintiff by way of summary judgment or a trial on that issue alone.

Significance of the Decision

This decision is significant as it exemplifies three emerging trends in wrongful dismissal actions:

1. **Summary Judgment.** Summary judgment allows litigants to bring a motion early in a law suit to request the court to rule on the merits of the case without proceeding to trial if there is "no genuine issue for trial". In a recent decision, the Supreme Court of Canada confirmed that Ontario judges should take a broad approach in granting summary judgment to a moving party. Following that decision, more and more employees have been utilizing the summary judgment mechanism in wrongful dismissal actions to quickly and affordably have their entitlement to reasonable notice and damages assessed by a court. This decision is an example of one of such successful motions for summary judgment.
2. **Reasonable Notice Periods.** Until recently, employers could be reasonably assured that courts would limit a dismissed employee's reasonable notice entitlements to a maximum of 24 months. However, in light of recent decisions, "exceptional circumstances" will support a reasonable notice period in excess of 24 months. This decision is an example of one of such cases where the Plaintiff's advanced age and long service amounted to exceptional circumstances, justifying a 27 month reasonable notice period.
3. **Mitigation.** This decision makes clear that in circumstances where a court is called upon to decide the amount of reasonable notice to which a dismissed employee is entitled prior to the expiration of the reasonable notice period (which may now be a more common occurrence given the increased use of motions for summary judgment), the courts can adopt one of three approaches to assessing the dismissed employee's mitigation efforts and awarding damages. Perhaps concerning for employers, this decision is an example of the application of the "Trust Approach", in which the employer must trust that the employee will both undertake reasonable mitigation efforts and account to the employer for

earnings received from alternative employment during the reasonable notice period.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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