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LAWYERS FOR EMPLOYERS

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Court Kicks Employee's Dismissal Suit for Failure to Reasonably Mitigate Damages

In a wrongful dismissal action, employers will not be held liable for damages during the notice period if they can establish that an employee failed to reasonably mitigate her damages. To succeed, the employer must prove i) that the employee did not take any steps (or at least reasonable steps) to search for comparable employment and ii) had she done so, she could have obtained comparable employment.

In the wrongful dismissal action of *Benjamin v Cascades Canada ULC*, Mr. Benjamin was a line operator with 28 years' service with Cascades, a tissue mill in Scarborough. In 2016, Cascades determined it would eliminate tissue production, but continue distribution, at its Scarborough site. Due to this restructuring, Cascades dismissed Mr. Benjamin on a without cause basis. Cascades offered Mr. Benjamin a severance package equivalent to 50 weeks, which was refused. As a result, Cascades paid Mr. Benjamin his statutory entitlements under the *Employment Standards Act, 2000* (an amount equivalent to 8 months' salary (including severance)). As part of its separation package, Cascades provided its dismissed former employees with job search coaching, outplacement counselling, and a weekly newsletter with job search tips, other comparable job opportunities at Cascades, as well as job postings with other employers. Rather than apply to these jobs, Mr. Benjamin decided to retrain as a welder.

Mr. Benjamin commenced a wrongful dismissal action, claiming two years' pay in lieu of notice. On a motion for summary judgment to dismiss his claim, Cascades argued that Mr. Benjamin had failed to reasonably mitigate his damages by applying to the jobs forwarded to him, and that in the circumstances, retraining did not constitute reasonable mitigation. In dismissing Mr. Benjamin's claim, the Court remarked that Cascades overcame its burden in showing that Mr. Benjamin could reasonably have avoided the loss he claimed. The Court found that either Mr. Benjamin did not reasonably review the jobs Cascades forwarded to him

or did not review them at all. Rather, during this period, Mr. Benjamin had already decided to switch careers. In the Court's view, had Mr. Benjamin applied to these positions, he would "likely" have gotten them. In neglecting to do so, Mr. Benjamin chose to deprive the employer of the opportunity to avoid damages arising from dismissal. As no damages were recoverable at law, the Court dismissed Mr. Benjamin's claim in its entirety.

As an aside, the Court noted that in certain circumstances, retraining may constitute reasonable mitigation; however this will not be the case where the employer can prove there was available comparable employment during the time, which the employee would likely have secured had he so attempted.

This case underscores the importance of mitigation in wrongful dismissal actions. If the employer can prove that the employee failed to take proper and reasonable steps to mitigate damages, those damages will not be recoverable at law.

McDonald's Franchisee Loses on Appeal

In our summer 2016 issue, we discussed an appeal underway in *Brake v PJ-M2R Restaurant Inc*. The central issues were whether the Employer, a McDonald's franchise, had cause to dismiss the Plaintiff, Ms. Brake, and whether her mitigation income ought to have been offset against her damages award. On May 23, 2017, the Court of Appeal sided with Ms. Brake and dismissed the Employer's appeal.

To recap, Ms. Brake, a 20-year managerial employee, was put on McDonald's progressive discipline program and ultimately told that she failed the program and had to "take a demotion or go." Ms. Brake refused the demotion and was dismissed for cause. Ms. Brake brought suit for constructive dismissal and was ultimately awarded 20 months' pay in lieu (a tidy sum totalling $104,499.33).

Among other grounds of appeal, the Employer argued that that the income Ms. Brake earned working at a grocery store and a hardware store should have been deducted as mitigation from the damages award. The Court of Appeal rejected this submission. Firstly, the Court found that since Ms. Brake was working at Sobey's during her time at McDonald's, she would have continued to earn income from Sobey's even if she had not been dismissed. Secondly, as mitigation monies are meant to be a substitute for work with the Defendant employer, Ms. Brake's income from the grocery store was so minimal that it did not rise high enough so as to be seen as a substitute for her work with the Defendant Employer. Finally, with regard to a sum of $600 earned at the hardware store, the Court found that the evidence was not clear with respect to this income and the Court declined to deduct it from the damages award.

Employees in a wrongful dismissal action are required to mitigate their damages. These monies are then deducted from a damages award. However, monies earned will only constitute mitigation if they can reasonably be considered a substitute for income from the Defendant Employer. In this case, it is clear that the Court ought not to have deducted the money earned from Sobey's because the Plaintiff was in Sobey's employ during her tenure with the Defendant. With regard to the Home Depot earnings, we are of the view that the Court's decision not to deduct the $600.00 was very likely an expression of its disapproval of the Employer's conduct; as opposed to a true reflection of the state of the law in Ontario.

Duty to Mitigate Not Triggered by Employer's Offer to Return to Work

In *Fillmore v Hercules SLR Inc.*, the Court of Appeal for Ontario determined that a terminated employee does not have to mitigate his damages upon termination by returning to work for the same employer in a new full time position at less compensation.

In this case, the employee, Roy Fillmore, was terminated by his employer, Hercules SLR Inc., and commenced an action seeking damages for wrongful dismissal. At the time of his termination, Mr. Fillmore was 51 years old and had been employed for 19 years with the employer. The lower court judge held that, although his position of Director of Purchasing was not a "classic managerial position", he was nonetheless senior and specialised as he was the only Director of Purchasing for the employer in Ontario.

There was no employment contract between the parties. Upon termination, the employer sent a letter to the employee stating that he would receive eight weeks' written notice in accordance with the requirements of the *Employment Standards Act, 2000* (ESA), and offered him an additional payment of 12 weeks' pay in exchange for executing and returning a Full and Final Release.

The employee also received a second letter from the employer offering him a full time position of Supervisor Service. The salary for this new position would be $60,000.00 per annum (more than 20 % less than his former salary). The employer's offer further provided the employee with a six month income guarantee at his old salary. The employee did not accept either offer by the deadline.

The lower court judge determined that an employer must offer an employee a "clear opportunity to work out the notice period" after the employee refuses to accept the new, lesser position. In other words, had the employee accepted such an offer from a third party employer, he would still be able to seek compensation from the employer for the difference between his new salary and his old salary during the notice period.

The lower court judge concluded that the new offer of employment was not an offer to work through the notice period. Instead, it was simply an offer for a new full time position at much less compensation. There was nothing in the second letter which confirmed that the potential acceptance of the new offer of employment would be without prejudice to the employee's rights arising from the dismissal from his former position. There was no obligation on the employee to effectively risk handing the employer a Full and Final Release "through the back door" and under the guise of mitigation efforts.

Accordingly, the employee did not fail to discharge his duty to mitigate. He was therefore entitled to payment of reasonable notice in the amount of 17 months in light of his age, length of service and position.

The employer appealed the decision and the Court of Appeal agreed with the lower court judge. It further held that where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity.

On the facts of this case, a reasonable person in the employee's position was not obliged to accept a term risking waiver of the wrongful dismissal claim.

For employers seeking to limit their liability upon termination, this decision clarifies issues regarding mitigation. If an employer offers an employee a chance to mitigate damages by returning to work, to trigger this form of mitigation duty, the employer is obliged to offer the employee the clear opportunity to work out the notice period after the employee refuses to accept the new position.

Risks of Fixed-Term Contracts and Independent Contractor Agreements

In *Covenoho v Pendylum Ltd.*, the Court of Appeal for Ontario quashed a lower court decision upholding the without cause termination of an employee under a fixed-term contract, and awarded her damages for the remainder of the term.

The employer, Pendylum Ltd., entered into a contract with the employee which stated that she was to provide consulting services to its customers as a Time and Attendance Implementation Consultant. The contract was for a one-year term. The termination clause in the agreement provided as follows:

> 2.1 The term of this Agreement will commence on the date of this Agreement and will continue in full force and effect unless the Agreement is terminated as follows:
>
> (a) immediately by PENDYLUM providing written notice to you if you violate or fail to honor any of these provisions of this Agreement or fail to perform your duties as set out in Appendix A in a satisfactory manner as determined by PENDYLUM (known as Cause); or if the PENDYLUM Client to which you have been contracted terminate[s] its contract with PENDYLUM for your services; OR
>
> (b) by either party providing written notice of at least two (2) weeks to the other.
>
> 2.2 In the event of termination, we will have no liability to you, save and except to pay any accrued and earned compensation up to and including the date of termination.
>
> 2.3 Upon termination or expiration of the agreement, you agree to return and/or destroy all confidential information and copies and sign an undertaking that all Confidential Information has been returned and/or destroyed.

After less than three months, Pendylum Ltd. terminated the agreement with the employee with immediate effect under clause 2.1 (a) as a result of a client's decision to terminate its contract with the employer for her services.

At first, the employee filed a claim under the *Employment Standards Act, 2000* (*ESA*) for overtime pay, vacation pay and public holiday pay. The Employment Standards Officer (ESO) found that the employee was an employee of Pendylum Ltd. and not an independent contractor because she worked at the employer's premises, she used the employer's equipment, she had little opportunity to make a profit beyond the assigned duties, and she had little risk of incurring significant financial losses in the course of performing her duties.

The employee then filed an action against Pendylum Ltd. for the balance of her fixed-term contract. The motion judge determined that the issue of whether the employee was an employee of Pendylum Ltd. would not be re-litigated in the action and relied on the ESO's decision in this respect.

The lower court judge determined that the language contained in article 2.1 was clear and unequivocal, and that effect should be given to the reasonable expectations of the parties reflected by the words they have agreed upon.

The employee appealed the decision. The Court of Appeal for Ontario determined that the termination provisions contained in Articles 2.1(a) and 2.2 of the contract were contrary to the *ESA* in that they purported to allow the employer to terminate, without cause, the employee, in the event that she had been continuously employed for more than three months, by providing less than the statutory minimum notice period.

In determining whether the contract was in compliance with the *ESA*, the terms had to be construed as if the employee had continued to be employed beyond three months; if a provision's application potentially violated the *ESA* at any date after hiring, it was void. As such, the termination provisions were void and common law standards applied.

As her employment was not validly terminated, the employee was entitled to damages equivalent to her salary for the remainder of the unexpired term of the contract, without deduction for mitigation.

For employers contracting with consultants or other types of private contractors, this decision is a reminder that a contract does not suffice to protect employers from employment relationship liabilities. Further, the Court of Appeal clarified that a termination clause that could potentially contract out of the ESA (i.e. in the future) will be null and void.

Employers can limit their risks upon termination of a fixed-term contract by including a termination clause in the contract which allows for early termination of the contract.

Legislative Updates

Further to last May's final report of the Changing Workplaces Review, the provincial government has announced its intent to implement measures to modify employment standards, including:

- Raising Ontario's general minimum wage to $14 per hour on January 1, 2018, and to $15 on January 1, 2019, followed by annual increases at the rate of inflation.
- Mandating equal pay for part-time, temporary, casual and seasonal employees doing the same job as full-time employees; and equal pay for temporary help agency employees doing the same job as permanent employees at the agencies' client companies.
- Expanding personal emergency leave to include an across-the-board minimum of at least two paid days per year for all workers.
- Increasing the minimum vacation entitlements to three weeks' after five years' service.
- Requiring employees to be paid for three hours of work for shifts cancelled within 48 hours of the scheduled start time.

Bird Richard will keep readers apprised of upcoming legislative changes in this regard.

Provincial legislation will address Sexual and Domestic Violence

Bill 26, Domestic and Sexual Violence Workplace Leave, Accommodation and Training Act, 2016 is slated to come into effect three months after it receives Royal Assent. This provincial Bill will amend the *Employment Standards Act, 2000* to allow employees a reasonable number of days each year (10 of which shall be paid) to take a leave of absence if they, or their children have experienced domestic or sexual violence. The leave is to be used for medical visits, consulting legal counsel or seeking out victim services. The amendments also entitle employees to reasonable accommodation with respect to their work hours and workplace.

The *Occupational Health and Safety Act* will be amended to require employers to ensure that every manager, supervisor and worker receives information and instruction about domestic and sexual violence in the workplace.

Amendments to the *Canada Labour Code*

Bill C-44, *An Act to implement certain provisions of the budget tabled in Parliament on March 22, 2017 and other measures*, was at its First Reading on April 11, 2017, and will enter into force on a day to be fixed by the Governor in Council.

As previously reported, this Bill amends the *Employment Insurance Act* to, among other things, allow for the payment of parental benefits over a longer period at a lower benefit rate, allow maternity benefits to be paid as early as the 12th week before the expected week of birth, create a benefit for family members to care for a critically ill adult, and allow for benefits to care for a critically ill child to be payable to family members.

The Bill also amends the *Canada Labour Code* (*Code*) to, among other things, increase the maximum length of parental leave to 63 weeks, extend the period prior to the estimated date of birth when the maternity leave may begin to 13 weeks, create a leave for a family member to care for a critically ill adult, and allow for the leave related to the critical illness of a child to be taken by a family member.

Additionally, the Bill amends the *Code* to:

- provide a complaint mechanism for employer reprisals under Part II of the *Code*;
- establish an administrative monetary penalty scheme to supplement existing enforcement measures under Parts II (health and safety) and III (labour standards) of the *Code*;
- permit the Minister of Labour to order an employer to determine, following an internal audit, whether it is in compliance with a provision of Part III of the *Code* and to provide the Minister with a corresponding report;
- permit inspectors to order an employer to cease the contravention of a provision of Part III of the *Code*;
- extend the period with respect to which a payment order to recover unpaid wages or other amounts may be issued;
- impose administrative fees on employers to whom payment orders are issued; and
- transfer to the Canada Industrial Relations Board the powers, duties and functions of appeals officers under Part II of the *Code* and of referees and adjudicators under Part III of the *Code*.