

No 'free pass' to forego mitigation opportunities to return to school

Notice entitlement not meant to fund retraining for better employment

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LITTLE IRRITATES an employer more than having to pay a terminated employee common law notice while the employee fails to take reasonable steps to find a new job and mitigate her losses. A dismissed employee has a duty to mitigate those damages by making reasonable efforts to find comparable replacement work. The income earned from the replacement work reduces the former employer's common law termination liability.

But what if the employee chooses to forego a new job (and mitigation income) to enrol in school or start a new profession? Is the former employer still on the hook for the full amount of the unmitigated loss? A recent Ontario Superior Court of Justice decision suggests the answer is no.

In *Benjamin and Cascades Canada ULC*, Cascades Canada closed one of its Greater Toronto Area facilities, resulting in the termination of 42 employees including Patrick Benjamin, a line operator and general labourer with no management or supervisory responsibilities. He had worked for Cascades Canada for 28 years without a written employment contract.

Benjamin was offered a termination package which he rejected. He was then given his entitlements under Ontario's Employment Standards Act (ESA), amounting to eight weeks' pay in lieu of notice and 26 weeks' severance pay.

Benjamin also received outplacement job counselling, job coaching, and a weekly email newsletter that included guidance on searching for new employment, job opportunities with Cascades Canada at other nearby locations, and job postings at other companies in the area for which he appeared qualified.

Instead of applying for a new job, Benjamin decided to switch careers. He entered a six-month, full-time welding training program, believing that upgrading his skills would give him greater job security.

Meanwhile, because Benjamin had not initially signed an employment contract limiting his notice entitlement to the ESA minimum, Cascades Canada remained exposed to the risk Benjamin might sue for common law reasonable notice. When he did launch that claim, seeking

the equivalent of two years' salary, Cascades Canada sought to dismiss it on the basis Benjamin failed to "mitigate" his damages by not applying for available positions, including the three at Cascades Canada's other locations.

The trial judge agreed with Cascades Canada, finding Benjamin's decision to go back to school was a failure to take reasonable steps to mitigate his losses. Benjamin's entitlement to wrongful dismissal damages therefore ended on the date he decided to enrol in school. By that time, Benjamin had already received the equivalent of eight months' salary through his ESA entitlements; well in excess of his then common law entitlement. His claim for wrongful dismissal damages was dismissed.

The court was clear that a dismissed employee who chooses to return to school instead of seeking comparable replacement work fails to mitigate her damages, giving up any entitlement to common law notice from that point forward:

"If the employer can establish that the dismissed employee (i) chose to retrain instead of seeking comparable positions, and (ii) could have procured that comparable employment, a dismissed employee ought not to have a "free pass" to change careers to enhance job security or obtain better hours, and then collect damages for notice simply because of dismissal. In those circumstances, an employer should not be required to fund retraining (through payment of reasonable notice) when the employee could have obtained comparable employment."

Lessons for employers

An enforceable employment contract is key. An enforceable employment contract can reduce the risk of exposure to liability for a lengthy common law notice period. In many cases, a contract can limit notice to the minimum amount required by employment standards legislation. An enforceable contract also reduces uncertainty by predetermining the amount of notice due upon termination. This can result in significant savings for an employer, as well as flexibility to make personnel decisions based on business needs rather than severance obligations.

Consider the above case. Based on his 28 years of service, Benjamin's common law entitlement

to reasonable notice may have been upwards of 24 months. Yet, under the ESA, he was entitled to eight months' pay (eight weeks' notice and 26 weeks' severance pay). An enforceable employment contract could have achieved this level of certainty right from the start.

The best time to introduce an employment contract is at the time of hire, prior to the employee commencing work so the offer of employment is the "consideration" in exchange for which the employee agrees to be bound by the terms of the contract.

However, all is not lost if an employment contract is not entered into prior to an employee starting work. There are opportunities during the employment relationship to introduce an employment contract in exchange for additional consideration (such as a salary increase, promotion, improved benefit plan, or signing bonus). The amount of consideration and the preferred approach depends on a variety of factors, so it is best to consult with counsel to ensure this is done correctly.

Take reasonable steps to assist the dismissed employee to find comparable replacement work. An employee dismissed without cause has a duty to mitigate her damages by making reasonable efforts to find comparable replacement work. The income earned from the replacement work reduces the former employer's common law liability (not the statutory entitlements).

As such, wherever possible and practical, it is in the interests of a former employer to help a dismissed employee find comparable replacement work. This might include offering another position in the organization, a positive reference, outplacement assistance, or bringing to the employee's attention any comparable job posting nearby. The sooner the employee finds new work, the sooner there will be mitigation earnings.

Further, as we saw in the *Benjamin* decision, helping a former employee identify new opportunities shifts the onus to the employee to either apply for a new position or provide a compelling reason for not doing so.

For more information see:

• *Benjamin and Cascades Canada ULC*, 2017 CarswellOnt 6278 (Ont. S.C.).