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Ontario Court of Appeal Affirms Reasonable Notice is a Two-Way Street Awarding \$20 Million in Damages Against Four Departing Fiduciaries

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Ontario's highest court recently upheld an award for nearly \$20 million in damages against four key employees who quit their employment with only two weeks' notice. The decision is an important reminder that the obligation to provide reasonable notice is a two-way street. The key is to protect your organization at the outset of the employment relationship with a well drafted employment agreement.

What happened?

In *GasTOPS v. Forsyth*, four senior employees gave two weeks' notice of resignation before starting a competing firm and soliciting several of their former co-workers. When two of the key employees gave two weeks' notice, GasTOPS told them to leave the workplace immediately. Prior to their departure the senior employees were the principal designers of GasTOPS' core programs. They also had intimate knowledge of GasTOPS' business plan including opportunities being pursued and proposals made to customers.

GasTOPS sued the four key employees claiming they were in breach of their fiduciary duties for misappropriation of confidential information, trade secrets and corporate opportunity. GasTOPS also claimed the 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 employees immediately vacate the workplace.

The trial judge agreed with GasTOPS, finding that the employees had breached their fiduciary duties and had failed to give reasonable notice of their intention to resign. Further, the judge found the employees knew they had given inadequate notice and did so with the intent of destroying GasTOPS by rendering it unable to fulfill existing contracts or pursue new opportunities. Based on these facts, the trial judge held that the employees ought to have provided GasTOPS 10 to 12 months' notice, and awarded GasTOPS almost \$20 million in damages including prejudgement interest and costs.

The Ontario Court of Appeal upheld the decision. However, it is important to note the parties did not appeal the length of notice awarded by the trial judge. The Court of Appeal was also careful to note its decision did not address the appropriateness of the 10 to 12 months' awarded. Still this decision is an important reminder the obligation to give reasonable notice is a two-way street.

How much notice can an organization expect?

Every employee owes to his or her employer common law reasonable notice of resignation unless an employment contract provides otherwise. Failure to provide sufficient notice of resignation is a breach of contract.

In reality, such lawsuits are rare and are typically only commenced against individuals alleged to be fiduciary employees and when substantial damages are at issue (as in *GasTOPS*).

The amount of reasonable notice owed to an organization is difficult to predict. The purpose of notice of resignation is to provide the organization reasonable time to replace the departing employee. The length of notice required will therefore depend on factors such as the employee's duties, expected length of time to recruit and train a replacement employee, the timing of the resignation in relation to the employer's peak period(s), and custom in the workplace and industry. Depending on the particular facts, reasonable notice of resignation can range from two weeks to 10 to 12 months.

An organization's conduct can affect the notice it receives

How an organization reacts to an employee's announcement of impending departure can affect the amount of reasonable notice to which the organization is entitled.

In *Aquafor v. Whyte, Dainty and Calder*, the court held the four and five weeks' notice provided by two departing fiduciary employees was sufficient. The two employees had quit their employment to start a competing firm. Their business accounted for 25% of Aquafor's revenues, and they were the face of Aquafor to the majority of the company's mining and land development clients. The departing employees also were intimately involved with firm management including determining employee salaries, marketing, and liaising with Aquafor's lawyer. The court agreed the employees were fiduciaries, but disagreed they should have provided Aquafor the 12 to 18 months' notice the company was seeking. The court's reasons were two-fold:

1. When the employees tendered their resignation with three and four weeks' notice, the President of Aquafor accepted four weeks from one of them, and asked the other to extend his notice to only five weeks. The President never asked for a greater period of notice or indicated he did not accept the proposed, short departure dates.
2. Aquafor was unable to offer any evidence to support its claim 12 to 18 months' notice was either reasonable or would have made a difference to the company. To the contrary, in the short notice period offered by the employees the President hired someone to take over certain projects and transferred other work to other managers. The employees also cooperated with Aquafor before leaving by advising of their active projects and even assisting with the transition of work after their departure.

How to protect your business

A common lament we hear from clients is the end of an employment relationship often feels like a one-way street. The *employer* is required to provide notice of termination to the employee but rarely, if ever, is that courtesy returned. What these recent decisions remind us is the obligation to provide reasonable notice is a two-way street. The key is to protect your organization at the outset of the employment relationship with a well drafted employment agreement. For example:

- **Stipulate in the employment agreement the employee's obligation to provide notice of the intention to resign.** Most employers appreciate the termination provisions in an employment agreement are an effective way to limit the organization's liability to provide notice in the event of termination without cause. However, a well-drafted termination provision can also protect the organization by requiring a departing employee to provide reasonable notice of the intention to resign. Intentionally including such a provision in the employment agreement also allows the organization (which knows its business best) to determine what is a reasonable period of notice, rather than leaving this determination to the courts.

- Inform the employee if he or she has not provided sufficient notice. An organization need not accept the length of notice provided by a departing employee. This is important to remember. As we saw in *Aquafor* an organization's failure to object to an employee's proposed notice period can undercut a later claim the notice period was insufficient. As such, in the absence of an employment agreement stipulating otherwise, the organization should clearly state if the period of notice proposed by the employee is insufficient. It is better to do so in writing.
- Mitigate. Just as the duty to provide reasonable notice is a two-way street, so too is the duty to mitigate. If an employee quits, the organization must make an honest and reasonable effort to replace the employee in a timely fashion. This may include recruiting a temporary employee, reorganizing duties among remaining employees, and asking the departing employee to assist with the transition even after the conclusion of his or her notice period.

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