

## Ontario Court of Appeal Ruling Means Employers Should Be Reviewing Termination Clauses in Employment Agreements

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[A full contingent of five judges sitting at the Ontario Court of Appeal](#) unanimously ruled that where an employment agreement provides for a stipulated sum upon termination without cause, and is silent as to the employee's obligation to mitigate, the employee will not be required to mitigate.

Peter Bowes had a written employment contract with his employer, Goss Power Products Ltd. ("Goss"). The employment agreement contained a sliding scale as to how much notice or pay in lieu of notice Peter was entitled to in the event that his employment was terminated without cause. The longer Peter was employed, the more notice (or pay in lieu thereof) he was to receive. The contract, which was prepared by Goss, was silent with respect to Peter's duty to mitigate.

Goss terminated Peter's employment without cause. Based on his length of service at the time of termination, the contract provided that Peter was to receive six months' notice or pay in lieu thereof. Goss advised him that he would be paid his salary for six months but that he was required to seek alternative employment during this period and was to keep Goss apprised of his efforts in this regard. Peter landed a new job within two weeks at the same salary he had been earning with Goss. Goss suddenly took the position that it only owed Peter three weeks of pay (the statutory minimum under the Employment Standards Act) as opposed to six months of pay given that Peter had found a new job and had therefore fully mitigated his damages.

Peter brought an application in the Superior Court of Justice asking for a determination of rights under the employment contract. Justice Whitaker held that where an employment agreement contains a fixed severance entitlement, the agreement is subject to a duty to mitigate unless the agreement, either directly or by implication, relieves the employee of this obligation. Since Peter's employment contract was silent on mitigation, Peter was not entitled to the full six months of pay as he had mitigated his loss by finding new employment. Peter then appealed to the Court of Appeal.

The Court of Appeal ("CA") disagreed. The CA noted that employment agreements are subject to the ordinary principles of contract law. However, peculiar to employment law is the principle that unless otherwise stated, every employment agreement contains an implied term that an employer must provide reasonable notice to an employee prior to the termination of employment and if the employer fails to do so, the employee is entitled to damages that flow from this breach. The employee is bound in law to mitigate these damages as best they can by seeking an alternative source of income.

The theoretical purpose of the requirement of reasonable notice at common law is to provide the departing employee with notice (or pay in lieu) in order to "keep them afloat" while they search for a new job. Reasonable notice is determined at common law by looking at a variety of factors including the employee's age, length of tenure, duties and responsibilities and the current economic climate. Factors such as these (in theory) help the court determine how long it ought to take an employee to secure new employment and to determine how much notice is therefore "reasonable". As such, the duty to mitigate makes complete sense given that if the employee finds another job right away they no longer need their former employer to keep them afloat, nor should the former employer be obligated to do so.

The CA held that where the parties substitute a fixed or readily calculable notice period, as they frequently do, they displace the common law period of "reasonable notice" with the contractual amount. The employee is entitled to the contractual amount due and there is no duty on the employee to mitigate, unless there is clear and specific language in the employment agreement imposing such an obligation. The decision is worth a read (specifically starting at paragraph 51) if you are looking for an

interesting discussion of the fairness of the decision, including issues such as double recovery, contractual certainty and the disparity in bargaining power between employers and employees.

The upshot of this decision for employers is that it is time to review employment contracts to ensure that all termination clauses clearly and specifically ensure that any notice period specified in the contract is subject to mitigation.