Back To Mitigation Basics: A Must-Read For Anyone Prosecuting Or Defending A Wrongful Dismissal Action

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In the recent case of *Steinebach* v. *Clean Energy Compression Corp.*, 2016 BCCA 112, the B.C. Court of Appeal provided an excellent overview of first principles when it comes to an employee's duty to take reasonable steps in mitigation of damage or loss flowing out of termination of employment.

Background facts

Steve Steinebach was employed by Clean Energy Compression Corp. as a salesperson. He had around 19 and a half years of service.

In early 2014, Steinebach was offered the newly-created position of Senior Regional Sales Manager by the employer. He, however, found the offer to be unsatisfactory and rejected it. In response, the employer asked him to return all company property in his possession or control and leave its premises.

After almost two months of unsuccessful negotiations, Steinebach was provided with formal notice of termination. He responded by suing for wrongful dismissal.

Decision at trial

At trial, the B.C. Supreme Court found that Steinebach had been wrongfully dismissed and held that he was entitled to 16 months of notice.

The Court, however, also held that Steinebach failed to mitigate his damage or loss by seeking reasonably similar, alternate employment. The Court was of the view that he had focused more on his personal preferences and career objectives than was reasonable in the circumstances, and had not taken the steps in mitigation that he was obligated to take. The notice period was accordingly reduced by the trial judge by three months.

The employer appealed, arguing that Steinebach was not entitled to any damages at all or, alternatively, that the notice period ought to be reduced by 12

months on account of the failure to properly mitigate.

Decision on appeal

In a unanimous decision, the B.C. Court of Appeal allowed the appeal and ordered a new trial on all of the issues.

The Court held that the trial judge erred in reducing the notice period to account for the failure to mitigate. The notice period is a substantive right arising from the employment relationship. A failure to mitigate should be taken into account in the calculation of damages flowing out of the breach of the contract of employment, not with respect to the notice period itself. Although there was no dispute regarding the finding that Steinebach had failed to mitigate his damage or loss, the trial judge had not made any finding with respect to the duration of the failure to mitigate.

Based on the findings at trial, the Court of Appeal held that Steinebach had ceased or significantly reduced his efforts to find other comparable employment as of August 2014.

The Court also highlighted, however, that the trial judge had made no determination regarding the point in time at which Steinebach would likely have found work had he exerted reasonable efforts to mitigate. In fact, there had been no evidence presented on this point at trial. The Court stated:

It is likely that the judge concluded that the respondent failed to mitigate for three months or perhaps that had he pursued searching for a job in the natural gas industry, acceptable employment would have been secured in 13 months. The difficulty is that there is no analysis to support a three month failure to mitigate or the date at which employment might have been secure. Both conclusions are mere speculation which is not open to this Court.

Lesson for HR professionals

This case is important for HR professionals to consider when faced with an allegation of wrongful dismissal where mitigation is likely to be at issue.

Evidence should be introduced with respect to the duration of the failure to mitigate. It will not do to simply point to the dismissed employee’s efforts in mitigation and claim those efforts were inadequate. The evidence adduced at trial should include the types of jobs for which the former employee was qualified, job advertisements matching the employee’s qualifications and, ideally, the proposed start dates of the positions advertised.

In appropriate circumstances, it may be worthwhile to consider retaining an expert to provide evidence as to when the employee would reasonably have been able to secure other comparable employment.

It is unlikely that an employer will be able to provide definitive evidence that a plaintiff would have been able to secure another job by a particular date, but it is clear that the courts will expect as much assistance from employers as possible in order to avoid pure speculation on any reduction in damages.

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