Dismissed Employee's Pursuit Of New Career Results In Reduced Notice Period

written by Tina Tsonis | July 19, 2022

In the wrongful dismissal context, a dismissed employee typically has a duty to mitigate their losses following a dismissal. That duty to mitigate most often requires an employee to search, apply for, and accept reasonable new employment to mitigate any claimed losses. A Court may reduce the notice period where a dismissed employee fails to take reasonable steps to mitigate, usually by failing to reasonably pursue new opportunities. At times, the Courts have held that an employee's attempt to train themselves for a new career can be considered an appropriate mitigation strategy, but only after the employee has first made reasonable and diligent efforts to test the market and find new employment in their area of expertise. This issue was revisited in *Okano v. Cathay Pacific Airways Limited*, 2022 BCSC 881 (CanLII), where the Supreme Court of British Columbia found that a dismissed employee had not properly sought employment in her field before looking for work outside of it.

Facts

At the time of the termination, the employee was 61 years old and had worked for Cathay Pacific Airways Ltd. in its Vancouver office for nearly 35 years. She had spent her entire working career in the airline's sales and customer service departments, eventually becoming the most senior employee in her department.

On October 13, 2020, the employee was informed that her employment would terminate effective December 11, 2020, along with that of the 71 employees she supervised. The decision was taken as a result of the unprecedented downturn in air travel caused by the COVID-19 pandemic and the devastating effect it had on the airline's business. By that time, the airline's passenger numbers were less than 1% of what they had been for the same month the previous year, and the airline was shuttering the entirety of its Vancouver operations.

The employee did not look for other employment during the two-month working notice period (from October 13, 2020 to December 11, 2020) or in the two months following her last day at work. She claimed she was sad, unmotivated, and had lost her confidence. In April, May, and June 2021, she attended sessions with a leadership-coaching consultant for the purpose of building her confidence and helping her to move forward with her job search. Finally, in June 2021, she began actively applying for jobs, all outside of the airline industry. The employee admitted that she had decided to adopt a new career path away from the airline and travel industry and felt she was "entitled" to do so after 35 years in the airline business.

As of the May 2022 trial, roughly 17 months following the termination of her employment, the employee had applied for 50 positions, all of them outside of the airline industry. She had still not secured alternative employment.

At trial, the employee submitted that, given her age, length of service, and management status with the airline, she is entitled to a common law notice period of 24 to 26 months. The employer argued that the notice period should be reduced as the employee had failed to take reasonable steps to mitigate her losses.

Decision

The Court sided in large part with the employer on the issue of mitigation.

The Court found that it was unreasonable to expect the employee to be proactively searching for a new job during the working notice period. During that time, the employee handled the transfer of the airline's operations to its new office in the Philippines. Likewise, the Court found that the employee was not required to immediately commence her job search following her last day. She was entitled to a reasonable period of time to process the shock of the termination, plan her next steps, and undertake the necessary research and preparation of resumes to compete for available positions. It was of no surprise that the employee had significant difficulty coming to terms with her sudden termination.

However, the evidence disclosed that several job postings for positions comparable to the employee's position were available in the airline industry in the intervening 17 months. The Court concluded that the employee was either unaware of these opportunities or chose not to follow up on them because she decided that she had earned the right to look for employment outside of the airline industry. Even though the employee had applied for 50 jobs outside the airline industry, it was incumbent upon her to explore available positions in the industry in which she had spent her entire working career, regardless of her preferences. The failure to do so was unreasonable and constituted a failure to mitigate.

Having determined that the employee was otherwise entitled to a notice period of 24 months, the Court reduced this to 21 months as a result of this failure to mitigate. In addition, the Court further discounted the employee's damages by 15% because it found there was a real and substantial possibility that she would find a job commensurate with her qualifications and experience at some point during the balance of the notice period.

Interestingly, the Court also reaffirmed that absent exceptional circumstances, the upper limit for reasonable notice remains capped at 24 months. The mere fact that the employee was a managerial employee with 35 years of service was not viewed as an "exceptional circumstance".

Takeaways

This decision reaffirmed that the duty to mitigate requires that a dismissed employee pursue available opportunities in their field or industry. It is all the more significant considering the impact of the COVID-19 pandemic on several major industries.

Employers should note that, in this particular case, the employer produced evidence of jobs that the employee could have applied for in her industry, despite the economic downturn. Given the evidence of available positions, it was not reasonable for the employee to look for work in a new field, or at least to fail to apply for available positions in her field of experience. This decision stressed the importance

for employers who wish to raise a failure to mitigate argument to gather evidence of any and all positions for which their former employee would have been a suitable candidate.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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