

Employers Must "Trust" Employees To Account For Mitigation Earnings During Notice Period



A typical wrongful dismissal case (where cause is not an issue) generally involves two legal issues. First, how much reasonable notice of termination (or pay in lieu) should the employee have received based on the employee's age, length of service, position, compensation and the availability of comparable employment. Second, did the employee mitigate his/her damages by finding alternative employment or failing to make reasonable efforts to do so during the notice period? Notably, a judge can decrease the notice period based on the employee's unreasonable mitigation efforts.

Often times by the time the trial rolls around, the notice period has finished. The employee's damages (i.e. compensation over the notice period less mitigation earnings) have "crystallized". The employer can test the employee's mitigation efforts in Court. However, what happens when a judge determines the notice period at a time when the majority of the notice period has yet to run its course? With summary judgement procedures becoming increasingly (and properly) used by Plaintiff's counsel in achieving a quick hearing date, this issue has increasingly come before the Courts.

The most recent case on this issue involved an employee with 40 years of service who was awarded 27 month's pay in lieu of reasonable notice at a summary judgement hearing. That hearing occurred 8 months following the termination date. The employer argued the result meant that the employee would be guaranteed 27 months' pay, thus absolving him from his duty to mitigate during the 27 months. The employer would be in a position where it had to pay the maximum liability when it was possible that the liability might be less based on the employee's mitigation efforts. The employee claimed that he had presented enough evidence to the Court such that it could find that he had made reasonable efforts to mitigate his damages during the 8 months leading up to the summary

judgement hearing, and would not be able to mitigate going forward for the remaining 19 months of the notice period.

The judge found that there are three approaches used by the Courts in dealing with this issue:

1. **The Trust Approach:** The employee must account to the employer for any mitigation earnings and a procedure is designed for potential for a return to Court in the event of disputes.
2. **The Partial Summary Judgment Approach:** The parties return at the end of the notice period to determine the adequacy and success of the employee's mitigation efforts.
3. **The Contingency Approach:** The employee's damages are reduced by a contingency for re-employment.

The judge held that while the evidence showed the employee's chances of re-employment were low, it did not establish that re-employment during the 27 month notice period was not possible. The Judge found it appropriate to adopt the "Trust Approach". The result was that the employer would have the obligation to pay the employee over the 27 month notice period on a monthly basis subject to the employee's continuing obligation to mitigate his damages. If the employee disclosed earnings (and that is the "trust" aspect here) the employer would deduct the earnings from the monthly payments.

The case is important as it demonstrates that employers should think carefully about how to handle wrongful dismissal cases where the only issues are notice period and mitigation. Not only can employees obtain a speedy hearing date via the summary judgement rules, the fact that the notice period has not run its course will not be a barrier for courts to award the maximum damages over the notice period (subject to "trusting" the employee of course to account for his/her earnings).

Article by Daniel Pugen and Patrick Pengelly