Employment Update



Court of Appeal Upholds 24-month Reasonable Notice, $50K Aggravated Damages

The Ontario Court of Appeal has clarified the requirements for employers to prove that a terminated employee failed to mitigate their damages, and the basis for a claim of aggravated or moral damages, in wrongful dismissal cases. A decision published on May 2, 2024, *Krmpotic v Thunder Bay Electronics Limited*, on appeal from an earlier trial decision, upheld the trial judge's finding of 24 months' reasonable notice, and $50,000 in aggravated damages. The two employers, Thunder Bay Electronics Limited, and Hill Street Financial Services (the "Employers") appealed the trial decision. The Court of Appeal (the "court") dismissed the Employers' appeal, which argued that there was insufficient medical evidence for the employee, Drago Krmpotic, to claim that he was physically incapacitated following his termination. The court also did not find the trial judge made any error in awarding $50,000 in aggravated damages, because the manner of dismissal, which breached the Employers' duty of good faith, inflicted additional harm to Krmpotic beyond the "normal distress and hurt feelings resulting from the dismissal." Furthermore, the Employers' appeal that the trial judge erred in finding each of them jointly and severally liable was dismissed based on the evidence that Krmpotic was in fact employed by both of the Employers. As with any employer in Ontario, charities and not-for-profits should be aware of the risks involved when terminating their employees, and this case is a helpful clarification of these important points of Employment Law.

Drago Krmpotic, employed for 29 years by Thunder Bay Electronics Limited and Hill Street Financial Services, was abruptly terminated in 2016 at age 59, shortly after returning from medical leave for back surgery necessitated by workplace injuries. At the time of his termination, Krmpotic was earning $72,864 in annual salary as a Building Maintenance Supervisor. Although he was offered a severance package of 16 months' salary post-termination, Krmpotic rejected the offer and claimed wrongful dismissal, seeking further damages for mental distress and aggravated/moral damages. The trial judge awarded Krmpotic a 24-month reasonable notice period, acknowledging his loyalty and dedication, and the challenging physical demands of his role. While grounds for mental distress were denied due to insufficient medical evidence linking his emotional suffering directly to the termination, aggravated damages of $50,000 were granted for the Employers' handling of the dismissal, which was "the antithesis of an employer's duty" of good faith, according to the trial judge.

The Employers argued on appeal that the trial judge ignored evidence from a doctor's report on Krmpotic's physical condition, which noted that Krmpotic had "no leg pain,

some back stiffness, and was happy post-surgery." While reviewing the trial judge's finding that Krmpotic's efforts to mitigate his damages were "scant at best", the Court of Appeal stated that the doctor's report did not comment on "physical capacity" required to perform the work that Krmpotic had been employed for. Providing a summary of the current law, the court stated that an employee has a duty to "take reasonable steps to mitigate his damages by searching for comparable alternate employment within the reasonable notice period." The burden of proving that the employee has not mitigated his damages falls on the employer. In this case there was evidence to show that Krmpotic could not perform the physical demands of his employment, because he was unable to do similar work that was offered to him by his son for a renovation business in Toronto. The court held that the Employers did not meet the burden of proving that Krmpotic failed to mitigate his damages, due to his physical condition.

On the issue of aggravated and moral damages, the court found "no basis for appellate interference with the trial judge's determination". The trial judge had found that the Employers "breached the duty of good faith in the manner of dismissal in a number of ways." Although they told Krmpotic that he had been terminated "for financial reasons" the Employers refused to produce financial statements in support of this position at trial. The Employers were "not directly untruthful", according to the trial judge, but they were "neither candid nor forthright." Krmpotic was terminated within two hours of returning to work after his back surgery, and the Employers were "misleading, and unduly insensitive" during the termination meeting, according to the trial judge. Reading the trial judge's reasons, the court stated it was "clear" that Krmpotic suffered harm "as a result of the manner of dismissal" by "anxiety, depression, fear, poor sleep, frustration, and feelings of helplessness."

In light of this decision, charities and not-for-profits should always treat employees with respect, compassion and honesty, with as much transparency as possible, during the entire termination process and choose the timing of a termination carefully.

Read the June 2024 Charity & NFP Law Update

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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