Making A Promise Can Cost Employers Dearly



Bottom Line

The Ontario Superior Court of Justice (the "Court") recently found that an agricultural employee was entitled to nearly $440,000 in damages following his constructive dismissal by an employer. The employee had worked for that employer for his entire working life. Included in this quantum of damages was $250,000 as a retiring allowance that the employer promised to the employee prior to the dismissal, but which the employer did not end up paying. The Court's reasons in *Scarrow v Walkey* (*"Scarrow"*) should serve as a cautionary reminder, not just for employers with very long service employees, but also of the pitfalls of making promises to employees.

The Plaintiff's Lifelong Employment and Dismissal

The plaintiff in this case ("Mr. Scarrow") began working for the defendant principal ("Mr. Walkey") in 1979. During his 40 year tenure as an employee of Mr. Walkey, Mr. Scarrow worked as a farm labourer and manager at Mr. Walkey's farming businesses. At the time of his dismissal, Mr. Scarrow earned an annual salary of approximately $55,000, an amount which remained essentially unchanged over the last 25 years of his employment.

In or around 2006 or 2008, Mr. Scarrow and Mr. Walkey discussed the future of Mr. Scarrow's employment. Specifically, they discussed Mr. Scarrow's concerns that he had no "safety net" for retirement. At this meeting, Mr. Walkey informed him that he would be provided with a retiring allowance: specifically 8–10% of the nonvoting shares in one of Mr. Walkey's farm businesses. Despite the subsequent sale of the farm business in which Mr. Walkey told him he would receive the shares, Mr. Scarrow continued working for Mr. Walkey, relying on the latter's promise that "the big money [i.e., a retirement allowance] is at the end".

On or around January 2019, Mr. Walkey advised Mr. Scarrow that he was being temporarily "laid-off" without cause and without any notice of termination or pay in lieu thereof. Mr. Walkey assured Mr. Scarrow that his employment would resume in April 2019. During this "lay-off", and at Mr. Walkey's request, Mr. Scarrow performed unpaid security work for Mr. Walkey while also receiving unemployment benefits.

On or about May 4, 2019, Mr. Walkey met with Mr. Scarrow and informed him that he could return, but that any pay he received from Mr. Walkey would be to top-up his benefits, and that Mr. Scarrow should attempt to collect unemployment benefits while

employed. Mr. Walkey also informed Mr. Scarrow that, on Mr. Scarrow's return, his duties would be substantially modified and he would be expected to perform lifting work that had previously injured Mr. Scarrow. Mr. Scarrow rejected Mr. Walkey's proposal, in part because Mr. Scarrow viewed the proposal as illegal.

Mr. Scarrow accordingly brought an action against his employer, alleging constructive dismissal and breach of contract.

Significant Damages for Long Service and Reliance on the Defendant's Promise

In his reasons, Justice Lemon found that Mr. Walkey constructively dismissed Mr. Scarrow by placing him on an unpaid "lay-off" and refusing to return Mr. Scarrow to his original position and pay when the "lay-off" ended. The Court further found that Mr. Walkey's promise of a retiring allowance was an implied term of Mr. Scarrow's employment agreement with Mr. Walkey, and that Mr. Walkey's failure to pay this allowance amounted to breach of contract. All in, the Court ordered $109,980 in damages for wrongful dismissal, $250,000 for Mr. Scarrow's retiring allowance, $5,000 for accrued but unpaid wages, and $70,000 in aggravated and punitive damages.

Canadian courts will generally find that an employee has been constructively dismissed when either: (a) a single act, unilaterally taken by an employer, breaches an essential term of an employment agreement; or (b) a series of acts undertaken by an employer show that it no longer intends to be bound by an employment agreement.

Here, the Court concluded, based on existing case law from the Court of Appeal of Ontario, that in "laying-off" Mr. Scarrow, Mr. Walkey fundamentally breached the terms of Mr. Scarrow's employment agreement. The Court also held that when Mr. Scarrow and Mr. Walkey met in May 2019 to discuss Mr. Scarrow's return, this too indicated that Mr. Walkey no longer intended to be bound to his employment agreement with Mr. Scarrow. Mr. Walkey, the Court held, constructively dismissed Mr. Scarrow.

Having found that Mr. Scarrow was constructively dismissed, the Court considered the notice Mr. Walkey owed to him, concluding that two years of pay was appropriate in the circumstances given Mr. Scarrow's age, position, and length of service, among other factors.

The Court then considered damages for Mr. Walkey's failure to pay Mr. Scarrow the promised retiring allowance. Again based on cases from the Court of Appeal, the Court held that Mr. Walkey's statements to Mr. Scarrow in 2006 or 2008 regarding the retirement allowance effectively created an implied term in Mr. Scarrow's employment agreement, one which entitled him to the allowance at the end of his employment with Mr. Walkey and his businesses. Justice Lemon found that Mr. Scarrow relied on Mr. Walkey's promise regarding the retiring allowance and conducted himself during his employment as if he was going to eventually receive the allowance.

The Court accordingly awarded Mr. Scarrow a retiring allowance equal to approximately 10% of the value of a farming business previously sold by Mr. Walkey.

Lastly, Justice Lemon held that Mr. Scarrow was entitled to his accrued but unpaid wages, as well as aggravated and punitive damages. On the aggravated and punitive damages, the Court noted that Mr. Walkey's conduct caused Mr. Scarrow "distress, frustration, aggravation" and the "erosion of his self-esteem and confidence". Mr. Scarrow's termination meant he had to sell his house and also prevented his wife from being able to retire. The Court awarded these punitive damages partly because Mr. Walkey did not deal with Mr. Scarrow in good faith, stating that he "behaved in a heartless and cowardly way" while asking Mr. Scarrow to work during his "lay-off"

with no intention of paying him.

Takeaways

The Court's decision in *Scarrow* should be a cautionary reminder to employers about the importance of their responsibilities and how they deal with their employees, both during the employment relationship and the ending of that relationship.

Employers should be aware that, if they make and renege upon a promise like that made by Mr. Walkey in this case, a court may well hold them to it. This case is the latest in a line of rulings suggesting that Canadian courts are becoming more willing to find that promises, particularly monetary promises, can amount to implied terms in employment agreements.

Similarly, *Scarrow* should also remind employers that when it comes time to dismiss an employee, this should be handled delicately and should result in a "clean break". As noted, part of the reason the Court found that Mr. Scarrow was entitled to $70,000 in aggravated and punitive damages was because Mr. Walkey did not deal with Mr. Scarrow fairly during the "lay-off" period and at his termination.

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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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