Ontario Court To Determine How Retirement Plans Affect Notice Periods

The Ontario Superior Court of Justice has recently decided a motion in *Kimball v. Windsor Raceway Inc.* and decided that it will have to hold a full trial to determine a dispute of alleged wrongful dismissal. The issues for determination will be whether Kimball is entitled to pay in lieu of notice equal to 24 months' pay as claimed by the employee, and whether a long service employee is entitled to a decreased award on wrongful dismissal if they intended to retire shortly after termination.

John Kimball was employed by Windsor Raceway Inc. beginning August 25, 1960. In February of 2007, the employer asked Kimball if he had any plans to retire. In response, Kimball stated that he planned to retire after his 65th birthday in December 2007. At that time, he began to collect a pension of $921, but he did not retire. In the summer of 2010, during a human resources planning meeting, Kimball again was asked if he had plans to retire. He responded that he planned to work until the end of 2012.

In March of 2012 the Ontario Lottery and Gaming Commission announced that it was going to cease operation of slot machines at a number of sites, including the Windsor Raceway. As a result, the employer lost funding and on July 9, 2012 it gave Kimball notice that he would be placed on indefinite layoff on August 31, 2012.

The employer provided Kimball with some of his entitlements under the *Employment Standards Act, 2000*, indicating his termination. Kimball, who was not quite 70 years old at the time of termination, had accrued 43 years of service, and brought a claim seeking 24 months' pay in lieu of notice at common law.

In the recent motion for summary judgment, the Court ruled that the employee was entitled to receive an amount equal to 26 weeks' pay for full payment of Severance Pay as required by the *Employment Standards Act, 2000*. However, the Court also decided that it would have to hear a full trial to determine the merits employee's actual claim at common law. In relevant part, the Court decided that a full trial was required to consider the impact of the employee's stated intention to retire.

Typically, any terminated employee is required to mitigate their losses or potential losses by taking reasonable steps to secure subsequent employment after being terminated. The Courts historically have not recognized an exception to this rule for senior employees. Rather, the duty to mitigate is regardless of age of employee

because the purpose of reasonable notice of termination (or pay in lieu thereof) is to help bridge an employee to the point of subsequent employment. The question that arose in this case was how potential retirement affects an employer's obligation with regard to notice.

In its decision the Court stated at paragraph 37:

If the dismissed employee has no intention to look for work, but has instead decided to retire, the very purpose for which reasonable notice is required to be given is absent. That is a factor that may well be relevant in assessing what constitutes reasonable notice in this case.

It would seem rational and consistent with the purpose of reasonable notice provision that an employee who intends to put an end to their working career does not have an entitlement to receive reasonable notice payments that would create an effective windfall, continuing their salary after they intend to stop working for a salary.

If the Court ultimately agrees with this rationale, one predictable consequence for employers may be that employees will be less willing to disclose their intentions to retire with much notice, for fear that, in the event of termination without cause, they will be entitled to a shorter notice period.

The lawyers at CCPartners have a great deal of experience advising employers on workplace issues, including how to effectively manage an aging workforce.

Last Updated: October 11 2014

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