“You Can’t Have Your Cake And Eat It (Part) 2”: An Update On Mitigation And Employment Contracts

In June 2012, we wrote about Chief Justice Winkler’s decision in *Bowes v Goss Power Products* (2012 ONCA 425) (“*Bowes*“), which had raised a number of eyebrows.

In this decision, the Ontario Court of Appeal held that where an employment contract stipulates a specific amount of payable notice upon termination, the employee is under no obligation to mitigate his or her damages. Instead, the pay in lieu of notice amount is treated as an amount owed under the contract. As such, the terminated employee has no duty to mitigate and can seek employment elsewhere and remain entitled to the entire notice amount payable under the contract.

A year and a half later, it is clear that this decision is gaining traction across the country. *Bowes* has been cited in four different decisions – two in British Columbia, one from Alberta and one in Ontario. While relying on *Bowes* to varying degrees, each of these decisions have upheld the principle that an employee does not owe a duty to mitigate if his or her contract contains a specified payable notice provision. The four decisions are briefly summarized below:

- In ***Freudenberg Household Products Inc. v DiGiammarino*** (2012 ONSC 5725), Justice Morawetz was requested to interpret a contractual provision, which entitled an employee to two years’ compensation following termination. The Court expressly followed Bowes and forced the employer to pay the full contracted notice amount. Notably, the contract was only for a fixed four-year term. Nevertheless, the Court appears to have treated the duty to mitigate under that contract no differently than how Chief Justice Winkler did in Bowes, where the contract in issue was for an indefinite term.
- In ***Allen v Ainsworth Lumber*** (2013 BCCA 271), the British Columbia Court of Appeal took Bowes a step further in ruling against an employer that attempted to work around a contracted notice by asking the employee to not report to work during that time. The Court held that the employee had actually been dismissed and, using Bowes to support its decision, required the employer to pay the full contractual notice amount.
- In ***Maxwell v British Columbia*** (2013 BCSC 1386), the Court cited both *Bowes* and *Ainsworth*, and confirmed that where there exists a contractual severance provision, a dismissed employee is entitled to that specified amount without also being required to mitigate. A duty to mitigate only arises where such a

duty is imposed in the contract. Of note, the employee's decision to decline alternative employment subsequent to her termination was deemed to be irrelevant.

- In ***Lovely v Prestige Travel*** (2013 ABQB 467), the main focus was the enforceability of the employment contract. Once the Court found that a valid contract existed, *Bowes* was cited in ruling that a duty to mitigate does not arise where there is an express contractual term which allows the employer to terminate a fixed-term contract by paying a certain amount of notice. The Court also held that fixed-term contracts should be treated no differently than contracts of indefinite duration. As such, just as an employer is now required to pay the full notice amount specified under an indefinite contract, an employer ought to be required to pay the full amount owed for a fixed term, absent a provision stating otherwise.

What This Means for Employers

Bowes and the decisions mentioned above confirm that employers wishing to prevent an employee from obtaining a windfall following termination must expressly establish a duty to mitigate in the employee's contract. Courts will now view the requirement to pay the entire specified notice period upon termination in an employment contract, whether fixed-term or indefinite, as a contractual obligation. Moreover, it is possible that an employee with a fixed-term contract will be entitled to the full sum owed under that contract without having to mitigate, absent an express provision stating otherwise.

Employers should continue to review their employment agreements to ensure that mitigation is addressed within the termination provisions. If not, employers face the risk of having to pay the kind of windfall envisioned in the decisions discussed above.

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