Case In Point

No Duty to Mitigate Where Employment Contract Silent on Mitigation

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The Ontario Court of Appeal recently released a significant decision on an employee's duty to mitigate post-employment when his or her employment contract has a fixed notice period and is silent on the issue of mitigation.

In Bowes v. Goss Power Products Ltd., Mr. Bowes' contract had a fixed notice period of six months if his employment was terminated prior to the completion of four years service. The contract did not say anything about mitigation. His employment was terminated within that period and he was paid out his statutory entitlement (three weeks) but not the six months stipulated in his contract. Mr. Bowes brought an application for payment of the full six months. The application judge concluded that an employment agreement implicitly includes a duty to mitigate post-employment unless it specifically states otherwise—because Mr. Bowes had fully mitigated, he was not entitled to the full six months.

In a unanimous decision, a five-member panel of justices of the Court of Appeal overturned the decision of the application judge. The Court applied the principles of contract law and damages and concluded that when parties include a fixed notice period in an employment contract, which contains no mitigation provision, they are fixing an amount of "liquidated" damages or a contractual amount that is owed to an employee upon termination and there is no duty to mitigate. In other words, when parties contract for a fixed notice period, they are contracting out of the common law reasonable notice period and, as such, the common law principle of mitigation does not apply. The Court left the door open for parties to require an employee to mitigate post-employment if this requirement is explicitly stated in the employment contract.

The result of this decision going forward is that if a contract does not specifically require an employee to mitigate, an employer must pay the full amount in the contract. This will have significant implications for employers that have contracts with employees containing fixed notice periods, as these contracts cannot be unilaterally altered by the employer to address the mitigation issue without due and proper consideration—that is, without providing something in return for the change. Here are a few practical tips for employers to follow in light of this decision:

- When entering into new employment agreements containing a fixed notice period, include a requirement that the fixed notice period is subject to a duty to mitigate;
- Review all existing employment contracts to determine if they provide for a fixed notice period and for mitigation. If your current contracts don't address the question of mitigation, you should consider revising them. We would be happy to discuss with you how this can most effectively be done and how to minimize your potential liability.