Case In Point

Ontario Court Finds Failure to Accept Comparable Position Constitutes Complete Failure to Mitigate

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In *Gannon v. Kinsdale Carriers*, the Ontario Superior Court recently considered what constitutes “comparable employment” for the purpose of mitigation of reasonable notice damages.

The plaintiff was employed by the defendant, a federally regulated trucking company, for 23 years. At the time of her termination from employment, the plaintiff held a role that included accounts receivable, dispatch and office clerk duties. As a result of COVID-19, the defendant’s business was no longer financially sustainable and it was forced to close the end of December 2020. As a result, the defendant terminated the employment of all employees, including the plaintiff, effective the same date.

While the plaintiff was paid out her statutory termination entitlements, she brought an action for wrongful dismissal, seeking 22 months’ reasonable notice. A key issue before the Court was whether the plaintiff had made appropriate efforts to mitigate her damages.

The Court heard evidence about how the owner of the defendant organization made efforts to find all terminated employees comparable positions elsewhere. The owner reached out to one industry contact, Zehr Transport Limited (Zehr), about potential employment for the plaintiff. The plaintiff interviewed with Zehr but ultimately decided she was not interested in the position available. Instead, she elected to take an online bookkeeping course, securing alternate employment seven months later.

The plaintiff’s evidence was that the position with Zehr was not comparable as it was exclusively dispatching work and required her to be available evenings and weekends. The defendant’s evidence was that the work was both dispatch and administrative, similar to what she performed with the defendant, and did not require her to work outside of regular office hours.

The Court held the plaintiff’s evidence minimized the dispatching duties she completed with the defendant and ultimately preferred the defendant’s evidence about the nature of the position offered by Zehr. It concluded the position with Zehr was comparable to the plaintiff’s role with the defendant and that the plaintiff had failed to mitigate her damages in declining the offer. As the Court noted, “While [the plaintiff] wanted to ‘see what’s out there’ and pursue on-line courses, it should not fall to the defendant to fund her educational pursuits.” The Court held that, as the plaintiff had failed to mitigate, she was not entitled to any amount for reasonable notice.

This decision reinforces the important notion that a dismissed employee has a duty to seek and accept comparable, alternative employment even if that comparable employment is not the employee’s preference.