

CASE COMMENT AND ANALYSIS OF AN EMPLOYEE'S DUTY TO MITIGATE WRONGFUL DISMISSAL DAMAGES

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A. INTRODUCTION

Canac Kitchens Ltd. shut down its Canadian manufacturing operations in Thornhill, Ontario on May 27, 2008 due to a major slow down in business. Canac paid many of its employees the statutory termination and severance minimums required under the *Employment Standards Act, 2000* (the "ESA"). Many wrongful dismissal lawsuits by these former Canac employees ensued, claiming additional common law damages for wrongful dismissal. Two of these recent decisions, *Moldovanyi v. Canac Kitchens Ltd.*, [2009] O.J. No. 771 (Ont. S.C.J.) ("*Moldovanyi*") and *Zaman v. Canac Kitchens Ltd.*, [2009] O.J. No. 872 (Ont. S.C.J.) ("*Zaman*"), both rendered by the Honourable Mr. Justice D.M. Brown in February and March of 2009, raise important issues concerning the extent of an employee's duty to mitigate, or reduce, damages for wrongful dismissal. The purpose of this *Charity Law Bulletin* is to review these principles and to provide some guidance to the employers and employees for charities and non-profit organizations faced with this situation.

B. THE DUTY TO MITIGATE WRONGFUL DISMISSAL DAMAGES

In an earlier *Charity Law Bulletin* (No. 153) entitled "The Ins and Outs of Wrongful Dismissal for Charities and Non-Profits", the statutory and common law entitlements for employees who have been wrongfully dismissed from their employment were analyzed. In that Bulletin, it was noted that the relationship between the employer and the employee was contractual in nature and that an implied term in most employment

contracts is that the employer may not dismiss an employee without providing reasonable notice or pay in lieu of that notice.

As with most other forms of contracts, the innocent party whose contract has been breached is required to mitigate, or reduce, his or her monetary damages to the extent reasonably possible. In the case of wrongful dismissal claims, if a wrongfully dismissed employee does not take reasonable steps to mitigate his or her damages, the court may reduce the amount otherwise owing to that employee based upon an estimate of the amount the employee could or should have reasonably earned during the common law notice period.

By way of an example, assume that an employee was wrongfully dismissed and there was a finding that the employee should be entitled to a damages judgment representing one year of pay in lieu of notice. However, there is also evidence that the employee did not undertake a search for comparable employment during that one year reasonable notice period and remained unemployed for that entire time. In that instance, it is possible that the court could reduce the damage award by several months if the court is of the view that the employee could have found employment within the reasonable period if he or she attempted to do so. Thus, the failure by the employee to attempt to mitigate his or her damages can result in a substantial reduction of the employee's wrongful dismissal award.

C. THE ISSUES IN THE MOLDOVANYI AND ZAMAN DECISIONS

In both the *Moldovanyi* and *Zaman* decisions, Justice Brown was faced with having to make a determination as to whether either of the wrongfully dismissed employees should have had their damages claims reduced as a result of an alleged failure to mitigate.

1. *Moldovanyi v. Canac Kitchens Ltd.*

In *Moldovanyi*, the plaintiff was a forty-year-old man whose last job at Canac was a service order layout technician. At the time of his termination, he earned an annual salary of \$44,686.20, together with participation in the health benefits package, and had been employed by Canac for nineteen years. At dismissal, Canac paid Mr. Moldovanyi ESA termination and severance pay totalling thirty two weeks, or eight months. Mr. Moldovanyi submitted that he was entitled to a further eight months notice, for a total of sixteen months, together with benefits. The court held that the reasonable notice in

this case should be fourteen months. In the result, Mr. Moldovanyi was owed a further six months of pay in lieu of notice.

During that fourteen month common law notice period, Mr. Moldovanyi found some employment from a part-time job he was able to secure at Ikea. Canac argued that whatever he earned from his part-time employment at Ikea during the eight month ESA period should be deducted from those ESA payments. If this argument was accepted, the result would have been a lesser amount owing by Canac.

The court rejected Canac's position, relying upon a decision of the Ontario Divisional Court in *Boland v. APV Canada Inc.* (2005), 250 D.L.R. (4th) 376 (Ont. Div. Ct.), where the court decided that the ESA entitlements cannot be reduced by amounts received by other employment. In rendering his decision, Justice Brown refused to follow a conflicting decision in *Yanez v. Canac*, [2004] O.J. No. 5238 (Ont. S.C.J.).

However, as the case was heard by way of motion for summary judgement prior to the expiration of what the court determined to be the reasonable notice period, the court was required to grant a judgement in such a way that the plaintiff would be required to account for monies earned through employment after the eight month time period covered by the ESA entitlements, but prior to the expiration of the fourteen month common law notice period. Otherwise, by having the court deal with a claim at a relatively early stage, there was a risk that the employee would receive more than his common law entitlements by not having to account for any monies earned during the common law notice period.

To address this issue, the court adopted the approach used by Justice Chadwick in *Brouillard v. Rostrust Investments Inc.*, [1997] O.J. No. 4136 (Gen. Div.). To ensure no excess recovery by the plaintiff, Justice Brown ordered as follows at para. 27 of decision:

- i) Canac shall pay to its counsel, in trust, the balance of the monies owing for the notice period;
- ii) Canac's counsel shall invest those monies in a separate interest-bearing trust account, and all interest will accrue for the benefit of Mr. Moldovanyi;

- iii) Canac's counsel shall pay to Mr. Moldovanyi equal monthly instalments on the last day of each month;
- iv) At least one business day before the end of each month, plaintiff's counsel shall send a statement to Canac's counsel indicating what income, if any, Mr. Moldovanyi has earned during that month. Copies of any pay stubs shall accompany the statement; and
- v) If income has been earned, the amount will be deducted from the amounts held in trust, and returned to Canac.

The clarification by Justice Brown in *Moldovanyi* as to the inability of employers to deduct wages earned by their dismissed employees from ESA entitlements is important, and provides further certainty to the law on this issue. However, it is also important to note that wages earned during the common law notice period are deductible from a wrongfully dismissed employees pay in lieu of notice claim.

2. *Zaman v. Canac Kitchens Ltd.*

In *Zaman v. Canac Kitchens Ltd.*, the Plaintiff, Rasheed Zaman was an accounts payable clerk at Canac Kitchens Ltd. He was thirty-nine years of age at the time of dismissal and had worked for the company for sixteen years. He was dismissed without cause and was given working notice of four weeks and statutory termination and severance pay of twenty-five weeks, i.e. 7.25 months.

The Plaintiff brought a motion for summary judgement. The court held that the applicable period of reasonable notice was thirteen months. Therefore, he was entitled to a further period of pay in lieu of notice representing a period 5.25 months in addition to the twenty-nine weeks, or 7.25 months, he had already been paid.

Canac took the position on the motion that Mr. Zaman had failed to take reasonable steps to mitigate his damages and, as a result, the court should reduce the period of reasonable notice to which he would otherwise be entitled by two months. In reviewing the law as to an employee's duty to mitigate damages, Justice Brown cited Echlin and Fantini, *Quitting for Good Reason: The Law of Constructive Dismissal in Canada* (Canada Law Book, 2001), at pp. 61-62:

In accordance with this general contract law principle, any employee who is wrongfully dismissed has an obligation to mitigate his or her damages. A failure to do so will result

in the court declining to award damages or reducing the wrongful dismissal damages which would otherwise have been payable to the employee. . . . Generally, the obligation requires the dismissed employee to seek alternative employment with another employer. The employee need not accept any position available, but is entitled to limit his or her efforts to employment of a comparable nature. Moreover, the onus is on the employer to demonstrate that the employee failed to mitigate. . . . A return to school does not generally satisfy the duty to mitigate unless the student remains available for work and is actively pursuing alternative employment. The critical factor, in all cases of mitigation, is that the employee behaved reasonably in attempting to mitigate his or her loss.

Justice Brown went on to state that the burden of an employer to prove lack of mitigation is not easily met. The employer must establish the employee failed to attempt to take reasonable steps and that had his job search been active, he would have been expected to have secured a comparable position reasonably adapted to his abilities. Given the current economic situation, this burden will be even more difficult to meet.

In support of his mitigation efforts, Mr. Zaman attached to his affidavit numerous job applications he had made in writing and on-line since August 2008. He also included a receipt for a fall 2008 Certified Financial Planner course to upgrade his skills. The court held that while there were some weaknesses in Mr. Zaman's evidence, it was also noted by the court that he was not cross-examined on his affidavit and that Canac could not provide its own evidence that the employee failed to take reasonable steps to mitigate his damages. Therefore, Canac's argument that Mr. Zaman failed to mitigate his damages was rejected.

D. CONCLUSION

An employee who has been dismissed from his or her position needs to take reasonable steps to search for alternative comparable employment. For the employee, it is important to document these steps and to keep copies of all applications and responses. Failure to do so may result in a substantially decreased damage award or may result in a reduced out of court settlement. Employers should be aware of the duty to mitigate and offer to assist the employee when circumstances permit. The employer may consider providing a positive reference or offering out-placement services. If litigation is likely, the employer may also wish to start a file of job-openings that may suit the former employee for future use in any lawsuit.