

Does an employee have a duty to mitigate where there is a fixed severance entitlement set out in the contract and no corresponding provision imposing an express requirement to mitigate?

In *Bowes v. Goss Power Products Ltd.*¹, the employee, Peter Bowes, entered into a written employment contract with Goss Power Products Ltd. in September 2007. Under this contract, which was drafted by Goss, Bowes was hired in the position of Vice-President, Sales and Marketing. His employment was subsequently terminated by Goss, without cause, in April 2011.

The contract of employment provided in paragraph 30(c):

30. The Employee's employment may be terminated in the following manner and in the following circumstances:

...

(c) By the Employer at any time without cause by providing the Employee with the following period of notice, or pay in lieu thereof:

...

Six (6) months if the Employee's employment is terminated prior to the completion of forty-eight (48) months of service; and

As Bowes was employed less than 48 months at the time of the termination of his employment, the letter of termination Goss issued to him stated that he would be paid his salary for six months but he would be required to seek alternate employment during this period and keep Goss apprised of his efforts.

Two weeks after the termination of his employment, Mr. Bowes secured alternative employment at about the same salary he was earning with Goss. Once Goss became aware that Bowes had secured alternative employment, Goss took the position that Mr. Bowes had mitigated his loss and, therefore, was only entitled to three weeks' salary under the *Employment Standards Act* of Ontario and paid him such.

Consequently, Mr. Bowes brought an application in the Superior Court of Justice of Ontario to have the termination provision of the employment contract interpreted, arguing that the contract delineated the termination pay he was due and owing and he had no duty to mitigate to obtain that termination pay. He also argued that the termination pay should be paid to him as a lump sum at the time of the termination of his employment.

The application judge ruled against Bowes stating where the contract of employment contains a fixed severance entitlement, the contract is subject to a duty to mitigate unless the agreement, directly or indirectly, relieves the employee of this obligation. According to the application judge, since the contract in this case did not provide an exemption from the duty to mitigate and since Bowes had found alternate employment, Bowes was not entitled to the full amount under the contract as he had mitigated his loss. The judge further held that severance payment is not required to be paid as a lump sum.

Mr. Bowes appealed the decision to the Ontario Court of Appeal. The Court of Appeal, in reversing the application judge's decision, stated:

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...the application judge erred in deciding that an agreement specifying a fixed notice period, in the event of dismissal without cause, was akin to damages *in lieu* of reasonable notice at common law. This mischaracterization led him to wrongly conclude that there was a presumption that the appellant had a duty to mitigate and that, since the agreement was silent in respect of mitigation, the presumption had not been rebutted. On this basis, he determined – wrongly in my view – that the parties intended, at the point of contracting, that mitigation would be applicable to the calculation of damages upon termination.

The Court of Appeal also observed that while there is some confusion about the law on this issue as a result of trial decisions going both ways, at the appellate level, the decisions support the principle that mitigation is an irrelevant consideration where an employment contract contains a fixed severance entitlement on termination without cause, particularly where there is not an express contractual requirement to mitigate imposed on the employee. The court then succinctly and very persuasively summarized the justification for its conclusion as follows:

- By contracting for a fixed sum the parties have contracted out of the *Bardal* “reasonable notice” approach or damages *in lieu* thereof. There is no material difference whether the quantum contracted for is fixed or readily calculable from the terms of the agreement.
- By specifying an amount, the stipulated quantum is characterized as either liquidated damages or a contractual sum.
- Mitigation is a live issue at law only where damages are at large, i.e. damages *in lieu* of reasonable notice. Mitigation is not applicable if the damages are either liquidated or a contractual sum.
- It would be unfair to permit an employer to opt for certainty by specifying a fixed amount of damages and then allow the employer to later seek to obtain a lower amount at the expense of the employee by raising an issue of mitigation that was not mentioned in the employment agreement.
- It is counter-intuitive and inconsistent for the parties to contract for certainty and finality, and yet leave mitigation as a live issue with the uncertainty, lack of finality, risk and litigation that would ensue as a consequence.
- Thus, where an agreement provides for a stipulated sum upon termination without cause and is silent as to the obligation to mitigate, the employee will not be required to mitigate.
- Moreover, a broad release in an employment agreement, as here, demonstrates an intention to avoid resort to the courts, confirms a desire for finality, and bolsters a finding that the parties intended that mitigation would not be required unless the agreement expressly stipulates to the contrary.

While courts in British Columbia are not bound by the decisions of courts in other provinces, where the decision of courts in other provinces is well reasoned and persuasive, as this Ontario Court of Appeal’s decision is, British Columbia courts may rely on it. Having said this, where an employer in British Columbia wishes to provide their employee a fixed termination notice in excess of the minimum provided in the *Employment Standards Act* of British Columbia, it is advisable that they include in the employment contract an express obligation on the employee to mitigate, as the obligation to mitigate may not arise otherwise.

¹ 2012 ONCA 425