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ARTICLE

B.C. Court of Appeal Reduces Notice Period for Short Service Employee

In *Munoz v Sierra Systems Group Inc*, 2016 BCCA 140, the B.C. Court of Appeal recently considered a notice award of ten months for an employee with less than three years' service. The plaintiff was a skilled IT specialist and was fluent in Spanish. The defendant recruited him to leave his job, in order to work almost exclusively with one of its large clients. As part of this arrangement, the plaintiff elected to change his compensation from a base salary to an hourly compensation plan, where he would be paid a higher rate for each hour billed to the client, but would be "benched" (not paid) for any time that was unbilled. Months later, the client chose to stop working with the plaintiff, who was then benched for the next four months before the defendant gave him notice of termination.

The trial judge made a number of findings in favour of the plaintiff receiving a long notice period of ten months. The plaintiff's character of employment involved specialized IT skills and a client-need for fluency in Spanish, and to that end the trial judge found that the job prospects for someone with the plaintiff's specialized skills were "very scarce," particularly in light of the plaintiff's absence of work during his benching. In addition, the trial judge noted the presence of some inducement in the defendant's recruitment of the plaintiff and emphasized the existence of non-competition and non-solicitation clauses in the employment contract. Finally, because the plaintiff was benched and therefore had no earnings at the time of his termination, the trial judge assessed his damages based on his annual earnings in the year immediately preceding his last day before he was benched.

The Court of Appeal disagreed, finding that the trial judge erred by using the plaintiff's benching as evidence that employment opportunities for someone with his skills were very scarce. The Court of Appeal observed that evidence of a lack of internal work does not logically support an inference that there was a lack of comparable external work, and reduced the notice period from ten months to eight months on this basis. However, the trial judge's findings that there was some inducement in the recruiting of the plaintiff and that the plaintiff's non-solicitation clause made it reasonable for him to have regarded the defendant's clients as off-limits during his job search were not overturned. With respect to the calculation of damages, the Court held that the trial judge erred by using only the 12 months before the plaintiff was benched. The plaintiff had agreed to benefit from periods of increased pay and accepted the risk of periods of without pay, and could not expect to avoid his part of the bargain by receiving only the higher pay during the notice period. Therefore, damages were assessed using the 12 months immediately before his notice of termination, which encompassed eight months of "bountiful work" and four months on the bench.

Looking forward, while the Court of Appeal's trimming of the notice period in this case could signal a more rigorous examination of rising notice entitlements for short service employees, the award was still significant and did not curb the general trend. Employers who wish to limit their exposure to longer notice periods for skilled, short service employees should ensure that they have well-drafted termination clauses in place, and consider a provision allowing for restrictive covenants to be waived when their harm outweighs their benefit.

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