Summary Judgment: Approaches to Mitigation Where Judgment is Granted Prior to the Expiry of the Reasonable Notice Period

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Since the decision by the Supreme Court of Canada in *Hryniak v. Mauldin*, summary judgment has been increasingly used as a quicker and more affordable means of resolving wrongful dismissal claims, without having to go all the way to trial. In most wrongful dismissal claims, there are often few material facts in dispute and the principle legal issue before the court is determining the length of the reasonable notice period. In many cases, however, summary judgment can be granted prior to the expiry of the reasonable notice period (for example, the hearing is held 6 months after termination of employment and the reasonable notice is held to be 12 months). In these cases, courts have faced the challenging issue of how to deal with the wrongfully dismissed employee's obligation to mitigate his or her damages (using our example, there is no way to know if the employee would find a new job in the second 6 months).

It is well settled law that wrongfully dismissed employees have an obligation to take reasonable steps to mitigate their damages. Any mitigation income earned by the wrongfully dismissed employee during the reasonable notice period is deducted from the award of damages. If an employee does not attempt to mitigate his or her damages by finding comparable employment, at trial the court may reduce the damages that would have otherwise been owed. In most wrongful dismissal claims that proceed to trial, the decision made by the court is after the expiry of the reasonable notice period and the wrongfully dismissed employee's mitigation efforts can be tested and assessed at trial.

In the past year, a number of cases have applied different approaches in dealing with an employee's obligation to mitigate his or her damages where the judgment is granted prior to the expiry of the reasonable notice period. In *Paquette v. TeraGo Networks*, 2015 ONSC 4189, and *Markoulakis v. SNC-Lavalin Inc.*, 2015 ONSC 1081, the courts reviewed three different approaches:

(a) the Contingency Approach, whereby the employee's damages are discounted by a contingency for re-employment during the balance of the notice period;

(b) the Trust and Accounting Approach, whereby the employee is granted judgment but a trust in favour of the employer is impressed upon the judgment funds for the balance of the notice period requiring the employee to account for any mitigation income; and

(c) the Partial Summary Judgment Approach, whereby the employee is granted a partial summary judgment and the parties then return to court during and/or at the end of the notice period for further payments subject to an assessment of the employee's ongoing duty to mitigate.

The Partial Summary Judgment Approach has been favoured by employers as it allows employers to test the wrongfully dismissed employee's mitigation efforts. In *Markoulakis*, Justice Pollak agreed with the Partial Summary Judgment Approach. Justice Pollak did so, it would appear, on the basis of *Hryniak*, in that the Partial Summary Judgment Approach allows the possible creation of an evidentiary record sufficient to "fairly and justly adjudicate the dispute". Further, Justice Pollak noted that it would be unfair to require the employer to pay an amount representing the maximum damages that it may be responsible for and the employer should be given the right to test the employee's fulfillment of his obligation to mitigate his damages.

The Trust and Accounting Approach has been favoured by employees as it avoids having the parties return to court at a later date to determine the adequacy and success of the employee's mitigation efforts. In *Paquette*, Justice Perell favoured the trust approach and noted that it allows the employee to utilize funds but also requires the employee to account for any mitigatory earnings for the balance of the reasonable notice period.

Both approaches are not without criticism. The court in *Paquette* rejected the Partial Summary Judgment Approach as "cynical, patronizing, unfair, impractical and expensive". However, the Trust and Accounting Approach has been rejected on the basis that the court will have no real ability to assess the reasonableness of the wrongfully dismissed employee's conduct. Once the money is paid, the ability to get the matter back before the court is practically non-existent. The Trust and Accounting Approach provides a theoretical duty to mitigate, but on a practical level the wrongfully dismissed employee will have no incentive to earn any income during the balance of the reasonable notice period.

Just to make things more complicated, in *Lalani v Canadian Standards Association*, 2015 ONSC 7634, the Ontario Supreme Court reviewed the three different approaches but determined that the most appropriate approach was a "hybrid order" somewhere between the Trust and Accounting Approach and the Partial Summary Judgment Approach. Justice Diamond proposed that a trust be impressed on the funds paid to the wrongfully dismissed employee during the balance of the notice period, but the employee would be required to account to the employer on a monthly basis with respect to the mitigation efforts and mitigation income earned.

We are regrettably no closer to a determination as to which approach is likely to be most favoured by the courts, going forward.

While summary judgment appears to have provided a quicker and more affordable way to deal with wrongful dismissal cases, employers and employees must carefully consider their approach to mitigation as it may significantly affect the amount of

compensation paid to a wrongfully dismissed employee. In any other type of action, a trial to quantify damages would not proceed until damages were fully crystallized. The cases over the past year confirm that the fact that the notice period extends beyond the date on which the summary judgment application is heard will not prevent a court from awarding maximum damages over the notice period. The award of maximum damages before they have crystallized hardly seems a fair and just way to adjudicate the dispute but it is a reality that employers must be prepared for.

By

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