Canadian Employment Law Today

Employers are people too

May 28, 2014

Ontario court sympathizes with employer's difficult financial circumstances

BY TOM GORSKY

THE PERCEPTION IN the business community is that severance compensation awards are spiralling ever upward. And although this perception is not necessarily misplaced, there are occasional rays of hope for employers, as demonstrated in a recent decision of an Ontario judge who reduced the amount of severance due to an employee on account of an employer's poor economic circumstances.

Herbert Gristey commenced employment with Emke Climatecare of Walkerton, Ont., in 1999 as a technician repairing and maintaining furnaces. In 2011, Emke encountered increasingly difficult economic conditions which led to a decision to lay off nine of its employees, including Gristey.

Not satisfied with Emke's severance offer of 16 weeks' pay in exchange for a release, Gristey sued for wrongful dismissal, claiming an entitlement to 12 months' notice based on his 12 years' service, and a bad-faith claim against his former employer.

In its defence, Emke argued Gristey was not entitled to more than the eight-week statutory notice under Ontario's Employment Standards Act. Throughout his employment, Gristey only worked for Emke when there was work available. Moreover, in the months leading to his termination, the market downturn had already reduced his hours from a high of almost 40 a week to a low of about 20. In other words, had he been given notice beyond the statutory eight weeks, there simply would not have been any work available for Gristey to perform, so he suffered no financial loss as a result of termination of his employment.

The trial judge accepted Emke's argument — in part. Agreeing with Gristey that a reasonable notice period might have been 12 months, the court then reduced that amount by a third in recognition of Emke's position that had Gristey remained employed during the longer notice period his income would have been reduced by at least that much on account of the lack of available work. Rejecting Gristey's allegations of bad faith — and sounding a more sympathetic note toward employers than is typically heard from the court — the trial judge stated:

"I think ... that 12 months is too high when one factors in the economic considerations. This was a tough decision for the company. It was entitled to adjust its operations in light of the relatively poor market prevailing at the time. I attribute no bad motives or callous behaviour to (Emke) or Douglas Schaab (Emke's owner). In fact, he struck me as a caring and earnest gentleman who has successfully built a solid business with an unblemished reputation. I give him a great deal of credit for that...It would not be fair to the defendant to apply the full 12-month notice period."

> The employee's hours had already been reduced. Had he remained employed during a longer notice period his income would have been further reduced.

Why is this decision important for employers?

Traditionally, courts have quantified "reasonable notice " based on a number of factors including: character of employment, length of service, age and availability of similar employment. Rarely, if ever, has the economic reality of the employer been a compelling factor. Not surprisingly, this traditional approach has seemed quite one-sided. It also fails to take into consideration that, for the most part, even when employers are facing financial challenges, they tend to hold on to employees longer than economic conditions justify. For most employers, layoffs are not a first option but a last resort. Yet with rare exception, employers have not enjoyed any favourable consideration from the courts for exercising restraint rather than proceeding quickly to termination. It is hoped this decision foreshadows more nuanced and realistic judicial treatment of employer interests which, in many cases, also reflects the best interests of the employees.

Tips for employers

In the course of implementing a layoff due to difficult financial circumstances, every penny is precious. Generally speaking, employee counsel will reflexively base the quantum of a claim on the previous year's T4, or an average of earnings over more prosperous times, even if that is not predictive of the prospective earnings during a notice period. This case supports an argument that it may be appropriate for an employer to factor in its own economic situation when structuring a severance package.

In addition, there are other ways to structure severance payments to reduce exposing an employer to extensive costs, including paying severance compensation in instalments, with a provision to reduce further payments should the employee find new employment during the instalment period.

Finally, it bears repeating that a well drafted employment contract at the outset of employment remains the most reliable way to reduce risk and control severance costs at the conclusion of the relationship.

For more information see:

• *Gristey v. Emke Schaab Climatecare Inc.*, 2014 CarswellOnt 3422 (Ont. S.C.J.).

TOM GORSKY

» *Tom Gorsky is a lawyer with Sherrard Kuzz LLP, a management-side labour and employment law firm in Toronto. He can be reached at (416) 603-0700 (Main), (416) 420-0738 (24 Hour) or by visiting www.sherrardkuzz.com.*