Wrongful dismissal claim unsuccessful, but reasonable

Ontario court reduces cost award against terminated employee because it was 'close call'

BY DANIEL HEATH

CLAIMS FOR wrongful dismissal may have become even more expensive and risky for employers thanks to a recent Ontario Superior Court of Justice decision, *Goruk v. Greater Barrie Chamber of Commerce*. Despite the former employee losing at trial and the court finding that there was just cause to terminate, the court nevertheless reduced the cost award against the employee by $35,000 (about 22 per cent) because her wrongful dismissal claim was "reasonable."

The decision is another in a long line of employee-friendly decisions from Ontario courts. Whether it will be appealed or spark a trend in employment litigation remains to be seen. Until there is clarity, employers should take heed.

Sybil Goruk worked for the Greater Barrie Chamber of Commerce from 1997 until she was terminated for cause in 2014 for taking unauthorized vacation, granting herself an unauthorized pay raise, awarding contracts to her sons without following protocol, and reimbursing herself for charges on a personal credit card. Goruk sued for wrongful dismissal and sought damages of more than $800,000. The trial judge found the employer had just cause to terminate Goruk's employment and dismissed her claim.

In terms of the cost award, the court started from the proposition that the employer had been successful and was entitled to its costs. Given Goruk had claimed nearly $1 million in damages, the trial took 13 days to complete and neither party acted unreasonably, the employer argued its $160,000 legal bill was a fair, proportionate and reasonable amount. Not surprisingly, Goruk disagreed. She argued the cost award should be in the range of $25,000 to $30,000, for four reasons:

- She was a partial winner at trial.
- The employer unnecessarily lengthened the proceeding.
- The costs awarded were disproportionate.
- Her claim was reasonable.

The court dismissed the first three arguments because it found the employer was the clear winner, the employer did not unnecessarily lengthen the proceeding, and $160,000 was not disproportionate.

However, the court agreed with Goruk on the last point — that her claim was reasonable and that this should be a basis to adjust the cost award against her. In reaching this

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decision, the court expressed concern for the potential impact on access to justice if a large costs award was made against an employee who had advanced a reasonable, albeit losing, case:

"The plaintiff advances, in mitigation of the quantum of any costs awarded, the argument that her claim, while unsuccessful, was nevertheless reasonable. I agree. As I have said, this was a close call. Her case, though unsuccessful in the end, was a reasonably compelling one.

"In my view, the reasonableness of the plaintiff's position in this case is a relevant factor, because it touches on access to justice issues.

"This is a wrongful dismissal action. There is almost always a power imbalance in employment cases in favour of the employer… [which] raises a heightened concern about access to justice. Future dismissed employees may look to cases like this one and be scared away from advancing legitimate claims due to the risk of facing a crushing costs award in the event of a loss."

In the end, the court balanced the competing interests to the benefit of the employee and determined the fair, reasonable and proportionate cost award for the employer was $125,000, plus disbursements and taxes. However, it noted that "litigation is an expensive business" and normally losers pay a "significant portion" of the winners' costs, which Goruk knew when she filed her suit.

"The [employer] was successful and is entitled to an award of costs… [and] ought not to have to pay the price for any under-estimation of risk on the part of the [employee]," said the court. "At the same time, I am prepared to take into consideration the negative impact that crushing costs awards may have on access to justice. Factoring in the reasonableness of the [employee's] claim results, in my view, in a modest reduction in the amount to be awarded in all the circumstances of this case."

Takeaways for employers

Goruk is noteworthy because it appears to depart from long-standing principles regarding costs, by taking into consideration the reasonableness of the losing party's claim as a standalone factor. It will be interesting to see if this decision is followed by other courts.

Perhaps more importantly, will "reasonableness" be considered equally for employers? In other words, if an employer alleges cause, loses at trial, but it was "a close call," will the employer be given the same break on costs as was the employee in *Goruk*? This seems unlikely, particularly given the court's comments about power imbalance (even in this case, where the employee was represented by experienced counsel) and the potential impact a large cost award could have on access to justice.

For more information, see:

- *Goruk v. Greater Barrie Chamber of Commerce*, 2021 ONSC 6290 (Ont. S.C.J.).

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