mcmillan

Employment Law Bulletin

December 2019

# Ontario Court Suggests Terminated Salespeople are Fish Out of Water

A recent decision of the Ontario Superior Court of Justice[1] calls into question prior holdings about the transferability of salespersons' skills and offers additional insight into a terminated employee's duty to mitigate their damages post-dismissal.

The plaintiff, Mr. Devlin, worked for the defendant, a frozen seafood company, for more than 25 years. When his employment was terminated without cause as a result of a restructuring, Mr. Devlin was 55 years old, held the position of Director of Customer Development, Retail Sales and earned nearly $200,000 per year, including a significant annual bonus. After the parties failed to agree on a separation package, Mr. Devlin brought a claim for wrongful dismissal.

## 26 Months: "The Sky" of Reasonable Notice

The Court began by noting that Mr. Devlin "asked for the sky" by claiming 26 months' reasonable notice.[2]

Citing the Court of Appeal's recent holding that reasonable notice is capped at 24 months in "all but exceptional circumstances"[3], the Court also observed that Mr. Devlin did not provide to the Court any

[1] *Devlin v High Liner Foods Incorporated*, 2019 ONSC 6897 ["*Devlin*"].

[2] *Devlin* at para. 5.

[3] *Devlin* at para. 5, citing *Dawe v The Equitable Life Insurance Company of Canada*, 2019 ONCA 512.

cases where the reasonable notice award actually exceeded that 24 months.

## Character of Employment

In setting the reasonable notice period at 22 months, the Court considered well-established factors such as Mr. Devlin's age, length of service, position and the availability of comparable alternative employment.

The Court's analysis of Mr. Devlin's prospects of locating alternative employment was particularly interesting. After considering that Mr. Devlin was a relatively senior employee with supervisory responsibilities, the Court expressed skepticism about the transferability of his sales skillset.

Courts in prior cases have suggested that sales roles are not particularly difficult to replace. For instance, in *Gingerich v Kobe Sportswear Inc.*, the Court described "sales skills" as being as transferable (if not more so) than managerial skills.[4]

The Court seemingly strayed from these previous holdings based on Mr. Devlin's particular sales position. The Court found that, unlike general sales skills, Mr. Devlin's skillset was not easily transferrable because the frozen seafood industry was relatively specialized. In particular, the Court noted that, while sales skills are generally transferrable, a long-service salesperson will have to "start again from the beginning" in establishing new knowledge, skills and relationships, including learning about a different "selling environment" and the "psychology of a potential buyer" in a role outside his niche expertise.[5]

On this basis, the Court found that Mr. Devlin knew the "ins and outs of the [defendant's] business" and would not have an easy time finding comparable employment.[6] The Court went on to suggest that Mr. Devlin's failure to locate alternative employment as of the

[4] (2008) 63 CCEL (3d) 311 (ONSC) at para. 17.

[5] *Devlin* at paras. 14-15.

[6] *Devlin* at para. 15.

hearing date reinforced the view that his passage to a new job "is far from guaranteed".[7]

## Mitigating Damages

The Court rejected the defendant's argument that Mr. Devlin failed to mitigate his damages, notwithstanding that he took five months to "recover" from the loss of his job prior to starting his job search.[8] The Court found that this was too long of a period to recover, network, and assemble his resume, and that two months would have sufficed. However, given that Mr. Devlin had gone on to submit 23 applications since his five-month recovery period, the Court held that the defendant did not discharge its significant onus to show that Mr. Devlin failed to take meaningful steps to mitigate his damages.

Notably, the defendant led evidence of "a great many" job postings on websites such as Workopolis for roles throughout the province. However, the Court rejected these searches as "vague and desultory", holding that they "ought to be given virtually no weight".[9]

## Take-Aways for Employers

Just about the only good news arising from this case is the reiteration of the principle that the reasonable notice period will exceed 24 months in only the most exceptional circumstances. Despite having worked more than 25 years in what a court finds to be a relatively specialized and supervisory position, an employee may even fall short of hitting this 24-month quasi cap on reasonable notice.

This case suggests that employers should be cautious when advancing an argument that sales skills are easily transferable, particularly where the employee was engaged in the sale of a specialized product at the time of termination.

---

[7] *Devlin* at para. 17.

[8] *Devlin* at para. 36.

[9] *Devlin* at para. 35.

This decision also confirms that employers face a nearly insurmountable task in arguing that a plaintiff has failed to take reasonable steps to mitigate their damages. While employees who take more than two months to begin a meaningful job search are subject to criticism, this will not necessarily lead to a deduction from damages, particularly when their subsequent job search efforts prove fruitless.

Finally, to the extent an employer intends to lead evidence of available positions in order to make out a mitigation argument, this case suggests that those job postings must be quite specific. Therefore, thoughtful and specific search parameters should be established to afford the employer even a chance of having the court rely on job postings in finding a failure to mitigate. Where mitigation is likely to be a material issue, employers may consider engaging an outplacement consultant to assist in assembling relevant job postings and/or act as an expert witness (where properly qualified) to speak to the availability of comparable alternative employment.

by Kristen Pennington and Joseph Osborne, Student-at-Law

For more information on this topic, please contact:

| | | | |
|---|---|---|---|
| Toronto | Kristen Pennington | 416.865.7943 | kristen.pennington@mcmillan.ca |