



What's New in HR Law

Court Relies on Secret Recording of Termination Meeting to Sanction Employer's Bad Faith Conduct

April 27, 2023 | By [Catherine Phelps](#)

Bottom Line

In [Teljeur v Aurora Hotel Group, 2023 ONSC 1324](#), the Ontario Superior Court of Justice awarded a whopping seven months' damages in lieu of common law reasonable notice and \$15,000 in moral damages to a relatively short-service employee. The Court relied on a covert recording taken by the Plaintiff during the termination meeting as evidence of the employer's bad faith conduct in the manner of the Plaintiff's dismissal.

Background Facts

The Plaintiff was employed as the General Manager of a golf course and full-service resort. In this role, the Plaintiff was responsible for managing all aspects of the resort, including hiring and managing a team of employees, dealing with staff-related issues and guest complaints, and managing marketing initiatives to increase guest attendance.

The Plaintiff was originally employed by the resort from May 2015 to September 2016, returning to employment with the resort on October 1, 2018.

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On December 6, 2021, two senior executives of the resort met with the Plaintiff and advised that his employment would be terminated on December 10 as the employer was able to retain an outside management company to manage the resort. No cause for termination was alleged.

At the time of his employment termination, the Plaintiff earned an annual salary of \$72,500 and was 56 years-old. There was no written employment agreement limiting the Plaintiff's entitlements upon his employment termination.

Unbeknownst to the executives, the Plaintiff took a secret recording of the meeting, which the Court found revealed "disturbing" aspects about the Plaintiff's termination.

The Decision

The Plaintiff brought a summary judgment motion in respect of his claim for wrongful dismissal. On the summary judgment motion, the Court ruled on four issues that could not be resolved between the parties, which related to the Plaintiff's entitlement to wrongful dismissal damages and moral damages.

The Plaintiff's Entitlement to Wrongful Dismissal Damages

The Court held that a seven-month notice period was appropriate in light of the Plaintiff's senior management position, his age, and the challenging circumstances that he faced in finding a new job, which the Court accepted was likely in part due to the COVID-19 pandemic. Of note, the Court based its reasonable notice assessment on the Plaintiff's three years of employment from 2018 to 2021, and did not account for the Plaintiff's first period of employment.

The Court also awarded the Plaintiff an additional 10% of the pay in lieu of notice as compensation for lost fringe benefits during the reasonable notice period.

Moreover, the Court declined to reduce the reasonable notice period on the basis of mitigation. During the motion proceeding, the employer argued that the Plaintiff had produced a skeletal job search log and that the scope of the Plaintiff's job search was limited to checking online job sites for a few minutes each morning. The employer also argued that the Plaintiff had failed to follow up on a number of job leads that it presented to him. The Court rejected these arguments and found that the Plaintiff had satisfied his duty to mitigate his damages. Importantly, there was no evidence that would allow the Court to conclude that the Plaintiff could have found new employment during the reasonable notice period had he made better efforts.

The Plaintiff's Entitlement to Moral Damages

In considering the Plaintiff's claim for moral damages, the Court spent a great deal of time reviewing the employer's conduct during the termination meeting as demonstrated by the Plaintiff's surreptitious recording. The Court ultimately found that the employer's conduct was "untruthful, misleading and unduly insensitive" for the following reasons:

- During the termination meeting, the Plaintiff asked on three occasions if he could receive something "in writing" to confirm his termination. Although the employer agreed to the request, it ultimately never provided the Plaintiff with written confirmation of his termination. In addition to being contrary to the employer's promise, the employer's conduct violated section 54 of the *Employment Standards Act, 2000* (the "ESA"), which requires employers to give written notice of termination to dismissed employees who have been employed for three or more months.

- The employer failed to deliver the Plaintiff's minimum *ESA* entitlements within seven days after his employment ended or on the next regular pay date, as required by section 11(5) of the *ESA*. Instead, the employer had mailed a cheque covering the Plaintiff's *ESA* entitlements more than a month after the Plaintiff's termination.
- The employer failed to reimburse the Plaintiff for \$16,680.03 that he had incurred as out-of-pocket expenses on behalf of the employer prior to his termination. The Court noted that the non-payment of these expenses placed a very significant financial burden on the Plaintiff as the principal amount represented approximately 23% of the Plaintiff's annual income. Furthermore, the Court found that the employer's refusal to reimburse the Plaintiff violated section 60(1)(a) of the *ESA*, which prohibits employers from reducing the employee's wage rate or altering any other term or condition of employment during the minimum *ESA* notice period.
- During the termination meeting, the employer told the Plaintiff that he would receive eight weeks' severance pay. The employer later back-tracked on this promise and provided the Plaintiff with only his minimum entitlements under the *ESA*, which did not amount to eight weeks' pay.
- Finally, during the termination meeting, the employer encouraged the Plaintiff to resign and told him that "it is better off for you to do it."

Taken together, the Court concluded that the above-described actions breached the employer's duty of good faith and fair dealing in the manner of dismissal. While there was no medical evidence of the stress suffered by the Plaintiff, the Court accepted the Plaintiff's testimonial evidence that the employer's conduct had added significant stress to his life on top of the stress that he had experienced as a result of being terminated. The Court awarded \$15,000 in moral damages as compensation for the Plaintiff's mental distress.

Check the Box

This case serves as an important reminder that the courts will scrutinize an employer's termination-related conduct and will sanction any bad faith, including actions contrary to the *ESA*, through an award of moral damages. Accordingly, employers should be careful to comply with the strict requirements of the *ESA* at every step of the termination process. Additionally, employers should be cautious about deviating from representations made to the employee during the termination meeting as those deviations may be found to be in bad faith.

The case also confirms that the employers need not account for prior periods of employment for the purposes of determining a reasonable severance package at common law. This is in contrast to section 65(2) of the *ESA*, which requires employers to account for non-continuous employment for the purpose of determining eligibility for and calculating severance pay.

This case also joins a growing number of decisions in which courts have found an employee's duty to mitigate to be satisfied by minimal job search efforts. For an employee's wrongful dismissal damages to be decreased on account of a failure to mitigate damages, an employer will have to prove that the employee did not take reasonable steps to mitigate their damages and that such steps would have resulted in the employee securing alternative employment. This is a high bar to meet. As such, employers should not assume that the reasonable notice period will be discounted even where the employee makes almost no effort to mitigate their damages.

Need More Information?

For more information or assistance with your employment agreements, contact [Catherine Phelps](mailto:cphelps@filion.on.ca) at cphelps@filion.on.ca or your regular lawyer at the firm.



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