

EMPLOYMENT MATTERS

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NO DUTY TO MITIGATE IF EMPLOYMENT AGREEMENT STIPULATES FIXED NOTICE PERIOD

Relevant Background

Under the common law, employers are required to provide employees with reasonable notice of the termination of their employment. Employees are then required to mitigate their damages by looking for new sources of income.

To avoid the hassle of having to determine the period of reasonable notice at the time of termination, the parties often pre-determine the notice period in an employment agreement. This provides distinct advantages to both parties: for the employer, it provides certainty; for the employee, it provides a guaranteed entitlement following termination of employment; and, for both parties, it can avoid the need for costly litigation.

What is the issue?

If the employment agreement provides for a fixed notice period or pay in lieu thereof, employees do not have a duty to mitigate their damages.

The Relevant Case

In [*Bowes v. Goss Power Products*](#)^{*}, the Ontario Court of Appeal addressed this very issue. In that case, the employer had entered into a written employment agreement with its employee, which stipulated that he would receive six months notice or pay in lieu thereof if his employment was terminated on a without cause basis. The agreement was silent on the issue of mitigation. The employee was let go and secured alternative employment within two weeks of his termination. The employer took the position it was only required to pay the employee his statutory notice period (3 weeks) on the basis the employee had mitigated his damages. The Court of Appeal did not agree. In its decision, the Court determined that:

- An employment agreement that provides for a fixed notice period or pay in lieu thereof should be treated as liquidated damages or a contractual amount owing upon termination;
- In those cases, employees are not required to mitigate their damages; and
- When the parties contract for a specific notice period, they are choosing to opt out of the common law approach to notice.

What does this mean for employers?

If you want to pre-determine the notice period in your employment agreements, which is recommended, and you want mitigation to apply, your termination clause must specify that the employee has a duty to mitigate and that the notice period will be reduced on account of mitigation. Further, it would be wise to ensure that any payments made under the termination clause are made by way of salary continuation and not by way of lump sum. As a final reminder, your termination clause must always comply with the minimums set out in the *Employment Standards Act*. If you require any assistance with your employment agreements, feel free to contact me directly at 416-365-3703.



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