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The Law Helps Those Who Help Themselves: Lessons for Employers from *Wilds v. 1959612 Ontario Inc.*

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By Daniel Wong,

In the context of adversarial litigation, it is tempting to want to do your opponent no favours and to "play hardball" at every opportunity. But in wrongful dismissal cases, employers are often better served "playing nice" with terminated employees. The recent decision of Justice Vermette in *Wilds v. 1959612 Ontario Inc.*[1] highlights some of the consequences of playing hardball with a terminated employee and serves as a stark reminder to employers that there is plenty to be gained by taking the high road.

At issue in *Wilds* was the termination of the employment of the plaintiff, Barbara Wilds, by her employer, 1959612 Ontario Inc. ("**Gibson**"). After terminating Ms. Wilds on a without cause basis, Gibson did not provide her with any notice or pay in lieu of notice as required by the *Employment Standards Act, 2000*. Gibson also refused to provide Ms. Wilds with a reference letter or any form of confirmation of her employment, despite Ms. Wilds' request for such a letter at the time of her termination and a subsequent request by her lawyer, and refused to reimburse her for valid business expenses she had incurred prior to the termination of her employment. Despite repeated requests by Ms. Wilds and her lawyer, and despite Gibson acknowledging her entitlement to these amounts during the litigation discussed below, Gibson never paid these monies to Ms. Wilds, citing a clerical error.

Ms. Wilds commenced a wrongful dismissal action against Gibson. In addition to asserting that the termination provisions in her employment agreement were unenforceable and seeking damages in lieu of five months of reasonable notice of termination at common law, she also sought damages for mental distress and an order for punitive damages against Gibson. Gibson in turn argued that Ms. Wilds' employment agreement was enforceable and that she had failed to mitigate her alleged damages by not making reasonable efforts to find new employment.

Ms. Wilds then brought a motion to decide the action by summary judgment, which was heard and decided by Justice Vermette of the Ontario Superior Court of Justice. Justice Vermette began by concluding that the action was appropriate for summary judgment given that it turned on questions of contractual interpretation and the absence of any genuine issues of credibility at play. She then determined that the termination provisions in Ms. Wilds' employment agreement violated the ESA and were therefore void, and that she was accordingly entitled to damages in lieu of two months' reasonable notice at common law. Justice Vermette also dismissed Ms. Wilds' claim for mental distress damages because she had failed to present any evidence that she had actually suffered mental distress, apart from her "conclusory and self-serving statement" in an affidavit asserting that she had.

Justice Vermette then turned to the issues of mitigation and punitive damages. It is in dealing with these issues that Justice Vermette sends a reminder to employers of the consequences of playing hardball with terminated employees.

First, with respect to Gibson's argument that Ms. Wilds had failed to mitigate her damages, Justice Vermette concluded that Gibson had failed to present adequate evidence that Ms. Wilds could have obtained alternative employment had she done more than she did. Gibson had only presented as evidence two lists of job search results for positions similar to Ms. Wilds' former position, whereas Ms. Wilds had presented a "mitigation journal" cataloguing her applications to over 245 jobs. In dealing with this issue, Justice Vermette

was also critical of Gibson for failing to provide Ms. Wilds with a reference letter to assist her in her search for employment.

Second, with respect to punitive damages, Justice Vermette saw fit to order Gibson to pay $10,000 in damages to punish Gibson for what she described as "a marked departure from ordinary standards of decent behaviour" which was "sufficiently reprehensible to merit an award of punitive damages." Gibson's conduct which justified this award of punitive damages included:

1. Gibson's failure to provide Ms. Wilds with her statutory minimum entitlements in accordance with the ESA;
2. Gibson issuing Ms. Wilds' Record of Employment "very late";
3. Gibson failing to reimburse Ms. Wilds for her legitimate business expenses; and
4. Gibson failing to take any steps to correct these failures despite them being repeatedly brought to its attention.

In sum, Gibson could have spared itself from a scathing decision and an award of punitive damages had it taken a more reasonable and even-handed approach to dealing with Ms. Wilds' termination. This decision presents a helpful reminder to employers that there is a great deal they can do following the termination of an employee minimize the risk of liability in any ensuing litigation, including the following:

1. **Comply with the Applicable Statutory Requirements:** Terminated employees will invariably allege that any provision of their employment agreement limiting their entitlement to notice of termination is unenforceable. Whether they are right or wrong, they will always be entitled to at least their minimum statutory entitlements, unless they were terminated for reasons that disentitle them to the minimum statutory amounts. Since the employee will always receive at least these minimum amounts, employers should not wait until the litigation is determined to pay them, as withholding these amounts as Gibson did constitutes a breach of the ESA and invites an award of punitive damages.
2. **Reimburse Proper Expenses:** If a terminated employee incurred proper business expenses prior to the termination of their employment, they are entitled to be reimbursed for those expenses. Withholding these payments without justification will not be looked upon favourably by the Court.
3. **Provide an Employment Letter:** It is always in the best interests of an employer that terminated employees find new employment quickly. It mitigates the risk of a wrongful dismissal lawsuit and limits the damages award that can flow from any such lawsuit. Accordingly, employers can help themselves by assisting terminated employees in finding new employment by providing an employment letter or such other assistance as is appropriate in the circumstances.
4. **Consider how the Court will View their Conduct:** As noted at the outset, it is tempting to "play hardball" in adversarial litigation. While the parties may approach the matter with emotion, a judge will not. Employers should consider how their actions will be viewed by an unemotional and impartial third party and should avoid treating terminated employees in a manner that invites criticism, as such criticism can be the basis for additional liability.

If you have questions or need advice with respect to the topics discussed above or any other employment or labour matter, please do not hesitate to contact Daniel Wong, Max Skrow or your regular lawyer in WeirFoulds' Employment & Labour Practice Group.

[1] 2024 ONSC 3452 [***Wilds***].

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