

A FIXED NOTICE PERIOD WILL NOT BE REDUCED WHEN THE EMPLOYEE FINDS A NEW JOB

Imagine you have to terminate a key employee. On reviewing his contract, you discover he is entitled to six months' notice. You put him on a salary continuance, but find out after three weeks that he reemployed. As a result, you cut off his salary continuance payments... and he sues the company.

At trial, the Court determines that the employee is entitled to the full six-month notice period, since the contract did not address what happens if the employee finds a new job within that time.

In *Bowes v. Goss Power Products*, this was how the Ontario Court of Appeal resolved this thorny legal issue.

Peter Bowes was hired as Vice-President of Sales and Marketing for Goss in the fall of 2007. Prior to starting, he signed a contract which laid out his base salary, bonus plan, and car allowance. The contract also described Bowes' entitlements in the event Goss terminated his employment without cause, calling for an escalating notice period depending on how many years Bowes remained employed.

In April of 2011, Goss terminated Bowes' employment on a without cause basis. Goss provided him with a letter indicating that he would receive a six-month continuation of his base salary in lieu of working notice, in accordance with his contract.

Bowes found a new job only two weeks after his termination. Relying on the employment contract the parties had signed back in 2007, Goss stopped paying Bowes his salary.

Goss assumed that any notice period was subject to the implied duty to "mitigate" - a legal principle which requires an aggrieved party to try to reduce their damages by acting reasonably, for instance by accepting a new job. On this theory, if someone finds a new job where they replace their earnings, they have no further entitlement as they have made themselves "whole". Correspondingly, if they find a position where they are making less, their former employer is only responsible for the difference between their previous wage and the new one.

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Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

OUR NEWS

[David Whitten](#) was interviewed on CBC Radio's "Here and Now" regarding his views on the CEO of eHealth, Greg Reed's decision to forgo his performance bonus. The whole interview on the subject of "[Executive Bonuses in the Public Sector](#)" can be listened to here.

On September 12th, [David](#) was a presenter at the Law Society of Upper Canada's CPD program on the topic of "Ethical Red Flag in Workers' Compensation" where he discussed topics including the importance of the initial consultation and decision whether to take on a client, process of drafting the retainer agreement and managing conflicts between the client and the professional.

[David](#) was also a featured speaker at the Law Society of Upper Canada's [Employment Law Practice Essentials](#).

[Daniel Lublin](#) frequently writes and appears in the media as a commentator for workplace legal issues. In his regular Globe and Mail column, [Daniel](#) addressed the issue of workplace bullying where he answered questions in an online discussion in *Bullied at work? Know your legal rights*. The whole discussion can be viewed here.

In his regular Globe and Mail column, Daniel talks about common situations of terminations while on parental leave in his latest articles *Can a company terminate someone on parental leave?* and [Why parental leave doesn't offer an iron-clad job guarantee](#).

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The Court of Appeal confirmed that this principle does not apply where the notice period is expressly stipulated in a contract of employment. The principle that Goss had in mind only applies where the contract does not address the period of reasonable notice.

In essence, the Court told Goss: if you wanted the salary payments to stop when Bowes reemployed, you should have said so in the contract.

The Court's decision in Goss means that it is imperative that employers carefully draft termination clauses designed to limit an employee's entitlement on termination, otherwise it could be interpreted as a "golden parachute". Indeed, the courts have a predilection for favoring employees when interpreting termination provisions which makes it critical for employers to have their contracts reviewed or drafted by an employment lawyer, who can recommend a number of approaches to address this issue and significantly reduce termination costs.

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UPCOMING EVENTS

[Daniel Chodos](#) will be speaking on October 24, 2012 at the Canadian Payroll Association about the importance of distinguishing between employees and independent contractors for payroll purposes.

OUR LAWYERS

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