



Court Orders Employer to Produce Termination Packages

Employers who negotiate exit packages for their departing employees often expect such negotiations and the resulting packages to remain confidential. A recent decision from the Ontario Superior Court ordered the employer to disclose termination packages offered to other similarly situated employees.

In [*Saarinen v. Rogers Communications Ltd.*](#), the plaintiff was terminated for just cause, and filed an action against their former employer, Rogers Communications, alleging wrongful dismissal. During examinations for discovery of the employer representative, the employer was asked to produce,

the termination packages of all employees (names of said employees may be redacted to only provide first initials) who had more than 25 years of service and were terminated without cause by the Defendant during the period of January, 2017 to December, 2019.

The employer was further asked to disclose HR's practice in determining,

what termination packages would be offered to employees who were terminated without cause and did not have a written employment agreement, who made said determination, and whether there were any general guidelines, written or otherwise used regarding:

- I. Length of notice;
- II. Claw-back use;
- III. Short-term incentive inclusion;
- IV. Long-term incentive inclusion;
- V. Pension;
- VI. Other benefits;
- VII. Outplacement;
- VIII. Legal fees; and/or
- IX. Other.

The defendant employer refused to respond to these questions for lack of relevance, stating that the plaintiff had been terminated for cause. The plaintiff then brought a motion to the court seeking an order compelling the defendant to answer.

During the hearing, the employer argued that the plaintiff's questions were irrelevant because information relating to settlement offers were not relevant



in determining the plaintiff's common law entitlements, as that required an individualized assessment as per the *Bardal* factors. The employer further claimed the termination packages were "without prejudice" communications protected by settlement privilege.

The court found that the plaintiff's questions were relevant to the action as the plaintiff had plead that there was no just cause for her termination:

The assertion by the defendant of a just cause defence cannot *per se* be a bar to discovery questions that are relevant to the assessment of damages based on the plaintiff's pleading (at para 8).

The Court also found the termination packages relevant because the plaintiff's claims went beyond her common law notice entitlements and alleged breaches of her employment contract and the defendant's existing policies and practices:

In light of the pleadings in this action, the disputed questions are relevant. If the court finds that there was no just cause for the plaintiff's dismissal, the termination packages provided to similarly situated employees and the defendant's policy and/or practice determining termination packages will be relevant to the determination of the plaintiff's damages (at para 12).

With respect to the employer's argument that the packages were privileged communications in furtherance of settlement, the court accepted that in certain circumstances, termination related communications between employers and employees were covered by settlement privilege. However, in the present case the defendant had refused to answer the questions based on relevance and had not raised an objection based on privilege until it served its responding factum. The employer had also failed to file any evidence to supports its "belated assertion" of settlement privilege:

As a result, there is no evidence in the record asserting that the sought-after communications and information are privileged. Instead, the defendant asks the court to infer that any communications and offers it made to terminated employees were *per se* made on a without prejudice basis and that, therefore, they are all privileged (at para 16).

Absent any supporting evidence, the court would not accept that every termination related communication between an employer and employee must be privileged. The defendant's failure to lead any evidence in support of



its assertion, subject to cross examination by plaintiff counsel, meant the court could not find that settlement privilege applied. The plaintiff's motion was granted.

Key Takeaways

It will be of interest whether the employer appeals the Associate Justice's ruling on this issue. The decision will no doubt encourage plaintiff's counsel to make similar requests in other termination cases.

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