

**CITATION:** Bowes v. Goss Power Products Ltd., 2011 ONSC 4445  
**COURT FILE NO.:** CV-11-426255  
**DATE:** 20110725

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Peter Bowes, Applicant  
**AND:**  
Goss Power Products Ltd., Respondents  
**BEFORE:** Whitaker J.  
**COUNSEL:** *Alex Van Kralingen*, for the Applicant  
*David Rosenfeld*, for the Respondents  
**HEARD:** July 5, 2011

2011 ONSC 4445 (CanLII)

**ENDORSEMENT**

**What This Case is About**

- [1] This is an application brought under rule 14.05 (3) (d) and (g) of the *Rules of Civil Procedure* by the applicant employee Mr. Peter Bowes (“Bowes”) to interpret the termination provisions of an employment contract.
- [2] The respondent employer is Goss Power Products Ltd. (“Goss”). On agreement, the title of proceedings is amended to reflect the proper name of the employer.
- [3] There are two narrow issues to determine.
- [4] The first issue is whether Bowes is obliged to mitigate his loss. The second issue is whether Bowes is entitled to be paid his outstanding wages in a lump sum.
- [5] For reasons which follow, I find that Bowes is obliged to mitigate and is not entitled to be paid a lump sum.

**The Facts**

- [6] The facts are essentially uncontested.
- [7] Bowes entered into a written employment contract with Goss on September 26, 2007. The contract was drafted by Goss.

[8] Bowes started working for Goss on October 9, 2007 in the position of Vice-President, Sales and Marketing.

[9] Goss terminated Bowes' employment without cause on April 13, 2011.

[10] By letter of termination, Goss told Bowes he would be paid his salary for six months, was required to seek alternate employment during this period and was obliged to keep Goss apprised of his efforts.

[11] At the point of termination, Bowes' base salary was \$140,000.00 plus bonus and benefits.

[12] Paragraph 30(c) of the employment contract describes Bowes' entitlements on termination without cause:

30. The Employee's employment may be terminated in the following manner and in the following circumstances:

...

(c) By the Employer at any time without cause by providing the Employee with the following period of notice, or pay in lieu thereof:

...

Six (6) months if the Employee's employment is terminated prior to the completion of forty-eight (48) months of service; and

[13] Paragraph 31 of the employment contract provides that pay in lieu of notice for purposes of paragraph 30(c) is on the basis of the base salary only.

[14] Paragraph 33 provides for a broad release:

33. The Employee agrees that the notice period provided in subsection 30(c) is in compliance with and in excess of the statutory minimum standards owed to the Employee and set out in the *Employment Standards Act* and constitutes full and complete satisfaction of any claim he/she may have to notice or compensation in lieu thereof, and to any other payments whatsoever (including any and all damages for wrongful dismissal) as a result of the termination of employment and the Employee agrees to release the Employer from any and all claims whatsoever which the Employee may have arising out of the termination, save and except for compliance with the terms herein set out. It is agreed that the notice provided in subsection 30(c) shall be an absolute, full and complete defence to any action or claim which the Employee may advance against the Employer as a consequence of any termination without cause, including, without limitation, any claim for constructive dismissal.

[15] The employment contract includes a “whole agreement” provision and further that amendments must be in writing.

[16] The employment contract does not expressly mention the word “mitigation” or refer to an obligation to mitigate.

[17] On April 25, 2011, Bowes began employment with a new company earning the same salary as he did with Goss.

[18] Actual salary loss was for the twelve day period of April 13 to 25, 2011.

### **Is There a Duty to Mitigate?**

[19] It is well established that in wrongful dismissal cases where there is a claim for damages, employees are obliged to mitigate in the absence of agreement to the contrary.

[20] While parties may provide in the employment contract that the duty to mitigate does not apply, the obligation to mitigate does not arise as an implied term of the employment contract but rather as a principle which applies in the calculation of damages.

[21] The first issue here is whether the same analysis applies where the contract of employment specifies the period of reasonable notice.

[22] The leading case in Ontario on this point is *Graham v. Marleau, Lemire Securities Inc.*, [2000] O.J. No. 383 (O.S.C.J.), a decision of Nordheimer J. of this court.

[23] In *Graham*, the court concluded that the plaintiff was not entitled to trigger a termination provision in an employment contract and for that reason was not entitled to damages. In the event that this conclusion was wrong, the court went on to deal with the plaintiff’s claim in the alternative, which was whether he was entitled to damages in lieu of notice without the obligation to mitigate.

[24] Nordheimer J. provides a thorough discussion of the authorities on point, including those from other jurisdictions: *Mills v Alberta* [1986] A.J. No. 605 (Alta C.A.); *Philp v Expo 86 Corp.* [1987] B.C.J. No. 2127 (B.C.C.A.); *Rossi v. York Condominium Corp. No. 123*, [1989] O.J. No. 1424 (Ont. H.C.J.), aff’d [1991] O.J. No. 3174 (Ont. C.A.); *Wilson v. Crown Trust Co.* (1992), 44 C.C.E.L. 123 (Ont. H.C.); *Emery v. Royal Oak Mines*, [1995] 24 O.R. (3d) 302 (Gen Div.); *Truckers Garage Inc v. Krell* (1993), 3 C.C.E.L. (2d) 157; and *Gunton v. London Borough of Richmond upon Thames*, [1980] 3 All E.R. 577.

[25] Following his review of these authorities, Nordheimer J. notes at para 53:

53 I agree with the thrust of the cases that hold that the principle of mitigation ought to apply to a contract of employment that contains a provision that stipulates what notice is to be given, or what payment to be made in lieu of notice, if the termination of the contract occurs. Such a stipulation is nothing more than

an agreement between the parties as to the length of the reasonable notice to terminate the contract. I see no reason why there should be any distinction drawn between contracts of employment where the notice period is not stipulated and those where it is with the result that there would be a duty to mitigate in the former but not in the latter. If that were the case, it would seem to be an unfair result for the employer simply because the parties tried to agree in advance on the proper notice and thereby eliminate that as an issue in the event of a dismissal – subject of course to the court’s overriding right to determine the reasonableness of such an agreement in any given case.

[26] The *Graham* analysis is that the principle of mitigation applies generally to the calculation of damages, flowing from either a breach of and/or application of contract. It is acknowledged that parties are certainly competent to contract out of this obligation, expressly or by implication. The task however is to determine the intention of the parties. In this exercise, the mere fact that the parties have agreed on the period of reasonable notice does not mean that the obligation to mitigate is ousted by agreement.

[27] Although it is correct that *Graham* has not necessarily been followed in other provinces, it is clear that it is followed in Ontario and considered at this point to be settled law, *Sures v. Calian Technology Ltd.*, [2003] O.J. No. 533 (O.S.C.J.); *Wells v. Conestoga Meat Packers Ltd.*, [2007] O.J. No. 4335 (O.S.C.J.); *Orr v. Magna Entertainment Corp.*, [2008] O.J. No. 116 (O.S.C.J.); *Eady v. TrekLogic Technologies Inc.*, [2008] O.J. No. 1693 (O.S.C.J.).

[28] Turning back to the present case, there can be no doubt that the parties wished to provide for certainty on a variety of points addressed in the employment contract - including the length of the period of reasonable notice, the basis for calculating wages owing during the notice period (base salary), the scope of the release, the boundaries of the entire agreement and the manner in which amendments to the contract were to be manifest.

[29] This desire for certainty does not mean however that the parties agreed to relieve Bowes of his obligation to mitigate.

[30] To reiterate, the real substance of *Graham* and those cases which follow is the notion that the core question for the court to answer is - what did the parties intend? Certainly the parties could if they had so wished, provide that Bowes owed no duty to mitigate his losses. Where the law following *Graham* clearly indicates that mitigation will be assumed as a general principle of contract law, the parties must in their choice of language, indicate that the presumption is rebutted.

[31] While I accept that the parties did turn their minds to a variety of issues that would arise in the application of the employment contract, I cannot conclude that it is agreed that mitigation does not apply to the calculation of damages.

[32] I conclude that the respondent employer’s construction of the contract is correct.

**Is There an Obligation to Pay in Damages in a Lump Sum?**

[33] The same analysis applies to the claim that the funds owing should be paid in a lump sum rather than by periodic payment. This question turns on the discernible intentions of the parties.

[34] There is nothing in the language of the contract to indicate that Bowes is entitled to a lump sum. Certainly Bowes could have been given working notice and that would have provided for periodic salary payments over the course of the notice.

[35] There is some suggestion in the case law that a lump sum obligation may be implied where there is no duty to mitigate as the damages crystallize at the point of discharge. As I have found there to be a duty to mitigate, the damages could not be quantified at the moment of termination.

**Outcome**

[36] I conclude that the respondent employer's construction of the contract is correct. The applicant Bowes was not entitled to a lump sum payment and was obliged to mitigate his damages. There remain no outstanding entitlements.

[37] The parties may make written submissions as to costs within fifteen days.

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Whitaker J.

**Date:** July 25, 2011