Focus on Gaps in Employment and Continuity of Service

November 2, 2010

By John D. Campbell and Stephanie L. Turnham

One of the key factors in determining the reasonable notice period on termination of employment is the length of the employee's service. Generally speaking, the longer the employee has worked for the same employer, the more notice the employee is entitled to receive (up to a limit).

Occasionally, the situation arises where there have been gaps in employment. An employee may have interruptions in his or her service for a variety of reasons, such as a leave of absence due to family responsibilities, a lay-off, or even a voluntary resignation to obtain alternative employment followed by a return to the original employer. These gaps in continuity can create uncertainties in determining the proper length of service for purposes of the reasonable notice period.

Whether a court will ignore the gap and treat the employment periods as cumulative, or will disregard the prior employment period and only count the most recent period, depends on a variety of factors. The factors are not always applied consistently, but some trends can be identified within the case law.

The following factors are the best predictors of how the court will treat gaps in employment:

- **The length of the gap in relation to the overall employment.** The less significant the gap in the overall scheme of employment, the easier it is to ignore the gap and treat the employment periods as cumulative.
- **The reason for the gap.** The gap is more likely to be ignored where the leave is for family reasons or other matters beyond the employee's control, rather than due to a voluntary resignation to seek alternative employment.
- **The means of reintegration into the workplace.** The gap is more likely to be ignored where the employee returns with recognition of his or her prior seniority, rather than being treated as a new employee. Similarly, the gap is more likely to be ignored if the employer lures the employee back to employment. This factor reflects an attempt to objectively determine the parties' intentions.

A few examples will assist to illustrate these points.

In ***Gibara v. ABN-Amro Bank*** (2003), 29 C.C.E.L. (3d) 80 (Ont. Sup. Ct.), the court declined to recognize the prior employment period. Although the interruption in service was not long (four months within 13 years), the employee had left voluntarily because he decided to join a competitor. There was no inducement for the employee to return, there was no agreement that the employee would retain seniority, and the employee returned to a differently constituted program. The judge held (at para. 10):

In my view the authorities establish that where an employee has quit and later returns, the earlier period will not be considered in determining reasonable notice unless there is agreement to that effect or circumstances such as inducement to leave a secure

position.

A contrasting set of facts is found in ***Brien v. Niagara Motors Ltd.*** (2009), 78 C.C.E.L. (3d) 10 (Ont. C.A.). In this case the court ignored a two-year gap in employment for a 23-year employee who had left to have her second child. The court specifically noted that the leave was "for family reasons and not for another job". The court also noted that the gap was "only two years". Further, the employee was invited back and was reintegrated as though she had never left, e.g., she retained her earned vacation entitlement.

A very recent British Columbia case illustrates both sides of the issue. In ***Graham v. Galaxie Signs Ltd.***, [2010] C.L.L.C. 210-029 (B.C.S.C.), the employee began working in 1983, and was constructively dismissed in 2007. In that time, there were two gaps in service: a six-month leave in 1990, and a two-year leave from 2002-2004. The court treated these two gaps very differently. The first was an unapproved leave of absence during which the employee worked for a different employer in a different industry. Upon his return he was treated as a new employee. Thus, the court declined to recognize the first period of service from 1983 to 1990. The second gap was different because the employee had bargained on return for recognition of his past service and ultimately retained his seniority. The court therefore considered the cumulative service from 1990 to 2002 and from 2004 to 2007.

Other cases in which the court declined to recognize a prior period of employment include: where the employee decided to leave, there was no inducement to return and the employee was hired as a new employee, including a probation period (***Leonard v. Kohler Canada Co. (c.o.b. Canac Kitchens)*** (2009), [2010] C.L.L.C. 210-007 (Ont. Sup. Ct.)); where the employee resigned to a join a competitor, was not lured back and was treated as a new employee on rehire based on a clear company policy (***Matheson v. Canadian Freightways Ltd.*** (2003), 30 C.C.E.L. (3d) 159 (B.C.S.C.)); where the employee left of his own volition to work for another employer and the gap was eight years (***Coppin v. MPR Teltech Ltd.*** (1997), 30 C.C.E.L. (2d) 293 (B.C.S.C.)); where the prior periods were intermittent and the employee quit each time and reapplied (***Trudeau-Linley v. Plummer Memorial Public Hospital*** (1993), 1 C.C.E.L. (2d) 114 (Ont. Gen. Div.)); and where the employee was previously terminated with a severance package (***Stant v. Elaho Logging Ltd.***, [2006] C.L.L.C. 210-023 (B.C.S.C.); ***Schwindt v. Jann & Neil Sulkers Ltd.***, [2007] C.L.L.C. 210-024 (Sask. Q.B.)).

Other cases in which the court considered the cumulative effect of all periods of service include: where the employee had resigned to raise her family, continued to work part-time during the leave, and was asked by her employer to return to full-time status (***Cronk v. Canadian General Insurance Co.*** (1995), 25 O.R. (3d) 505 (C.A.)); where the employee was rehired at the same position, with an increase in salary and resumption of earned vacation (***Jezic v. Thomson Newspapers Co.*** (1994), 5 C.C.E.L. (2d) 113 (Ont. Gen. Div.); ***Gordon v. Saint John Shipbuilding & Dry Dock Co. Ltd.***, [1983] N.B.J. No. 187, 47 N.B.R. (2d) 150 (Q.B.)), where the employee had jointly structured his return to work to take into account prior service as evidenced by e-mails (***Potter v. Halliburton Group Canada Inc.*** (2004), 36 C.C.E.L. (3d) 255 (B.C.S.C.)); where the break lasted only a few days and the employee was hired into a more senior position (***Immaculate Confection Ltd. v. Claudepierre*** (1991), 38 C.C.E.L. 119 (B.C.S.C.)); and where both the employer and employee ignored the effect of the hiatus after a few years (***Chorny v. Freightliner of Canada Ltd.*** (1995), 9 C.C.E.L. (2d) 11 (B.C.S.C.); ***Beach v. Ikon Office Solutions Inc.*** (1999), 45 C.C.E.L. (2d) 12 (B.C.S.C.)).

Finally, it is important to note that the issue is less murky when it comes to statutory termination payments. There is express recognition in the Ontario *Employment Standards Act*, 2000, S.O. 2000, c. 41 that time spent on "leave or other inactive employment" is to be included when determining the period of employment for purposes of statutory termination pay, but this does not apply to a lay-off (s. 59). In addition, all of the time spent "in the employer's employ, whether or not continuous and whether or not active" is to be included when determining eligibility and calculating entitlement to severance pay under the statute (s. 65(2)).

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035