

EMPLOYMENT LAW UPDATE

Court Penalizes Employer for Making Unreasonable Offers to Settle

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Courts are awarding higher costs against employers that provide employees with only employment standards minimums and fail to make reasonable offers to settle. Employers can reduce their exposure to higher costs awards by taking proactive measures and using the court's rules to their advantage.

Quick Primer on Costs Awards in Wrongful Dismissal Actions

Successful parties in lawsuits are generally entitled to a portion of their costs. How much they get depends on a number of factors, including whether the costs they claim are reasonable, whether offers to settle were made prior to judgment and whether judgment was obtained that betters a party's offer.

There are incentives to making and accepting reasonable settlement offers built into the rules (primarily under rule 49). For example, if a defendant makes an offer to settle a case for \$35,000, the plaintiff refuses, and the plaintiff only obtains a judgment for \$30,000, the court has discretion to award costs to the defendant.

Alternatively, if the plaintiff makes an offer to settle for \$25,000, the defendant refuses, and the plaintiff obtains judgment for \$30,000, the defendant would ordinarily be required to pay a substantial proportion of the plaintiff's costs, termed "substantial indemnity." Costs are ordinarily awarded on the "partial indemnity" basis, meaning a much lower proportion of actual costs than "substantial indemnity."

Moldovanyi v. Canac Kitchens Ltd. (Kohler Ltd.) (February 26, 2009)

Mr. Moldovanyi was among a large number of employees who were terminated solely for economic reasons. He was terminated without notice, and only received his minimum statutory entitlements. Mr. Moldovanyi (and apparently quite a few other employees as well) initiated a wrongful dismissal action against Canac at the Ontario Superior Court of Justice. Mr. Moldovanyi brought a motion for summary judgment swiftly, and was successful.

Higher Costs Awarded for Unreasonable Offer

The court in *Moldovanyi* took into account the various offers to settle made by the parties (as the courts usually do). The court found that while Mr. Moldovanyi made reasonable offers to settle, Canac's offers were entirely unreasonable.

The court made clear its disapproval of the employer's low offers and decision to pay only statutory entitlements:

"Canac's offer came nowhere near the ballpark of reasonably possible outcomes. Where an employer dismisses a large number of employees without cause as a result of poor business conditions and persists in a corporate strategy of paying only the minimum statutory amounts which the courts consistently reject, I think the employer must understand that a court will give weight to the offers to settle made by the parties, even if they do not fall strictly within Rule 49"

The court awarded Mr. Mondovanyi \$9,500 in costs (a substantial award in the circumstances), even though he obtained judgment for less than his last offer to settle.

Lessons for Employers

The courts are signaling clearly that they may penalize employers by awarding higher costs. Employers should consider providing departing employees with something above employment standards minimums where employees have to be let go. Employers should also consider making reasonable offers to settle, if sued, at an appropriate time in the litigation. Taking these steps may reduce employers' exposure to high costs awards in wrongful dismissal litigation.

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