Mitigation: To Deduct Or Not To Deduct Earnings? That Is The Question

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The legal corollary of an employer's obligation to provide reasonable notice of termination is the employee's duty to mitigate the damages flowing from a wrongful termination. The operation of the duty to mitigate was described by the Supreme Court of Canada in *Red Deer College v. Michaels*[1] as follows:

If, however, the employee can obtain other employment, he can avoid part at least of these damages. Therefore, in an action by the employee against the employer for a wrongful discharge, a deduction of the net amount of what the employee earned, or what he might reasonably have earned in other employment of like nature, from what he would have received had there been no breach, furnishes the ordinary measure of damages.

The employee's duty to mitigate was most recently considered by the Ontario Court of Appeal in the case of *Brake v. PJ — M2R Restaurant Inc.* (2017 ONCA 402), with the Court of Appeal upholding the trial judge's findings with respect to mitigation and declining to deduct income earned by the employee during the notice period.

Background

Esther Brake, a long serving employee of a McDonald's franchisee, PJ — M2R Restaurant Inc., took legal proceedings against her employer after she was given a choice between a demotion from her Manager position to a position of First Assistant, and termination of her employment because of alleged performance issues. The trial judge found that Ms. Brake was constructively dismissed and fixed her notice entitlement at 20 months, including her statutory severance entitlement.

The trial judge considered Ms. Brake's mitigation efforts, which consisted of increased hours at an existing part-time cashier job at Sobeys which she held while employed by PJ — M2R Restaurant Inc.; a job at Tim Hortons; attempts at starting a babysitting and cleaning service business which were ultimately abandoned; unsuccessful applications for several store manager and supervisor positions in the retail sector; and work in a cashier position at Home Depot which she still held at the time of trial. On the basis of his review, the trial judge determined that Ms. Brake had been unsuccessful at

mitigating her damages despite her best efforts, and he did not reduce her damages award.

Ontario Court of Appeal

The employer's appeal of the trial decision was dismissed by the Court of Appeal with respect to the constructive dismissal finding and the notice period assessment.

With respect to the damages award, the employer challenged the trial judge's treatment of mitigation, arguing that:

- Ms. Brake ought to have accepted the demotion to the position of First Assistant and that her failure to do so was in breach of her duty to mitigate;
- The trial judge erred in finding that Ms. Brake had made reasonable efforts to mitigate her losses; and
- The trial judge erred in law in failing to deduct the income Ms. Brake received during the notice period from the damages award.

The Court of Appeal dismissed the first ground of appeal, accepting the trial judge's finding that it would have been unreasonable and "downright insulting" for Ms. Brake to accept the demotion and continue working for PJ — M2R Restaurant Inc. As for the second ground of appeal, the Court found that there was no basis to interfere with the trial judge's finding, notwithstanding that Ms. Brake had not applied to other restaurant management positions (comparable positions) during the notice period.

With respect to the "deductions from damages" argument, the Court also left the trial judge's findings undisturbed. The majority of the Court noted, however, that the trial judge had not directly addressed the question of the deductibility of employment income received during the notice period, and had simply stated that Ms. Brake's ability to find work during the notice period "did not take away from the loss" she had suffered from her dismissal. Pointing out that the trial judge's finding did not appear to be consistent with the duty to mitigate principle, the majority of the Court went on to categorize the income received by Ms. Brake during the notice period and offered its explanation for why these various earnings should not be deducted from the damages award. These are discussed below.

1. Employment Income (EI) Benefits

Referring to previous Supreme Court of Canada and Court of Appeal decisions, the Court confirmed that EI benefits are not to be deducted from damages, because an employer should not be able to benefit from its wrongful termination of an employee which requires that employee to apply for and make use of EI benefit entitlements.

2. Employment Income Earned During the Statutory Notice Period

The Court first established that the reasonable notice period must be segmented into the statutory notice period on the one hand, which starts to run from the date of termination, and the balance of the reasonable notice period on the other. This would have allowed the trial judge to identify which items of employment income related to the statutory period, and which were attributable to the balance of the notice period.

The Court further concluded that the employment income which Ms. Brake earned during her statutory notice entitlement period was not deductible as mitigation income, reasoning that statutory entitlements (termination and severance pay) are not damages and that employees are entitled to receipt of these statutory entitlements whether or not they secure new employment during the period they are intended to cover.

3. Employment Income Earned in the Balance of the 20 Month Notice Period

Having segmented the statutory and the non-statutory portions of the notice period, the Court identified a portion of Ms. Brake's Sobeys income and her earnings from her job at Home Depot as income received during the balance of the notice period.

Regarding the Sobeys income, the Court noted that Ms. Brake had held the Sobeys job while employed at PJ — M2R Restaurant Inc., concluding that the two jobs were not therefore mutually exclusive. The Court accepted the principle that income from a supplemental source that the employee could have earned while continuing with his or her primary employment is not deductible from damages. In this regard, the Court took specific note of the fact that PJ — M2R Restaurant Inc. had prior knowledge of Ms. Brake's employment at Sobeys. Although on the facts of the case, the Court concluded that the part-time income received from Sobeys did not rise to a sufficient level to make it a substitute for her work at PJ — M2R Restaurant Inc., it raised the possibility that such an argument could be made in the appropriate case.

As for the Home Depot income, the majority noted that it considered the evidence on the record to be unclear and therefore refrained from deducting the modest amount received from the damages award. On the other hand, in her concurring minority decision, Justice Feldman opined that the trial judge was in fact entitled to find that the Home Depot position was so substantially inferior to the managerial position Ms. Brake had held with PJ — M2R Restaurant Inc. that it should not be considered in mitigation. Justice Feldman reasoned that where a wrongfully dismissed employee is forced, because of financial considerations, to accept an inferior position because no comparable positions are available, the amounts earned in that inferior position should not be deducted from the damages award. She further suggested that it would be within the trial judge's purview to determine whether a new job is comparable to the lost one and whether a decision not to pursue such a job would amount to a breach of the duty to mitigate.

Musings On Mitigation

Employers have always had the burden of convincing the Courts that wrongful dismissal damages ought to be reduced to reflect the real value of an employee's losses over the notice period.

The *Brake* decision makes it abundantly clear that this is an onerous burden, and that an employer advancing mitigation arguments needs to go beyond simply establishing that income was earned during the notice period.

Mitigation arguments will need to focus on when the income was earned, and the type of job from which the income was derived.

With regard to the latter, employers ought to expect that a Court will want to engage in a thorough analysis of whether pre-existing supplemental part-time work, if increased during the notice period, can be considered as substitute employment which should be considered as mitigation employment; and whether new employment constitutes comparable employment. Further, based on the comments contained in the minority decision, it should be expected that an employee's need to get back to work due to financial constraints may become a consideration in the assessment of mitigation efforts and will therefore need to be addressed in evidence.

[1] (1975), 57 D.L.R. (3d) 386 (S.C.C.) at p. 391

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