

Demystifying the Duty to Mitigate

Nadia Halum, MacLeod Law Firm

A recent decision from the Ontario Court of Appeal, *Brake v PJ-M2R Restaurant Inc.*, 2017 ONCA 402, clarifies an employee's obligation to look for work after being terminated. In particular, is an employer required to accept a job offer for a less responsible position as part of the duty to mitigate her damages?

The court also determined whether income earned during the minimum notice period under the *Employment Standards Act* is considered when calculating wrongful dismissal damages. Furthermore, the court considered whether income earned at a part-time job should be considered when calculating wrongful dismissal damages. In this case, the employee had a part-time job in addition to her full-time job.

Ms. Brake worked at various McDonald's restaurants for more than 25 years. For a significant part of that time, she was employed on a full-time basis by PJ-M2R Restaurant Inc., a franchise holding company that owns several McDonald's restaurants in the Ottawa area.

In August 2012, after being placed on a performance improvement plan, Ms. Brake was told that she had to accept a demotion from Restaurant Manager to First Assistant or she would be fired. Although her compensation would remain the same, her benefits as First Assistant would be inferior and she would be forced to report to younger, less experienced workers, some of whom she herself had trained. Ms. Brake refused to accept the demotion, as she felt the position would be humiliating for her. Ms. Brake never returned to work, and she received a letter from the employer terminating her for cause.

Ms. Brake successfully sued PJ-M2R for wrongful dismissal. The trial judge rejected the Defendant's argument that it had just cause to dismiss her due to performance, and awarded Ms. Brake damages equivalent to 20 months.

The trial judge also found that despite Ms. Brake having made reasonable best efforts to find comparable full-time work after her employment with PJ-M2R was terminated, she was unsuccessful in that regard. She was able to find work in positions that were substantially inferior to the managerial position that she had held with PJ-M2R.

The Defendant appealed on the basis of various grounds. This article will focus on the Court of Appeal's findings on the duty to mitigate.

The Defendant appealed on the basis that Ms. Brake's refusal to accept the position of First Assistant amounted to a failure to mitigate and that the trial judge failed to properly account for income that Ms. Brake earned during the notice period.

First, the appellate court upheld the trial judge's decision that it would have been unreasonable to have expected Ms. Brake to accept the demotion and continue working for PJ-M2R, under a young man whom she had trained.

Next, after upholding the 20 months' notice period, the appellate court turned to the Defendant's argument that the trial judge erred in failing to reduce the damages award by the amounts that Ms. Brake received during the notice period.

It is established law that an employee who is dismissed without reasonable notice is entitled to damages for breach of contract based on the employment income the employee would have earned during the reasonable notice period, less any amounts received in mitigation of loss during the notice period.

The appellate court upheld the trial judge's treatment of mitigation during the notice period by finding that the amounts Ms. Brake received during the notice period were not "amounts received in mitigation of loss."

The appellate court first divided the twenty month notice period into two periods: her statutory entitlement period and the balance of the notice period. As the appellate court noted, statutory entitlements are not damages. Ms. Brake was entitled to receive her statutory entitlements even if she secured a new full-time job the day after the Appellant terminated her employment. Therefore, the income that Ms. Brake earned during her statutory entitlement period is not subject to deduction as "mitigation income."

During the balance of the notice period, Ms. Brake earned income from her cashier position at Sobey's (a position she held during her employment at PJ-M2R) and \$600 from Home Depot. The appellate court found it was open to the trial judge to make no deduction for the income that Ms. Brake earned from Sobey's and Home Depot during the balance of the notice period. In a Supreme Court decision from 1943, the Supreme Court found that if an employee works full time for one employer, but their employment contract permits for simultaneous employment with another employer, and the first employer terminates them without notice, any income from the second employer that they could have earned while continuing with the first employer is not deductible from damages. The appellate court noted that the amounts Ms. Brake received from Sobey's did not rise to such a level that her work at Sobey's could be seen as a substitute for her work at PJ-2R.

The appellate court did not answer the question of when supplementary employment income rises to a level that it should be considered as a substitute for the amounts earned under the original contract, noting that this was not argued by the Defendant. Until this matter is further litigated, we can expect that the way damages are calculated, either by the courts or by counsel in settlement discussions, will change in cases where employees have secured supplementary employment out of necessity rather than in full mitigation of their damages.