

Ontario Court of Appeal rules not all Mitigation Income earned in Common law Notice Period is deductible

The Ontario Court of Appeal issued a landmark ruling in ***Brake v. PJ-M2R Restaurant Inc.*** (2017) ONCA 402 on the issue of mitigation in wrongful dismissal. Typically, when an employee is terminated by his/her employer, he/she has a positive obligation to mitigate his/her damages by looking for alternate work. It is a well established principle of wrongful dismissal that any income earned during the notice period is subtracted from what the company owes. However, in this case, the Ontario Court of Appeal held that certain income earned by the Plaintiff should not be deducted from her damages which changes the typical approach to assessing mitigation income. In particular, this decision will have a significant impact on the duty to mitigate of all employees but non-managerial ones who are forced to accept inferior work once they are terminated from their positions.

In this case, the Plaintiff Ms. Brake was a long service employee of an Ottawa based McDonalds and she was constructively dismissed after 25 years of service. The trial judge awarded her 20 months of damages for wrongful dismissal.

The Employer appealed the ruling on a number of grounds including mitigation. Specifically, the Employer alleged Ms. Brake had only applied to one other restaurant job in a period of 6 months and if she had applied to more she could have easily mitigated her damages. The Employer also took issue with the trial judge's refusal to deduct income earned over the notice period from what was owed.

The Ontario Court of Appeal dismissed the Employer's appeal and made the following key comments with respect to mitigation:

- The Court of Appeal held that Ms. Brake's efforts to look for work were reasonable and her decision not to look for jobs in the restaurant industry was not a breach of her duty to mitigate. She continued to work at a part-time job at Sobey's and accepted a job at Tim Horton's making a little more than minimum wage. She also applied to other retail establishments for work. The Court of Appeal summarized the principles of the duty to mitigate as follows at Paragraph 94:

There is no magic formula that an employee must follow when making reasonable efforts to obtain other employment and thereby mitigate his or her loss. When an employer alleges that a former employee has not reasonably mitigated his or her losses, "the question is whether [the employee] has stood idly or unreasonably by, or has tried without success to obtain other employment": *Michaels v. Red Deer College*, [1975 CanLII 15 \(SCC\)](#), [1976] 2 S.C.R. 324, at p. 331. A terminated employee is entitled to consider her own long-term interests, so she will not fail to mitigate merely because she chooses to take some career risks that might not minimize the compensation that her former employer will owe to her: *Peet v. Babcock & Wilcox Industries Ltd.*(2001), [2001 CanLII 24077 \(ON CA\)](#), 53 O.R. (3d) 321 (C.A.), at para. 8. Thus, the fact that Ms. Brake did not apply for other restaurant management positions does not mean that she did not make reasonable efforts to mitigate.

- The Court of Appeal then considered whether the trial judge had made an error of law by failing to reduce Ms. Brake's damage award by the income she had earned. The Court of Appeal held the trial judge did not commit an error for the following reasons.

- First, the Employment Insurance benefits that Ms. Brake received should not be deducted from an award of damages for wrongful dismissal.
- Second, employment income earned in the statutory notice period provided for by her Termination Pay and Severance Pay under the *Employment Standards Act, 2000* should not be deducted because employees are entitled to their statutory entitlements and any income earned during this statutory period with no deduction for “mitigation income” (such deduction is not contemplated in the legislation). Simply put, the *ESA* does not provide for the reduction of statutory payment of Termination and Severance Pay.
- The Court of Appeal then refused to deduct the Sobeys income earned after termination because Ms. Brake had always worked for Sobeys pre-termination and was therefore allowed to earn amounts without deduction from her damages for wrongful dismissal. However, the Court of Appeal qualified this statement by suggesting that if Ms. Brake had worked more hours at Sobeys, then it would have considered the issue of deduction.
- The Court of Appeal held that the Home Depot income did not have to be deducted because it was so small. In a concurring judgement, Justice Feldman expressed the principle at Paragraph 158 that if an employee has to accept an inferior position as part of the duty to mitigate, such damages should not be deducted:

It follows, in my view, that where a wrongfully dismissed employee is effectively forced to accept a much inferior position because no comparable position is available, the amount she earns in that position is not mitigation of damages and need not be deducted from the amount the employer must pay.

Therefore, this decision is important for articulating the test for mitigation, demonstrating that there is no mitigation set off during the statutory notice period and confirming that sometimes mitigation income will not be deducted if it is inferior to what the employee would have otherwise earned.