

Employment and Labour Fall seminar

# When has an employee failed to mitigate? Tips and best practices for wrongful dismissal claims



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# The Principle of Mitigation

- The duty to mitigate is the duty to "act reasonably" in seeking and accepting alternate employment and is a "duty to take such steps as a reasonable person in the dismissed employee's position would take in [her] own interests" and is "not an obligation owed by the dismissed employee to the former employer to act in the employer's interests" (*Lake v. La Presse*, 2022 ONCA 742)

# When is an employee obligated to mitigate their damages?

- An employee is obligated to mitigate their damages over any common law reasonable notice of termination period.
- The common law reasonable notice period is different for each employee, and is based on a variety of factors.

# What impact can mitigation have at trial?

- Courts will consider the Plaintiff's mitigation efforts over any reasonable notice period.
- Common law reasonable notice damages may be reduced if:
  - The Plaintiff failed to mitigate; or
  - The Plaintiff did mitigate their damages and earned income over the reasonable notice period.
- Most income earned over the reasonable notice period is offset against any damages owed to the employee.

# Who proves the failure to mitigate?

- It is the employee's duty to mitigate their damages, but...
- It is the employer's obligation to prove that the employee failed to mitigate.
- The employer must prove:
  - 1) the employee job search was unreasonable; AND
  - 2) that with a reasonable job search the employee would have secured a job.
- Difficult to establish

# How do employer's show a failure to mitigate?

- At a minimum, the employer must find and record available **comparable** job postings on a regular basis
  - Employer must be able to show that the job is comparable.
- Provide the job postings to the Plaintiff.
- This still may not be enough:
  - Even if the employee does not apply to the jobs, employers must prove that had they applied they would have gotten a job.
- Some contexts are easier, such as a sale of business or clear offers of employment that are rejected.

# When is an employee not obligated to mitigate?

- Statutory entitlements.
- The employment is for a fixed term.
- The employment contract contains a specific, enforceable term providing the amount of notice to be given in the event of termination of employment.
- An employee is dismissed for just cause.

# What if an employee fully mitigates?

- Most income earned over the reasonable notice period is offset from the ultimate damages award.
- Plaintiffs who secure comparable or better employment may be more motivated to settle in advance of trial, to avoid a large offset.



# What if the trial takes place before the end of the alleged notice period?

- The trial judge could do any of the following:
  - Reduce the notice period;
  - Require the damages award to be paid in installments, through a trust, to allow for a future offset if the Plaintiff mitigates their damages;
  - Order payment of damages up to the date of trial – with the rest of the damages to be paid following the conclusion of the notice period;
  - Move the hearing date to *after* the conclusion of the reasonable notice period;
  - Nothing – simply award the full notice period even if it has not yet concluded.

# Mitigation Case Law Update

*Lake v. La Presse*, 2022 ONCA 742

- The *Bardal* factors:
  - Age: 52 years old
  - Position: General Manager of a French Language newspaper
  - Length of service: 5.5 years
- Reasonable notice at trial: 8 months, reduced to 6 due to failure to mitigate
  - Waited too long to begin the job search; did not apply for more junior/lesser paying roles
- Ontario Court of Appeal overturned the decision, and reinstated the 8 month notice period
  - The Plaintiff was not obligated to accept a lesser position in order to mitigate her damages

# Mitigation Case Law Update

*Humphrey v. Mene Inc.*, 2022 ONCA 531

- The *Bardal* factors:
  - Age: 32
  - Position: Chief Operating Officer
  - Length of Service: 3 years
- Reasonable notice at trial: 12 months, reduced to 11 months due to lack of mitigation efforts.
- Ontario Court of Appeal further reduced the notice period to 6 months, because the Plaintiff rejected a comparable high-paying, high-level job (Vice-President, E-Commerce)

# Mitigation Case Law Update

*Monterosso v. Metro Freightliner Hamilton Inc.*, 2023 ONCA 413

- The Court of Appeal found that an independent contractor on a fixed-term contract had a duty to mitigate his damages when his contract was terminated 7 months into the 72-month term.
- Award at trial: the balance of the contract (over \$500,000).
- On appeal, the Court of Appeal found that the independent contractor had a duty to mitigate – but he had fulfilled his duty through an extensive job search.
- The Ontario Court of Appeal did not reduce the damages award.

# Best Practices

- Assist employees with their job search from the outset
  - Provide a confirmation of employment letter
  - Offer outplacement services (if available)
- Diligently keep track of available, comparable job postings, and provide them to the employee on the record.
- Question the employee about their job search at each stage of the litigation process: mediation, examination for discovery, and at trial
- Don't depend on a failure to mitigate to drastically reduce the notice period