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"She Got a Break Today" – Court Refuses to Deduct Earnings During Notice Period

Brake v. PJ-M2R Restaurant Inc. (2017 ONCA 402) is an important decision on employers' potential liability in wrongful dismissal actions. The Ontario Court of Appeal clarified a number of issues relating to mitigation after dismissal and in doing so imposed limitations on an employer's ability to rely on mitigation earnings to reduce its liability.

Background

Esther Brake ("**Brake**") was a 20 year employee of PJ-M2R Restaurant Inc. ("**PJ-M2R**") who was placed on a 90-day performance improvement plan ("**PIP**") after several years of strong performance. At the end of the PIP term, Brake was told that she had failed the program and was given a choice between demotion and termination. Brake refused the demotion, was terminated and began proceedings against PJ-M2R.

At trial, the judge found that the complaints about Brake's performance did not amount to cause for dismissal and set a notice period of twenty months. PJ-M2R appealed.

For more information on the trial decision, see our previous bulletin "[She's Lovin' It! Poor Use of Performance Plan Leads to Wrongful Dismissal](#)".

The Appeal Decision

The Court of Appeal dismissed PJ-M2R's appeal and upheld the trial judge's decision that Brake was constructively dismissed. The majority also rejected PJ-M2R's argument that the trial judge should have set a shorter notice period given the length of her employment, noting the appellate deference owed to such determinations.

Much of the decision focused on issues relating to mitigation of damages. The majority found that Brake was not obliged to accept the demotion in order to mitigate. Following the Supreme Court of Canada's decision in *Evans v. Teamsters, Local 31*, the Court upheld the trial judge's finding that it would have been humiliating for Brake to have accepted a demotion and therefore not something a reasonable person would accept. The Court also upheld previous decisions finding that income earned during the "statutory entitlement period" is not considered as mitigation earnings, a finding that remains a source of frustration for employers as the "statutory entitlement period" includes the period of severance pay that an employee receives.

The majority of the Court also rejected the appellant's submission that Brake's income during the notice period should be deducted from the damages award. The majority agreed with the general principle that an employee may have wrongful dismissal damages reduced by amounts received in mitigation during the notice period. However, they held that the earnings in this case should not be deducted as it was unclear that the additional income earned from a job that Brake held while employed with PJ-M2R was "supplemental". Of greater concern to employers is the minority's opinion that because the character of employment was substantially different, there should be no deduction from wages.

Implications

This decision raises a number of important issues for employers to consider when dealing with, or preparing for, potential claims for wrongful dismissal.

- a. Courts will take a broad perspective when determining whether an employee failed to mitigate their losses by accepting a demotion with their current employer and absent “cause”, such demotions will be difficult to implement.
- b. If an employer claims that an employee has failed to make reasonable efforts to mitigate, it must prove more than just that the employee could have earned income during the notice period.
- c. A potential number of categories of income will be excluded from consideration as mitigation income, including employment income benefits, employment income during a statutory entitlement period as well as other income from non-mutually exclusive sources. The latter category is particularly important as it suggests that employers will lose opportunities to claim mitigation to the extent that their employees are contractually permitted or otherwise allowed to pursue additional employment.

The *Brake* decision makes it clear to employers that mitigation arguments will remain difficult to prove and the evidentiary record has to be carefully built in order to persuade a Court that the income earned should be deducted. If the comments from the minority opinion take hold in other decisions, employers will face an almost insurmountable battle in dealing with mitigation arguments.

If you have any questions about this case or about employee’s mitigation of losses following dismissal, please contact any member of our Employment and Labour Relations group.

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[a cautionary note](#)

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