EMPLOYEES' DUTY TO MITIGATE: COMPARABLE EMPLOYMENT DOES NOT MEAN ANY EMPLOYMENT

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The Ontario Court of Appeal has confirmed in a recent decision that an employee's duty to mitigate following a without cause termination does not require the employee to accept a notably lesser position with the same employer.

In *Dussault v. Imperial Oil Limited*, the Court held that despite the general rule that an employee may be obligated to mitigate his or her loss by accepting a comparable position with the company, in order to be comparable, offers of employment must be offer comparable status, hours, and remuneration of the employee's employment with his/her former employer. Put simply, comparable employment does not mean any employment.

Background

The two plaintiffs in *Dussault* were managers with Imperial Oil Limited ("Imperial") for over 39 and 36 years respectively. Their remuneration included participating in a savings plan, whereby contributions were split between savings and a retirement income plan.

Following the sale of Imperial's retail business to Mac's Convenience Stores Inc. ("Mac's"), the plaintiffs received employment offers with the following terms:

their base salaries (as with Imperial) would remain the same for a period of 18 months;
Mac's would not recognize their years of service with Imperial; and,
Imperial would provide "lump-sum payments" to make up for the reduction in value of the benefit plans contingent on the acceptance of Mac's offer, resignation from Imperial, and signing of a release in favour of Imperial.

Both plaintiffs rejected offers from Mac's, alleged that they were wrongfully dismissed, and sought summary judgment. The motion judge held that the plaintiffs were reasonable in refusing the offers from Mac's, notwithstanding their duty to mitigate. The motion judge emphasized Imperial's demand that the plaintiffs sign a release in order to receive the lump-sum payment in lieu of lost benefit value and Imperial's failure to

recognize the plaintiffs' past service. Overall, the motion judge found that the proposed positions with Mac's were not sufficient comparable to the plaintiffs' previous jobs, particularly in terms of salary and benefits, and awarded each 26 months' notice.

Court of Appeal Decision

Imperial appealed, submitting that the motion judge erred in finding that the respondents had not mitigated their damages by accepting comparable employment with Mac's.

The Court of Appeal dismissed Imperial's appeal, finding that the offers from Mac's were insufficient and that the plaintiffs / respondents acted reasonably in refusing them. The Court of Appeal emphasized that "comparable employment" does not mean "any employment". In order to be "comparable", offers of employment must be comprehensive of the status, hours, and remuneration of the employee's employment with his/her former employer.

Key Takeaways

The Court of Appeal's decision in *Dussault* highlights employers' need to carefully craft offers to employees when attempting to mitigate the impact of a without cause termination, especially when making an offer after acquiring a business. Whether or not an employee's decision to refuse an offer was reasonable is a fact-driven inquiry based on factors such as the timing of the offer (pre-termination vs post-termination) and the offer's terms, especially remuneration. Employers, especially those involved in asset transactions, should seek advice as to how to draft offers of employment to the seller's employees.

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A Cautionary Note