WHAT, I HAVE TO FIND YOU A JOB, TOO? THE ONUS ON EMPLOYERS TO SHOW A FAILURE TO MITIGATE IN WRONGFUL DISMISSAL CASES

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In the recent decision of *Jimmy How Tein Fat v PRGX Canada Corp.*,[1] Ontario's Superior Court of Justice emphasized that in order to successfully obtain a reduction in a notice period because of a failure of a former employee to mitigate, the employer has to establish that the employee could have found comparable employment had the employee conducted a reasonable search.

Background

PRGX Canada Corp. ("**PRGX**") terminated the employment of Mr. How as a result of a restructuring. Mr. How worked for PRGX for 29 years and held the position of VP of North America Operations and Global Audit Innovation. He was 63 years old at the time of termination.

PRGX is a global audit and advisory firm, which both parties described as being in a highly specialized and niche market.

Following his dismissal, Mr. How sued for wrongful dismissal and moved for summary judgement.

The Decision

The Court had no hesitation in awarding a 24-month notice period. Of note, the Court found that Mr. How was a senior executive in a niche industry who was paid a significant amount. At his age, his prospects of finding another employment opportunity commensurate with his seniority and compensation were slim.

Mitigation

It is well established that the damages an employee is entitled to may be reduced where the employer can demonstrate that the employee did not take reasonable steps to mitigate their losses by seeking comparable employment.

It is a two-part test, and the onus is on the employer to establish that the dismissed employee failed 1) to take

reasonable steps to search for a job and 2) that a comparable job could have been found if the employee had taken reasonable steps.

PRGX argued that Mr. How did not take reasonable steps in his job search as he did not target PRGX's competitors for employment opportunities. Mr. How only did so after PRGX cross-examined him on his mitigation efforts prior to the summary judgement motion and suggested that he had failed to contact a host of PRGX's competitors.

The Court found that although it would have been wise for Mr. How to begin his search within the industry much earlier, the failure of Mr. How to do so did not make his efforts unreasonable. The Court found that Mr. How's evidence demonstrated a sustained effort to seek senior level employment, albeit in various industries.

Additionally, the Court found that PRGX showed it was not genuinely interested in assisting Mr. How avoid losses due to his termination. Despite an offer to provide a reference letter when he was first terminated, no reference letter was ultimately forthcoming, and PRGX did not take any steps to facilitate Mr. How contacting others in the industry to assist him in securing alternative employment.

Notably, the Court highlighted that PRGX did not put forward any evidence that a comparable job was available with any of the competitors, or elsewhere, at any time since Mr. How's termination. On this basis, the Court concluded that PRGX did not meet the onus of demonstrating that Mr. How failed to mitigate his losses.

Takeaways for Employers

When dismissing an employee, and particularly if the matter becomes litigious, employers should keep in mind that their efforts in assisting the employee to find new employment are critical if the employer wants to establish an argument that the employee failed to mitigate. Reference letters, outplacement assistance and engaging in providing comparable job postings to the dismissed employee can form part of a litigation strategy where settlement is not on the horizon.

Employers can help their argument by ensuring that they have evidence of comparable positions or evidence from an outplacement counsellor or recruiter about available jobs in the marketplace. It is common for employees to claim that they will have difficulty finding employment in a depressed job market. However, that position needs to be challenged by the employer, particularly as the employer would know the industry and can confirm its own ability to find candidates for employment opportunities.

[1] *Jimmy How Tein Fat v PRGX Canada Corp.*, 2023 ONSC 6374.

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A Cautionary Note