

When mitigation isn't mitigation

Ontario Court of Appeal stirs controversy by not excluding employee's income during notice period from constructive dismissal damages

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IN A RECENT decision, the Court of Appeal for Ontario erred when it excluded from “mitigation income” all earnings by a dismissed employee during what the court referred to as the “statutory entitlement period” — a notional period created by the court, equivalent to the number of weeks used to calculate the employee's entitlement to pay in lieu of notice and severance pay under the Employment Standards Act (ESA).

Essentially, the court erred by confusing “statutory payments” — pay in lieu of notice and severance pay — with other income earned during the notice period. Statutory payments are mandated, minimum sums payable in any event. They are not “replacement” income and cannot be reduced by other mitigation income (*Boland v. APV Canada Inc.*). By contrast, all other income earned during the notice period is replacement income, except for supplementary income. The court's error appears to be based on a misreading or misunderstanding of *Boland*.

Unfortunately, until this error is corrected, it is likely to be followed and perpetuated by other courts.

In a separate but concurring judgment, Justice Feldman also erred when she held “mitigation income” did not include earnings from a position so inferior to the original position the employee would not breach her duty to mitigate by not taking it. This reasoning was rejected by the majority and inconsistent with the law of mitigation.

Why did these errors occur? The familiar adage of ‘bad facts make bad

law’ may be to blame. In this case, the employee's circumstances were sympathetic and the employer's behaviour less than exemplary. It is possible the court was trying to help the employee keep more money in her pocket. However, when the Court of Appeal speaks, other courts must listen, and the law of employment mitigation may now have changed, in error.

For more than 25 years Esther Brake was a good employee for a large fast food chain, eventually achieving a managerial position. Over time, Brake's performance slipped slightly. She also began supplementing her income with part-time work at Sobeys's. Ultimately, Brake was offered a demotion — which she rejected — following which her employer considered her to have resigned.

The details of Brake's performance issues were not material for the discussion of mitigation. Suffice it to say, both the trial and appeal courts found Brake's treatment to have been less than fair. This included her participation in a performance management program the courts found was applied unfairly and “set up” to ensure Brake would fail.

Against this backdrop, it is not surprising the court found the demotion to be a constructive dismissal. It awarded damages equivalent to 20 months' pay (\$104,499.33), inclusive of common law and statutory entitlements.

However, the court then erred by declining to deduct from the common law damage award any of Brake's

earnings during the notice period — about \$40,000 — because that money was not “received in mitigation of loss.”

How did the court make this error?

Typically, an employee's earnings during the notice period are considered “mitigation income” and deducted from any award of common law damages.

In the 20 months following Brake's dismissal, the court found she made reasonable efforts to find alternative employment and earned \$40,000 by increasing her hours at Sobeys's and working non-managerial positions at Tim Hortons and Home Depot.

In a surprising ruling, the trial judge and Court of Appeal held that none of that \$40,000 was “received in mitigation of loss.” The Court of Appeal's reasoning was three-fold:

All earnings accrued during the “statutory entitlement period” are not “mitigation income.” Here the court erred by excluding from mitigation income all income earned by Brake in the 34 weeks following her dismissal, on the basis that income was earned during the “statutory entitlement period.” There are several problems with this analysis.

First, a “statutory entitlement period” does not exist in fact or law. It is not an actual period of time — while an employee may be provided notice of termination, where this does not occur the statutory entitlement is to payment (termination and severance pay).

Second, the court appears to have

confused a statutory payment with all other income during the notice period, based on a misreading or misunderstanding of *Boland*. In *Boland*, the employee claimed only the minimum statutory entitlement — no common law damages — and the judge rightly declined to deduct the employee's post-dismissal earnings from the statutory payment.

Had there been a claim for common law damages in *Boland*, the court would have reduced that claim by the amount of the statutory termination and severance payments and any income earned during the notice period. This is consistent with *Yanez v. Canac Kitchens*, in which the court deducted from the common law notice entitlement all earnings post-dismissal, despite some earnings having accrued in what the Court of Appeal described as the “statutory entitlement period.”

It is therefore incorrect to rely on *Boland* for the concept of a “statutory entitlement period” or the position that income earned during this notional period is not mitigation income. Those were not the facts, the decision does not stand for that proposition, nor is there any principled reason to reach this conclusion.

Third, there is no basis in law to shelter income earned during the notice period, other than a statutory payment and supplementary income. Indeed, the court offers no substantive explanation for this part of its ruling, other than to misstate *Boland*:

“Since the employment income that Ms. Brake earned during her statutory entitlement period is not

deductible from the damages award, the trial judge ought to have determined her statutory entitlement period and identified which items of employment income were attributable to that period and which were attributable to the balance of the notice period.”

“Supplementary income” earned during the period of common law notice is not “mitigation income.” This part of the ruling is not controversial. If an employee works two jobs and is dismissed without cause from one, income earned during the common law notice period from the second job is not “mitigation (replacement) income” because the employee would have earned it anyway. This is the basis on which the court excluded much of Brake’s post-dismissal earnings from Sobey’s.

The Court of Appeal declined to identify in what circumstances an

increase in supplementary income during the notice period would change it to replacement income. That, the court said, is “for another day.”

Income earned from a non-comparable job during the period of common law notice may not be deducted. This is another error. In a separate but concurring decision, Justice Feldman (expanding on comments of the trial judge) went even further, holding “mitigation income” does not include earnings from a position so inferior to the original position the employee would not breach the duty to mitigate if she turned it down. On this basis, Justice Feldman excluded all of Brake’s income earned during the common law notice period.

However, Justice Feldman confused an employee’s right to not accept markedly inferior replacement work with income earned during

the notice period. Although an employee may not be obliged to accept an inferior position to mitigate damages, once accepted, income earned should be treated as mitigation income. If not, the employee unjustly benefits twice — once from the replacement earnings and again from the damage award.

The majority distanced themselves from this narrow interpretation of mitigation income and stated that employment income earned during the notice period is generally to be treated as mitigation of loss.

Final thoughts

The court’s error of excluding from mitigation income all income earned during the notional “statutory entitlement period” is disappointing and will need to be corrected by the Court of Appeal or Supreme Court of Canada. As of this writing, neither party has sought

leave to appeal.

Justice Feldman’s decision, though neither accepted by the majority nor binding, is troubling to the extent it even suggests “mitigation income” does not include earnings from work not comparable to the original position. That proposition is simply inconsistent with the law of mitigation.

Finally, the decision stands as a reminder to employers of the importance of doing whatever can reasonably be done to help a dismissed employee find comparable replacement work.

For more information see:

- *Brake v. PJ-M2R Restaurant Inc.*, 2017 CarswellOnt 7619 (Ont. C.A.).
- *Boland v. APV Canada Inc.*, 2005 CarswellOnt 532 (Ont. Div. Ct.).
- *Yanez v. Canac Kitchens*, 2004 CarswellOnt 5351 (Ont. S.C.J.).