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...an employee's duty to act reasonably in seeking and accepting alternate employment is not an obligation to act in the employer's interests.

The bar is high, but within reach - How to establish (and benefit from) an employee's failure to mitigate their losses

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In August 2021, we wrote about a decision of the Ontario Superior Court of Justice, *Lake v La Presse (2018) Inc.*[1] In the decision, a dismissed employee's mitigation efforts were found to be unreasonable because she waited too long to begin her job search, applied for too few jobs and unreasonably limited her search by aiming "too high". The Court of Appeal for Ontario ("ONCA") recently set aside that ruling[2] and while the appeal decision may, at first glance, appear to strip away the good news derived from the lower court's decision, a closer analysis reveals important and positive reminders for employers.

Court of Appeal decision

ONCA held Merida Lake ("Lake") was entitled to an eight-month notice period, without reduction for failure to mitigate.

While ONCA agreed with the lower court that Lake unreasonably delayed her job search by waiting several months when she ought to have begun to search one month after being dismissed, ONCA held the lower court judge erred in three ways:

- By holding that Lake was required to search for lesser paying jobs, including jobs for which she was overqualified, when she was unable to find comparable replacement income.
- By placing too much emphasis on the title of the positions for which Lake applied, rather than their true nature, which led to those positions being characterized as "promotions" over her former role.
- By speculating that Lake likely would have found comparable employment if she had taken reasonable and appropriate steps to mitigate, without any evidence from the employer regarding the true nature of the positions available at the time.

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Takeaways

Viewed together, the lower court and appeal decision provide important reminders about the law of mitigation in the context of a dismissal without cause.

While an employer is not responsible for losses a dismissed employee could reasonably have avoided,[3] an employee's duty to act reasonably in seeking and accepting alternate employment is not an obligation to act in the employer's interests. It is a duty to take the steps a reasonable person in the same position would take to protect the employee's own interests.[4] This distinction underpins the high onus an employer (the party in breach of contract) must discharge to benefit from positive action on the part of an employee (who, in the eyes of the court, is the innocent party).

The employer, not the dismissed employee, has the onus of demonstrating the employee failed to take reasonable steps to mitigate, on a balance of probabilities. While a court may infer a dismissed employee could have found comparable employment if they had taken reasonable and appropriate steps to do so, such inferences must be drawn from proven facts, not speculation.

In this case, Lake asserted the positions for which she applied had more senior titles but were substantially similar to the positions she previously held, though she provided no evidence (*e.g.*, job descriptions). Unfortunately, the employer did not lead evidence to refute Lake's assertions, choosing to rely only on the various job titles. ONCA held the lower court could not speculate based on job titles alone. While this uneven playing field may be a source of frustration for employers, it is further evidence of the principles highlighted above.

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Best practices for employers

To successfully challenge a dismissed employee's mitigation efforts in future litigation, an employer must be intentional in gathering evidence throughout the anticipated notice period. Failure to do so will make it difficult to discharge the employer's burden at trial and benefit from an employee's failure to mitigate, even if such failure occurred.

As noted in our previous article, while the bar to success may be high, an employer can put itself in a stronger position to challenge a former employee's mitigation efforts by taking the following steps:

- **Offer the employee outplacement counselling**. Provide an employee the tools to obtain new employment as quickly as possible. If the employee fails to use the tools at their disposal, an employer can rely on this as evidence of a failure to take reasonable steps to mitigate.
- **Be diligent from the outset**. Search for available positions suitable to the employee and save evidence of those job postings throughout the anticipated notice period. Share the job postings with the dismissed employee (or their counsel) to ensure they are aware of them.
- **Look beyond the job titles**. Analyze the nature of the available positions, including the duties and responsibilities, both when gathering evidence of suitable job postings and assessing the reasonableness of an employee's mitigation efforts. Just as an employee need not limit their job search, an employer should not limit its job search.
- **Watch the clock**. Time is an objective, persuasive factor upon which an employer can rely. Consider when the employee started making meaningful efforts to find new employment (*i.e.*, applying, not just searching/browsing) and how soon after they obtained it.

To learn more and for assistance, contact a member of the Sherrard Kuzz LLP team.

[1] 2021 ONSC 3506 (CanLII)
[2] 2022 ONCA 742 (CanLII)
[3] *Red Deer College v Michaels*, [1976] 2 SCR 324
[4] *Forshaw v Aluminex Extrusions Ltd*, 1989 CanLII 234 (BCCA)

DID YOU KNOW?

In May 2022, Prince Edward Island became the first province in Canada to limit the use of a non-disclosure agreement ("NDA") in cases of harassment, discrimination and sexual misconduct. In October 2022, Ontario proposed legislation to prohibit a post-secondary institution from agreeing not to disclose that a judge, arbitrator or other adjudicator found its employee committed sexual abuse of a student.

This follows a wave of similar lawmaking in the United States where many states have prohibited use of a NDA for any type of harassment. In addition, Federal US legislation may soon be in force to invalidate any NDA relating to harassment and assault in the workplace.

Other countries, including Australia and the United Kingdom, are also grappling with these issues.

To learn more and for assistance, contact the team at Sherrard Kuzz LLP.

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Alternative to reinstatement for unionized employee

When a unionized employee is terminated for cause, an arbitrator may find the employer was justified in imposing discipline but may not agree that termination was appropriate. In these circumstances, it is common for the arbitrator to reinstate that employee ("grievor") with back pay.

In "exceptional circumstances," an employer can successfully argue that reinstatement is inappropriate, in which case an arbitrator can decide not to reinstate a grievor and instead award damages in lieu of reinstatement. This most commonly occurs when there is a breakdown of trust in the employment relationship, or where there is no chance reinstatement would be successful.

What are exceptional circumstances?

Reinstatement may be inappropriate when the employment relationship is no longer viable. To determine this, an arbitrator will consider the following non-exhaustive factors:

1. Lack of trust between the grievor and employer
2. The inability or refusal of the grievor to accept responsibility for wrongdoing
3. The demeanor and attitude of the grievor at the hearing
4. Animosity on the part of the grievor towards management or co-workers
5. The refusal of co-workers to work with the grievor
6. The risk of a "poisoned" atmosphere in the workplace[1]

Examples of an arbitrator denying reinstatement

In one arbitration award, a grievor was terminated from her employment at a French-language school because the school was dissatisfied with her French-language proficiency.[2] While the arbitrator found termination unjust, he did not grant reinstatement because he found it would be impossible for the grievor to develop the French-language proficiency required for the role. As such, there was no purpose in reinstating her because doing so would ultimately lead to her employment being terminated again.

In another decision, an arbitrator declined to reinstate a grievor who made racial comments on Facebook because doing so could have had a significant detrimental effect on the company's reputation and ability to conduct its business.[3]

In another decision, a grievor was terminated for insubordination involving a "heated confrontation" during which the grievor refused to move his company vehicle from an unauthorized parking spot until his manager paid him overtime. The arbitrator found the serious misconduct did not meet the "just cause" standard for termination but declined to grant reinstatement because the employment relationship was "so irretrievably damaged that it [could not] be resuscitated".[4]

How will an arbitrator calculate damages in lieu of reinstatement?

There are two prevailing approaches to calculating damages in lieu of reinstatement. The Federal Court of Appeal recently found that both approaches are reasonable, so employers are not likely to receive further clarity from the courts any time soon.[5]

The two prevailing approaches are: (1) the length-of-service approach; and (2) the fixed-term approach.

Under the length-of-service approach, a grievor is generally awarded 1 to 1.5 months of pay per year of service. Sometimes, an additional 10-15% is added to represent other "fringe" benefits under a collective agreement. This is the more traditional approach still used by many arbitrators.[6]

Under the fixed-term approach, the arbitrator predicts what would have happened had the grievor not been terminated (e.g., would the grievor have worked until retirement, quit, or been terminated from employment at some later point). The employer is then required to pay out the remainder of that term of employment under the collective agreement. This is a more novel approach but has become more common.[7] Under the fixed-term approach arbitrators have considered:

1. The grievor's employment history
2. The grievor's failure to respond to progressive discipline
3. Whether the grievor had plans to return to higher education
4. Whether the employer imposed or had plans to impose a layoff
5. The likelihood the worksite might close or a technological change might render the position obsolete.

Pros and cons of each approach

If reinstatement is not the employer's preference, it is important to consider which approach is best in terms of calculating damages. While the damages that arise from each approach can be similar, in some cases they are quite different – particularly if the grievor has either a very short or very long period of employment.

The advantage to the length-of-service approach is predictability. On the other hand, the fixed-term approach may be used to show that an otherwise large damage award should be reduced because the grievor was unlikely to continue working with the employer, regardless of the termination.

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer, or our firm at info@sherrardkuzz.com.

[1] *DeHavilland Inc and CAW-Canada, Local 112 (Mayer) (Re)*, 1999 CanLII 35895 (ON LA)

[2] *Regional Authority of Greater North Central Francophone Education, Region No. 2 and CEP, Local 777 (Monterrosa), Re* (2012), 223 LAC (4th) 135

[3] *Wasaya Airways LP v ALPA (2010)*, 195 LAC (4th) 1

[4] *NAV Canada and I.B.E.W., Local 2228 (Coulter) (Re),* 2004 CanLII 94784 (CA LA)

[5] *Hussey v Bell Mobility Inc.*, 2022 FCA 95

[6] See, for example, *Ontario Public Service Employees' Union, Local 529 v Toronto Community Housing Corporation*, 2018 CanLII 85978 (ON LA)

[7] See, for example, *Hay River Health & Social Services Authority v PSAC (2010)*, 201 LAC (4th) 345

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Termination of Employment:
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   - Risks associated with the termination of a fixed term employment agreement.
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   - What should (and should not) be included in the termination letter.
   - How to minimize the risk of reputational damage to an employee post-termination.
   - When will delay in the payment of statutory entitlements increase an employer's potential liability?
3. **Post-Termination Income and its Impact on Damage Awards**
   - An update on the duty to mitigate.
   - The impact of Employment Insurance (EI) and Canada Emergency Relief Benefits (CERB) payments on a damage award.

DATE: **Wednesday, March 8, 2023, 9:00 a.m. – 10:30 a.m.**
WEBINAR: **Via Zoom** (registrants will receive a link the day before the webinar)
COST: Complimentary
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