

## Labour & Employment

# Updated: Ontario Court of Appeal clarifies employment law on mitigation of damages

By **Cristin Schmitz**

(May 25, 2017, 10:49 AM EDT) -- The Ontario Court of Appeal has answered some important questions about the mitigation of damages in a judgment affirming a 20-month constructive dismissal award to a longtime McDonald's manager who was "set up to fail" by her employer.



Justice Eileen Gillese

Justice Eileen Gillese's May 23 judgment, backed by Justices Kathryn Feldman and Sarah Pepall, dismisses the appeal of an Ottawa-area McDonalds franchisee: *Brake v. PJ-M2R Restaurants Inc.* 2017 ONCA 402.

Notably the panel ruled (among other points of law related to damages) that a fired employee's earnings during the period that she is entitled to statutory severance and termination pay are not deductible as mitigation income from the damages award payable by her ex-employer.

Appellant PJ-M2R Restaurants Inc. challenged a \$104,499 damages award made last year to its former restaurant manager, Esther Brake, who was 62 when she was constructively dismissed in 2012 after 20 years of achievement and mostly excellent performance reviews. (The award of 20 months' pay in lieu of notice was inclusive of her termination and severance pay entitlements under Ontario's *Employment Standards Act*).



Miriam Vale Peter, KMH Lawyers

Plaintiff's counsel Miriam Vale Peters of Ottawa's KMH Lawyers advised employment lawyers to pay attention to Justice Feldman's "extremely important" concurring decision for its statement that where a terminated employee must take substantially inferior employment, the income from that employment is not mitigation income. "So if you were a manager, like Ms. Brake, and cannot get another managerial position, you will not be penalized with the deduction of your post-employment income from the damages award," Vale Peters explained. "As far as I am aware, this is new law, ... an absolutely wonderful principle for vulnerable employees who cannot afford not to work."

Now she predicted, "every employee will try to argue that their post-termination income should not be deducted. If an employee earns income after a termination, an employer should not necessarily count on a reduction"

Vale Peters also highlighted the Court of Appeal's clarification that income earned during the statutory notice period is also not deductible. "To my knowledge, that is the first Court of Appeal decision on this point."

Vale Peters said she is not anticipating that the defendant employer will seek leave to appeal to the Supreme Court of Canada, but "would not be surprised" if it does so.

The employer's counsel, Jean-Francois Lalonde of Vice and Hunter LLP in Ottawa, did respond to requests for comment.

The employer's appeal was multi-pronged, but raised several important questions about the extent to which income Brake earned during the notice period had to be deducted from her damages award. In that regard, the panel held:

- Employment income earned during an employee's statutory entitlement period (i.e. during the period that termination and severance pay is due) is not deductible from the common law damages award as mitigation income. Only employment income earned during the common law notice period is subject to deduction as mitigation income.
- Trial judges should determine the statutory entitlement period, and identify which post-firing employment income is attributable to that period, and which is attributable to the common law damages owing for the balance of the notice period.
- It is for the employer to prove what employment income is attributable to the statutory entitlement period and what employment income is attributable to the balance of the notice period. Once an employee has proven wrongful dismissal and has adduced evidence of her losses, the onus shifts to the employer to demonstrate that some, or all, of those losses were

avoidable or avoided.

- If the employment contract of a fired full-time employee permits her to be employed at the same time by another employer— and she engaged in part-time work, for example — “any income from the second employer that she could have earned while continuing with the first is not deductible from her damages.”
- In a noteworthy concurrence, Justice Feldman added that when a wrongfully dismissed employee is unable to secure a position with comparable pay and responsibility, despite her “reasonable best efforts” — and thus “is effectively forced to accept a much inferior position because no comparable position is available — the amount she earns in that position is not mitigation of damages and need not be deducted from the amount the employer must pay.” Therefore, explained Justice Feldman, “If the trial judge finds that the new job is vastly inferior to the old one, such that the employee would not be in breach of the duty to mitigate if she turned it down, the earnings should not be deducted.”



Justice Kathryn Feldman

The Court of Appeal affirmed that Brake was constructively dismissed when she was told to accept a demotion to assistant manager — working under a much younger employee she had trained — or be fired. This happened after she barely missed achieving one of three 90-day performance goals — described by the trial judge as “arbitrary and unfair” — that the defendant imposed on her as part of a progressive discipline program.

The demotion would have “meaningfully” reduced Brake’s benefits, but not her pay. She left. However she was unable to find a management job, and made ends meet by working several low-paid cashier and other retail jobs with Sobeys, Tim Hortons and Home Depot.

The trial judge found that Brake had been a competent manager, with a long track record of successful contribution at the standard expected of her position. While she ran into some difficulties in the last few months of her employment, these difficulties had to be considered in the light of her lengthy history of effective contribution. There was also nothing close to gross, or serious, incompetence. Moreover, at the end of the progressive discipline program, her performance was trending upwards to an “extraordinary” degree.

In affirming the trial judge, the Court of Appeal declined to reduce the damages award by any of the amounts that the plaintiff earned during the notice period. The panel held those amounts were not, for various reasons, “amounts received in mitigation of loss.”

(The general principle is that an employee who is dismissed without reasonable notice is entitled to

damages for breach of contract based on the employment income the employee would have earned during the reasonable notice period, less any amounts received in "mitigation of loss" during the notice period.)

The Court of Appeal held that the Sobeys income — a job she also worked part-time while she was working for McDonald's — was supplementary, and thus not in substitution for her McDonald's income. Therefore the Sobeys earnings during the balance of the notice period did not have to be deducted from the damages award.

"I leave for another day the question as to when supplementary employment income rises to a level that it (or a portion of it) should be considered as a substitute for the amounts that would have been earned under the original contract and, accordingly, be treated as deductible mitigation income," observed Justice Gillese.

The appeal court rejected the employer's submission that the plaintiff did not make reasonable efforts to mitigate because she didn't apply for any management positions in restaurants. "A terminated employee is entitled to consider her own long-term career interests, so she will not fail to mitigate merely because she chooses to take some career risks that might not minimize the compensation that her former employer will owe to her," wrote Justice Gillese.

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