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When Mitigation Isn't Mitigation
The Court of Appeal for Ontario Errs

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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") (*Brake v. PJ-M2R Restaurant Inc.*, 2017 ONCA 402 (Gillese and Pepall, JJ.A.)).

Essentially, the court erred by confusing statutory payments (pay in *lieu* of notice and severance pay) with all 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.* (2005), 250 DLR (4th) 376 (Ont Div Ct)). By contrast, all other income earned during the notice period is replacement income[1]. The court's error appears to be based on a misreading or misunderstanding of *Boland* (addressed in this article).

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

In a separate but concurring judgement, 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 be in breach of the duty to mitigate if he or she had not taken the job. Justice Feldman's reasoning is rejected by the majority and not consistent with the law of mitigation.

[1] An exception is "supplementary income" addressed below

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 therefore possible the court made these rulings in an effort to help the plaintiff 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.

What happened in this case?

For more than 25 years Ms. Brake was a good employee for a large fast food chain, initially at an entry level and eventually in a managerial position. In the final years of her employment, Brake's performance slipped slightly. She also began supplementing her income with part-time work as a cashier with Sobey's. Ultimately, Brake was offered a demotion which she rejected, following which her employer took the position she had resigned.

The details of Brake's performance issues are not material for the purpose of the court's discussion of mitigation. However, suffice it to say, both the trial and appeal courts found Brake's treatment to have been less than fair. This includes 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 entitlements and statutory entitlements (ESA pay in *lieu* of notice, and severance pay).

However, the court then erred by declining to deduct from the common law damage award **any** of Brake's earnings during the 20-month notice period, totalling about $40,000, because, said the court, 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 supplementary hours at Sobey's and working non-managerial positions at Tim Horton's 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 is essentially three-fold:

1. **All earnings accrued during the "statutory entitlement period" are not "mitigation income"**: Here the court errs by excluding from mitigation income all post-dismissal income earned by Brake in the 34 weeks (about 8 months) 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 nor could it be[2]. The statutory entitlement is to payment (termination pay and/or severance pay).

Second, the court appears to have confused a statutory payment with all other income earned during the notice period, based on a misreading or misunderstanding of *Boland*. In *Boland*, the employee claimed only the minimum statutory entitlement (*ESA* notice and severance pay). There was no claim for common law damages and the judge rightly declined to deduct the employee's post dismissal earnings from the statutory payment entitlement (the mandated, minimum entitlement).

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* [2004] OJ No 5238 (Sup Ct), in which Echlin J. deducted from the common law notice entitlement all earnings post dismissal, despite some earnings having accrued in what the Court of Appeal describes as the "statutory entitlement period".

It is therefore incorrect to rely on *Boland* as authority 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 in *Boland*, the decision does not stand for that proposition, nor is there any principled reason to reach this conclusion.

Third, and in any event, there is no basis in law to shelter income earned during the notice period, other than a statutory payment (and supplementary income, addressed below). 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.
>
> [emphasis added]

2. "**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 job, income earned during the common law notice period from the second job is not "mitigation (replacement) income" because the employee would have earned that income in any event. This is the basis on which the court excludes much of Brake's post dismissal earnings from Sobey's.

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[2] Severance pay must be paid out in a lump sum. While an employee may be provided notice of termination, where that does not occur (as in this case) the entitlement is to termination pay in a lump sum.

In *obiter*, the Court of Appeal declines to identify whether and in what circumstances an *increase* in supplementary income during the notice period would change the character of that income from *supplementary income* to *replacement income* (and therefore "mitigation income"). That, the court says, is "for another day".

3. **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 be in breach of the duty to mitigate if he or she turned down the position. On this basis, Justice Feldman excludes all of Brake's income earned during the common law notice period.

However, in reaching this conclusion, Justice Feldman confuses an employee's right to not accept replacement work markedly inferior to the original job as a means of mitigation with income earned during the period of notice. That is, although an employee may not be obliged to accept an inferior position as a means of mitigating damage, once accepted, income earned should be treated as replacement/mitigation income. If not, the employee is unjustly enriched by benefitting twice – once from the replacement earnings and a second time from the damage award.

Although the majority did not directly reference Justice Feldman's reasons, they were clear to distance themselves from this narrow interpretation of mitigation income:

> To the extent the trial judge was suggesting that the court did not need to consider whether income received from a job that was inferior to the one from which the employee was dismissed was mitigation income, I respectfully disagree. That approach does not accord with the principle 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 the writing of this article, 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 and appropriately be done to assist a dismissed employee find comparable replacement work. The sooner the employee gets back on his or her feet, the better for everyone.

To learn more and for assistance with the full range of workplace matters, contact the employment law experts at Sherrard Kuzz LLP.

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