

Case In Point

Appellate Court Substantially Reduces Reasonable Notice Award for Failure to Mitigate

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In [*Humphrey v. Mene Inc.*](#), the Ontario Court of Appeal found that a dismissed employee failed in her duty to mitigate by rejecting a comparable job offer with a new employer seven months following her termination of employment.

The former employee, who had been the employer's Chief Operating Officer, was 32 years old when her employment was terminated after three years of service. The termination came shortly after the employee requested a substantial increase in salary. After initially alleging cause, the employer later indicated that the documentation in support of the cause allegation had been destroyed.

The motion judge awarded the employee a 12-month notice period, but deducted one month's notice due to her deficient mitigation efforts. The lower court also awarded aggravated damages of \$50,000 and punitive damages of \$25,000 due to the egregious conduct of the employer in the manner of termination.

On appeal, the employer challenged the quantum of reasonable notice, the findings of the motion judge on mitigation, and the award of aggravated and punitive damages. The employee cross-appealed on the quantum of punitive damages. The Court largely dismissed the appeal, but accepted the employer's ground of appeal alleging insufficient mitigation efforts by the employee.

On this issue, the employer had argued that following the employee's dismissal: 1) she waited six months to start pursuing re-employment; 2) she applied to what the employer characterized as an overly narrow range of positions and did not apply to comparable positions that were reasonably available; and 3) she unreasonably rejected a job offer with a new employer seven months post-termination. The Court rejected the first two arguments but agreed on the third.

With respect to the first argument, the Court stated that it was based on a "false premise: that any mitigation delay, other than what is legitimately an 'adjustment period', should result in an automatic reduction in the notice period." In the Court's view, the motion judge reasonably concluded that given the way the employee was treated, it was "difficult to fault" her for her delayed job search. Notwithstanding this finding, the motion judge determined that a six month delay was too long and deducted one month's notice as a result.

The Court found no reason to interfere with the motion judge's findings of fact regarding the employer's second argument. The motion judge reasonably concluded that the employee was qualified for the positions for which she applied and the employer failed to demonstrate that those positions for which she did not apply were comparable to her former position.

The Court did, however, accept the employer's argument regarding the motion judge's treatment of the evidence that the employee did not accept a job offer as a Vice-President of E-Commerce, which she declined because she stated it was not for a broad-based senior leadership role. The Court held that the motion judge "set the bar too high on the issue of mitigation in addressing this evidence. Comparable employment does not mean identical employment. It means 'a comparable position reasonably adapted to [the plaintiff's] abilities'."

The Court further held that it was sufficient for the employer to rely on evidence that the employee had been "offered a senior management position with compensation that was comparable to or greater than what she earned" with the employer. It noted that it was "difficult to conceive" what more the employer could have done to establish that the former employee unreasonably rejected an offer of comparable employment seven months post-termination.

In light of these findings, the Court substantially reduced the employee's damages arising from her failure to mitigate. Her damages were limited to the equivalent of six months' compensation, as compared to the 12 months' notice awarded by the lower court (less the one month's notice that the motion judge deducted).

This decision is important for employers for two reasons. First, it demonstrates that the court will reduce reasonable notice damages if the employer can establish a failure to mitigate. Second, while confirming that the burden remains on the employer to establish a failure to mitigate, it provides a template for how to establish a failure to mitigate and relatedly clarifies the court's expectation of dismissed employees to accept comparable offers of employment as part of their duty to mitigate.