

Mitigation: What One Hand Giveth, The Other Taketh

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Employers can take comfort from a recent decision of the Ontario Superior Court of Justice on the issue of mitigation. Typically, employers face an uphill battle in proving that an employee has not reasonably mitigated his or her damages. The more exacting judges have demanded that an employer prove not only that the employee has not reasonably sought alternate employment, but also that there were specific positions that the employee had a reasonable chance of accepting. In *Plotogea v. Heartland Appliances Inc.*, Mr. Justice R.D. Reilly took a different approach.

Plotogea had been employed as a senior design engineer by Heartland for 11 years. After a series of incidents of misconduct and inadequate job performance, he was terminated for just cause. In defence to Plotogea's action for wrongful dismissal, the employer relied on the doctrine of cumulative cause; that is, while the individual incidents did not amount to just cause, the cumulative effect did meet that test.

The court did not accept that argument. It found that the incidents and circumstances relied on by Heartland did not amount to cumulative cause. In fact, Plotogea's service to the company had been exemplary other than for isolated incidents. His failure to perform had to be viewed in the context of 11 years of otherwise commendable service. The employer's action in terminating the employee was disproportionate to his misconduct. In light of his length of employment, the appropriate notice period, ruled the court, would be nine months.

The legal obligation rests on the employer to demonstrate, on a preponderance of evidence, that the employee has failed to make reasonable efforts to obtain alternate employment. The court noted, however, that it could scrutinize the plaintiff's evidence of his job search in assessing whether the efforts were reasonable.

Plotogea had presented a list of some 125 companies that he claimed were involved in his job search. He stated that he had attended at the business premises of most of the companies, the names of which he obtained from the Canada Employment Centre. He could not, however, produce any proper log showing the dates of such attendance or the names of the contact persons at any of these companies. He claimed that at none of the businesses was he provided with an application form to complete. Finally, he stated that he was unable to find any advertised position for an equivalent job of design engineer. He sought no professional advice for his job search.

Condemning the plaintiff's efforts as woefully inadequate, the court determined that his attempts to look for work were desultory at best. It assessed his resume as amateurish, non-revealing and not likely to attract the attention of any prospective employer. Indeed, the CV was found to have deterred any employers from interviewing him.

Additionally, an expert witness was produced by the employer on outplacement and career counseling, and she supported the court's evaluation that the CV was inadequate and that there were a variety of other resources that the plaintiff could have accessed to assist him in his job search. He had not done so. Based on all of this information, the court concluded that Plotogea had not taken reasonable steps to secure alternate employment.

The court proceeded to discount the plaintiff's notice period entitlement from nine months to two months. It concluded that any employee is entitled to a period of two months as a cushion to recover from the impact of a job loss and to then diligently search for alternative employment.

The lessons for employers are evident. If an employee is terminated, offer outplacement services to assist him or her to find alternate employment. Should the employee choose not to make use of such a service, that can be used as evidence of a failure to mitigate. As well, if employers are sued for wrongful

dismissal, they should keep track of the job market to confirm the availability of other jobs and send such postings to the employee. They should not hesitate to call upon experts in the job placement field to assess the quality of an employee's mitigation that can effectively diminish the damages an employer must otherwise pay.

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