



No deduction for mitigation income during notice period

The Ontario Court of Appeal recently released a landmark decision on the impact of employment income earned during the reasonable notice period and what in fact constitutes mitigation income.

In *Brake v. PJ-M2R Restaurants Inc.*¹, Esther Brake worked as store manager for PJ-M2R, a McDonald's franchise holding company in the Ottawa area. After almost 20 years with the company, and consistently positive performance reviews, Brake received a negative performance review in November 2011. Brake was subsequently transferred to a poorly performing restaurant and placed on a progressive discipline program. After failing to meet performance standards, PJ-M2R attempted to demote Brake. Brake refused to accept the demotion and was fired for cause.

Brake sued for constructive dismissal and was awarded 20 months of reasonable notice at trial. Somewhat surprising was that the trial judge declined to deduct employment income Brake had earned during the reasonable notice period from her work as a grocery store cashier (which she had held prior to her termination) and as a cashier at a building supply store. PJ-M2R appealed.

The Court of Appeal dismissed PJ-M2R's appeal. While the court addressed a myriad of issues on appeal, most noteworthy is the fact that the Court upheld the trial judge's decision not to deduct employment income earned during the notice period. The Court held that Brake's current positions were not a substitute for her former employment and that because the employment income was earned in a position "substantially inferior to the managerial position she held with the Defendant... the former does not diminish the loss of the latter".²

This decision seemingly casts aside the historical notion that any employment income earned during the notice period will be deducted from the notice period, regardless of the nature of the position. As a result, employers and employees should be mindful of this decision when accepting alternate employment during the notice period, as it may not necessarily reduce the amount of money an employee is entitled to.

¹ Brake v. PJ-M2R Restaurants Inc. 2017 ONCA 402.

² Ibid., at paras 154-155

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