



An Update on Employee Mitigation Obligations

Two recent decisions regarding an employee's obligation to mitigate damages following the termination of their employment serve as a reminder that the courts will not only carefully assess an employee's mitigation efforts but may also reduce damages that may otherwise be owing because of the employee's failure to properly mitigate.

In *Sinnathamby v. The Chesterfield Shop Limited* (2016 ONSC 6966), a 45 year old Senior Customer Service Agent with more than 13 years of service was terminated for cause for failure to provide medical documentation in a timely manner to support her continued absence from work. On a summary judgment motion, the court found that "while the plaintiff's behaviour was inappropriate, her immediate termination of employment was disproportionate to the misconduct in question". As such, the court turned to the issue of determining the length of the notice period. The plaintiff acknowledged that she did not take steps to find other work until 15 months after her termination due to her medical condition, though she was able to secure alternate employment 17 months following her termination. However, there was no admissible evidence that supported the plaintiff's medical claim. . Ultimately, the court set the appropriate notice period at 10 months but reduced it to 6 months on account of the plaintiff's failure to properly mitigate her damages.

The decision of *Schinnerl v. Kwantlen Polytechnic University* (2016 BCSC 2026) dealt with a summary judgement motion where the main issue was whether the plaintiff had complied with her duty to mitigate her damages when she chose to work in a part-time position, which could have been a full-time position, three months after the termination of her employment from the defendant. Following her termination, the plaintiff successfully applied for a full-time position but asked to work in the position part-time for a period of time in order to complete her doctoral studies that she had commenced while working for the defendants. The court found that the defendant's obligation to pay notice to the plaintiff ended when she commenced part-time employment that could have been full-time employment, which would have fully mitigated her damages. While the plaintiff was entitled to choose not to accept full-time employment, the defendant had no obligation to bear the financial obligation of that choice.