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CALCULATING WRONGFUL DISMISSAL DAMAGES AFTER MITIGATION AT HIGHER PAY

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A recent case weighs in on an interesting puzzle in the law of wrongful dismissal damages: How to factor mitigation income into the award when the employee gets new work at significantly higher pay. *Kideckel v. Gard-X Automotive Refinish Inc.*, 2020 ONSC 37 (Ont. Div. Ct.), suggests the jurisprudence is consolidating around a principled approach, holding that an employer shouldn't get retroactive credit for an employee's surplus mitigation income.

The Puzzle

As with any breach of contract, when employees are dismissed without notice or cause, they have an obligation to mitigate their losses, which in this instance means trying to find alternative employment. If successful, their damages for the dismissal without notice (i.e. the breach of contract) are offset by income earned through new work. When the new work pays less than the old, the former employer must make up the difference. But what happens if, midway through the notice period, the employee gets new work at significantly higher pay?

The two broad options are:

1. Start with the total amount the employee would have earned over the notice period and subtract the amount earned through new work during the same period, and the result is the total award of damages. In some cases, this would mean the employee gets nothing, despite a period of unemployment.
2. Calculate damages up to the point within the notice period that the employee got new work at higher pay and cap damages there, with no offset for the surplus income earned after mitigation. On this approach, the employee always at least gets compensation for lost income while he or she was unemployed.

The Solution

The *Kideckel* case holds that Option 2 is the correct approach. Wrongful dismissal damages are intended to compensate employees for income that they would have earned had they been given reasonable working notice of termination. Citing Waddams (*The Law of Damages*), the Court wrote: "... if the employer gave adequate working notice for the entire notice period, the worker would have been paid while he continued work up until commencing new employment, with no duty to account back to his old employer for his increased wages." In other words, the employer cannot "backfill" the notice period with the employee's surplus income. On the other hand, Option 1 would have the effect of crediting surplus income to the employer to offset damages that accrued even before the worker got the new, higher-paying job. That would leave the employee worse off than had he or she been given working notice and thus had the opportunity to continue receiving unmitigated income up to the point of starting the new job.

Kideckel's principled approach is a welcome addition to the jurisprudence and, along with other cases in the same line, should bring a measure of finality to this issue.

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