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WHY MITIGATE WHEN YOU COULD WORK ON YOUR SAILBOAT?

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A recent case demonstrates the challenge employers face when seeking reduced damages for an employee's inadequate attempts to mitigate. The plaintiff in *Hucsko v. A.O. Smith Enterprises*, 2020 ONSC 1346, made no efforts to find alternative employment after termination, but the Court opted not to reduce his damages because the defendant company did not lead sufficient evidence of the availability of comparable jobs. The decision adds its voice to a line of jurisprudence holding that proving a failure to mitigate has two components: the employer must show (1) that the employee did not make reasonable efforts; and (2) what the value of mitigation would have been, had reasonable efforts been made.

This article will discuss the *Hucsko* ruling in the context of similar decisions permitting employees to receive full compensation despite lackadaisical efforts to find new work.

Sometimes Something *Can* Come from Nothing

John Hucsko was a Senior Product Designer for A.O. Smith Enterprises who was dismissed on allegations of cause. The company claimed that Mr. Hucsko had made inappropriate comments to a coworker, failed to show remorse for them, and was insubordinate in refusing to comply with the company's mandated corrective actions (including refusing to apologize to the coworker). Though the alleged comments contained overtones of sexual harassment, it appears that insubordination was the principle basis of the company's assertion of cause.

The Court rejected the cause defence and held that Mr. Hucsko was entitled to 20 months' notice of termination. At the time, he was 60 years old and had been with the company for approximately 20 years.

Turning to the issue of mitigation, the Court held unequivocally that Mr. Hucsko "made no effort to find another job." Without even testing the job market, he concluded that "he would be unable to secure alternate employment because of his age and the circumstances of his dismissal." Apparently instead of looking for a new job, Mr. Hucsko enrolled in a course to learn how to build a sailboat to enjoy during his retirement.

Normally these facts would make for an easy deduction in the employer's favour based on failure to mitigate. But the Court found that the company did not discharge its burden of proving that the plaintiff would have found comparable work had he tried, noting that there was no evidence of the availability of alternative employment in the plaintiff's field within a reasonable distance of his home.

Some may find this ruling surprising: despite pursuing a new hobby instead of new work, the plaintiff got over a year-and-a-half's worth of pay. But the result is consistent with other authorities.

The *When* Is Essential

In *Steinebach v. Clean Energy Compression Corp.*, 2016 BCCA 112, the British Columbia Court of Appeal overturned a lower court's decision to reduce damages for inadequate mitigation efforts on the grounds that the trial judge neglected to first make findings of fact needed to quantify the reduction.

The employee, Steve Steinebach, was a salesperson for a supplier of natural gas. He was in his late 40's when he was dismissed after 19.5 years of service.

At trial, Mr. Steinebach was awarded a 16-month notice period, reduced to 13 months based on a finding that he made inadequate efforts to mitigate. Unfortunately, the trial judge did not state the basis for the modest three-month deduction. The employer appealed, arguing that damages for the wrongful dismissal should be reduced considerably more based on the plaintiff's decision to change careers early in the notice period and pursue a course of study in financial management.

The Court of Appeal agreed with the employer that it was an error to simply apply a modest reduction to the notice period to account for insufficient mitigation efforts. The notice period is a right that flows from the contract and the issue of its duration is independent of any actual or attempted mitigation, which relates to the quantification of damages. Both parties asked the Court of Appeal to make a finding that would not require a new trial. The Court phrased the defendant's request as seeking a "somewhat arbitrary deduction". However, the Court held that a new trial was necessary, stating:

> ... there is no finding of when [the plaintiff] might have found alternative employment. In my view, that is essential to support the conclusion that [he] did not act reasonably and to support any reduction in damages based on a failure to mitigate for a period of time.

Lacklustre Efforts Are Not Evidence of Missed Opportunities

Similarly, in *Clark v. Township of Otonabee-South Monaghan*, 2019 ONSC 6978, the Court emphasized the importance of marshaling evidence to justify a reduction in the employer's favour. The employee, Gregory Clark, was an equipment operator and later a foreman with the Township. He was dismissed at age 43, after 15 years' service, and was entitled to 15 months' notice of termination.

The Township argued that Mr. Clark failed to properly mitigate his damages, pointing out that "he has made no applications for employment, has not sought the assistance of a professional employment agency, and has limited the scope of his search to 'grader operator'."

The Court agreed that the plaintiff's efforts at mitigation seemed "somewhat lacklustre", but it declined to apply a reduction on the basis that there was "no evidence to suggest that the plaintiff could have obtained comparable alternative employment had he put more effort into the search." In so concluding, the Court cited dicta from the Supreme Court of Canada's decision in *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20. Justice Bastarache wrote:

> An employer alleging a failure to mitigate must prove two things: that the employee did not make a reasonable effort to find new work and that had the employee done so, he or she would likely have been able to obtain comparable alternative employment. In other words: that the loss was avoidable.

Arrive Early for the Discount

When assessing the adequacy of a dismissed employee's attempts to mitigate it is important not to focus solely on the efforts made, without consideration for what reasonable efforts would have resulted in. Just as plaintiffs must prove their damages, defendants must prove the quantum of their reductions.

Employers should turn their minds to the evidentiary question early in the process. This could mean providing a letter of reference, suggesting available jobs through with-prejudice correspondence, or addressing the market conditions in relevant sectors. But absent some evidence, even employees who do nothing to make up their losses could receive full compensation.

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