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INSIGHTS

A Terminated Employee's Obligation to "Mitigate": Important New Case that could be a Game Changer

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The Ontario Court of Appeal issued a new [case](#) ("*Brake*") which materially changes what constitutes "mitigation of damages" on the part of a terminated employee under Ontario law. Given the similarity of employment legislation across Canadian provinces, Alberta courts *may* adopt the same approach as cases arise.

Alberta law, like that of Ontario, requires a terminated employee to exert reasonable efforts to mitigate lost wages by seeking alternative employment during the applicable notice period. Wages earned, or wages which should have been earned, in the notice period are to be deducted from the amount owed by the employer in the form of payment in lieu of notice.

Brake involved a terminated restaurant manager who sued her employer for damages on account of not having received adequate payment in lieu of notice. The trial judge agreed, awarding the 20-year employee, who had received "excellent" performance reviews, damages equating to 20 months' worth of salary and benefits. The employer appealed to the Ontario Court of Appeal. One of the grounds of appeal was the fact that the trial judge did not deduct wages the employee earned during the notice period. While working at the restaurant, the employee worked as a cashier at a department store. She continued to work at that store post-termination.

Before the decision in *Brake*, Ontario law provided that all income earned during the notice period, irrespective of its nature, was deductible from the termination pay owed. *Brake* changed that paradigm.

Ontario's appellate court held that the wages earned during the time the employee worked as a cashier were not deductible from the amount owed to her. One judge on the appellate panel held that the income was not deductible because the employee had been working at the job before termination with the employer's tacit consent. In other words, the income was supplemental before and after the termination. *Importantly, though, another judge on the panel held the income was not deductible solely because it was earned at a "substantially inferior" job.*

It can be anticipated that this "substantially inferior" employment issue will play into employment litigation in Alberta. Employees will argue that income earned during the notice period should not be deducted because it was earned from substantially inferior work. The main questions going forward from *Brake* are: 1) will Alberta courts accept the concept that income derived from "substantially

inferior” jobs should not be deducted, and 2) what constitutes “substantially inferior” employment? Those questions will be answered over time as the body of case law emerges.

Invitation for Discussion:

Our litigation lawyers are skilled in corporate law. If you would like to discuss this blog in greater detail, or any other business litigation matter, please do not hesitate to contact [Mohamed Amery](#) or one of the lawyers in the Business Litigation Group at Shea Nerland LLP.

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