



e2r Alert!

Less than diligent job search effort reduces employee's notice award

In a surprising decision from the Ontario Superior Court of Justice, the court recently reduced an employee's common law reasonable notice period by two (2) months due to her failure to properly mitigate her damages.

By way of reminder, upon termination, employees have a responsibility to look for alternative employment – often referred to as the 'duty to mitigate'. The previous case law in this area set the bar very low respecting what constituted a sufficient job search effort. Historically, it has been very difficult for an employer to argue that the employee failed to mitigate his/her damages and therefore the employee's common law reasonable notice period should be reduced.

In *Lake v. La Presse (2018)*, the employee was hired as the general manager of a sales division based in Toronto. In March 2019, the Company decided to close the Toronto office and outsource the work. On March 25, the Company advised the employee that her last day of work would be May 30. The Company and the employee entered into negotiations regarding the termination, but they were unable to reach an agreement. The employee's last day of work was April 30. As of the date of termination, the employee had five and a half (5.5) years of service with the Company.

The employee started looking for work in June (one (1) month after her last day of work and more than two (2) months after she was notified of the termination of her employment). Of note she signed up for email notifications from a job search website. She also started using career counselling services provided by the Company. She submitted her first job application in September. Over the next year she applied for 11 jobs, 9 of which were more senior than her position with the Company or any other company she had previously worked for, but the employee claimed the jobs had similar responsibilities to her previous roles. She also attended conferences for networking purposes.

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The court determined that the employee was entitled to eight (8) months' reasonable notice but reduced the employee's entitlement to six (6) months' given her failure to properly mitigate her damages. In particular, the court found that the employee waited too long to commence her job search, aimed too high by not applying for less senior roles, and waited too long to apply for any position. This failure of the employee warranted the two (2) month reduction to her common law reasonable notice entitlement.

This decision is a welcome surprise to employers. Normally, the employee's search efforts in this case would have been sufficient to satisfy a court. Perhaps this is an indication from the court that employees will be expected to now act relatively quickly in their job search and apply for jobs that are reasonably comparable to their former positions, otherwise their common law reasonable notice periods will be reduced.

If you have any questions related to employee terminations, please do not hesitate to reach out to speak with an e2r™ Advisor.