

# Court Clarifies IME May Be Necessary To Test Plaintiff's Explanation For Failure To Mitigate Damages



## **Bottom Line**

The Ontario Superior Court of Justice (“Court”) recently held that an employee would have to undergo an independent medical examination (“IME”) if they continued to argue that they could not take steps to mitigate their damages for more than one year due to a mental health issue caused by their termination. The Court found that this unusual order would be necessary for the employer to fully and fairly defend against the employee’s wrongful dismissal claim.

## **Overview**

When an employer terminates an employee’s work, that employee has a legal duty to take reasonable steps to find comparable work. This is called the “duty to mitigate damages”, or the “duty to mitigate”.

When bringing a wrongful dismissal lawsuit, former employees will often need to provide some evidence that they have satisfied this duty. Some courts have also recognized the principle that employees are not required to mitigate their damages for the period in which they are incapable of working or otherwise taking steps to mitigate these damages due to a health condition and/or due to mental health symptoms arising from the termination itself. When former employees make such claims as to why they cannot mitigate their damages, they are generally subject to a low evidentiary threshold.

However, in [\*Marshall v. Mercantile Exchange Corporation\*](#) (“*Marshall*”), the plaintiff attempted to push this principle to an extreme. The plaintiff argued that he was unable to mitigate his damages for 26 months as a result of a mental health condition caused by his termination. In response, the defendant-employer requested that the plaintiff undergo an IME. The Court agreed with this request, and ordered that if the plaintiff continued to insist upon an inability to mitigate his damages beyond 12 months, he would be expected to submit to the IME.

## **Facts**

Lyndon Marshall (“Plaintiff”) was employed as a courier with Mercantile Exchange

Corporation (“Defendant”). His employment was terminated on October 10, 2023, following the Defendant’s closure of its internal delivery department. The Plaintiff brought an action for wrongful dismissal.

In the nine months following the Plaintiff’s termination, he took no steps to find new work. He alleged that he could not do so, because he was suffering from stress and depression arising out of his termination, which prevented him from seeking alternative employment. The Plaintiff took the position that his medical condition would continue to prevent him from mitigating his damages until he was cured, which he claimed would take longer than the 26 months he claimed as a notice period.

In response, the Defendant requested that the Court order an independent medical examination (“IME”) of the Plaintiff, pursuant to section 105 of the *Courts of Justice Act* and Rule 33 of the *Rules of Civil Procedure*.

## **The Court’s Decision**

The Court balanced two considerations in determining the circumstances in which it would order the Plaintiff undergo an IME:

1. First, the Court acknowledged the risk identified by the Plaintiff, namely that setting a precedent of ordering IMEs in wrongful dismissal actions for the purposes of assessing a Plaintiff’s inability to mitigate for mental health reasons could become a “weapon for employers” to dissuade employees from “legitimately relying on medical issues that prevent them from mitigating damages”.
2. Second, the Court recognized an important “countervailing consideration,” that of fairness to the Defendant. This, the Court ruled, meant that the Plaintiff could not rely on an untested claim that he had a mental health condition preventing him from fulfilling his duty to mitigate for the entire alleged common law notice period of 26 months

On this latter consideration, the Court noted that the Plaintiff had chosen to put his mental health condition into question. The Court further remarked that this claim “goes well beyond the usual adjustment period that courts afford plaintiffs to overcome the shock of dismissal before being obliged to mitigate their damages”. Reviewing the authorities provided by the Plaintiff, the Court observed that the longest period of time in which mitigation was not required due to post-termination stress was 12 months, far shorter than the 26 months alleged by the Plaintiff.

The Court concluded that if the Plaintiff continued to take the “unusual” position that he is unable to mitigate after 12 months have passed due to the “stress and depressing arising out of his termination”, he should be required to submit to an IME.

## **Takeaway**

This decision shows that there are circumstances where courts will grant an employer’s request to order a former employees to undergo an IME during employment litigation. Specifically, here, the Court found that an IME was required to substantiate the plaintiff’s allegation that their mental health condition prevented them from satisfying their duty to mitigate. While the scenario described in *Marshall* may not arise often, the Court’s decision opens the door for employers to consider a potential request for plaintiff-employees to undergo IMEs in a variety of circumstances, primarily where litigation fairness requires that the employer be able to test a plaintiff’s assertion that they are unable to mitigate damages due to a health condition.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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