

# Ontario Court Of Appeal Finds Plaintiff Did Not Fail To Mitigate, Upholds \$50,000 Aggravated Damages Award For Manner Of Dismissal



A recent Court of Appeal decision provides an illustration of when an employee may successfully claim they were unable to mitigate due to physical incapacity. It also provides a reminder of the factors a court will examine to determine if an employee is entitled to aggravated damages for the manner of dismissal.

[\*Krmpotic v. Thunder Bay Electronics Limited\*](#) involved the termination a 59-year-old building maintenance supervisor with almost 30 years of service. The employee's role was physical in nature, and he had sustained various workplace injuries. His employment was terminated just hours following his return to work from back surgery and he was advised at the termination meeting the termination was for financial reasons. The employee filed a wrongful dismissal claim.

At trial, the employee was awarded 24 months of notice. The employers had provided 16 months of pay following the termination and argued the employee had failed to mitigate his damages by looking for alternate employment. The evidence produced at trial was that the employee had attempted to mitigate approximately 16 months after his termination but this was not successful as he could not meet the physical demands of the role. The trial judge accepted evidence from the employee, his wife and his son that he could not work during the notice period due to physical incapacity.

The trial judge also held the employers had breached the duty of good faith in the manner of dismissal by terminating the employee immediately on his return from surgery and not being candid and honest with the reason for the termination. The trial judge accepted the employee suffered mental distress as a result and awarded \$50,000 in aggravated damages. The employers appealed the conclusion that the employee could not have mitigated his damages and also appealed the aggravated damages award.

On appeal, the Court upheld the trial judge's finding that the employee was physically incapable of work during the notice period. The Court rejected the proposition that physical incapacity could be established only by expert medical evidence. The evidence before the trial judge included details regarding the employee's medical history, which included numerous back and knee problems, and four

different back injuries sustained at work, ultimately resulting in his need for back surgery. The employee, his wife and his son all provided evidence at the trial regarding his physical limitations. The Court held that the trial judge did not err in accepting this evidence.

The Court also rejected the argument aggravated damages were appropriate only if there was medical or psychological evidence to confirm the manner of dismissal resulted in mental distress. The Court confirmed the employee was not required to demonstrate that he had suffered a diagnosable medical condition as a result of the employer's conduct. On this point, the Court stated:

[34] Mental distress is a broad concept. It includes a diagnosable psychological condition arising from the manner of dismissal but is not limited to that. There is a spectrum along which a person can suffer mental distress as a result of the manner of dismissal. At one end is the person who suffers the normal distress and hurt feelings resulting from dismissal, which are not compensable in damages. At the other end of the spectrum is the person who suffers from a diagnosable psychological condition as a result of the manner of dismissal. In between those two end points, there is a spectrum along which the manner of dismissal has caused mental distress that does not reach the level of a diagnosable psychological injury.

The Court confirmed that, in the absence of a diagnosed condition related to the dismissal, the trial judge was to consider (1) if the employers' conduct breached their duty of honest performance and (2) if it did, whether the employee suffered harm, beyond the normal harm that arises from the termination of employment, as a result of the breach. In this case, the Court held it was open to the trial judge to conclude that both had occurred and, as such, there was no basis to interfere with the aggravated damages award.

## **Key Takeaways for Employers**

This case provides a good reminder of the type of evidence a trial judge may accept to support an employee's claim they were not able to mitigate due to physical limitation. It also serves as a reminder to ensure that termination decisions are implemented in a manner that is candid, forthright and not unduly sensitive to an employee's circumstances.

*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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