

Ontario Court Orders Defence Medical Examination Of Terminated Employee Alleging Inability To Mitigate



In [*Marshall v Mercantile Exchange Corporation*](#), the Ontario Superior Court of Justice granted an employer's motion for a defence medical examination of a former employee who claimed an inability to mitigate their damages due to a mental health condition. This decision makes clear that in appropriate cases, a defendant in a wrongful dismissal lawsuit will be entitled to seek a defence medical examination of a plaintiff who has put their mental health in issue.

The plaintiff had been employed by the defendant for just over 25 years, earning a salary of \$52,000. The defendant terminated the plaintiff's employment when he was 58 years of age, and provided him with 11 weeks of working notice and approximately six months of salary in lieu of notice. The plaintiff claimed entitlement to a 26-month notice period.

In the nine months between his termination from employment and the hearing date of the motion, the plaintiff had taken no steps to find alternate employment. He alleged that he was unable to mitigate his damages because of stress and depression arising from his termination from employment. He took the position that his mental condition would continue to prevent him from mitigating his damages until it was cured.

The defendant sought an independent medical examination of the plaintiff pursuant to section 105 of the *Courts of Justice Act* and rule 33 of the *Rules of Civil Procedure*.

In resisting the motion, the plaintiff argued that allowing defence medical examinations in wrongful dismissal actions could become a weapon for employers. He also pointed out that all of the cases relied upon by the defendant had concerned personal injury claims whereas, in this case, his mental health was not the basis for the damages he claimed and therefore there was an insufficient connection between his medical condition and the proceeding to warrant an independent medical examination.

The Court considered the plaintiff's arguments, but held that it would be unfair to allow the plaintiff to assert that his mental health condition prevented him from taking steps to mitigate his damages without permitting the defendant an opportunity to test the assertion. The Court noted that the plaintiff had put his mental health in issue by his own choice, and that the degree to which he did so (by claiming an inability to mitigate for a full 26 months following his termination from employment) went well beyond the usual adjustment periods that courts normally afford plaintiffs

to overcome the shock of dismissal before being obliged to mitigate their damages.

The Court cited the Court of Appeal decision in [Brito v Canac Kitchens](#), which suggested that in appropriate circumstances, independent medical examinations are available in wrongful dismissal actions. The Court reviewed existing case law, and found that the longest time period in which mitigation was not required because of a mental health condition was 12 months. The Court held that if the plaintiff was taking the position he was unable to mitigate after 12 months had passed, he would have to submit to a defence medical examination.

Key Takeaways

This decision confirms that, in appropriate cases where a plaintiff has put their mental health in issue, a defendant in a wrongful dismissal lawsuit will be entitled to seek a defence medical examination. The court must be satisfied that ordering a defence medical examination would strike an appropriate balance between protecting employees from the excessive use of defence medical examinations and providing employers a fair opportunity to test allegations of inability to mitigate.

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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