COURT OF APPEAL FOR ONTARIO

CITATION: Brake v. PJ-M2R Restaurant Inc., 2017 ONCA 402
DATE: 20170523
DOCKET: C61997

Feldman, Gillese and Pepall JJ.A.

BETWEEN

Esther Brake

Plaintiff (Respondent)

and

PJ-M2R Restaurant Inc.

Defendant (Appellant)

J.F. Lalonde, for the appellant

Miriam Vale Peters, for the respondent

Heard: February 1, 2017

On appeal from the judgment of Justice Kevin B. Phillips of the Superior Court of Justice, dated March 14, 2016, with reasons reported at 2016 ONSC 1795, 29 C.C.E.L. (4th) 192.

Gillese J.A.:

[1] A long-serving McDonald's restaurant manager was dismissed from her position without notice or payment of her statutory entitlements under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "Act").

[2] She successfully sued for wrongful dismissal. She was awarded damages representing 20 months' compensation in lieu of notice, inclusive of statutory severance under the Act.

[3] This appeal raises, among other things, several important questions about what income the employee received during the notice period must be deducted from the damages award.

OVERVIEW

[4] Esther Brake ("Ms. Brake" or the "Respondent") worked at various McDonald's restaurants for a total of more than 25 years. For a significant part of that time, she was employed on a full-time basis by PJ-M2R Restaurant Inc. ("PJ-M2R" or the "Appellant").

[5] PJ-M2R is a McDonald's franchise holding company that owns several McDonald's restaurants in the Ottawa area. Perry McKenna and Jo-Ann McKenna own and operate PJ-M2R.

[6] On August 2, 2012, Ms. Brake was working for PJ-M2R as a Restaurant Manager, a position that she had held for a number of years. Mr. McKenna told Ms. Brake that she had to accept a demotion to First Assistant or she would be fired. Ms. Brake refused to take the new position, as she felt that the position would be embarrassing and humiliating for her. Her employment was then terminated. At that time, Ms. Brake was 62 years of age. She is now 66.

[7] Ms. Brake sued PJ-M2R for wrongful dismissal. PJ-M2R defended on the basis that she had failed to meet the requisite standards and, therefore, it had just cause to dismiss her.

[8] The trial judge found that as of August 2, 2012, Ms. Brake had the equivalent of 20 years of employment with PJ-M2R. He further found that she had been wrongfully dismissed and that an appropriate notice period was 20 months, inclusive of statutory severance as required by the Act.

[9] By judgment dated March 14, 2016 (the "Judgment"), Ms. Brake was awarded $104,499.33, plus pre-judgment interest and costs.

[10] PJ-M2R appeals. Its position on appeal is that: Ms. Brake was not wrongfully terminated; Ms. Brake's refusal to accept the position as a First Assistant amounted to a failure to mitigate, thereby disentitling her to damages; the trial judge erred in setting a notice period of 20 months; and, the trial judge failed to properly account for income that Ms. Brake earned during the notice period.

[11] For the reasons that follow, I would dismiss the appeal.

BACKGROUND

[12] The following recitation of the facts draws heavily from the trial judge's reasons, including his findings of fact at paras. 4(a) – (v).

[13] Ms. Brake started working at McDonald's restaurants in 1986 in Corner Brook, Newfoundland. In 1999, she moved to Ottawa and began working for PJ-M2R in its McDonald's restaurants.

[14] At the commencement of Ms. Brake's employment with PJ-M2R, she received a letter from Mr. McKenna (the "Credit Letter") that reads as follows:

> This letter is to confirm Esther Brake length of service credit.
>
> Esther joined us in July of 1999. She worked for 13 years in Corner Brook prior to joining PJ-M2R Restaurants. 50% of her service time will be credited towards full time benefits. This means that she will be credited with 7 years of Full Time service as of 1999.
>
> Perry McKenna
> Owner/Operator

[15] From 1999 to 2004, Ms. Brake worked for PJ-M2R in a variety of capacities. In 2004, she was promoted to the position of Restaurant Manager at one of PJ-M2R's restaurants. In 2008, she was transferred to manage PJ-M2R's Kanata restaurant. Her duties included managing another of PJ-M2R's McDonald's restaurants that was located in a nearby Wal-Mart. In November of 2011, Ms. Brake was assigned exclusively to the Wal-Mart location.

[16] From 2000-2010, Ms. Brake received an overall rating of "excellent" or better in all of her annual evaluations. In his reasons, the trial judge included many representative excerpts from Ms. Brake's various performance reviews over that period. Some of those excerpts are set out below.

- "Esther you have excellent standards and make the effort to stay current in the operational aspect of the business."

- "Esther the last six months have not been easy due to the anticipated closure of Carling. We had limited resources to work with, which affected the results. During all of it you have stood like a rock persisting thru [sic] the obstacles."

- "Esther… it has been a pleasure taking on a challenge like Kanata with you. …Your focus is to continue to push and support the team."

- "Esther you have achieved excellent results by your hard work, high standards and commitment. You have always shown a passion and willingness to learn and continue your progress."

- "Esther you have achieved some excellent results in the P&L's and sales increase overall in the year…. Esther all of the above results highlights [sic] your management style: Involved, demanding and a doer."

- "Esther, it has been a true pleasure working with you this past year. You were able to achieve most of your goals and even surpassed some. Thank you for everything you do and have done to be successful."

- Ms. Brake was rated, at the close of 2007, as an "excellent performer" who "demonstrates each of the behaviours described in a generally effective manner all of the time. She demonstrates high standards in her values and behaviours."

- In 2008, a period when Ms. Brake managed the Kanata and Wal-Mart locations, she was rated as "excellent" in the various performance metrics, including Sales, "Quality/Service/Cleanliness" and "People and Profit". Her evaluation included the following comments: "Congratulations on your

> outstanding Crew Commitment Survey result of 97%. That was the best score ever achieved for my company. I believe it's a direct result of your influence on the management team and some of the key crew people."

[17] In 2009, Ms. Brake was rated "excellent" but showed a minor decline in performance. Mr. McKenna's written comments were mixed. They included a recommendation that Ms. Brake develop routines to improve follow-up but also a comment that her "work ethics, high standards, pride, and job knowledge" were "exceptional".

[18] In 2010, Ms. Brake was again given an overall "excellent" rating. However, she was given a rating of "satisfactory" for the second half of that year. Comments in her review for the first half of 2010 include:

> Esther, this is the best start to a new year I've ever seen you put together. You have the store running the best I've seen. Your CSO scores are below the national and regional average and way ahead of last year…. Also for the first time, both the McDonald's and PJ-M2R scorecards are outstanding.

[19] "CSO" is a McDonald's restaurant measurement metric that stands for "Customer Service Opportunities". It is expressed as a percentage of visits that miss one or more of five critical drivers: quality, friendly, accurate, fast and clean. The lower the CSO rating, the better the score.

[20] In November 2011, Ms. Brake received her first truly negative performance review since her promotion to Restaurant Manager in 2004. The trial judge

accepted her evidence that she was “dumbfounded” and “shocked”. During the review, Mr. McKenna told Ms. Brake that she would be transferred to the Wal-Mart location. At trial, Mr. McKenna explained that his decision to transfer her was an attempt to provide an opportunity for Ms. Brake to improve her performance.

[21] The trial judge accepted Ms. Brake’s evidence that the Wal-Mart location was more difficult to manage because there was high staff turnover and less staffing, which meant the manager on duty was expected to cook, serve customers, and keep the restaurant clean.

[22] The Wal-Mart location had been “trending badly” since at least April 2011. According to McDonald’s corporate documentation, that location had failed 8 out of 12 customer service opportunities that year. It ranked 1,410 out of 1,437 McDonald’s restaurants in Canada.

[23] Mr. McKenna knew the Wal-Mart location was struggling and that for Ms. Brake to succeed she would have to first “turn that place around”.

[24] Ms. Brake moved to the Wal-Mart location around the end of November 2011. She says it is undisputed that she worked 12-hour days, 7 days a week from November 2011 to April 2012 and never asked for overtime.

[25] On April 16, 2012, Ms. Brake was summoned to a three-month review meeting. She was rated as “needs improvement” and told that because of her

performance, she would be placed in McDonald's progressive discipline program, known as the Goals Achievement Process ("GAP"). The GAP document that she was given said that she had been placed in the program because her performance had declined to an "unsatisfactory level". The program gave Ms. Brake up to 90 days to achieve goals on which she and the Appellant were to agree.

[26] The trial judge found that the GAP program was not implemented in accordance with its terms, either in letter or spirit. He found that the thresholds that Ms. Brake was ordered to meet were arbitrary and unfair. He gave, as an example, the Appellant's use of the CSO scores. For example, Ms. Brake was required to achieve a 0% CSO score at the Wal-Mart location at each of the 30, 60 and 90-day GAP evaluation periods. The Wal-Mart location had historically "trended" at a 35% CSO score.

[27] He also found that the GAP goals were objectively more difficult to meet than the standards set over the course of Ms. Brake's employment with the Appellant.

[28] The trial judge gave other examples of the arbitrariness of the GAP process and the goals set for Ms. Brake.

[29] On two of her three "90-day goals", Ms. Brake had outstanding scores according to McDonald's own corporate standards, with a CSO of 0% and a QSC

score of 90% or higher. She did not achieve the third goal, her "labour" goal, but missed it by a small margin. As with the CSO metric, a perfect labour score would be 0%. Ms. Brake's "goal" was 19.6%, and her actual result was 22.7%.

[30] According to the GAP protocol document, an employee who successfully completes the GAP process is to continue with his or her regular employment without additional supervision.

[31] Nonetheless, on August 2, 2012, Mr. McKenna met with Ms. Brake and told her that she had failed the GAP program and that she had a choice between a demotion to First Assistant and termination. The salary as a First Assistant would have been the same as that which she had been receiving as a Restaurant Manager but the benefits would have been meaningfully inferior.

[32] Ms. Brake refused the demotion. At trial, she explained that she was embarrassed and humiliated by the proposed demotion to First Assistant because she would be reporting to people whom she had trained and supervised, and those people were younger and less experienced than she was. She left the meeting and never returned.

[33] Shortly after the meeting, she received a letter from Mr. McKenna that gave her a final deadline of August 10, 2012, to accept the First Assistant position. In the letter, Mr. McKenna stated that if she declined the offer or failed to answer, it would be taken as confirmation of her resignation.

[34] Ms. Brake did not respond to that letter. She began this proceeding soon afterwards, in November 2012.

[35] The trial judge found that despite Ms. Brake having made reasonable best efforts to find comparable full-time work after her employment with PJ-M2R was terminated, she was unsuccessful in that regard. She had been able to find work only in positions that were "substantially inferior to the managerial position" that she had held with the Appellant. Details of the attempts she made to find work and the treatment of the income that she received during the notice period are set out below, in the analysis on Issue #5.

THE TRIAL DECISION

[36] The trial judge began by making his findings of fact, summarized above. He gave detailed reasons for his findings and included quotations from documents made at the relevant times.

[37] He then set out the legal principles that govern employment contracts, constructive dismissal, and the determination of a reasonable notice period.

[38] The trial judge found that, while "probably not a perfect employee in every respect", Ms. Brake "was an overall competent manager with a long track record of successful contribution at the standard expected of her position. The performance appraisals filed over a considerable timespan can lead to no other conclusion."

[39] He said that there was some evidence that Ms. Brake had "run into some difficulty" in late 2011 and into 2012. He noted that this period could not be looked at in isolation, given Ms. Brake's lengthy history of effective contribution to the Appellant. The trial judge concluded that the difficulties did not amount to anything close to gross or serious incompetence and stressed that, by the end of the GAP program, Ms. Brake had met the Appellant's "new and improved" standards: "She was trending upward at an extraordinary degree when the decision to demote her was put on the table."

[40] He further found that, taken at their highest and in aggregate, the complaints about Ms. Brake's performance, as set out by the Appellant, did not amount to cause for dismissal: "There was far more right about her performance than wrong with it."

[41] The trial judge also found that Ms. Brake had not been given a clear and reasonable opportunity to correct the issues that the Appellant had with her employment performance. He noted that she had been transferred to a failing restaurant and was expected to turn it around and perform to standards that exceeded any that had been expected of her in the past. He reiterated his findings that the GAP program, as implemented by the Appellant, was arbitrary and unfair and held Ms. Brake to goals that were more onerous than usual and in excess of those set by McDonald's generally. He concluded that Ms. Brake had been set up to fail from the beginning of the GAP program, pointing out that,

although Ms. Brake ultimately met the onerous goals set for her, that was not enough for the Appellant. Instead, it told her that she could take a demotion to First Assistant or leave.

[42] The trial judge found that the Appellant had made a substantial and fundamental change to Ms. Brake's employment contract and, in so doing, constructively dismissed her without cause.

[43] The trial judge noted that Ms. Brake was 62 years of age at the time she was constructively dismissed and that she had worked for McDonald's in some capacity for the majority of her working life. He found that she had effectively worked for the Appellant for 20 of those years. He noted that she had little in the way of formal education and that she had risen to a management position through perseverance and hard work. Despite Ms. Brake's reasonable best efforts, she had been unable to secure a reasonably comparable managerial position since her dismissal.

[44] After considering Ms. Brake's age, the length and nature of her employment, the manner in which she had been dismissed, the low likelihood that she would ever again attain a similar managerial position, and the impact on her of being unjustly dismissed in the context of her character, reputation and circumstances, the trial judge found that a fair compensatory notice period was 20 months, inclusive of any statutory severance required by the Act.

[45] He then awarded damages equivalent to her remuneration over a 20-month time period, without deduction for income she received during that period. The 20 months of compensation amounted to $104,499.53. It was based on an annual salary of $53,000, a $6,000 car allowance, $1,307.76 for a cell phone and $2,391.84 in miscellaneous health benefits.

THE ISSUES

[46] PJ-M2R submits that the trial judge erred:

1. by failing to give adequate reasons for his findings of fact and credibility determinations;
2. in finding that Ms. Brake had been constructively dismissed;
3. by failing to find that Ms. Brake's decision to not accept the offer of continued employment as a First Assistant amounted to a failure to mitigate her damages, thus disentitling her to any damages;
4. in setting the notice period at 20 months; and,
5. in his treatment of mitigation during the notice period.

ANALYSIS

Issue #1 Adequacy of Reasons

[47] The Appellant makes two different complaints on this ground of appeal.

[48] First, the Appellant submits that the trial judge's reasons for decision do not show the pathway taken through the conflicting evidence or provide an adequate explanation for the "why" of the result.

[49] Second, the Appellant contends that the Respondent's own evidence does not support the findings of fact made by the trial judge. For example, the Appellant points to the trial judge's acceptance of Ms. Brake's evidence that she was "dumbfounded" and "shocked" when she received a negative review in November of 2011. How can that be, asks the Appellant, when Ms. Brake had signed and agreed with her numerous performance reviews in which her shortcomings had been pointed out?

[50] I see nothing in this ground of appeal. I will deal with each of the two complaints in turn.

[51] The first complaint is that the trial judge gave inadequate reasons. I do not agree.

[52] Appellate intervention based on inadequacy of reasons is justifiable when the inadequacy prejudices the appellant's exercise of his or her legal rights to an appeal or impedes or prevents an appellate court from understanding the basis of the trial decision: *Canadian Broadcasting Corp. Pension Plan (Trustee of) v. BF Realty Holdings Ltd.* (2002), 214 D.L.R. (4th) 121 (Ont. C.A.), at para. 64. Neither such difficulty exists in the present case.

[53] The trial judge articulated the relevant legal principles. He reviewed the evidence, made his findings, and indicated how he applied the legal principles in light of those findings. The route by which he found that Ms. Brake's

employment had been wrongfully terminated is abundantly clear. So, too, is his reasoning on the other legal issues that he decided. There is no impediment either to the Appellant's ability to mount its appeal or to this court's understanding of the basis for each decision that he reached.

[54] The Appellant's second complaint is essentially a quarrel with the trial judge's findings of fact. I see no palpable and overriding errors in the trial judge's findings. On the contrary, the record supports the findings made by the trial judge.

[55] Take, for example, the Appellant's complaint that the trial judge erred in accepting Ms. Brake's evidence that she was dumbfounded when she got a negative performance review in November of 2011. The trial judge was uniquely positioned to make such a finding. He heard the parties and their witnesses and he had a full documentary record in front of him. In Ms. Brake's performance reviews from 2000-2010, she had received an overall rating of "excellent". It will be recalled that Ms. Brake's review for the first half of 2010 included this comment:

> Esther, this is the best start to a new year I've ever seen you put together. You have the store running the best I've seen. Your CSO scores are below the national and regional average and way ahead of last year … Also for the first time, both the McDonald's and PJ-M2R scorecards are outstanding.

[56] It was within this context that the trial judge accepted Ms. Brake's evidence that she was dumbfounded when she was given her negative review in 2011. Although Ms. Brake had received a "Satisfactory" review score for the second half of 2010, in light of her long streak of "Excellent" ratings on annual reviews, it was clearly open to the trial judge to accept Ms. Brake's testimony that she was "shocked" by her 2011 review.

[57] Another example that the Appellant relies on for its contention that the trial judge's presentation of the facts was unsupported by the evidence relates to Ms. Brake's part-time work for Sobey's. I address that matter below as part of my analysis of Issue #5.

[58] Accordingly, I would dismiss this ground of appeal.

Issue #2 The Constructive Dismissal Finding

[59] The Appellant submits that the trial judge erred in finding that the Respondent had been constructively dismissed. It contends that Ms. Brake knew what was expected of her and that she was struggling to achieve her goals. It says that Ms. Brake was placed on GAP in an attempt to assist her in achieving her goals and that, over a 90-day period, rather than accept that GAP was to assist her, Ms. Brake adopted a negative attitude, failed to acknowledge her difficulties and became a detriment to herself.

[60] While this is the Appellant's view of how events unfolded and how it treated Ms. Brake, it does not accord with the trial judge's findings of fact – findings which are fully supported on the record.

[61] As the trial judge found, when the Appellant offered Ms. Brake the non-supervisory position as First Assistant, with "meaningfully inferior" benefits, it unilaterally made a substantial or fundamental change to her employment contract. In so doing, it constructively dismissed her.

[62] In reaching this conclusion, the trial judge relied on the Supreme Court of Canada's decision in *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846. At para. 36 of *Farber*, the Supreme Court explained that "a demotion, which generally means less prestige and status, is a substantial change to the essential terms of an employment contract that warrants a finding that the employee has been constructively dismissed."

[63] Although the trial judge did not refer to *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500, on the findings of the trial judge, there would be no change in result.

The *Potter* Test for Constructive Dismissal

[64] The test that *Potter* establishes for constructive dismissal consists of two branches. Satisfaction of either branch is sufficient for a finding of constructive dismissal.

[65] The first branch of the *Potter* test has two steps. First, the court must determine objectively whether a breach has occurred. To do so, the court must ascertain whether the employer has unilaterally changed the contract. If an express or an implied term gives the employer the authority to make the change or if the employee consents or acquiesces in it, the change is not a unilateral act and will not constitute a breach. To qualify as a breach, the change must also be detrimental to the employee. Second, once it has been objectively established that a breach occurred, the court must ask whether a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed (*Potter*, at paras. 37-39).

[66] The second branch of the *Potter* test necessarily requires a different approach. On this branch, constructive dismissal consists of conduct that, when viewed in light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract (*Potter*, at para. 42).

Application of the *Potter* Test

[67] In the present case, the first branch of the *Potter* test is the applicable one. Its application leads to the conclusion that when the Appellant told Ms. Brake she could take the First Assistant position or her employment would be terminated, it constructively dismissed her.

[68] On the first step in the first branch of the *Potter* test, the court must determine whether a breach occurred. On the findings of the trial judge, there can be no doubt that it did. The demotion was unilateral – Ms. Brake did not consent or acquiesce to it and there was no suggestion that either an express or implied term in the employment contract authorized the change in position. Further, the demotion would have been detrimental to Ms. Brake if for no other reason than that her benefits would have been "meaningfully inferior".

[69] On the second step, the court must ask whether a reasonable person in the same situation as Ms. Brake would have felt that the essential terms of the employment contract were being substantially changed. In my view, it is self-evident that a reasonable person in Ms. Brake's situation would have felt that a demotion to First Assistant amounted to a change to the essential terms of her employment contract.

[70] In sum, the Appellant unilaterally changed the employment contract to Ms. Brake's detriment when Mr. McKenna told Ms. Brake she had to take the demotion or her employment would be terminated. In so doing, it constructively dismissed her.

[71] I would conclude on this ground of appeal with a final comment. At times it appeared that the Appellant was asserting that it had just cause to dismiss Ms. Brake. If so, I would simply observe that the trial judge's findings of fact are a

complete answer to such an assertion. As the trial judge explained, Ms. Brake had a lengthy history of effective contribution to PJ-M2R and her performance never fell to such a level that there was cause for dismissal. On the record, he was fully justified in those findings.

Issue #3 Refusal to Accept Continued Employment

[72] The appellant submits that if Ms. Brake was constructively dismissed, she was obliged to accept the demotion to First Assistant and by failing to do so, she breached her obligation to mitigate her damages and disentitled herself from receiving compensation.

[73] I do not agree.

[74] The law governing this issue, as enunciated in *Evans v. Teamsters, Local 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, at para. 30, can be summarized as follows. Where an employer offers an employee a chance to mitigate damages by accepting a different position, the central issue is whether a reasonable person in the employee's position would have accepted the offer. This is an objective standard, on which the employer bears the burden of proof: *Evans*, at para. 35. The employee is not obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation. The non-tangible elements of the situation, including work atmosphere, stigma and loss of dignity, as well as the

tangible elements, such as the nature and conditions of employment, must be considered in determining whether the objective standard has been met.

[75] The trial judge found that, in the circumstances, it would have been "unreasonable" to have expected Ms. Brake to accept the demotion and continue working for PJ-M2R. He noted that he had heard from many witnesses and gotten a real sense of the culture at PJ-M2R and how Ms. Brake fit into it. He described the evidence given by some witnesses on behalf of PJ-M2R as being "downright insulting to Ms. Brake and her personality and abilities". He concluded that it was "perfectly understandable" that Ms. Brake would have found working under a young man whom she had trained to be embarrassing or even humiliating. He concluded that Ms. Brake could not have been expected to continue with PJ-M2R "given the way they had treated her".

[76] The trial judge effectively found that the objective standard had not been met – a reasonable person in Ms. Brake's position would not have been expected to have accepted the demotion to First Assistant. As a finding of mixed fact and law, it is subject to appellate intervention only if there is a palpable and overriding error: *Evans*, at para. 35. The Appellant has not demonstrated any such error.

[77] Accordingly, I would dismiss this ground of appeal.

Issue #4 The Notice Period

[78] The Appellant says that, in any event, the trial judge erred in awarding Ms. Brake damages based on a notice period of 20 months. This submission is based largely on the Appellant's position that Ms. Brake began working for PJ-M2R in July of 1999 and, while she had worked for McDonald's prior to 1999, that work was "in no way connected to the Appellant". The Appellant says that it recognized Ms. Brake's prior service with other McDonald's restaurants only for the purposes of benefits. Accordingly, the Appellant says, Ms. Brake worked for it only for approximately 13 years and an appropriate period of reasonable notice would be 8 to 10 months, inclusive of any statutory severance required by the Act and subject to mitigation.

[79] I see nothing in this argument.

[80] I begin with this important preliminary observation: the reasonable notice period for wrongful dismissal was not 20 months in this case. The 20-month period included Ms. Brake's entitlement to termination and severance pay under the Act. The significance of this point will become evident when I deal with the question of what constitutes mitigation income in Issue #5.

[81] There is no question that Ms. Brake worked for PJ-M2R for 13 years. In finding that Ms. Brake had the equivalent of 20 years of service with PJ-M2R, the trial judge took into consideration the Credit Letter that Mr. McKenna sent to Ms. Brake when she began working for PJ-M2R.

[82] For ease of reference, the Credit Letter is set out again now.

> This letter is to confirm Esther Brake length of service credit.
>
> Esther joined us in July of 1999. She worked for 13 years in Corner Brook prior to joining PJ-M2R Restaurants. 50% of her service time will be credited towards full time benefits. This means that she will be credited with 7 years of Full Time service as of 1999.
>
> Perry McKenna
> Owner/Operator

[83] The Appellant maintains that the Credit Letter was intended solely to credit Ms. Brake with service time for purposes of the calculation of benefits. The trial judge interpreted the Credit Letter differently. He found that, in recognition of Ms. Brake's work experience and the associated value that she brought to PJ-M2R, the Credit Letter was the Appellant's acknowledgment that it credited her with having 7 years of full-time service with it. The trial judge added the 7 years of credited service to Ms. Brake's 13 years of actual service and found that she had the equivalent of 20 years of service with PJ-M2R.

[84] While the Credit Letter does include the sentence that "50% of her service time will be credited towards full time benefits", the first line of the Credit Letter indicates that its purpose is "to confirm Esther Brake length of service credit." Furthermore, the last sentence in the Credit Letter is unequivocal. It states, "This means that she [Esther Brake] will be credited with 7 years of Full Time service as of 1999."

[85] Given the plain language in the Credit Letter and in light of the deference that this court owes to the trial judge's interpretation of the Credit Letter, there is no basis to interfere with the trial judge's finding that Ms. Brake had the equivalent of 20 years of employment with the Appellant.

[86] A trial judge's determination of the period of reasonable notice is entitled to considerable deference: *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), at pp. 343-344. In finding that the period of reasonable notice was 20 months (including her statutory entitlements under the Act), the trial judge took into account the well-established *Bardal*[1] factors: the character of her employment, her length of service, her age, and the availability of similar employment in the light of her experience, training, and qualifications. Moreover, in oral argument, counsel for PJ-M2R conceded that if the court were to find that Ms. Brake had 20 years of service as a restaurant manager, a notice period of 20 months would be within the acceptable range.

[87] Accordingly, I would dismiss this ground of appeal.

Issue #5 Mitigation during the Notice Period

[88] The Appellant submits that the trial judge erred in two ways in his treatment of mitigation during the notice period.

[1] *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), at p. 145.

[89] First, it says that the trial judge erred when he found that the Respondent had made reasonable efforts to mitigate her losses. It points to the Respondent's evidence at trial that she made one application for a job between August 10, 2012, and January 29, 2013 (when she was examined for discovery) and that she had not applied for any restaurant management positions.

[90] Second, the Appellant argues that the trial judge erred in law in failing to deduct the income that Ms. Brake received during the notice period from the damages award. In its factum, the Appellant represents Ms. Brake's income during the notice period as follows:

Sobey's, August – December 2012	$ 9,208.88
Sobey's, January – December 2013	$19,566.58
Tim Horton's – two months in 2013	$ 2,701.00
EI benefits – 2013	$ 7,150.00
Sobey's, January – April 2014	$ 6,793.20
Home Depot, January – April 2014	$ 600.00

1. Reasonable Efforts to Mitigate

[91] At para. 4(v) of his reasons, the trial judge gave this explanation for finding that Ms. Brake made reasonable efforts to mitigate:

> (v) Ms. Brake had long had another job at Sobey's as a cashier, a fact that was always known to the [Appellant]. After August 2012 she increased her hours at Sobey's. In addition, Ms. Brake made other efforts to mitigate her damages. From October 2012 until mid-January 2013, she worked 30-36 hours per week at Tim Horton's. Her hourly wage was $11.25. I accept Ms. Brake's testimony that she attempted to start a babysitting service and cleaning service. She made phone calls, put up posters and posted an advertisement for both businesses on Kijiji. I further accept that by January 2013, Ms. Brake realized that the businesses were not working and that she needed to find another source of income. Accordingly, she applied for several positions including as a McDonald's mystery shopper, store manager and front store supervisor at Shopper's Drug Mart, overnight supervisor at Home Depot, part-time cashier at IKEA, store manager at Mark's Work Warehouse, supervisor at Costco, assistant store Manager at Loblaws, store manager at Dollarama and various other positions at Bed, Bath and Beyond, Swiss Chalet, LCBO and Target. Ms. Brake has not been offered a management position with any company since her termination. In March 2013, Ms. Brake accepted a position as a cashier at Home Depot. She works approximately 35-38 hours per week and earns a wage of $12.50 per hour. She continues to work there to date.

[92] I see no basis on which to interfere with the trial judge's finding that the Respondent made reasonable efforts to mitigate. The record amply supports that finding, as the reasons in para. 4(v) readily demonstrate.

[93] It is trite law that a trial judge's factual findings are to be afforded deference and an appellate court is not to disturb them absent palpable and overriding error. The Appellant does not argue that the trial judge's finding is infected by a palpable and overriding error. In effect, the Appellant is asking this court to retry

the question of reasonable efforts. That request ignores the standard of review to be applied to findings of fact.

[94] There is no magic formula that an employee must follow when making reasonable efforts to obtain other employment and thereby mitigate his or her loss. When an employer alleges that a former employee has not reasonably mitigated his or her losses, "the question is whether [the employee] has stood idly or unreasonably by, or has tried without success to obtain other employment": *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324, at p. 331. A terminated employee is entitled to consider her own long-term interests, so she will not fail to mitigate merely because she chooses to take some career risks that might not minimize the compensation that her former employer will owe to her: *Peet v. Babcock & Wilcox Industries Ltd.* (2001), 53 O.R. (3d) 321 (C.A.), at para. 8. Thus, the fact that Ms. Brake did not apply for other restaurant management positions does not mean that she did not make reasonable efforts to mitigate.

2. No Deductions from Income during the Notice Period

[95] I turn now to the Appellant's second argument in respect of mitigation, namely, that the trial judge erred because he failed to reduce the damages award by the amounts that Ms. Brake received during the notice period.

[96] An employee who is dismissed without reasonable notice is entitled to damages for breach of contract based on the employment income the employee would have earned during the reasonable notice period, less any amounts received in mitigation of loss during the notice period: *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, at paras. 14-17.

[97] While this general statement of principle governs, I would not reduce the damages award by the amounts that Ms. Brake received during the notice period because, in my view, they are not "amounts received in mitigation of loss".

[98] The trial judge did not directly address the question of whether to deduct employment income received during the notice period from the damages award. It may be, as the Respondent contends, that his reasons can be inferred from the last few sentences of para. 24, where the trial judge said:

> I find that [Ms. Brake's] subsequent employment represents a reasonable effort on her part to mitigate her losses. However, I also find that her ability to find employment does not take away from the loss she suffered from being dismissed without cause. The cashier position she occupies now at Home Depot is so substantially inferior to the managerial position she held with the [Appellant] that the former does not diminish the loss of the latter.

[99] To the extent that the trial judge was suggesting that the court did not need to consider whether income received from a job that was inferior to the one from which the employee was dismissed was mitigation income, I respectfully disagree. That approach does not accord with the principle that employment

income earned during the notice period is generally to be treated as mitigation of loss.

[100] Having said that, in my view, the income earned by Ms. Brake during the notice period need not be deducted from the damages award. To explain why, I will consider:

a. the Employment Income ("EI") benefits that Ms. Brake received;

b. Ms. Brake's employment income in the statutory entitlement period under the Act; and

c. Ms. Brake's employment income in the balance of the 20-month notice period (the "Balance of the Notice Period").

a. EI Benefits

[101] In my view, the law is clear: EI benefits are not to be deducted from damages awarded for wrongful dismissal. Accordingly, the damages award was not to be reduced by the $7,150 of EI benefits that Ms. Brake received in 2013.

[102] The Supreme Court addressed the deductibility of EI benefits from wrongful dismissal damages in *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812. In that case, Mr. Jorgenson successfully sued Jack Cewe Ltd. (the "company") for wrongful dismissal. The trial judge awarded damages equivalent to a year's salary. From that amount, the trial judge deducted, among other

things, the EI benefits[2] that Mr. Jorgenson had received during the twelve-month notice period. The British Columbia Court of Appeal held that the EI benefits should not be deducted. The company appealed to the Supreme Court and argued that EI benefits should be deducted in proportion to the company's contribution. Its appeal was dismissed.

[103] At p. 818 of *Cewe*, Pigeon J., writing for the Court, stated that he found the company's position "untenable". He explained:

> The payment of [EI] contributions by the employer was an obligation incurred by reason of [Mr. Jorgenson's] employment, therefore, to the extent that the payment of those contributions resulted in the provision of [EI] benefits, these are a consequence of the contract of employment and, consequently, cannot be deducted from damages for wrongful dismissal.

[104] This court expressed a similar view in *Peck v. Levesque Plywood Ltd.* (1979), 27 O.R. (2d) 108. In *Peck*, after awarding an employee damages for wrongful dismissal, the trial judge reduced the award by the amount of EI benefits that the employee received during the notice period. This court allowed the employee's cross-appeal, holding that the damages award should not be reduced by the amount of the EI benefits.

[105] Justice Dubin (as he then was), writing for this court, thoroughly canvassed the jurisprudence from across Canada on the question of whether there should

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[2] At that time, such benefits were called unemployment insurance benefits.

be a deduction of amounts received by way of EI from a damages award for wrongful dismissal. At p. 112 of *Peck*, he concluded that they are not to be deducted since the employer ought not to profit from the benefits payable to the employee. He stated:

> It is to be observed that as a result of the [employer] breaching its contract of employment with the [employee], the [employee] was required to use up at least part of his [EI] benefits. It would be inconsistent to have that amount taken into account for the benefit of the employer who, by its breach of contract, compelled the employee to resort to his [EI] benefits.

[106] Numerous lower court decisions in Ontario have followed these decisions and refused to deduct EI benefits from wrongful dismissal awards. See, for example, *Desforge v. ED Roofing Ltd.* (2008), 69 C.C.E.L. (3d) 115 (Ont. S.C.), at paras. 70-73, and *Saladini v. Affinia Canada Corp.*, 2011 ONSC 79, at para. 47.

[107] Therefore, in accordance with settled law, Ms. Brake's 2013 EI benefits were not received in mitigation of loss and are not deductible from the damages award.

b. Employment Income in the Statutory Entitlement Period

[108] In this section of the analysis, I will begin by explaining why employment income earned during the statutory entitlement period is not subject to deduction as mitigation income. Thereafter, I will consider Ms. Brake's statutory entitlement period and the burden of proof in respect of it. I will conclude this section of the

analysis by considering the income earned during the statutory entitlement period.

Employment Income in the Statutory Entitlement Period is not subject to Mitigation

[109] When Ms. Brake's employment was wrongfully terminated, she was entitled to two types of compensation – termination and severance pay under the Act ("statutory entitlements") and common law damages for wrongful dismissal. In her amended Statement of Claim, she claimed for both. At para. 35 of the claim, she states that she had been paid no compensation in lieu of reasonable notice and none of the amounts required by the Act.

[110] The trial judge was entitled to make a global award encompassing both Ms. Brake's statutory entitlements and her common law damages, provided that there was no double recovery: *Stevens v. Globe and Mail* (1996), 28 O.R. (3d) 481 (C.A.), at p. 493. That is what the trial judge did in this case: he awarded damages based on what Ms. Brake's remuneration would have been over a 20-month time period but made it clear that the damages award was inclusive of Ms. Brake's statutory entitlements. Thus, as I indicated earlier, the damages award of 20 months was not solely compensation at common law for wrongful dismissal. The 20-month damages award included Ms. Brake's statutory entitlements.

[111] Statutory entitlements are not damages. Ms. Brake was entitled to receive her statutory entitlements even if she secured a new full-time job the day after the Appellant terminated her employment. Therefore, the income that Ms. Brake earned during her statutory entitlement period is not subject to deduction as "mitigation income". In reaching this view, I adopt the reasons of the Divisional Court in *Boland v. APV Canada Inc.* (2005), 250 D.L.R. (4th) 376.

[112] In *Boland*, the employee received part of his statutory severance entitlement at the time that his employment was terminated. He brought an action in which he sought damages for wrongful dismissal and to recover the balance of his statutory entitlements. He then sought summary judgment for payment of the balance of his statutory entitlements on the basis that such an amount was not subject to mitigation.

[113] The motion judge refused summary judgment because, among other things, he was of the view that entitlements under the Act were not enforceable by action but only through the administrative procedures in the Act.

[114] The Divisional Court disagreed. It allowed the appeal, set aside the order of the motion judge, and substituted an order granting summary judgment for the outstanding balance of the employee's statutory entitlements.

[115] Lane J., writing for the Divisional Court, addressed the question of whether, if an action is brought, statutory entitlements are subject to mitigation. He concluded that they are not.

[116] He noted that when such entitlements are obtained through the administrative route, they are not subject to mitigation (at para. 21). He then summarized, at para. 22, the argument of the Director, who had intervened, as follows:

> The [Act] benefits are minimum entitlements and may not be reduced whether sought in an action or by the administrative route. The [Act] entitlements are not damages. They are not linked to any actual loss suffered by the employee, but are payable in any event. They are to be paid "promptly", a legislative indication that the employer is not entitled to wait and see if the employee becomes re-employed.

[117] At para. 23, Lane J. stated that he agreed with the Director's position and went on to further explain:

> [Act] entitlements are not linked, as damages are, to the criteria established in *Bardal* such as the age of the employee, the likely length of time to find another position, the actual finding of another position etc. They are payable in any event. In my view, it is illogical to suppose that the Legislature intended that such payments would become 'damages' if sought in an action, but not when sought administratively. <u>They are minimum sums to be paid by the employer and subjecting them to reduction by reason of sums received from others removes their character as minimum.</u> Their character as minimums was clearly recognized in *Machtinger* and in *Rizzo & Rizzo Shoes Ltd., Re*. [Citations omitted.] [Emphasis added.]

[118] For the reasons given by Lane J. in *Boland*, statutory entitlements are not subject to mitigation. Therefore, any employment income that Ms. Brake earned during her statutory entitlement period is not deductible as mitigation income.

[119] Since the employment income that Ms. Brake earned during her statutory entitlement period is not deductible from the damages award, the trial judge ought to have determined her statutory entitlement period and identified which items of employment income were attributable to that period and which were attributable to the Balance of the Notice Period.

Ms. Brake's Statutory Entitlement Period

[120] Ms. Brake's statutory entitlement period would clearly cover the period from the date of her dismissal to the end of 2012 and some part of 2013. Unfortunately, the record does not permit this court to determine the precise number of weeks to which she was statutorily entitled. Consequently, the court cannot determine when in 2013 the statutory entitlement period expired.

[121] The trial judge recognized that Ms. Brake was entitled to benefits under the Act but made no determination of what they were. He simply ordered that the damages award based on 20 months' compensation included her entitlements under the Act.

[122] The court explored the matter of statutory entitlements at the oral hearing of the appeal and asked the parties for further written submissions on the matter.

In her additional written submissions, counsel for Ms. Brake submitted that the Appellant had a separate, mandatory obligation to pay Ms. Brake her statutory entitlements of "34 weeks". However, she did not indicate how she arrived at the figure of 34 weeks. She asked this court to make an order requiring the Appellant to pay that amount in addition to the 20 months' notice. I return to that request below.

[123] The Appellant, in its additional written submissions, said nothing about the Respondent's assertion that her statutory entitlements were 34 weeks. Its position was that Ms. Brake's statutory entitlements were subsumed within the damages awarded by the trial judge.

The Burden of Proof

[124] It is important to know the duration of the statutory entitlement period because, as I have already explained, employment income earned during that period need not be deducted as mitigation income. In my view, where (as in this case) a blended damages award is made, it is for the employer to prove what employment income is attributable to the statutory entitlement period and what employment income is attributable to the Balance of the Notice Period. I say this for the following reasons.

[125] Once an employee has proven wrongful dismissal and has adduced evidence of his or her losses, the onus shifts to the employer to demonstrate that

some or all of those losses were avoidable or avoided: *Red Deer College*, at p. 331.

[126] The principle of avoidable loss is described as follows in Harvey McGregor, *McGregor on Damages*, 19th ed. (London: Thomson Reuters (Professional) UK Limited 2014), at p. 311:

> Where it appears that steps have been taken by the claimant to avoid loss which are [sic] to be taken into account in assessing the damages, the onus is on the defendant to prove that, *and also how far*, loss has thereby been avoided. [Emphasis added.]

[127] Accordingly, as the Appellant wished to have employment income that Ms. Brake received during the notice period treated as mitigation income, it was up to the Appellant to show what part of that income was properly attributable to the Balance of the Notice Period.

Employment Income in the Statutory Entitlement Period

[128] As I have explained, employment income that Ms. Brake earned during the statutory entitlement period is not deductible from the damages award. On that basis, I would exclude three amounts of income: (1) income from Sobey's for the period August to December 2012 ($9,208.88); (2) a portion of the total Sobey's income earned in 2013 ($19,566.48); and (3) income from Tim Horton's for two unidentified months in 2013 ($2,701.00).

[129] The first item – Ms. Brake's income from Sobey's for the period August to December 2012 – is not to be deducted because, although the precise duration of the statutory entitlement period is not known, it would not have been exhausted by the end of 2012.

[130] The second item is Ms. Brake's income from Sobey's in 2013. The record does not permit the court to determine the precise duration of Ms. Brake's statutory entitlement period nor does it permit the court to determine what part of the 2013 Sobey's income was received outside of that period. While those determinations should have been made at trial, in this case, it is of no moment as I would not treat any of the Sobey's income as mitigation income. I explain how I reach that conclusion below.

[131] As for the third item – the $2,701 that Ms. Brake earned from Tim Horton's during two months in 2013 – I would not deduct it for this reason. There is no finding as to when in 2013 Ms. Brake earned that income. Bearing in mind the Appellant's onus to demonstrate what losses were avoided, I am not prepared to assume that the Tim Horton's income was earned outside of the statutory entitlement period. Therefore, I would not deduct it.

c. Employment Income in the Balance of the Notice Period

[132] The notice period of 20 months expired near the beginning of April 2014. During the Balance of the Notice Period, Ms. Brake received: (1) that part of the

2013 Sobey's income not attributable to the statutory entitlement period; (2) $6,793.20 from Sobey's for the period from January to April of 2014; and (3) $600 from Home Depot.

[133] Before addressing whether the income that Ms. Brake earned during the Balance of the Notice Period must be deducted from the damages award, I will deal briefly with the Appellant's complaint that the trial judge erred in his factual findings in respect of Ms. Brake's income from Sobey's.

Sobey's Income – a Factual Clarification

[134] The Appellant points to the first sentence of para. 4(v) of the reasons (set out above at para. 91) and says that the trial judge erred in his findings of fact in that sentence. The Appellant says that: Ms. Brake had not "long" had another job at Sobey's; she made salads for Sobey's and did not act as a cashier; and Mr. McKenna discovered only in June of 2012 that Ms. Brake had also been working, on a part-time basis, for Sobey's.

[135] I do not accept that the trial judge made the alleged factual errors. On the record, those findings were available to him.

[136] Ms. Brake's marriage failed after she relocated to Ottawa. Her evidence at trial was that she worked part-time at Sobey's between 2002 and 2004 because she wasn't earning enough money working for PJ-M2R to provide for herself and her son and to also pay for the costs of her divorce. She testified that Mr.

McKenna was aware that she was working at Sobey's but never said anything about it.

[137] Ms. Brake also testified that because of her negative performance review in November of 2011, she lost her bonus and did not get an increase in salary. In light of those losses, she told Mr. McKenna in January of 2012 that she would look for a part-time job and he said "do whatever you want to do". When a friend approached Ms. Brake about working at Sobey's, she took the position because she believed her job with the Appellant was in jeopardy and she needed to have some money in the bank in case she got fired.

[138] In light of Ms. Brake's testimony, while one might quarrel with exactly how the trial judge phrased the first sentence of para. 4(v), I see no palpable and overriding error in it. The essential point to be taken from that sentence is that, while employed by the Appellant and to the Appellant's knowledge, Ms. Brake supplemented her income by working part-time at Sobeys.

Deductibility of the Sobey's and Home Depot Income

[139] In my view, it was open to the trial judge to make no deduction for the income that Ms. Brake earned from Sobey's and Home Depot during the Balance of the Notice Period.

[140] In a wrongful dismissal action, an employer is generally entitled to a deduction for income earned by the dismissed employee from other sources

during the common law notice period. However, as Rand J. explained in *Karas v. Rowlett*, [1944] S.C.R. 1, at p. 8, for income earned by the plaintiff after a breach of contract to be deductible from damages, "the performance in mitigation and that provided or contemplated under the original contract must be mutually exclusive, and the mitigation, in that sense, is a substitute for the other." Therefore, if an employee has committed herself to full-time employment with one employer, but her employment contract permits for simultaneous employment with another employer, and the first employer terminates her without notice, any income from the second employer that she could have earned while continuing with the first is not deductible from her damages: see S.M. Waddams, *The Law of Damages*, loose-leaf (Rel. Nov. 2016), 2d ed. (Toronto: Canada Law Book, 1991), at para. 15.780.

[141] The Saskatchewan Court of Appeal applied this principle in *McIntosh v. Saskatchewan Water Corp.* (1989), 26 C.C.E.L. 196 (Sask. C.A.).

[142] In *McIntosh,* a resource economist was wrongfully dismissed from his position. During the notice period, he taught an evening class in economics for which he was paid the sum of $3,674. The trial judge did not deduct that sum from the damages award because Mr. McIntosh "could have taught this evening course if he had remained in the respondent's employ".

[143] At pp. 201-202 of *McIntosh,* the Saskatchewan Court of Appeal specifically ratified this aspect of the trial decision, stating that in light of the trial judge's

finding with respect to the teaching income, it would make no deduction for that income.

[144] This principle applies in the present case. As Ms. Brake had worked a second job with Sobey's while working full-time for the Appellant, her work for Sobey's and her work for the Appellant were not mutually exclusive. Had Ms. Brake stayed in the Appellant's employ, she could have continued to supplement her income through part-time work at Sobey's. Therefore, I would not deduct the income that she received from Sobey's during the Balance of the Notice Period from the damages award.

[145] Whether Ms. Brake's Sobey's income exceeded an amount that could reasonably be considered as "supplementary" and, therefore, not in substitution for her employment income was not argued. On the facts of this case, the amounts received from Sobey's do not rise to such a level that her work at Sobey's can be seen as a substitute for her work at PJ-M2R. I leave for another day the question as to when supplementary employment income rises to a level that it (or a portion of it) should be considered as a substitute for the amounts that would have been earned under the original contract and, accordingly, be treated as deductible mitigation income.

[146] For these reasons, I would not deduct the sums that Ms. Brake earned from Sobey's during the Balance of the Notice Period.

[147] The evidence regarding Ms. Brake's Home Depot income is unclear[3]. In these circumstances, I would refrain from deducting from the damages award the modest sum of $600 that Ms. Brake earned from Home Depot.

THE RESPONDENT'S NEW SUBMISSION

[148] As I have already mentioned, the court sought additional written submissions from the parties after the oral hearing of the appeal. In Ms. Brake's additional submissions, she argued that the employee's right to receive severance benefits under the Act is separate from the right to damages at common law. Accordingly, she contended, the trial judge erred in combining the two amounts. She asked that she be granted 34 weeks of severance pay in addition to compensation for 20 months' notice at common law.

[149] I reject this submission.

[150] Where the employer dismisses the employee and fails to give the employee the benefits to which the employee is entitled under the Act, the employee may claim both those benefits and common law damages in a single civil action, so long as there is no double recovery. This approach follows from *Stevens*. See also *Boland*, at paras. 11-17.

[151] In this proceeding, Ms. Brake sought compensation for both common law damages and statutory entitlements. The trial judge was entitled to make the

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[3] See para. 4(v) of the trial reasons, the trial transcripts and the chart in the Appellant's factum.

damages award in the fashion that he did, namely, based on 20 months' compensation in lieu of notice and inclusive of statutory benefits as required by the Act.

[152] In any event, the Respondent did not bring a cross-appeal so it is not open to the court to consider increasing the damages award.

DISPOSITION

[153] For these reasons, I would dismiss the appeal with costs to the Respondent fixed at $19,500, all inclusive.

"Eileen E. Gillese J.A."
"I agree. S.E. Pepall J.A."

Feldman J.A. (concurring):

[154] I fully concur with the result reached by Gillese J.A., and with her excellent reasons. However, with respect to the income the respondent earns as a cashier at Home Depot, in my view, the trial judge was entitled to make the following finding:

> The cashier position she occupies now at Home Depot is so substantially inferior to the managerial position she held with the Defendant that the former does not diminish the loss of the latter.

[155] It was on that basis that the trial judge declined to deduct the Home Depot income that the respondent earned during the notice period from her damages for wrongful dismissal. I would uphold that decision.

[156] The trial judge found that the respondent made reasonable best efforts to find a managerial position reasonably comparable to the one she held with the appellant. Having been unable to do so, the respondent accepted a non-managerial job as a cashier at a much lower salary, because she needed to earn money.

[157] A wrongfully dismissed employee has a duty to try to mitigate her damages by making reasonable best efforts to obtain a position that is reasonably comparable in salary and responsibility to the one from which she was wrongfully dismissed. If she is able to secure such a position, her earnings are deducted

from her damages as mitigation.[4] If she turns down such a position, or fails to make reasonable best efforts, then the amount she could have earned at a comparable position is similarly deducted from her damages, based on a failure to meet the duty to mitigate. But if she can only find a position that is not comparable in either salary or responsibility, she is entitled to turn it down, and if she does, the amount she could have earned is not deducted from her damages.

[158] It follows, in my view, that where a wrongfully dismissed employee is effectively forced to accept a much inferior position because no comparable position is available, the amount she earns in that position is not mitigation of damages and need not be deducted from the amount the employer must pay.

[159] It is always up to the trial judge to determine if the employee has met her duty to mitigate. When a wrongfully dismissed employee accepts new employment during the notice period, the question of whether or not to deduct those earnings depends on the trial judge's assessment of mitigation. If the trial judge finds that the new job is comparable to the old one, the earnings should be deducted as mitigation of damages. If the trial judge finds that the new job is vastly inferior to the old one, such that the employee would not be in breach of the duty to mitigate if she turned it down, the earnings should not be deducted.

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[4] See, for example, The Honourable Justice Randall Scott Echlin & Christine M. Thomlison, *For Better or For Worse: A Practical Guide to Canadian Employment Law*, 3rd ed. (Aurora, Ont.: Canada Law Book, 2011), at p. 257.

[160] In other words, the trial judge decides whether a job that an employee takes or turns down, amounts to mitigation of damages. As my colleague states at para. 98, only monies that are received in mitigation of the loss are deducted from the damages award.

[161] In this case, the employee was not an executive who could afford to live during the notice period without a salary. It was in her interest to try to obtain a comparable managerial position but she was not able to do so, and because she could not afford to earn nothing, she had to take the only job she could find. The trial judge determined that the job she found was in no way comparable to her managerial position with the appellant. As a result, it did not have the effect of mitigating the damages she suffered from her wrongful dismissal by the appellant employer and should not be deducted.

Released: "K.F." May 23, 2017

"K. Feldman J.A."