

Employment Law

This is a summary of employment law matters of interest, from a litigator's point of view.

Further Clarification on Mitigation Earnings and Deduction from Damages

The *Michaels v. Red Deer College* decision of the Supreme Court of Canada from 1976 held that employees pursuing wrongful dismissal damages have a duty to mitigate their damages. Mitigation earnings reduce the liability of the employer for damages during the notice period to the extent of those earnings. But what if the terminated employee had another job prior to his or her termination of employment, which allowed them to earn income during the notice period?

As employee counsel, this comes up frequently. The employee who moonlights in real estate is a classic example. Often there are negotiations around how that mitigation income will be treated and what thresholds to apply because in principle, we know that the income which would have been earned even if the employee continued to be employed should not be deducted. We also know that if the employee takes up a full time career in real estate after the loss of his or her day job, then those earnings cannot all be exempt.

The latter was precisely the finding of the British Columbia Court of Appeal in reviewing the trial judge's decision that none of the employee's post-termination earnings were to be taken into account in calculating damages on the basis that he worked as a consultant prior to commencing work with the employer and continued his work throughout his employment. The court of appeal found that to be an error.

It held that principles of mitigation can lead to a reduction in damages where the employee reduces the loss by replacing the income with new income that would not have been earned if the employment relationship had continued. This is termed "avoided loss" and it is for the court to make an assessment of how much of this post-termination income is to be considered replacement or substitute income, and therefore deductible from the damage claim, and how much is to be considered supplementary income that the employee could have earned if his or her employment continued, and therefore not deductible

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from his or her damage claim.

It is not an all or nothing approach. Logical and sensible, yet as always the context and facts of the individual case will determine the outcome in any specific situation.

Pakozdi v. B & B Heavy Civil Construction Ltd., 2018 BCCA 23 (CanLII).

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