



IFW NEWSLETTER

July 2024

WHAT'S NEW

- Our firm celebrated our 19th anniversary this year with our annual firm summer party on July 20th.



WHAT'S NEW IN THE LAW

A recent Court of Appeal decision illustrates the potential liability associated with terminating an employee returning from a medical leave of absence

Background

Krmpotic v. Thunder Bay Electronics Limited involved the termination of a building maintenance supervisor with almost 30 years of service. His employment was terminated less than 2 hours after returning to work from a medical leave of absence. At the termination meeting, he was advised that the termination was for financial reasons.

Trial Decision

The trial judge awarded the employee 24 months of reasonable notice. The employer argued that the reasonable notice period should be reduced because the

employee failed to make reasonable efforts to mitigate his damages. While the trial judge acknowledged that the employee's attempts to find alternative employment were "scant at best", it was found that the employee was unable to mitigate due to physical incapacity. While the employee did not present expert medical evidence at trial, there was testimony from the employee and his wife and son indicating that his attempt at re-employment failed because of his physical condition.

The trial judge also awarded aggravated damages of \$50,000 based on the employer's handling of the dismissal. In making this award, the trial judge found that the employer breached the duty of good faith in several ways, including:

- the employer told the employee that the termination was solely for financial reasons but provided no evidence on this issue;
- the actual reason for termination was the employee's physical limitation's after returning from leave; and
- the employee was terminated mere hours after returning to work.

Appeal Decision

On appeal, the Court confirmed that expert medical evidence was not necessary to establish an inability to mitigate due to physical incapacity. The trial judge was entitled to conclude that the employee was physically unable to mitigate based on the evidence of the employee and his family members.

The Court of Appeal also found no basis to interfere with the trial judge's award of aggravated damages. It was fully open to the trial judge to award aggravated damages based on his findings that the employer engaged in conduct that was untruthful, misleading and unduly insensitive during the termination meeting and that the employee suffered harm beyond normal distress and hurt feelings. The Court confirmed that aggravated damages can be awarded without medical evidence of mental distress or a diagnosable psychological condition.

Key Takeaways

First, employers should exercise caution and consult with our team of experienced lawyers before terminating an employee returning from a medical leave.

Second, employers must be very careful about how they approach termination meetings. Employers may expose themselves to a significant award of aggravated damages if they provide untrue reasons for termination or engage in insensitive conduct such as terminating an employee immediately after their return from a leave of absence.

Third, where an employee has a medical condition that incapacitates or interferes with their ability to look for or perform work during the notice period, this may hinder an employer's argument that the employee has failed to mitigate their damages.

Fourth, this decision makes it easier for employees to claim aggravated damages related to the manner of dismissal as no medical evidence of mental distress or a diagnosable psychological condition is necessary.

Finally, it is worth noting that this case could have resulted in additional damages under the *Human Rights Code* considering the trial judge's finding that the employee was terminated due to his physical limitations. This further underscores the importance of seeking legal advice before terminating an employee returning from a leave of absence.

LET'S TALK

Israel Foulon Wong LLP is one of Canada's leading employment and labour law firms. The firm's partners, [Peter Israel](#), [Chris Foulon](#), [Carita Wong](#), [Alex Van Kralingen](#), [Krista Kais-Prial](#), [Behzad Hassibi](#), [Katherine Chau](#), [Mark Repath](#) and their associates, [Vibhu Gairola](#) and [Domenica Moran](#), have over 125 years of collective experience in assisting clients with employment and labour law issues.

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