



# What's New in HR Law

## Reducing Mitigation Prospects May Reduce an Employee's Reasonable Notice Period

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### Bottom Line

When an employee disagrees with a unilateral change to their employment, they are free to resign, claim damages, and relocate. However, as the Ontario Superior Court of Justice recently found in *Quesnelle v. Camus Hydronics Ltd.*, 2022 ONSC 6156 (“*Quesnelle*”), if a dismissed employee moves from a location that has a robust job market to one that has limited job opportunities, a court may reduce their entitlement to common law reasonable notice. In such cases, it may be unreasonable for the employer to bear the consequences of the employee's decision to limit their prospects for re-employment.

### Background Facts

In *Quesnelle*, a seasoned HVAC professional was persuaded to work for Camus Hydronics Ltd. on the condition that the company provide him with a vehicle and pay for its related expenses. When he was hired, the employee resided in Oshawa and his employer's workplace was located in Mississauga. His commute was approximately an hour each way.

For seven years, the employer paid for all of the employee's vehicle operating costs, including maintenance, highway tolls, and fuel. By March 15, 2021, the vehicle had accumulated 409,000 kilometers and was no longer roadworthy. The employee informed his employer that the vehicle needed to be

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replaced. In response, the employer advised that it would not replace the vehicle and would only pay for the vehicle and its related expenses for one more month, after which, the employee would be responsible for those costs. The employee subsequently resigned and sued for constructive dismissal, seeking 12 months of common law reasonable notice damages.

After resigning, the employee sold his home in Oshawa and moved to Omemee in the Kawartha Lakes region. The employer subsequently offered the employee the opportunity to mitigate his damages by returning to his previous job, with a fully-paid vehicle for one year. The employee turned down the offer as his residence in Omemee was located an additional 40 minutes from the employer's workplace.

In the months that followed, the employee was unable to mitigate his damages by finding alternate comparable employment as the job market in Omemee was weaker than that in the Greater Toronto Area ("GTA").

## The Court's Decision

### The Employment Contract

Justice Charney of the Ontario Superior Court of Justice held that the employer's unilateral cessation of the employee's vehicle benefit constituted a constructive dismissal. Notably, the value of the vehicle benefit amounted to at least 24% of the employee's remuneration.

Further, Justice Charney held that the termination clause in the employee's written employment agreement was unenforceable. The termination clause stated:

*During your Probation Period and afterwards, you will be entitled only to notice of termination, termination pay and/or severance pay as required by the Ontario Employment Standards Act.*

*[Emphasis added.]*

The termination clause was unenforceable because it provided "only ... termination pay and/or severance pay". This meant that the clause: (1) did not provide for benefit continuation during the notice period; and (2) created an ambiguity regarding the payment of termination pay "or" severance pay, as the provision could be interpreted as giving the employer the option of paying either termination or severance pay, but not both. Because the termination clause could be interpreted in a manner that violated the *Ontario Employment Standards Act, 2000*, it was deemed unenforceable.

Justice Charney ultimately found that the employee was entitled to damages for common law reasonable notice, which was determined to be 10 months.

### The Employee's Duty to Mitigate

Justice Charney then found that the employee did not unreasonably decline the employer's offer to return to work. Although a reasonable person in the employee's position would *not* have found it embarrassing or humiliating to return to work, the employer's return-to-work offer was made too late. The employee was not obliged to remain in his Oshawa home "in the hope that he might one day receive an offer of re-employment from his former employer." Furthermore, a reasonable person in the employee's circumstances could consider the commute from Omemee to be too long. For these reasons, the employee was not required to mitigate his damages by returning to work with his former employer.

Significantly, however, Justice Charney held that the consequences of the employee's decision to relocate to Omemee and remove himself from the GTA job market should not be borne by the employer. Accordingly, the employee's reasonable notice period was reduced by 30% to a total of seven months.

## Check the Box

*Quesnelle* outlines two situations in which an employer might successfully argue that an employee's reasonable notice period should be reduced because of an employee's failure to mitigate their damages.

First, an employee will have failed to mitigate their damages if they unreasonably decline an offer to return to work during their reasonable notice period. In *Quesnelle*, Justice Charney found that "[b]ut for the fact that [the employee] had already moved, the [employer's] offer of re-employment would have been accepted by a reasonable person in his circumstances." In other words, if the employee had still lived in Oshawa at the time that the offer of re-employment was made, he would have been obliged to accept it — failing which most, if not all, of his alleged damages would have been mitigated.

Second, the consequences of an employee's lifestyle choices post-termination might justify reducing the employee's reasonable notice period, similar to how the *Quesnelle* employee's voluntary relocation resulted in a reduction to the notice period.

## Need More Information?

For more information or assistance with employment litigation, contact [Michael Lee](#) at [mlee@filion.on.ca](mailto:mlee@filion.on.ca) or your regular lawyer at the firm.



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