

Reasonable Notice Period: 24 Months; Damages: \$0?

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Two recent cases demonstrate the aggressive approach Ontario courts are taking to employees who turn down offers to mitigate their damages for wrongful dismissal by returning to work for the dismissing employer. Both cases involve claims for damages by long-service employees. Given their long tenures, the claims for damages were significant. In each case, however, the employee ended up receiving no damages and faced a significant costs award.

Chevalier

Earl Chevalier worked for Active Tire & Auto Centre for over 30 years, most recently in the position of service centre manager at a store in Niagara Falls. When the location he managed began underperforming, Active Tire laid him off. Mr. Chevalier took the position that he had been constructively dismissed and commenced an action for wrongful dismissal. The court agreed that the layoff constituted a breach of Mr. Chevalier's employment contract and that he was entitled to a reasonable notice period of 24 months. Nevertheless, the trial judge found that Mr. Chevalier had not suffered any damages. Why?

The case turned on the steps that Active Tire took after Mr. Chevalier filed his claim. Following its receipt of the claim, Active Tire sought and obtained legal advice confirming that it had not been legally entitled to lay off Mr. Chevalier. As such, it contacted Mr. Chevalier, apologized for the mistake, and asked him to come back to work. Mr. Chevalier refused and proceeded with the litigation. The trial judge concluded that a reasonable person would have returned to work for Active Tire, and that by not doing so Mr. Chevalier had failed to mitigate his damages. Mr. Chevalier's action was therefore dismissed and he was liable to Active Tire for a portion of its legal costs in defending the proceeding.

Ghanny

Aleem Ghanny worked for Downtown Toyota for 18 years, most recently as a Service Manager. Downtown Toyota eliminated his position with one month's notice and offered him an additional three months' pay in lieu of notice, which Mr. Ghanny declined in favour of suing for wrongful

dismissal. The trial judge held that the three month additional offer was “grossly inadequate”, as Mr. Ghanny was entitled to a reasonable notice period of 14 months. However, as in the *Chevalier* case, the judge found that Mr. Ghanny had not suffered any damages. Why?

When the owner of Downtown Toyota terminated Mr. Ghanny's employment, he offered him a substantially similar position working at a Suzuki dealership he owned. Mr. Ghanny refused the offer because he thought that his 18 years of service would not be recognized and because he was concerned about the viability of the Suzuki dealership. The trial judge held that Mr. Ghanny's decision, viewed objectively, was unreasonable, and that he should have mitigated his damages by accepting the position at the Suzuki dealership. As such, Mr. Ghanny's action was dismissed.

Summary

As these two cases demonstrate, employers can substantially reduce or even eliminate an employee's entitlement to damages for wrongful dismissal by arranging to provide an alternative but commensurate position or working notice. The terminated employee will then face a significant burden in demonstrating that a reasonable person would not have accepted the opportunity to work during the reasonable notice period. Employees (and their counsel) should be mindful of the potential risk if they have gambled and pursued an action for wrongful dismissal in similar circumstances.

[*Chevalier v. Active Tire & Auto Centre Inc.*, 2012 ONSC 4309 \(CanLII\)](#)

[*Ghanny v. 498326 Ontario Limited*, 2012 ONSC 3276 \(CanLII\)](#)