CITATION: Handy v. M&C Investments Incorporated, 2026 ONSC 648
COURT FILE NO.: CV-25-00000688-0000
DATE: 2026-02-02

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: David Handy, Plaintiff/Responding Party

AND:

M&C Investments Incorporated, Defendant/Moving Party

BEFORE: Associate Justice Glick

COUNSEL: Taiwo Onabolu, for the Plaintiff/Responding Party

Simon Heath, for the Defendant/Moving Party

HEARD: January 15, 2026

ENDORSEMENT

[1] This is an action for wrongful dismissal brought by the Plaintiff, Mr. David Handy, against the Defendant M&C Investments Incorporated. The Plaintiff worked for the Defendant, a corporation engaged in the distribution of petroleum products, as a DEF Truck Driver. The Plaintiff was terminated by the Defendant on November 13, 2024. The central disputes as between the parties concern the nature of that termination and the enforceability of a termination clause in the Employment Agreement. Damages are also in dispute, including the issue of what steps, if any, the Plaintiff took to mitigate the alleged loss.

[2] This motion arises in relation to that last issue. The Defendant is seeking an Order requiring that the Plaintiff produce and serve a better Affidavit of Documents on the basis that the Plaintiff has failed to produce all arguably relevant documents relating to his mitigation efforts and income during the alleged notice period as required by the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 ("*Rules*") and the agreed to discovery plan. The Plaintiff in response takes the position that he has produced all relevant documents, that this motion is a fishing expedition,

unnecessary and that its “sole purpose is to harass the Plaintiff and conduct an unwarranted, disproportionate, and intrusive examination.”

[3] For the reasons that follow, I disagree with the Plaintiff as to the purpose or necessity of this motion. I find that an Order requiring the Plaintiff to produce and serve a better Affidavit of Documents is warranted on the record.

FACTS

[4] This is an action brought under the Simplified Procedure rule. The Plaintiff’s total quantified damages claim, though not articulated in the Statement of Claim as a total amount, is for approximately $240,000. The Plaintiff also claims for special damages equal to the costs incurred in seeking to obtain comparable employment, in an amount to be proven at trial and unquantified to date. The Plaintiff pleads at paragraph 23 of his Claim that since he was terminated by the Defendant “he has attempted to mitigate his damages and sought other reasonably comparable positions. [The Plaintiff] therefore claims his job search expenses and any relocation expenses incurred as special damages, the full particulars of which will be provided before trial."

[5] The Defendant denies the allegations in the claim. Of note for this motion, the Defendant has at paragraphs 9, 26 and 27 of their Statement of Defence raised the issue of mitigation on the part of the Plaintiff, taking the position that if the Plaintiff is entitled to damages, he ought to, and could have, taken steps to mitigate those damages.

[6] Following the close of pleadings, the parties exchanged a number of draft discovery plans. The Defendant requested a provision whereby the Plaintiff would explicitly agree to provide proof of all mitigation efforts he had made, but the Plaintiff would not agree. Ultimately the parties were unable to agree to a plan before, on May 22, 2025, the Plaintiff provided an Affidavit of Documents which did not provide any documents that spoke to his mitigation efforts. The Plaintiff in and around that time also served a notice of examination requiring the Defendant’s attendance at discovery on July 23, 2025.

[7] The Defendant insisted on a discovery plan in advance of discovery and also noted that the Plaintiff’s Affidavit of Documents needed to be signed and contain all relevant documents.

The Plaintiff thereafter sent a revised discovery plan which removed the specific language requested by the Defendant and inserted in its place a clause which stated that "the parties agree that they will abide by a policy of full disclosure, meaning that they shall disclose in their respective Affidavits of Documents, all documents which are arguably relevant to this proceeding." This draft was executed by the parties on June 23, 2025 (the "Discovery Plan").

[8] The Plaintiff then served another Notice of Examination requiring the Defendant to attend for discovery on September 29, 2025. The Defendant produced their Affidavit of Documents on August 21, 2025.

[9] On August 22, 2025, the Plaintiff served a copy of his Supplementary Affidavit of Documents. This supplemental Affidavit contained a tab titled "mitigation efforts" which consisted of a short application log listing 6 jobs which the Plaintiff stated he applied to in November 2024, and no other information or materials.

[10] Defendant's counsel raised this as an issue on September 25, 2025 when he wrote to the Plaintiff's counsel identifying that the Plaintiff had not provided a resume, any evidence of EI applications, collections or payments, no evidence with respect to jobs identified, applied to or outcomes and no evidence of any jobs, self-employment, contracts or payments for the alleged notice period. Defendant's counsel stated his client would not proceed with examinations until it received what he described as "proper documentation" as required by the Rules and the Discovery Plan.

[11] That same date, counsel for the Plaintiff responded and stated that "the documents we provided are the ones we had. Should more documents arise we will provide them. If you have concerns regarding EI or EI documentation you can ask about them during the discoveries as you have a right to do so."

[12] On September 26, 2025, the Plaintiff produced his Employment Insurance Payments. Counsel for the Plaintiff stated in the email attaching those documents that they would still be proceeding to discovery. Counsel for the Defendant responded, again asking for mitigation documents and for the material to be put into a sworn affidavit of documents. Plaintiff's counsel responded and stated "my client says no such documents exist. While he mitigated, he has no

contract or email confirmation since it was all verbal. That is, still, allowed under the law. You can ask him more questions about that at the discovery, or ask for undertakings at that time."

[13] On September 29, 2025, the Plaintiff attended at discoveries and obtained a certificate of non-attendance as the Defendant did not attend.

[14] On October 14, 2025, the Plaintiff provided a Supplementary Supplementary Affidavit of Documents which attached a resume for the Plaintiff.

[15] On or about October 23, 2025, Plaintiff's counsel advised Defendant's counsel that the Plaintiff had obtained employment with a new employer. The Plaintiff did not provide any documents in relation to his application for that position or details of the employment. Instead, he advised through his counsel that any further information sought could be addressed through oral discovery and any undertakings that may follow.

[16] The Defendant thereafter, on November 13, 2025, attended triage court where it was granted leave to bring this motion.

[17] On January 9, 2026, the Plaintiff provided his counsel with Employment Pay Statements. Those Statements were included in the Plaintiff's Responding Record for this motion as an exhibit to the affidavit of a clerk in Plaintiff's counsel's office. That affidavit was sworn on January 12, 2026, three days before the hearing of this motion. The Plaintiff did not himself provide an affidavit in response to this motion, nor is there any evidence with respect to what steps were taken to conduct the searches which led to the affidavit of documents, the supplementary affidavit of documents, the supplementary supplementary affidavit of documents or the additional productions contained in the responding motion record for this motion.

LAW

Affidavits of Documents

[18] The obligation of every party to civil litigation, whether conducted under the general or simplified rules, is to produce every document relevant to any matter in issue that is in the possession, control or power of the party. An affidavit of documents must disclose "to the full extent of the party's knowledge, information and belief all documents relevant to any matter in

issue in the action that are or have been in the party's possession, control or power" (subrule 76.03(1) when an action like this one is brought under the simplified rules). In preparing an affidavit of documents, a party must make diligent efforts when conducting a search for relevant materials. An affiant attests to having made those diligent efforts when swearing an affidavit of documents, although in the usual course does not set out what those efforts were.

[19] In *Mitrex Inc. v. Wilson* 2023 ONSC 4658, Associate Justice Jolley set out the law with respect to a motion for a further or better affidavit of documents:

> To quote *Galea v. Best Water Limited*, 2019 ONSC 7213, at paragraph 15, "On a motion (for production of a further and better affidavit of documents or for additional documents), the moving party must prove that the subject documents exist on a balance of probabilities before an order is made that they be disclosed in a further and better affidavit of documents: see, for example, *Seelster v. HMTQ and OLG*, 2016 ONSC 97 at para. 46, and *Apotex Inc. v. Richter Gedeon Vegyeszeti Gyar RT*, 2010 ONSC 4070 at para. 119. While evidence in support of the motion cannot be based on speculation or guesswork, the level of proof required must take into account that one party has access to the documents and the moving party does not: *Apotex Inc.*, *supra* at para. 119.

[20] In *Dawkins v. Precision Resource Canada Ltd.*, 2024 ONSC 3514, Associate Justice Robinson found that the test had been met to require a party to produce a better affidavit of documents where a party, through counsel, took the position that they did not have the documents requested, but subsequently produced additional documents which proved the initial assertion incorrect. That case, also a wrongful termination case involving an individual performing trucking services, also brought under the Simplified Procedure rule, is particularly relevant.

Mitigation

[21] There is no question that mitigation is a live issue in this case, as it is in many, if not all, wrongful termination cases. The Plaintiff, in his book of authorities, provided two cases which speak to the test to be applied when the issue is raised. The burden lies with the employer to prove the mitigation efforts were unreasonable. They must do so by proving that the employee failed to take reasonable steps and that if those steps were taken the employee would have been expected to secure a comparable position reasonably adapted to their abilities. The standard for job efforts

in mitigation is not perfection. See: *Boyle v. Salesforce.com* 2025 ONSC 2580 at paras 38-40; *Pateman v. Koolatron Corporation*, 2025 ONCA 224 at para. 6.

ANALYSIS

[22] Having regard to the facts and law as set out above, I am satisfied that the moving party has met the test for requiring the production of a further and better affidavit of documents from the Plaintiff providing all documentation in his control, power or possession relating to steps he took to mitigate his alleged loss.

[23] The Plaintiff has produced three affidavits of documents to date. The first affidavit contained no evidence of mitigation even as mitigation was an issue raised in his claim. The second contained a sheet of paper with a brief log and the third contained a resume. Further productions have now been made in response to this motion consisting of EI documentation, but these new documents have not been included in a sworn affidavit. This latest disclosure by itself warrants a further affidavit, at least with respect to those new documents.

[24] The issue though is broader than the new EI documents. The trickle of disclosure of documents relating to mitigation, only in response to the Defendant's repeated requests, those new EI documents, and the fact that the Plaintiff has obtained new employment but has produced no records with respect to same, collectively satisfy me that the Plaintiff has not, to date, conducted a diligent or comprehensive search for relevant documents or "arguably relevant documents" as he agreed to in the discovery plan.

[25] Importantly the Plaintiff has not filed an affidavit on this motion and has presented no evidence as to the search that he conducted for relevant documents. There is no explanation as to why, for example, the EI documents were not produced in any of the three affidavits of documents sworn to date. The position of the Plaintiff on this motion and as seen throughout the correspondence filed in evidence, is that questions about mitigation can be put to him at discovery and undertakings can be given in response. While there is a continuing obligation to disclose, the

Plaintiff's proposal, particularly in the context of an action brought under the Simplified Procedure rule, is problematic.

[26] In a proceeding under the Simplified Procedure rule, the parties have abridged examination times. Further examinations for discovery can only be granted with leave of the court, even where the basis for that further discovery are documents provided subsequent to examination (see for example *Keedi v. Wawanesa Mutual Insurance Company et al*. 2021 ONSC 3650 and *Blue v. Metro Ontario Inc*., 2022 ONSC 1283). While leave may be granted, it is not assured, as the court has found in previous cases that the discretion to extend the time for discoveries in a Simplified Procedure action "should only be exercised sparingly and granted only where the interest of justice, as mandared by Rule 3.02 warrants it": *Leask v. Homewood Health Centre Inc.*, 2023 ONSC 342.

[27] If the Defendant proceeds to discovery without receiving fulsome disclosure with respect to the Plaintiff's attempt to mitigate, including information about his new employment, the Defendant runs the risk that it will lose the opportunity to ask questions with respect to any documents produced after discovery. This is a reasonable concern, and one which provides an answer to the Plaintiff's arguments with respect to the proportionality of this motion and the assertion that it is an attempt to delay the prosecution of this matter. I note a similar conclusion was reached by Associate Justice Robinson in *Dawkins, supra*, at para.23, where he found that it was reasonable for the party in that matter to refuse to proceed with examinations until there had been complete documentary discovery.

RELIEF

[28] The Plaintiff is hereby ordered to conduct a thorough search for any and all physical or electronic records relating to mitigation efforts during the relevant notice period.

[29] The Plaintiff is further ordered to produce and serve to the Defendant a further and better sworn Affidavit of Documents containing all arguably relevant documents, including all of the Plaintiff's mitigation efforts, and that the Plaintiff serve this further and better sworn Affidavit of Documents within 30 days from the date of this Order.

[30] The Defendant asked for an order permitting it to rely at trial or at summary judgment on any negative inferences that may be drawn from the Plaintiff's failure to abide by the terms of an order for a further affidavit of documents, but the Defendant does not require such an order to make such an argument, and no such order is made here.

Costs

[31] Both parties sought their costs of this motion and both submitted costs outlines, though I did not hear submissions on the date of the hearing. I encourage the parties to settle the costs of the motion. If they cannot do so, then costs submissions can be made in writing through the administration office. Submissions are to be limited to three pages. If offers were made to settle the motion they can be appended as attachments to those submissions and will not count towards the page limit. The Defendant is to serve and file their submissions within fourteen days of this decision. The Plaintiff is to serve and file his responding submissions seven days later. There will be no reply.

Triage Court Attendance

[32] Justice Coats, in her endorsement of November 13, 2025, ordered that this matter return to Triage Court to set a timetable for the remainder of this action upon filing a new requisition. The parties ought to confer on a proposed timetable and proceed to book that attendance.

Glick A.J.

Date: February 2, 2026