CITATION: Marshall v. Mercantile Exchange Corporation 2023 ONSC 4182
COURT FILE NO.: CV-24-00715036
DATE: 20240724

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: LYNDON MARSHALL

Plaintiff

AND:

MERCANTILE EXCHANGE CORPORATION

Defendants

BEFORE: Koehnen J.

COUNSEL: *Filomena Kandola* for the plaintiff

Stefano Tripodi for the defendant

HEARD: July 24, 2024

ENDORSEMENT

[1] The plaintiff has brought an action for wrongful dismissal. The defendant seeks an independent medical examination of the plaintiff because the plaintiff alleges that he cannot mitigate his damages because of a mental health condition. Although it is unusual to order an independent medical examination in a wrongful dismissal case, I am satisfied that it is appropriate to do so in the somewhat unusual circumstances of this case.

[2] The plaintiff was employed as a courier by the defendant for at just over 25 years. His annual salary was approximately $52,000. He was 58 years old at the time of his dismissal.

The defendant alleges that it terminated the plaintiff's employment when the defendant shut down its internal delivery department. The plaintiff was provided with 11 weeks working notice plus approximately 6 months salary in lieu of notice.

[3] The plaintiff claims he is entitled to 26 months notice.

[4] The plaintiff's employment was terminated on October 10, 2023. In the 9 months since then, the plaintiff has taken no steps to find alternative employment because he alleges that he is suffering from stress and depression arising out of his termination that prevents him from mitigating. The plaintiff takes the position that his mental condition will continue to prevent him from mitigating his damages until he is cured.

[5] The defendant seeks an independent medical examination of the plaintiff pursuant to section 105 of the *Courts of Justice Act*[1] and rule 33 of the *Rules of Civil Procedure.*

[6] The plaintiff notes as well that the cases the defendant relies on in support of its request for an independent medical examination all concerned personal injury claims. The plaintiff argues that his mental health is not the basis for the damages he claims and that his duty to mitigate is ancillary to his claimed damages. In those circumstances, the plaintiff argues that there is insufficient relation between his medical condition and the proceeding to warrant an independent medical examination.[2]

[1] *Courts of Justice Act* R. S. O. 1990, c. C. 43
[2] *Davis (Litigation guardian of) v. McFarlane,* [1997] OJ No 6137.

[7] The plaintiff also notes that courts have recognized that it is common for employees to experience mental health issues after being dismissed from their employment and that courts have accepted this as a valid reason for not being able to mitigate.[3] The cases the plaintiff relies on in this regard are all cases where the court accepted that the plaintiff was unable to mitigate for a certain period of time because of the mental stress arising from the dismissal. None of them are cases in which the court considers whether it is appropriate to order an independent medical examination.

[8] The plaintiff quite fairly notes that allowing defence medical examinations in wrongful dismissal actions for the purpose of assessing an inability to mitigate for mental health reasons can become a weapon for employers.

[9] At the same time, however, there is a countervailing consideration. Here, the plaintiff claims he has no duty to mitigate for up to 26 months because of a mental health condition. That may very well be the case. In my view, it would, however, be unfair to allow the plaintiff to make that assertion without having it tested.

[10] Section 105 (2) of the Courts of Justice Act provides:

> Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.

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[3] *Preuss v. Dr. P. Safari-Pour Inc. (c.o.b. I.Q. Dental)*, at para. 75 [2021] B.C.J. No 1114; *Reid v. Stratford General Hospital*, [2007] O.J. No. 5144, at paras 37-38; *Slater v. Halifax Herald Ltd*., [2021] N.S.J. No. 263, at paras. 28, 32; P*ohl v. Hudson's Bay Co*., [2022] O.J. No. 4195, at paras. 66-76; *Rothenberg v. Rogers Media Inc*., [2020] O.J. No. 4155, at paras. 14, 54, 55 and 60; *Fenos v. Facca Inc*., [2019] O.J. No. 6072, paras. 28-31; *Brito v. Canac Kitchens, a Division of Kohler Canada Co*., [2012] O.J. No. 376, paras. 15-18; and *Dizka v. Vantage Machine Shop Ltd*., [2021] O.J. No. 5274, paras. 3, 11).

[11] The mental condition of the plaintiff has been put into question in this proceeding by the plaintiff's own choice. The degree to which is mental condition has been put into question goes well beyond the usual adjustment period that courts afford plaintiffs to overcome the shock of dismissal before being obliged to mitigate their damages. At the moment, the plaintiff takes the position that he has had no obligation to mitigate for 9 months and that his inability to mitigate will continue into the indefinite future including up to the full 26 months notice he claims. This position arises in the context of relatively high employment and in the context of an income level which is not particularly high, and for which one might expect a significant number of jobs to exist.

[12] In *Brito v. Canac Kitchens, a Division of Kohler Canada Co.*,[4] Cronk J.A. accepted that an employee was unable to mitigate damages because of health issues. In doing so, however, she noted at para. 17:

> Moreover, there was no evidence at trial that the respondent was requested and refused to submit to any examination or evaluation required or specified by the appellant or the Plan administrator.

[13] This suggests that independent medical examinations are available in wrongful dismissal actions in appropriate circumstances.

[4] *Brito v. Canac Kitchens, a Division of Kohler Canada Co.*, [2012] O.J. No. 376 (ONCA) at para. 17.

[14] As noted earlier, the plaintiff referred to a number of cases in which courts accepted that plaintiffs were unable to mitigate damages because of the stress of the termination. The longest time period in which mitigation was not required was 12 months.[5]

[15] It strikes me that in the circumstances of this case, if the plaintiff takes the position that he is unable to mitigate after 12 months have passed, he should be required to submit to an independent medical examination. That strikes me as a fair balance between giving an employer the right to test allegations of inability to mitigate without allowing employers to abuse independent medical examinations as a tactic to dissuade plaintiffs from legitimately relying on medical issues that prevent them from mitigating damages.

[16] None of that is to say that the plaintiff is not suffering from a condition that prevents him from mitigating. It is merely to say that if someone takes a position as unusual as the plaintiff is taking, they should be prepared to subject themselves to an independent medical examination in order to test the assertions they are making.

[17] Neither party filed cost submissions. I order that costs be in the cause.

Ancillary Issues

[18] Examinations for discovery will occur on September 26, 2024 at Network Reporting Services.

[5] *Reid v. Stratford General Hospital,* [2007] O.J. No. 5144, at paras 37-38; *Rothenberg v. Rogers Media Inc*., [2020] O.J. No. 4155, at paras. 14, 54, 55 and 60.

[19] The parties shall use a randomly assigned roster mediator to mediate on a single day between October 21 and October 25, 2024.

Date: July 24, 2024

Koehnen J.