7 Things Wrongfully Dismissed Employees Must Do to "Mitigate" Their Damages

written by Tina Tsonis | September 28, 2021

Employees who don't try to find comparable new employment may get less termination notice.

In addition to termination notice under employment standards laws, wrongfully dismissed employees are entitled to common law damages compensating for the lost employment income and other financial losses they suffer. The longer employees remain out of work, the greater their losses. To counter the perverse incentive this creates and ensure that employers aren't on the hook for avoidable losses, the law requires employees to mitigate their losses by taking "reasonable steps" to find comparable new employment. If employees fail to mitigate, the court can slash or even totally eliminate their damages.

The "mitigation of damages" defence can help employers who commit wrongful dismissal save significant amounts of money. The problem is that the employer has the burden of proving that employees didn't take reasonable steps to mitigate and that they would have found comparable work had they tried. And that's not easy. While each case is different, here are 7 general principles about mitigation to keep in mind.

1. Employee Must Make Active Job Search

At a minimum, mitigation is about engaging in a reasonable job search. Simply going through the motions won't cut it. In the words of a BC court, a job search "requires more than creating a resume, conducting computer searches and looking at job postings. . . [it may involve] activities such as reaching out to contacts within the industry, writing cover letters setting out why you qualify for a position, following up with telephone calls or email correspondence" [*Moore v Instow Enterprises Ltd*., 2021 BCSC 930 (CanLII), May 17, 2021].

2. New Job Can't Be Too Big of a Step-Down

Mitigation requires seeking not just any job in any field or market but **comparable** employment. While employees are expected to be flexible, they're not required to accept jobs offering substantially inferior pay, benefits or even prestige. Examples:

- Employee need not accept a demotion and 20% pay cut [*Farwell v. Citair Inc*., 2014 ONCA 177 (CanLII)]; and
- Demotion to a cashier position would have been "too humiliating and embarrassing" for a 62-year-old with 25 years of managing experience to accept [*Brake v PJ-M2R Restaurant Inc*., 2017 ONCA 402].

3. New Job Can't Be Too Big of a Step-Up

The comparable employment rule runs both ways. Thus, an employee doesn't meet the duty to mitigate if he/she doesn't get a new job because of aiming too high. Thus, for example, an Ontario court ruled that manager failed to mitigate not only because she applied only for 11 jobs in 2 years but also because 9 of those jobs were for VP roles, a title she didn't hold with her previous employer. **Result:** The court cut her notice from 8 months to 6 months [*Lake v. La Presse (2018) Inc*., 2021 ONSC 3506].

4. Employees Must Search for Jobs in Their Industry

While wrongful dismissal may be the perfect occasion for entering a new field, failing to seek work within an employee's own industry gives the employer failure-to-mitigate ammunition, especially when the employee has worked a long time and is well established in the industry being jettisoned. Thus, for example, one reason the employer in the *Lake* case won is that the manager didn't apply for any jobs in her industry, media.

Strategic Pointer: Mitigation doesn't preclude seeking more senior jobs or jobs in other industries **in addition to** positions comparable to the one from which employees were wrongfully dismissed. The problems occur when they dedicate most or all of their job search to those non-comparable positions.

5. Retraining Doesn't Count as Job Seeking

It's perfectly understandable for an employee to seek retraining after getting a pink slip. But, again, wrongful dismissal isn't a free pass for an employee to embark on a new career path. Accordingly, retraining that replaces or unduly interferes with the search for comparable employment constitutes a failure to mitigate. **Example:** Instead of applying for any of the positions his former employer forwarded to him, an unskilled general labourer enrolled in a 6-month welding training program. The Ontario court rejected his claim for 24 months' notice, finding that his entitlement to damages ended when he put his job search on hold and began the training program [*Benjamin v. Cascades Canada ULC*, 2017 ONSC 2583].

6. Employee Can't Unduly Delay Job Search

Being wrongfully dismissed can be a traumatic experience and employees are allowed a certain amount of time to recover and plan for the future before jumping back into the job market. But the adjustment period can't be unreasonably long. Inordinate delay in starting a job search is a failure to mitigate. How long is too long? **Answer:** It depends on the case and circumstances, including the efforts employees make to get counselling or other help.

For example, while acknowledging that an employee was "emotionally distraught" after being dismissed, a BC court ruled that the more than one year it took her to begin looking for work was unreasonable. "I would have been much more impressed by her argument had she been able to show that she had sought counselling and assistance, and begun her search for alternate employment, say, six months after her dismissal," the judge explained [*Dixon v. Sears Canada Inc*., 1995 CanLII 536 (BC SC)].

7. Employee May Have to Accept Alternate Employment from Current Employer

One of the most commonly litigated mitigation issues is whether employees must accept temporary alternative employment during the notice period offered by the employer that fired them. In a landmark 2008 case, the Supreme Court of Canada ruled that the

standard should be whether a “reasonable person” in the employee’s position would have accepted the offer [*Evans v. Teamsters Local No. 31*, [2008] 1 S.C.R. 661, 2008 SCC 20]. Although each case is different, the factors determining reasonableness are well established:

Factors of Reasonableness of Returning to Work with Former Employer

Factors For Returning	Factors For Not Returning
*Salary offered is the same *Work is substantially the same or at least not demeaning *Personal relationships aren’t acrimonious	*Atmosphere of hostility, embarrassment or humiliation *Employee has already started lawsuit *Offer was made after employee had left

Takeaway

One of the best ways to minimize your liability exposure is to support the employees you wrongfully dismiss and help them find new work, either with you or another company in your industry. If possible, offer job counselling and notify them of current opportunities. In addition to helping employees get back on their feet, this constructive approach puts you in a stronger position to use the mitigation of damages defence, especially where employees don’t accept the support and assistance you offer.