

# After the Axe Falls: Mitigating Damages: How Far Must Fired Employees Go to Find a New Job?



## **The Stakes**

Wrongful termination lawsuit can saddle your organization with 5- or even 6-figures worth of termination notice. But you may also be able to slice huge chunks off your bill by relying on an age-old legal doctrine called the mitigation damages (mitigation of damages) rule.

## **Mitigation Law, 101**

The point of wrongful dismissal damages is to compensate employees for the losses they suffer as a result of termination. In a legal proceeding, employees have the burden of proving their losses, typically by showing the employment income they'd have earned if they hadn't been fired. But the case doesn't end there. The court or arbitrator can reduce or even eliminate termination notice and damages if it thinks employees didn't do enough to mitigate their losses.

While it may sound like a legal technicality, the employee's duty to mitigation damages serves a significant practical purpose: "It means employees who lose their jobs can't just sit idly back and allow their employment losses to add up," explains an Ontario lawyer. They need to go back into the job market. "Mitigation is less a duty the employee owes to the former employers as to him/herself," the lawyer explains.

**Exceptions: When the Duty to Mitigate Doesn't Apply**  
Although it's a universal rule, there are a few situations to which the employee's duty to take reasonable steps to mitigate damages doesn't apply. [Click here](#) for the details.

## **What Does 'Reasonable Efforts' Mean?**

The rule: Employees must make "reasonable efforts" to seek and accept suitable new employment. The standard is a lot easier to state than to apply in real-life

situations. And that's a problem for you because, as the employer, you bear the burden of proving that the employee *didn't* act reasonably. Since it's a case-by-case determination, the key to making sound judgments of your own legal position is looking at other mitigation cases. Of course, you probably don't have the time to gather and analyze the cases—nor the money to have a lawyer do it for you. So we did the heavy lifting for you.

## **5 Rules of Thumb**

Although each case is different, there are 5 clear lessons about reasonable efforts that we can draw from the case law:

### **1. Employees Must Make Job Search**

Reasonable efforts doesn't necessarily require getting a job but seeking one. At a minimum, employees must perform basic job search functions like preparing and posting resumes, approaching prospective employers, checking job listings and networking.

**Example:** A BC mine worker won his wrongful dismissal case. But it took 3  $\frac{1}{2}$  years. And in all that time, he stayed home and took care of his kids. There was no job search, no resumes, just vague conversations with relatives. And jobs were, in fact, available. So the arbitrator cut his damages:

- 50% for year 1;
- 70% for year 2;
- 90% for year 3; and
- 100% for the 6 months after that.

[*Kelland Grievance*, [1994] B.C.A.A. No. 362].

### **2. Reasonable Efforts a Sliding Scale**

Exactly how long and how hard must employees look for new work? It depends on circumstances like:

- Their age;
- The transferability of their experiences and skills set;
- Their health, including stress or other collateral psychological damage caused by the dismissal; and
- The local job market.

**Example:** Alberta court rules that truncated job search is adequate for a 63-year-old senior manager considering his age, failing health, lack of transferable skills and the poor job market [[\*Sumner v. PCL Constructors Inc.\*](#), [2010] ABQB 536, Aug. 23, 2010].

Of course, mitigation isn't simply by the numbers.

**Example:** A 75-year-old employee is offered suitable employment but turns it down. The Québec court rules he didn't make reasonable efforts and cuts his termination damages in half [[\*Levy c. Standard Desk Inc.\*](#), 2012 QCCS 3471].

### **3. New Job Must Be Suitable**

Employees don't necessarily have to take the first job that comes along. The obligation is to seek and accept "substantially similar" work. Employees aren't generally expected to leave their field or geographic market nor accept significantly inferior jobs in terms of salary, benefits, responsibilities, opportunities for

advancement, etc.

**Example:** Alberta court rules that senior manager's refusal to accept a "dead-end" job at a lower salary and no prospects of advancement isn't a failure to mitigate. Employees are entitled to consider their best interests in deciding on replacement opportunities and courts should be reluctant to second guess their decisions, the court reasoned [[Nixdorf v Broadstreet Properties Ltd](#), 2017 ABQB 132 (CanLII)].

**Example:** Five months after being wrongfully dismissed, a senior manager at a large accounting firm is offered a lower-paying generalist position with a smaller firm. He puts the offer on hold and continues seeking jobs in his specialty with a larger firm. No failure to mitigate, says the Ontario court. The manager was "entitled to [continue searching for] a position commensurate with his expertise and skills" [[Tsakiris v. Deloitte & Touche LLP](#), 2013 ONSC 4207 (CanLII)].

But while employees don't have to settle for inferior jobs, they can't be too picky either.

**Example:** BC court rules that luxury car salesman didn't act reasonably in holding out for a job with Ferrari when he could have probably secured positions with other dealerships. His Ferrari aspirations were "unrealistic and unreasonable" and put "personal preference and career objectives" first, the court reasoned [[Coutts v. Brian Jessel Autosports Inc.](#), 2005 BCCA 224].

#### 4. Retraining & Returning to School Doesn't Replace Job Search

General rules:

- Reasonable: Going back to school or pursuing retraining *during* a job search as long as the employee keeps actively searching and is available to work if the opportunity arises;
- Not Reasonable: Going back to school or pursuing retraining *instead of* job searching and resuming the search afterwards.

**Example:** It was unreasonable for an unskilled labourer to enroll in a 6-month welding training program when there were at least 3 jobs at comparable pay available that he could have probably gotten had he tried. Wrongful dismissal isn't "a free pass to change careers," stated the Ontario court in slashing \$25K from his \$44K damage award [[Benjamin v Cascades Canada ULC](#), 2017 ONSC 2583 (CanLII)].

#### 5. Duty to Accept Suitable Re-Employment

Mitigation may require employees to accept re-employment with the employer that wrongfully fired them. The test: Whether a reasonable person in the employee's position would accept the employer's offer.

**Example:** Ontario court rules that a superintendent acted unreasonably in refusing to accept a foreman position. Although the new position was a demotion in terms of prestige and responsibility, it offered the exact same salary, benefits and opportunities for advancement [[Mifsud v. MacMillan Bathurst Inc.](#), 1989 CanLII 260 (ON CA)].

The reasonable person test considers not just economic terms but psychological dynamics. Thus, employees need not accept reemployment if it would expose him to bad blood, hostility or undue humiliation. This is likely to become a key issue in cases of constructive dismissal due to a toxic work environment.

**Example:** Ontario court rules that an employee need not accept alternative employment

to mitigate her damages after being called a liar by her boss [*Turner v. Inndirect Enterprises Inc.*, 2009 O.J. No. 6345 (S.C.J.), aff'd 2011 ONCA 97].

### **3 Things You Can Do to Help Employee & Protect Yourself**

Although mitigating damages is primarily about employees helping themselves, you also have a vested interest in the process. The sooner the employee finds suitable employment, the less you have to pay in termination notice. Here are some of the things you can do to help employees in their job search while also laying the groundwork for mitigation damages defence in case you need it down the road.

#### **1. Support the Employee's Job Search**

In addition to moral support and encouragement, you can help employees land a new job by offering letters of reference, job counselling and access to job recruiters. You can go the extra mile by contacting organizations in your industry to see if there are any openings.

#### **2. Direct Employees to Appropriate Opportunities**

Let employees or their representatives know of any suitable job openings or postings you learn about. You may even want to suggest that they apply. In addition to helping their job search, this puts you in a stronger position to claim lack of mitigation later on, especially if the employee fails to follow up.

#### **3. Don't Offer Lump Sums**

If you're in settlement negotiations, offer salary and benefits continuances rather than lump sum payments. If lump sums can't be avoided, require the employee to mitigate damages and clarify your right to clawback in the event he/she secures new employment during the notice period.