

# Employees Who Refuse Alternative Employment With Their Employer May Not Be Entitled To Statutory Termination Pay



Generally speaking, when an employee is dismissed without cause, they are entitled to notice or pay in lieu of notice as set out in the British Columbia *Employment Standards Act* (“ESA”). However, there are certain exceptions to this rule. One such exception is where the employee is offered and refuses reasonable alternative employment by their employer.

## **Legislative Framework**

Pursuant to section 63 of the ESA, after three consecutive months of employment, an employee becomes entitled to notice of termination or pay in lieu of notice based on their length of employment.

However, section 65 of the ESA sets out certain exceptions to this general rule, and section 65(1)(f) states that section 63 (individual termination pay) and section 64 (group termination pay) **do not apply** to an employee who has been offered and has refused reasonable alternative employment by the employer.

Employment standards decision makers have held that “the employer” means:

1. the employee’s current employer;
2. an associated employer;<sup>1</sup> or
3. a successor employer.<sup>2</sup>

The test under s. 65(1)(f) to determine if an offer is reasonable is the “reasonable person test.” This is an “objective test, that is, what a reasonably officious bystander would consider as reasonable, not what the employee believes is reasonable.”<sup>3</sup> The onus of showing that an offer is reasonable is on the party making the offer (i.e. the employer).<sup>4</sup>

In applying the test and determining what reasonable alternative employment is, the following non-exhaustive list of factors may be considered:

1. **Whether there is a standard practice in the business or industry in which the employee is working:** For example, if it is common place for employees to work at different locations, then offering an employee a job at another location could

be reasonable if the job is the same or similar.

2. **The nature of the job offered compared to the one currently performed:** If the job offered involves a completely different type of work that the employee does not want to perform (even if the employer provides training), or the job requires skills or qualifications the employee does not have, then the offer is likely not going to be reasonable.
3. **Any express or implied understandings or agreements:** This could include any agreements made during the hiring process, and the terms of the employee's Employment Agreement.
4. **Whether the wages, benefits, working conditions and security of employment are comparable:** If the job offered is at a lower salary or would constitute a demotion or drop in status, then the offer is likely not going to be reasonable.
5. **Geographic proximity or costs of relocation:** If the offer would require a significant commute, it may not be reasonable.
6. **Any objective personal circumstances that might operate against accepting the offer:** What may be reasonable for one employee, may not be for another due to their personal circumstances. Such circumstances could include an employee's childcare obligations or their ability to travel to a new location or work different hours.<sup>5</sup>

An employee who refuses an offer of alternative employment may not be entitled to termination pay under the ESA, if, after applying the above factors, the offer is deemed to be reasonable.

### **Example One: Offer Likely Reasonable**

ABC Ltd. operates a cafe and bakery. Sally is the head baker and has worked for ABC Ltd. for three years. ABC Ltd. is being purchased by 123 Ltd. Sally is offered a job as head baker with 123 Ltd. at the same location that she currently works and on the same terms and conditions as her current employment. Sally declines the offer.

In the context of the purchase and sale of a business, "the employer" includes the purchaser. As such, the offer of alternative employment is likely reasonable as Sally was essentially offered exactly the same job with 123 Ltd. as she already has with ABC Ltd. Therefore, Sally would likely not be entitled to termination pay.

### **Example Two: Offer Likely Not Reasonable**

An employer has two locations in Vancouver which are a 10 minute walk from each other. The employer is closing one of the locations and has offered Sandy, the Manager of the closing location, a job as the Assistant Manager at the other location. Sandy has worked for her current employer for 10 years and currently earns \$30/hr and reports to the owner. The hourly rate for the Assistant Manager position is \$25/hr and Sandy would have to report to Bob (the Manager of the other location). Sandy declines the offer.

The offer of alternative employment is likely not reasonable as it amounts to a demotion and would require Sandy to take a pay cut. Therefore, Sandy would likely be entitled to termination pay based on her length of employment.

### **Take Away**

While an employer might not always be in a position to offer an employee an alternative position instead of dismissing them (e.g. if there are performance issues or financial constraints), if there are other positions that could be offered to an employee prior to dismissing them, it is always worth considering doing so. However, employers should first evaluate the offer to determine whether it is objectively

reasonable in the circumstances.

### **Footnotes**

1. As defined in section 95 of the *ESA*.

2. As defined in section 97 of the *ESA*.

3. *Hopp (Re)*, 1997 CanLII 25649 (BC EST) [*Hopp*].

4. *Isle Three Holdings Ltd. (Thrifty Foods) (Re)*, 2008 CanLII 93086 (BC EST), at para. 11.

5. *Hopp supra*; *Helliker (Re)*, 1997 CanLII 25626 (BC EST); Guide to the Employment Standards Act and Regulation.

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