

# Mitigation Following Termination Of Employment: A Cautionary Tale



Absent a contractual term to the contrary, an employee who has been terminated from employment has a “duty to mitigate” and search for alternative employment. As set out in *Michaels v. Red Deer College*:

“The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a “duty” to mitigate should be understood in this sense.”<sup>1</sup>

In short, this duty requires an employee to take reasonable steps to attempt to find new employment. A court will reduce any monetary award made to the former employee by the amount of employment income the employee earned from other sources during the reasonable notice period. A court may also reduce any monetary award for an employee’s failure to act and take reasonable steps in their duty.

In a wrongful dismissal action, the employer bears the onus of proving, on the balance of probabilities, both of the following:

- The employee failed to make reasonable efforts to find work; and
- The employee could have found employment of a similar kind, suited to the employee’s abilities, had reasonable efforts been made.

It is often not sufficient for an employer to merely criticize an employee’s efforts, but rather, must lead evidence that the employee’s efforts were not reasonable. Further, an employer’s failure to lead evidence of reasonable comparable employment may also preclude their ability to prove a failure to mitigate. However, where an employer is successful in proving the above elements, the consequences to the employee can be significant.

In *Patel v Crimp Circuit Inc.* (2022, Small Claims Court Decision), the court reduced a notice period award from 14 months to 5 months (reduction of 7 months for failure to mitigate and further reduction of 2 months working notice). In concluding that the employee failed to mitigate, the Court considered the following facts:

- The Plaintiff failed to apply for any jobs in the field in which he had

experience;

- The Company that purchased his former employer offered him comparable employment, but he did not accept such employment; and,
- Counsel for the employer provided the employee with six job postings within the industry in which the employee had experience. The employee did not pursue these postings.

## **Takeaways and Considerations**

Upon termination of employment, if an employee has not agreed to a termination package, consider reviewing availability of similar employment. Document these postings and consider sending copies of available postings to the employee/counsel, rather than waiting for the employee to commence an action. Further, consider providing outplacement counseling to assist an employee in their mitigation efforts. However, if an employer intends to rely on the offered assistance at trial, it should not be made conditional upon signing a release.

## **Footnotes**

1 *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324 at para 9.

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*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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