

# Termination Pitfalls: Beware of 4 Situations When Fired Employees Need Not Mitigate



The so called duty of employees to mitigate gives employers the right to subtract the employment earnings received during the notice period from the employee's damages. In most cases, mitigation applies automatically and doesn't have to be spelled out in the employment contract. But there are some important exceptions in relation to fixed termination notice and others, including 2 situations where the duty to mitigate must be spelled out and 2 others where the duty can't be applied regardless of what the contract says.

## 1. No Implied Duty if Contract Sets Fixed Termination Notice

The duty to mitigate doesn't automatically apply where the employment contract sets out a fixed termination notice period or formula for calculating the notice period.

### The *Bowes* Case

This rule comes from a 2012 Ontario case called [Bowes v. Goss Power Products Ltd.](#) (2012 ONCA 425 (CanLII)) that began when a senior VP of marketing was fired without cause after 3.5 years of service. It only took the VP to find a new job at the same salary. So, everything seemed peaches and cream, at least mitigation-wise.

But there was a twist: The VP's contract promised 6 months' notice if the VP was terminated before 48 months of service. And it didn't say anything about his having to mitigate damages. Result: The company had to pay him the promised 6-months' notice. "It would be unfair to let an employer opt for certainty by specifying a fixed amount of damages and then allow the employer to later seek a lower amount at the employee's expense by raising an issue of mitigation that wasn't mentioned in the employment contract," explained the Ontario Court of Appeal.

The same rule binding employers to pay termination notice fixed in the contract without requiring the employee to mitigate damages applies in not just Ontario but most of Canada.

**Practical Pointer:** Although courts won't imply a duty to mitigate when there's a fixed termination notice period, employers can get around this by simply adding a contract clause specifically requiring employees to mitigate.

**Model Language**  
**Employee's Duty to Mitigate:** The termination notice set out in Section X of this Employment Agreement [insert number of section setting a fixed notice period, amount or calculation formula to which the employee is entitled in the event of termination without cause], is subject to Employee's duty to make reasonable efforts to seek new and substantially similar employment to mitigate the losses he/she incurs as a result of under this Agreement and Employer's right to clawback in any employment earnings incurred during the notice period from the termination notice provided for in Section X [insert number of section setting a fixed notice period, amount or calculation formula to which the employee is entitled in the event of termination without cause].

## 2. No Implied Duty if Employee Receives Lump Sum Settlement Payments

The duty to mitigate also doesn't automatically apply to lump sum payments employees receive as part of a post-termination settlement. Translation: Employees who get a lump sum under a termination settlement don't have to give back any of that money if they take a new job during the notice period unless the agreement expressly requires mitigation.

**Practical Pointer:** As with fixed termination notice, you can establish the employee's duty to mitigate by expressly spelling it out in the settlement agreement.

**Model Language**  
**Employee's Duty to Mitigate:** Employee is obligated to make reasonable efforts to seek new and substantially similar employment during the notice period to mitigate his/her losses and any replacement employment income earned during the notice period shall be set off against the lump sum payment set out in Section X [insert number of section setting the lump sum termination notice payment] of this Settlement Agreement.

## 3. Mitigation Doesn't Apply to ESA Termination Notice & Severance

The money employees receive in employment standards termination and severance benefits don't count toward mitigation. Translation: You can't subtract these amounts from damages if the employee finds a new job during the notice period. And unlike the 2 exceptions above, you can't get around this one via contract.

#### **4. Mitigation Doesn't Apply to *Wallace* Damages**

The damages employees receive as a result of the bad faith manner in which termination is carried out, i.e., *Wallace* damages, don't count as income that can be subtracted for failure to mitigate. Such payments are considered compensation for abusive treatment, not employment earnings. Again, this rule cannot be contracted out of.