

SPECIAL PROMOTIONAL FEATURE

## MITIGATION

# The duty to mitigate still exists

Employers should not give up on this important cost-saving tool



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**LITTLE FRUSTRATES** an employer more than having to pay a dismissed employee common-law notice while the employee fails to take reasonable steps to find a new job and mitigate their losses. Subject to limited exceptions, a dismissed employee has a duty to mitigate any damages they may suffer by making reasonable efforts to find comparable replacement employment. Mitigation is important to employers because income earned from the replacement work reduces the former employer's common-law termination liability.

In recent years, the law around mitigation has become more complicated, leading some employers to give up on the concept entirely and simply pay out the full common-law termination entitlement.

However, knowing when and how to require a dismissed employee to mitigate their damages can save an employer thousands of dollars in separation packages.

It is impossible to cover all mitigation issues here. However, as a starting point, every employer should have at least some understanding of three key concepts: i) what constitutes comparable replacement employment; ii) whether income from a "side hustle" counts toward mitigation income; and iii) the impact of contractual terms on the duty to mitigate.

## What constitutes comparable replacement employment?

Comparable employment means neither identical employment nor any employment. If a former employee has a duty to mitigate their damages, they are not entitled to hold out for perfect employment, nor are they obligated to accept any position available to them. An employee is entitled to focus their job search on "comparable" roles.

The Court of Appeal for Ontario recently addressed the meaning of "comparable" in *Humphrey v. Mene Inc.* The court held that, while a former employee may limit their search to comparable roles, this does not mean the roles must be "identical."<sup>1</sup> In this case, the employee was terminated from her role as chief operating officer (COO), and her wrongful dismissal action proceeded by way of summary judgment. The evidence before the motion judge confirmed that, seven months post-termination, the employee had declined an offer of employment in a vice president e-commerce role because it was not a "broad-based senior leadership role" nor, according to the employee, was it financially similar to her former role as COO.

The motion judge found the employer had "not provided the Court with persuasive evidence or analysis on whether this position was comparable in terms of role, as well as in terms of all aspects of the remuneration including stock options, bonuses, etc." Notably, the burden to establish that an employee has failed to mitigate rests with the employer. The court found the former employee was entitled to twelve months' reasonable notice but reduced this by one

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month because the employee had done little to look for new employment in the six months post-termination.

On appeal, the court overturned the motion judge's decision on the mitigation issue, holding the judge had "set the bar too high." While the appeal court acknowledged the employer's burden to establish a failure to mitigate is a "heavy one," in this case it was sufficient that the employer had established that the former employee had been offered a senior management position with compensation comparable to or greater than what she had earned with the employer. The court reduced the notice period from eleven to six months' compensation.

## What about a "side hustle"?

Increasingly, employees may have a "side hustle" – another income stream, be it consulting, a "gig" job or other employment. Is this mitigation income?

If the secondary stream existed pre-termination, this income will not be counted as mitigation income. However, if a former employee ramps up their secondary income post-termination, the increase in compensation may appropriately be considered mitigation income.

In a 2018 case before the British Columbia Court of Appeal,<sup>2</sup> a former employee was entitled to five months' common-law notice. Prior to his termination, the employee had a side hustle through which he earned up to \$9,600 per month. Post-termination and throughout the five months' notice period, he increased that income to roughly \$80,000 (equivalent to \$16,000 a month). The appeal court held that the difference between these two amounts earned over the five months' notice period (estimated by the court to be \$30,000) was appropriately characterized as replacement income, and so it was deducted from the notice award.

### Contractual notice terms and the duty to mitigate

The duty to mitigate arises out of general contract law and is not unique to employment matters. Courts have generally held that if an enforceable termination clause sets out an employee's entitlement on termination, and there is no express requirement to mitigate, it is presumed the parties have agreed the employee is entitled to the full contractual amount. To rebut this presumption, the termination clause should include an express requirement to mitigate.

In a 2020 decision of the Ontario Superior Court of Justice,<sup>3</sup> an employee's termination clause entitled him to 11 months' notice, without any mention of a duty to mitigate. The court held that the employee was entitled to that full amount, despite the fact the employee had found new employment and fully mitigated within the contractual notice period. The amounts earned in the new employment were not deducted from the award. According to the court, "having contracted out of the common law by specifying the notice period, or pay in lieu of notice, if the applicant were to be terminated without cause, the employment contract making no reference to mitigation, the applicant was under no duty to mitigate his damages."

### Takeaways for employers

The duty to mitigate is an important tool to both reduce an employer's potential liability and create leverage. Best practice is to ensure your organization's employment agreements and termination packages are reviewed by experienced employment counsel and the duty to mitigate is addressed.

An employment agreement should also require an employee to seek the employer's consent before engaging in any side hustle. There are many reasons for this, including to ensure there is no conflict of interest and the employer is aware of the secondary income. At the very least, an employee should be required to disclose such secondary income.

Finally, it is almost always in the parties' best interests that the employee find comparable income replacement as soon as possible. Consider providing a positive letter of reference (to the extent possible) and forwarding to the former employee any information regarding comparable work. This will help the employee to find new work, and create an evidentiary record that comparable work was available at the relevant time. 

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<sup>1</sup> *Humphrey v. Mene Inc.*, 2022 ONCA 531  
<sup>2</sup> *Pakozdi v. BGG Heavy Civil Construction Ltd.*, 2018 BCCA 23  
<sup>3</sup> *Gula v. Freed Developments Ltd.*, 2020 ONSC 6463

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