



## Case Law Update: Failure to Mitigate

An employee who has been wrongfully dismissed from their employment has a duty to mitigate their damages by making reasonable efforts to find alternative employment. While employees are not required to accept radically different positions, depending on the manner of their dismissal, they might be expected to accept a lesser position with their previous employer. Employees who have been constructively dismissed may be required to mitigate their damages by continuing to work for their employer despite a “substantial change” to their terms of employment. Failure to mitigate may result in a court voiding the wrongful dismissal damages an employee may be entitled to.

The British Columbia Superior Court did exactly this in the case of [Blomme v Princeton Standard Pellet Corporation](#). The plaintiff had worked for the employer for 20 years and was laid off on April 2, 2020, due to the COVID-19 pandemic. On October 1, 2020, the plaintiff's counsel wrote a demand letter to the employer claiming that under British Columbia's *Employment Standards Act* (ESA), the plaintiff had been deemed terminated on August 30, 2020, when her temporary layoff extended beyond the 24 weeks provided by the Act.

BC had no legislative equivalent to Ontario's Infectious Disease Emergency Leave which suspended ESA constructive dismissal claims during the “COVID-19 period” and the plaintiff claimed 18-22 months of reasonable notice damages for wrongful dismissal. The employer wrote to the plaintiff on October 8, 23 and 26, rejecting her termination claim and asked whether the plaintiff was interested in returning to work as soon as November 3. The plaintiff did not reply. On October 30, the employer wrote to the plaintiff offering eight (8) weeks of pay in lieu of notice and repeating its offer to return her to work. The offer was not accepted.

The plaintiff's evidence was that she did not understand the employer's October 8, email and feared returning to a hostile work environment. The employer's evidence was that the plaintiff had retained her position throughout the layoff and had not been recalled earlier because her strongest skill related to training new employees which were not being hired due to the pandemic.



The Court determined that the plaintiff had been terminated by operation of the ESA on August 30, 2020, and was entitled to eight (8) weeks statutory notice of termination on that date. Her common law right to damages was triggered on October 1, 2020, when she wrote to the employer and took the position that her employment had ended.

Based on her age (64), length of service (20 years), position (plant supervisor), and the availability of alternative employment, the Court determined the plaintiff's common law reasonable notice damages were between 15 to 16 months. However, the Court noted that the plaintiff had taken almost no steps to mitigate her damages, applying to no positions between October 2020 and January 2021. The Court further found that, "In the absence of conditions that would render her return to work unreasonable, on an objective basis," (at para 97) the plaintiff should have mitigated her damages by returning to work:

I conclude that, in the circumstances of this case, a reasonable person in Ms. Blomme's position would have accepted Princeton's offer. Although the specific terms of her re-employment were not set out in Mr. White's October 8, 23, and 26 emails, it was incumbent on her to at least explore the option of returning to work. Ms. Blomme was being asked to return to the same position, salary, and benefits, which had never been cut off... There was no evidence to support that she would be returning to an atmosphere of hostility, embarrassment, or humiliation. There was no evidence that either Mr. White or Mr. Andrews bore Ms. Blomme any animus. Ms. Blomme's mistrust of Mr. White appears to have been an unfortunate result of their miscommunication and misunderstanding (at para 112).

The plaintiff's failure to return to work resulted in a failure to mitigate and the Court dismissed her claim for damages.

## Takeaways

- Employers faced with a claim of constructive dismissal should always explore whether they can return a laid off employee to work.



HUNTER-LIBERATORE-LAW

- To mitigate against a finding of damages, the employee should be returned to the same position, with the same salary and benefits.

---

The article in this update provides general information and should not be relied on as legal advice or opinion. This publication is copyrighted by Hunter Liberatore Law LLP and may not be photocopied or reproduced in any form, in whole or in part, without the express permission of Hunter Liberatore Law LLP.