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<p>WRONGFUL DISMISSAL David Harris, B.A., LL.B. Release No. 6, June 2024</p>

This four-volume national work provides a comprehensive treatment on the law of wrongful dismissal in Canada. Coverage includes: the contract of employment and employee status; types of dismissal and the “just cause” defence; damages and the duty to mitigate; related actions including actions tort, injunctive relief, and statutory actions; employee protections under the *Canada Labour Code*, tax considerations; the impact of statutes on the assessment of damages; practical considerations; charts of notice awards; and relevant legislation and concordance tables.

What’s New in this Update

This release features updates and new and revised headings added to Chapter 8 (Duty to Mitigate).

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Highlights

- **CHAPTER 8. DUTY TO MITIGATE — INTRODUCTION — 8.1 OVERVIEW** — The evaluation of an employee’s mitigation efforts requires the court to consider numerous principles and factors. Some of these were summarized recently in *Preuss v. Dr. P. Safari-Pour Inc. (I.Q. Dental)*, 2021 BCSC 973. Specifically, the employee must make reasonable efforts to find alternate employment, the employee is entitled to a reasonable grace period before looking for a job, there is no obligation to mitigate where the individual is unable to work, job search may be limited to a reasonable commuting distance, and an employee who previously worked part-time is entitled to limit their search to part-time employment. In *Monterosso v. Metro Freightliner Hamilton Inc.*, 2023 ONCA 413, 2023 CarswellOnt 9036, 2023 A.C.W.S. 2560, 41 B.L.R. (6th) 1, the trial judge had ruled that the dismissed employee, who had been working under a fixed-term contract, was not required to mitigate his damages. The Appeal Court ruled this was in error, explaining that the trial judge erred by conflating the situation of independent contractors with that of employees working under fixed-term contracts. Although the Ontario Court of Appeal ruling in *Monterosso* accordingly establishes that independent contractors working under fixed-term contracts do have an obligation to mitigate, this is subject to any agreement with the employer otherwise. Importantly, however, the courts in British Columbia overtly diverge from the conclusion reached in Ontario, or at least persist in finding uncertainty on this point. In *Leclair v. Patel Pharma Inc.*, 2021 BCSC 1904, 2021 CarswellBC 3069, 2021 A.C.W.S. 163, the court clarified that the duty to mitigate is not confined to the employee taking steps to simply *search* for employment; rather the employee must also *accept* offers of employment that are reasonable in the circumstances. The duty involves a “constant and assiduous application for alternative employment, an exploration of what is available through all means” (*Goetz v. Instow Enterprises Ltd.*, 2021 BCSC 709).
- **CHAPTER 8. DUTY TO MITIGATE — INTRODUCTION — 8.2 BURDEN OF PROOF OF NON-MITIGATION** — The decision in *Kozar v. The Canadian National Railway Company*, 2024 MBKB 12, 2024 CarswellMan 19, illustrates the extent to which a court will consider all the facts, when evaluating the employee’s mitigation efforts. In that case the employer, claimed that the 60-year-old employee had failed to mitigate his post-termination losses, by opting to take early retirement instead of looking for a replacement position. The court began by confirming there was a high onus on the employer; it had to do more than show a mere lack of suf-

ficient effort by the employee to find himself any job. Instead, it had to show that comparable employment was available to the employee in the same or other industry, if only he made diligent efforts to find it.

- **CHAPTER 8. DUTY TO MITIGATE — FAILURE TO MITIGATE — 8.7 GENERALLY** — The COVID-19 pandemic's impact on the job market figured prominently in the court's reasoning in *Henderson v. Slavkin et al.*, 2022 ONSC 2964, 2022 CarswellOnt 11594, 2022 A.C.W.S. 1528, 2023 C.L.L.C. 210-011, 81 C.C.E.L. (4th) 244. The dental clinic employee had been terminated in April 2020, which she considered to be the height of the pandemic when many businesses, including dental offices, were closed. She gave evidence that suitable positions were hard to find, even after businesses had started to reopen. In her case, she was unable to find work until 18 months after being dismissed. After confirming that the burden lies on the employer to show the employee failed to take reasonable steps to mitigate in her mitigation duty, the court noted the unique timing of the termination, relative to the pandemic. The court declared it had "no doubt that the pandemic and the significant closures of businesses across the province and the country had an impact on the plaintiff's search for employment and the success of that search." This, in conjunction with her age at termination (63 years old), and her decision to move away from a large city where job opportunities were relatively abundant, all made finding a comparable position more difficult.
- **CHAPTER 8. DUTY TO MITIGATE – FAILURE TO MITIGATE – 8.8.10 FAILURE TO TAKE ANY STEPS TO MITIGATE** — As the case law illustrates, an employee has a duty to act reasonably, and to take such affirmative steps as a reasonable person in the employee's position would take in his or her own interest to maintain income and status in the industry, trade or profession. It has been said that this duty involves "a constant and assiduous application for alternative employment, an exploration of what is available through all means" (see *Dove v. Destiny Media Technologies Inc.*, 2023 BCSC 1032, 2023 CarswellBC 1730, 2023 A.C.W.S. 4160, 90 C.C.E.L. (4th) 215). If there is a complete failure by the employee to seek work after dismissal, then the court may dismiss his or her wrongful dismissal action entirely, and deny the related claims for damages.
- **CHAPTER 8. DUTY TO MITIGATE – FAILURE TO MITIGATE – 8.8.25 PERIOD OF ADJUSTMENT** — When assessing an employee's efforts to seek alternative employment, the court must apply its scrutiny to all the facts, including the employee's particular personal circumstances. In the course of doing so, the court may take into account that the employee needed to "regroup" or "adjust" to his or her changed

employment situation, before embarking on a proper search for comparable employment. Similarly, the court may allow for a relatively short period for the employee to address any post-dismissal stress or disorientation, especially where he or she has not been in the job market for a significant length of time. In *Pohl v. Hudson's Bay Company*, 2022 CarswellOnt 13487 (Ont. S.C.J.), additional reasons 2022 CarswellOnt 14494 (Ont. S.C.J.), the employee had started working with the employer at age 25, and had worked his way up over the next 28 years. When he was terminated without cause and brought an action for wrongful dismissal, the employer alleged a failure to mitigate. The employee had waited about six months before looking for alternative work. The court rejected the employer's accusation, concluding that no failure to mitigate had been proven. In the circumstances, it was reasonable to allow the employee a period of about three months to adjust to his new situation, plus an added period to account for the effects of the COVID-19 pandemic. The employee's mental health - which had been exacerbated by the manner of dismissal - had also interfered with his job search capabilities. On the other hand, the court concluded the employee would not necessarily have found himself a comparable job even if he had started looking six months earlier. However, in *Cho v. Café La Foret Ltd.*, 2022 BCSC 1560, 2022 CarswellBC 2459, appeal allowed in part 2023 BCCA 354, 2023 CarswellBC 2678, 2023 A.C.W.S. 4707, the court heard the employee's various explanations for what it called his "sub-optimal" job search, including the proposition that he needed a period of adjustment, and was in distress of the manner of his dismissal. The court nonetheless ruled that the employee had failed to mitigate his loss, since he admitted that it not only took him four months before he even started to look for work, but at that point he did not undertake what could be considered an expansive job search.

- **CHAPTER 8. DUTY TO MITIGATE – FAILURE TO MITIGATE – 8.8.50 IMPACT OF EMPLOYER'S OFFER OF RE-EMPLOYMENT** — In *Preuss v. Dr. P. Safari-Pour Inc. (I.Q. Dental)*, 2021 BCSC 973, 2021 CarswellBC 1637, 332 A.C.W.S. (3d) 283, 71 C.C.E.L. (4th) 17, the 63-year-old employee had worked for the employer dental clinic for 37 years. Immediately prior to her abrupt dismissal, she had been working three days a week, to allow her to care for her elderly father. When the employee formally launched her suit for wrongful dismissal, the employer then offered to re-hire her on the same terms. The employee declined since she felt the relationship between had deteriorated irreparably due to a lack of trust. The court held that it was not unreasonable for the employee to have declined the employer's late-breaking offer. It involved 10-hour workdays, three days a week, which

were untenable due to her personal circumstances around her father's care. The erosion of trust was also a factor. On the other hand, the court also found that the employee "did not exactly pull out all the stops to find other employment. Her own evidence suggests that she did not look very hard." Still, the legal effect of the employee's feeble efforts were ameliorated by her personal circumstances, as the court found: She was 63 years old, on the brink of retirement, and available only for part-time work. Her mitigation efforts, as established on the evidence, were not unreasonable in the circumstances.

- **CHAPTER 8. DUTY TO MITIGATE – MISCELLANEOUS – 8.20 EARLY RETIREMENT** — Although dismissed employees clearly have a duty to mitigate their damages, that duty can be attenuated in some narrow circumstances, including appropriate cases where the employee opts to take early retirement. This was the scenario in *Kozar v. The Canadian National Railway Company*, 2024 MBKB 12, 2024 Carswell-Man 19. The employer, CN, claimed that the employee refused to mitigate his damages, by accepting an early retirement offer that had been presented by the employer at the time of termination. This meant the employee, who had not yet reached 65, would nonetheless be receiving retirement benefits starting on the date of termination. The court rejected the employer's claim that there had been a failure to mitigate in the circumstances.