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Wrongful dismissal case law update

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

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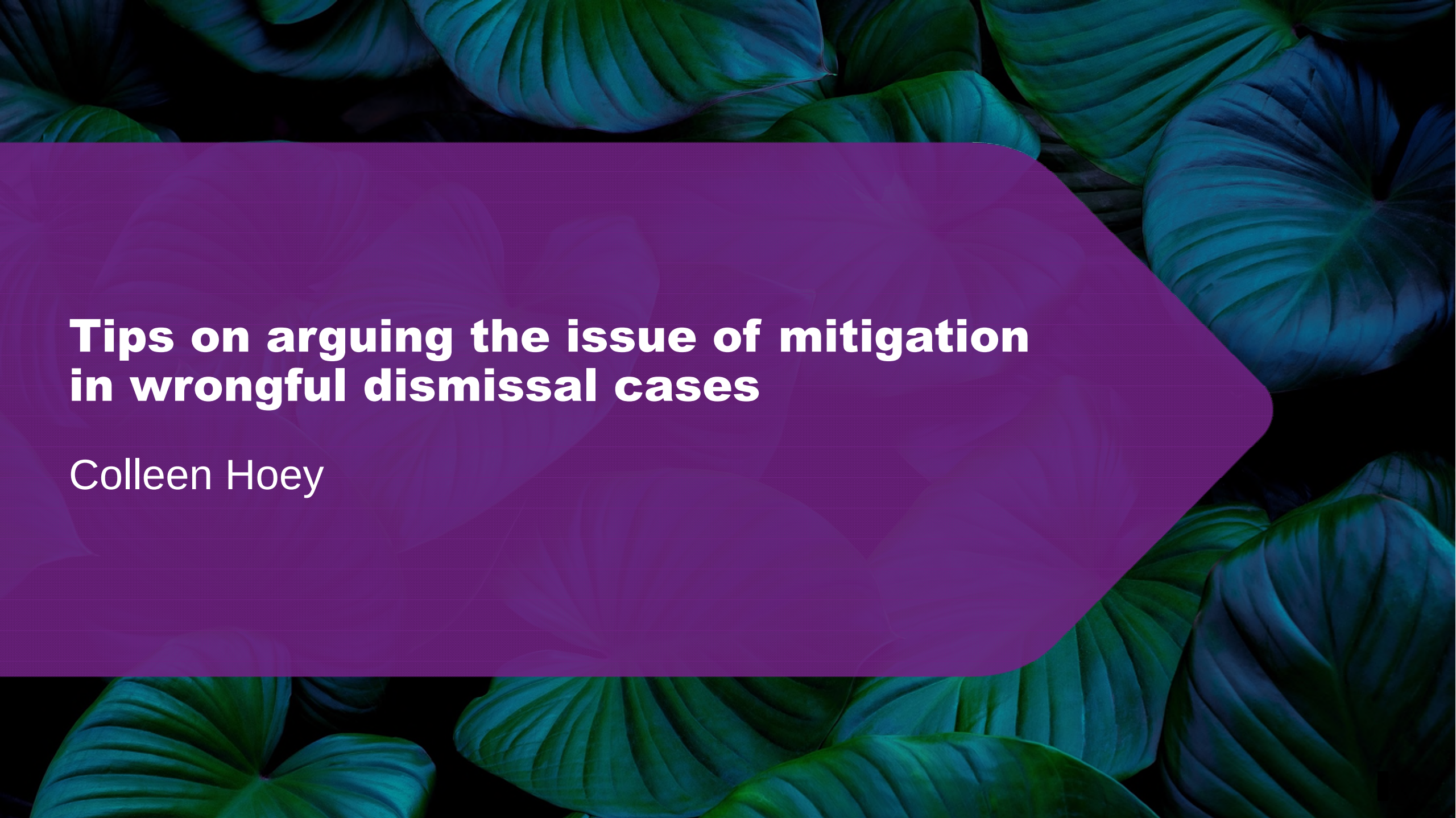

Tips on arguing the issue of mitigation in wrongful dismissal cases

Colleen Hoey

Principle:

A former employee, must take reasonable steps to mitigate their damages by seeking comparable employment.

When an employee fails to properly mitigate the court may reduce the wrongful dismissal damages.

Any income earned from complying with the duty to mitigate must be deducted from damages due in lieu of reasonable notice.

Establishing failure to mitigate

- Burden of proof is on the employer to show that the employee either found work **OR** could have found similar employment if they had conducted a reasonable search.

- Employer must show
  - The plaintiff failed to take reasonable steps
  - The plaintiff could likely have obtained alternative employment
  - High burden – must show that there were reasonable efforts / not perfection

How is mitigation playing out in the courts?

A. Cases where failure to mitigation found and award reduced

Employee had done nothing to find a comparable job. In "full retirement mode" Court suggested it would have been reasonable to look for work at a lower salary for a limited term.

Reduced notice by 20% (*Zoehner v. Algo Communication* 2023 BCSC 224)

Employee waited 4 mths before starting her search. Did not include any cover letters, did not follow up with employer and did not sign up for job alerts.

Reduced notice by 2 months (*Cadrin v. Dunsmuir Holdings* 2023 BC 130)

Employee refused position with another company. Court found that although the position paid less initially, there was the possibility of promotion in relative short order.

Reduce notice by 1 month (*Leclair v. Pate Parma* 2021 BCSC 1904)

Employer was able to show that employee was unaware of and had failed to pursue a number of job postings.

Reduced notice by 1 month (*Wilson v. Pomerleau* 2021 BCSC 388)

Employee took 12 weeks before starting to look for a new job. This was considered too long.

Notice reduced by 8 weeks (*Bustos v. Celestica International Inc. CanLii 24598* ON SC 2005)

Employee was sad and unmotivated after losing job. Court found that she did not take reasonable steps prior to Feb 2021. Afterwards her efforts were 'passive', and she only began actively applying in June 2021. Her failure to apply for jobs within the industry where she had been working for her career also merited a reduction in the notice period.

Reduce notice by 3 mths (*Okano v. Cathay Pacific Airway Ltd* 2022 BCSC 88)

Employee failed to take reasonable and diligent steps. In this case the employee only considered sales rep jobs with tire companies within a limited geographic area. He only registered with two job search websites and spoke to two contacts about possible jobs but did not send his CV.

Reduced notice by 2 months (*Goetz v. Instow Enterprises Ltd. 2021* BCSC 709 2021)

B. Cases where there was no failure to mitigate

The employee's diagnosed psychological condition plus rumours of financial mismanagement led a BC Tribunal to conclude the employee's minimal mitigation efforts were sufficient.

A2201612 (Re) 2023 CanLII BC WCAT 2023

Employer argued the court could infer that the plaintiff would have secured alternate employment earlier if reasonable efforts had been made. Court concluded that in order for that argument to succeed employer must adduce evidence that other opportunities were available.

Telejeur v. Aurora Hotel Group, 2023 ONSC 1324

Employer put forward hearsay evidence by associate (law firm) of available jobs through LinkedIn and argued that employee should have applied for more positions. Court pointed to an absence of evidence that the positions were comparable, absence of salary information, benefit information, the dates they were available, and whether the plaintiff would have secured comparable employment.

Milwid v. IBM Canada Ltd., 2023 ONSC 1324

Court of Appeal overturned lower court decision where Court had reduced damage award for want of mitigation. Although Court of Appeal agreed that the employee delayed her mitigation efforts unreasonably the Court roundly rejected the lower court finding that there was an obligation, after a reasonable period of attempting to find similar employment, to begin searching for lesser paying jobs.

Lake v. LaPresse, 2022 ONCA 742

The employer offered to re-employ the employee who left claiming constructive dismissal. Court found that had the employee not moved to another city before the offer was made that it would have found the employee should have accepted the position. The letter of offer to the employee provides insight into what might work.

> *The employer would welcome the employee back to work and he should understand there would be no animosity or ill will of any sort toward him as a result of his commencing the action. The Employer has a high regard for Employee's ability, considered him to be a valued employee and was sorry to see him leave. I understand that our clients had a good working relationship and the only issue of disagreement between them was whether the Employer would continue to provide the employee with the truck.*
>
> *Quesnelle v. Camus Hydronics Ltd.,* 2022 ONSC 6156

Courts in Alberta and Saskatchewan also confirm onus of proving a failure to mitigate rests on the employer and is not an easy burden to discharge.

What can we learn from recent decisions?

Lessons Re: Offers of re-employment

- Offering the employee re-employment may be a method of helping the employee mitigate their losses and, if rejected by the employee, may lead to a conclusion that there was a failure to mitigate
- Constructive dismissal – employee may have an obligation to mitigate by continuing to work for the employer.
- Is the offer Reasonable?
  - ➢ Offer of re-employment must be on substantially similar terms and correspond in status, hours and remuneration
  - ➢ Courts will probe whether there is an atmosphere of trust and if the offer is truly made in good faith
- Employer must expressly offer the alternative position to the Plaintiff for the duration of the Notice period after the employee had refused to accept the alternate position on the grounds that it amounted to constructive dismissal

Lessons Re: Employees efforts to find alternate employment

- The number of resumes sent by an employee is a factor but not determinative of whether there was a failure to mitigate
- Employee's failure to use services provided by the employer may support failure to mitigate argument
- The law on mitigation in Ontario and BC differs:
  - In BC: "An offer of employment need not be made at the same salary that the employee earned before they were terminated; it may be necessary for a terminated employee to accept a position that would pay less in the short-run"
  - In On: The Court of Appeal in *Lake* (2022) wrote " there was no obligation …to seek out less remunerative work."
- Obligation to move – several cases have held an individual does not have an obligation to break local ties and move outside their local area
- Emerging trend: Courts will take the mental health of plaintiff into account when assessing mitigation efforts (See *Pohl v. Hudson's Bay Company*, 2022 ONSC 5230)

Lesson Re: Delay before mitigation begins

- Courts will allow plaintiffs “an appropriate amount of time to adjust to their situation and to plan for the future before fulfilling their duty to mitigate”

- However, case law suggests 12 weeks before starting considered too long. Some case law suggests that a delay of 4 weeks may be too long.

Lesson Re: Where the employee does earn other income

Key Case remains *Brake v. PJ – M2R Restaurants Inc.* 2017 ONCA 402 (CanLii)

- Courts in Ontario and BC will not deduct any income earned during the statutory notice period

- Courts will also not treat income as deductible mitigation income if the amounts earned do not rise to a level that substitutes for the employment lost (if the replacement income earned is minimal)

- Scope for debate whether new income (in excess of the statutory minimum) counts as mitigation income if earned at an inferior job. This was certainly the position put forward in the "concurring reasons" However the majority of the Court of Appeal wrote at paragraph 99 -

> *To the extent that the trial judge was suggesting that the court did not need to consider whether income received from a job that was inferior to the one from which the employee was dismissed was mitigation income, I respectfully disagree. That approach does not accord with the principle that employment income earned during the notice period is generally to be treated as mitigation of loss.*

Lessons Re Mitigation – Early trial

- If there is an early trial – the employee's mitigation obligation may continue post trial. If so, the employer is entitled to a credit for money earned during the remaining notice period

  - In *Cadrin v. Dunsmire Holdings Ltd.,2023 BCSC 130* , the Court allowed for a one-month contingency reduction because the notice period went beyond the trial date, and it was considered likely that the plaintiff will find another job within the notice period
  - In *Okano v. Cathay Pacific Airway,* 2022 BCSC 88 the court applied a 15% discount on the damages award from the date of the hearing to the end of the notice period to allow for possibility of mitigation.

Summary of practical considerations

Employment contracts:

- If offering more than minimum standards in your employment contracts, consider adding mitigation language to address what will happen if the person secures alternate work during the excess notice period and/or if they claim constructive dismissal.

Termination letters and exit strategy

- Build in an opportunity for the employee to mitigate their losses:
  - Is working notice a workable option for at least part of the notice period?
  - Consider lump sum vs. salary continuance with claw back options
- Provide letter of reference
- Provide career transition supports

Constructive/Wrongful dismissal claim

- Is this an employee you can recall to work?
- Early Negotiations: Make use of the mitigation contingency argument in support of a reduction of claim.

If litigation begins:

- Track comparable job opportunities
- Lead evidence that suitable replacement work could likely have been found during the notice period
- Be prepared to explain:
  - what qualifications the person has to identify positions that are comparable
  - why the alternate positions were considered comparable or reasonably appropriate
  - how the alternates are truly comparable in salary, benefits & skills
  - whether the alternates are geographically accessible

During examination consider the following areas

- When did they begin taking steps to mitigate
- Use of outplacement
- Courses taken
- How employee selected which positions to apply for (do they match the person’s experience and qualifications)
- Request chart of job searches
- Question why they have not applied for specific available positions

Silence is not acceptance and other case law developments on temporary layoffs

Fatimah Khan

***Pham v. Qualified Metal Fabricators*, 2023 (ONCA)**

Condonation of lay-off

- A signature on a layoff letter will not be sufficient to demonstrate condonation if it only acknowledges receipt of the terms of the layoff;
- A failure to object to the layoff and remaining silent while on the layoff, even when the layoff has been extended, does not constitute condonation:
  - An employee is permitted reasonable time to assess contractual changes to their employment terms; and
  - Condonation in a layoff context requires a positive action such as express consent to the layoff or expressing a willingness to work before claiming wrongful dismissal.

***Blomme v. Princeton Standard Pellet Corporation*, 2023 (BCSC)**

Refusing a return to work after lay-off considered a failure to mitigate

- Employee laid off effective April 4, 2020.
- On October 1, 2020, the employee sent a demand letter asserting that she had been terminated.
- On October 26, 2020, the employee was recalled to work effective November 3, 2020 (without backpay) and was also offered 8 weeks of termination pay in accordance with the deemed termination provisions of BC's *Employment Standards Act.*
- Employee rejected the offer.
- Although awarded reasonable notice damages, the Court held that it was unreasonable for the employee to have rejected the reinstatement offer and that she had failed to mitigate her damage.

Northern Air Charter (PR) Inc. v. Dunbar, 2023 (ABKB)

- Employee was laid off on June 30, 2016.
- On July 21, 2016, the employee took the position through his lawyer that he had been terminated.
- On September 15, 2016, the employer sent the employee a recall notice (without offering back pay).
- The employee rejected the recall notice and pursued a constructive dismissal action.
- There was no failure to mitigate when the employee declined the recall offer.

Changing tracks – A warning on trying to convert a without cause to a just cause dismissal

Maggie Sullivan

Laying the Foundation

With Cause verses Without Cause Terminations

With Cause

- Serious misconduct and/or a significant breach of one’s employment obligations
- Not entitled to reasonable notice upon termination
- A high threshold to establish

Without Cause

- Termination for any reason not prohibited by statute
- Entitled to reasonable notice upon termination

When you know, you know

Whether an employer can later assert cause will depend on their knowledge at the time of termination

- *Alayew v The Council for the Advancement of African Canadians in Alberta*, 2023 ABKB 113
  - Conclusion: when an employer has evidence to support a just cause termination but instead terminates an employee without cause, the termination may not be recharacterized later on.

- See also *Kaminsky v Janston Financial Group*, 2020 ONSC 5320 where the Ontario Superior Court struck the employer's subsequent cause allegations from the employer's statement of defence.

When you know, you know

Saving language in a termination letter will not save you

- *Abrams v RTO Asset Management*, 2020 NBCA 57.
  - "…without prejudice to our ability to take the position that your employment has been terminated for just cause, the Company has decided to terminate your employment, effective immediately, on a without cause basis."
  - Conclusion: the employer's reservation of the right to assert cause in the termination letter could not actually permit the employer to later assert cause.

After Acquired Cause

The limited circumstance where cause may later be asserted

- The employer must be able to demonstrate that:
    1. The employer did not have knowledge of the misconduct at the time the employee was terminated;
    2. The employer did not condone the misconduct by failing to take timely action; and
    3. The misconduct was sufficiently serious to provide grounds for termination for cause.

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Thank you

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