

Employees who Litigate are Required to Mitigate!

It is a well-established principle that terminated employees have a legal obligation to minimize their damages by taking reasonable steps to search for new employment. In circumstances where a terminated employee files an action for wrongful dismissal damages, the onus rests with the employer to prove that the employee failed to mitigate their damages. The burden that must be met to prove a failure to mitigate is very high. Only in rare circumstances will a court find that an employee failed in their duty to mitigate.

A recent British Columbia court decision has offered a glimmer of hope to employers that these types of arguments can be successful. In *Steinebach v. Clean Energy Compression Corp.*, 2015 BCSC 460, the employee sued his former employer for wrongful dismissal damages when he was terminated after 19.5 years of service. The court awarded the employee 16 months of reasonable notice.

In its defense, the company alleged that the employee had failed to properly mitigate his damages. The employee after a limited period of time searching for alternate employment, elected to pursue a completely different career despite available sales positions. In assessing the details of the employee's job search efforts, the court concluded that the employee's job criteria were too narrow, that he failed to pursue available opportunities that fell within his skills and experience and that he placed an overly strong emphasis on his personal preferences and career objectives. In light of these findings, the court reduced the reasonable notice period by 3 months.

This case serves as a reminder for employers that employees legitimately have a duty to mitigate. Although the burden of proof is high, employers should keep this in mind when structuring and negotiating termination packages. The case also provides guidance with respect to some of the relevant principles that will be assessed by a court to determine whether a terminated employee has met their duty to mitigate.

Please contact an e2r® Advisor to discuss how an employee's duty to mitigate can impact terminations and litigation in your organization.