



e2r Alert!

The Duty to Mitigate: A Refresher

In working with your e2r® Advisors, you may have heard us refer to an employee's duty to 'mitigate' their losses following the termination of their employment.

The employee's duty to mitigate means that they must proactively seek comparable replacement employment after their employment is terminated. Broadly speaking, when an employee finds comparable replacement employment, the former employer's potential liability for pay in lieu of notice over and above the minimum requirements of legislative employment standards comes to an end.

If an employee refuses to take reasonable steps to seek alternative employment, a court may consider reducing their entitlement to common law notice. However, the Ontario Court of Appeal has - *sigh* - arguably raised the bar for employers to prove their former employee failed to satisfy their duty to mitigate.

In the recent decision of [Pateman v. Koolatron Corporation, 2025 ONCA 224](#), the Ontario Court of Appeal outlined the burden of proof an employer must meet in order to prove their former employee failed to mitigate their damages:

"It was Koolatron's burden to show both that (1) Mr. Pateman failed to take reasonable steps to mitigate and (2) that if reasonable steps were taken, he would have been expected to secure a comparable position. In other words, not only was Koolatron required to show a failure to take reasonable steps, but also that the failure caused part of the loss".

In this case, while the trial judge found that the employee's mitigation efforts were "half-hearted at best" and deducted three months from the 24-month notice period awarded, the Court determined the employer failed to produce evidence of specific job opportunities available to the employee within a reasonable distance of their home and reversed the 3-month deduction.

In doing so, the Court clarified that it is not enough for an employer to simply allege a failure to mitigate. Instead, the employer must produce further evidence that if the employee had made reasonable efforts to find new employment, it would have resulted in their obtaining comparable employment.

From this perspective, it is prudent for employers to consider what actions they are willing to take to assist former employees in finding new work. This can include providing the employee with local job postings for comparable work, a letter of employment to help with the application process, or access to job coaching services.

As always, we are here to help. When a termination occurs in your organization, consider speaking with an e2r® Advisor about what steps you can take to satisfy your onus to prove an employee has failed to mitigate their damages.