



# What's New in HR Law

## Ontario Court of Appeal Confirms that Employers Must Lead Evidence When Disputing Mitigation Efforts

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### Bottom Line

In a recent ruling, the Court of Appeal for Ontario set aside a lower court decision that reduced a dismissed employee's reasonable notice period on the grounds of poor mitigation efforts. The Court of Appeal's decision confirms that the duty to mitigate requires a dismissed employee to seek employment comparable to the position they held at the time of dismissal, not lesser jobs.

### Relevant Facts

The employer in *Lake v. La Presse*, [2022 ONCA 742](#), was a daily online French language newspaper based in Montréal, Québec. The plaintiff was hired in August 2013 and worked for the newspaper company for five and a half years, during which time she was the general manager and the most senior employee in the company's Toronto division.

The employer terminated the plaintiff's employment without cause after it decided to close its Toronto office. The plaintiff was 52 years old and was making \$185,000 at the time of her dismissal.

On March 25, 2019, the plaintiff was notified of her employment termination effective May 30, 2019; however, she stopped working for the employer on April 30, 2019. She began conducting job searches

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shortly after this date but remained unemployed at the date of the summary judgment motion, which was held two years after her dismissal.

### **The Summary Judgment Decision**

The plaintiff commenced a wrongful dismissal action in the Superior Court of Justice (the “Court”) against her former employer. The fact that the plaintiff was terminated without cause and that she was likewise entitled to reasonable notice at common law was not in dispute. Instead, one of the major issues before the Court was whether the plaintiff’s entitlement to common law reasonable notice should have been reduced for her failure to mitigate damages.

The Court concluded that the plaintiff had not taken reasonable steps to mitigate her damages. In the Court’s view, the plaintiff had waited too long before beginning her job search and had applied to very few jobs in total. The Court also stated that the plaintiff had “aimed too high” in applying for vice-president roles and should have also applied for less senior roles since she continuously remained unemployed. Consequently, the judge reduced the applicable reasonable notice period from eight months to six months.

### **The Court of Appeal for Ontario’s Decision**

The plaintiff appealed the Court’s decision and asserted that the motion judge both: (a) mistakenly concluded that she had not taken reasonable steps to mitigate her damages; and (b) erroneously reduced the reasonable notice period absent evidence that the plaintiff would have found a comparable position if she had taken different steps in her job search.

The Court of Appeal allowed the appeal, effectively reversing the two-month reduction of the plaintiff’s notice period. In arriving to its decision, the Court of Appeal affirmed that an employer bears the onus of proving that a former employee failed their duty to mitigate their damages and would have otherwise secured comparable employment if they had made better efforts.

Although the Court of Appeal agreed that the plaintiff had unreasonably delayed the start of her job search, it disagreed with the motion judge’s statement that “in mitigation, after a reasonable period of attempting to find similar employment, a dismissed employee must begin searching for a lesser paying job.” According to the Court of Appeal, the duty to mitigate required the plaintiff to seek employment that was comparable in status, hours, and remuneration to the position that she had held at the time of her dismissal. As such, the motion judge erred in concluding that the plaintiff “aimed too high” when she applied for vice-president positions.

The Court of Appeal also held that no evidence was adduced to show that the plaintiff would have found a comparable position during the reasonable notice period if other steps had been taken. To the contrary, the plaintiff had provided extensive evidence of the various steps she took to mitigate her damages, including regular online job searches, networking efforts, private career coaching, and her applications for 20 suitable positions.

## Check the Box

*Lake v. La Presse* acts as a reminder that employers face a difficult task in proving that a former employee has failed to mitigate their damages. The duty to mitigate requires employees to search for comparable employment, not lesser employment. Even if an employer can prove that an employee did not take proper steps to mitigate their post-termination damages, they must provide evidence that the employee would have found comparable employment had they taken proper steps.

That said, employers should be mindful that courts and other adjudicators will be driven by a highly fact-specific analysis in determining the reasonableness of mitigation efforts and the steps taken to secure alternate employment. While *Lake v. La Presse* reaffirms general principles, additional considerations may be relevant in other cases.

## Need More Information?

For more information or assistance with employment termination, contact [Anja Djogo](mailto:anjad@filion.on.ca) at [adjogo@filion.on.ca](mailto:adjogo@filion.on.ca) or your regular lawyer at the firm.



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