

# DUTY TO MITIGATE PART II - REVENGE OF THE JOB OFFER

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In *Gannon v Kinsdale Carriers*,<sup>[1]</sup> the Ontario Superior Court of Justice found that a terminated employee failed to mitigate by refusing to accept an offer of comparable employment, disentitling her to damages for reasonable notice.

As discussed in our [previous bulletin](#), this decision is helpful in reinforcing that an employer's liability for reasonable notice damages can be significantly reduced if the employer can demonstrate that a position was available and the employee was unreasonable in pursuing or accepting it.

## Background

Kinsdale Carriers is a trucking company and it terminated the employment of Ms. Gannon as a result of the company's permanent closure. Ms. Gannon worked for the company for over 22 years and was 57 years old at the time of termination.

Ms. Gannon was originally hired in the position of office personnel/accounts receivable. In 2015, Ms. Gannon's role expanded to also include dispatch duties. A salary increase accompanied this change as did an increase in the hours of work.

Following her dismissal, Ms. Gannon brought an action for wrongful dismissal, seeking a 22 month notice period.

## The Decision

The Court found that Ms. Gannon was not entitled to damages for reasonable notice. Critically, Ms. Gannon failed to mitigate her damages when she rejected an offer of comparable employment extended to her on December 29, 2020, for a position she could have started in early January 2021.

### *Mitigation*

It is well established that the damages an employee is entitled to may be reduced where the employer can demonstrate that the employee did not take reasonable steps to mitigate their losses by seeking comparable employment.

It is a two-part test, and the onus is on the employer to establish that the dismissed employee failed 1) to take reasonable steps to search for a job and 2) that a comparable job could have been found if the employee had taken reasonable steps.

Kinsdale argued that following the delivery of the notice of termination on December 16, 2020, it made every effort to assist Ms. Gannon in obtaining comparable work as soon as possible by calling on various industry contacts. In particular, Kinsdale reached out to another transporter, Zehr Transport Limited ("**Zehr**"), and recommended Ms. Gannon. Kinsdale insisted that Ms. Gannon's hourly wage and work schedule remain the same in any offer Zehr may extend to Ms. Gannon.

As a result, Zehr set up a job interview with Ms. Gannon. Kinsdale argued that before the end of the interview, Zehr verbally offered Ms. Gannon the same position that she held at Kinsdale, with similar duties and responsibilities.

Ms. Gannon argued that no offer was ever made to her by Zehr or, if an offer was made, it did not constitute comparable employment because the position was for a full-time dispatcher, which did not include administrative and other office duties that she carried out at Kinsdale.

Ultimately, the Court found that Ms. Gannon was offered the position of dispatcher by Zehr, with ancillary office administration duties, similar to her position at Kinsdale. Her salary and hours of work would have also remained the same. This opportunity constituted comparable employment, which Ms. Gannon could have accepted to properly mitigate her damages.

### **Takeaways for Employers**

Employers should keep in mind that to be successful in proving an employee's failure to mitigate, it will be necessary for the employer to present evidence that a comparable job could have been found by the employee. In this case, the evidence Kinsdale presented to support its position was particularly strong, with witnesses from Zehr confirming that they extended a comparable job opportunity to Ms. Gannon.

While it may not be possible or practical to facilitate a job interview for a dismissed employee, employers can help their argument by reaching out to industry contacts to inquire about comparable positions or obtaining information about available jobs in the market from an outplacement counsellor or recruiter. The employer should then lead evidence that these jobs were brought to the employee's attention and if the employee did not pursue them, use that evidence to show that the employee was not diligent in searching for comparable employment.

[1] *Gannon v Kinsdale Carriers*, 2024 ONSC 1060.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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