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## **When Can a Terminated Employee Reject an Offer of Re-Employment?**

**By: Landon Young and Jessica Young**

Does a terminated employee have a duty to accept an offer of re-employment after termination? This issue was recently considered by the British Columbia Court of Appeal in **Fredrickson v Newtech Dental Laboratory**.

The employee had been employed as a dental technician assistant in a small dental practice for a period of eight and a half years. Upon returning from a leave of absence, she was told that she had been laid off due to insufficient work. She was provided with a record of employment and a letter of reference. The plaintiff took the position that her employment had been terminated and demanded termination pay. The company responded by taking the position that she had not been dismissed and directed her to return to work. The company also stated that if she had been dismissed, she was obligated to mitigate her damages by accepting the offer of re-employment.

The employee did not return to work and instead commenced a wrongful dismissal action. A day later, the company offered her re-employment again, this time with an offer to pay her unpaid wages from when she was initially to return from her leave of absence until the company made its original offer of re-employment. The company made three other similar offers in the months to follow. However, these offers only included wages back to the date of the initial offer, not to the return to work date.

### **Applicable Legal Principles**

In Canada, employees who are terminated from employment have a duty to mitigate their damages. An employer may provide a terminated employee with an offer of re-employment. This can put the employee in the “hot seat” so to speak. If the employee rejects the offer, they risk receiving no damages for pay in lieu of notice on account of a failure to mitigate.

However, employees do not need to accept re-employment with the terminating employer in all circumstances. The legal test is whether a reasonable person in the employee’s position would have accepted the employer’s offer. This analysis takes into account factors such as the work atmosphere and stigma, as well as the nature and conditions of employment.

### **The Decision**

The trial judge found that the plaintiff failed to mitigate her damages by refusing the offer of re-employment, and only awarded notice period damages for the period when her leave ended to when the first offer of re-employment was made, which was approximately two months.

The British Columbia Court of Appeal overturned the trial judge’s decision. The Court found that the trial judge erred in two ways. First, it reasoned that none of the offers would make the

plaintiff whole, as none accounted for the full period of loss. The plaintiff would be left with a claim for lost income, which would put her at odds with her employer.

Second, the Court reasoned that the actions of the employer eroded the mutual trust that must be present in order for a continued relationship. The Court relied on the fact that the owner of the company had recorded conversations that he had with the plaintiff without her knowledge, and subsequently made use of the conversations. As well, the owner engaged in a conversation with another employee, where he agreed that the plaintiff would likely be too embarrassed to return to work. The Court found that by discussing the situation with another employee in a small work environment, the owner breached the confidence that one would expect from their employer.

We will be providing more information on employee dismissals, among other current hot topics in labour and employment law, at our 29<sup>th</sup> Annual Employers' Conference. Attendees receive 5.25 CPD Credit Hours toward HRPA Recertification and this may apply toward 5.25 substantive CPD hours with LSUC. To review our complete agenda, or to register, [click here](#).

Whether a court will find that an employee must mitigate by returning to work for the terminating employer all boils down to reasonableness. In this case, the Court found it was unreasonable to expect the terminated employee to accept the offer of re-employment due to the employer's conduct. As this case illustrates, especially in small work environments, one or two inappropriate comments can have a significant impact on whether the terminated employee has a duty to accept a re-employment offer.

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*UPDATE* is an electronic publication of Stringer LLP  
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