

Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

## W&L CASE REWARDS 60-YEAR EMPLOYEE AND SETS IMPORTANT PRECEDENT REGARDING THE DUTY TO SEARCH FOR COMPARABLE EMPLOYMENT

Many employers believe that they are off the hook for an employee's severance the minute they stop applying for a new job. Jonquille Pak of our firm proved that this belief is an overly broad misunderstanding of the law in the case of *Leeming v. IBM of Canada Ltd.* Jonquille successfully argued that her client should receive full compensation over a 10 month notice period without reduction despite abandoning the traditional job market, retraining for a new career and opening her own business.

### Background

Ms. Leeming was hired by DWL Incorporated in April of 2005, a business acquired by the Defendant, IBM Canada Inc. ("IBM"). She received a termination letter on July 16, 2013 that stated her employment would end August 16, 2013 and which offered her an insufficient separation payment in exchange for signing a release in IBM's favour. At the time of her dismissal she was 60 years of age and worked as a Senior Managing Consultant, a "middle managerial administrative position".

In the four months following termination Ms. Leeming searched job websites, spoke to recruiters, utilized outplacement counsellors, met with business contacts and applied for 20 positions in various industries and job types. She had two job interviews but was not offered a position. She did not secure full-time comparable employment and was only able to obtain a part-time independent contractor position.

As a result, she decided to switch gears, retrain for a new career and start her own business. As is often the case her business was not profitable during start-up and Ms. Leeming was not earning a profit at the time the case was heard.

### Position of the Parties

IBM argued that Ms. Leeming's failure to continue searching for comparable employment should reduce her notice entitlement, a concept referred to as "failing to mitigate".

Ms. Leeming's position was that she made diligent effort to find new employment and then made the reasonable decision to become self-employed.

### The Law

Every dismissed employee has an obligation to mitigate his or her damages. Put simply, this obligation requires the terminated employee to take steps to find an alternative job instead of allowing losses to accumulate while not working. It does not require the employee to accept *any job*. Rather, mitigation requires the former employee to take reasonable steps to obtain a job comparable to the position held with the ex-employer, in terms of status, responsibility and compensation.

If an employee does not put in the proper effort to find a similar position, or even any position, after dismissal (assuming they are capable of working) the notice period and damages they would have otherwise been entitled to, will be reduced.

### OUR LAWYERS

[DAVID WHITTEN](#)

[DANIEL LUBLIN](#)

[ELLEN LOW](#)

[DANIEL CHODOS](#)

[JONQUILLE PAK](#)

[MARK YAZDANI](#)

[OZLEM YUCEL](#)

[PAUL MACCHIONE](#)

[MARC KITAY](#)

### CONSULTATIONS

For a consultation please call us at 416-640-2667 or submit your online request [here](#).

### HR MANAGER'S GUIDE TO INDEPENDENT CONTRACTORS IN THE WORKPLACE



Available for purchase from [Carswell's](#) store.

## The Decision

Despite IBM's argument that Ms. Leeming should have stayed in the traditional labour market longer Justice Perell agreed with the points Jonquille presented and found that there was not a failure to mitigate. Ms. Leeming was found to have "tested the market long enough to retrain for a new career" and start her new business. As a result, she was entitled to her full compensation over a reasonable notice period of ten (10) months without reduction.

## Lesson for Employers

This decision should serve as notice that employer's must not only assess the adequacy of their severance offers but that they should be less rigid in evaluating the mitigation efforts of terminated employee's. Importantly, just because an employee has abandoned traditional means for obtaining a position does not mean that they have necessarily failed to mitigate.

The lawyers at Whitten & Lublin are experienced in assisting employers and employees with the assessment of separation packages and the adequacy of mitigation efforts. As such, consider consulting us when faced with these significant evaluations.

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## LATEST NEWS

[Daniel Lublin](#) was recently interviewed by [CTV News](#) regarding Hydro One's termination of employment for one Toronto FC fan who followed one obscene 'meme'. Watch the full [interview here](#).

The [Toronto Star](#) interviewed [Daniel Lublin](#) discussing the CBC's decision to sever ties with two executives in the Jian Ghomeshi scandal. Read his [feedback here](#).

[Daniel](#) spoke with [Global News](#) about the Jian Ghomeshi Report and its impact on CBC's decision. [Watch his full interview](#).

[David Whitten](#) was interviewed for [CBC Radio](#) regarding medical marijuana in the workplace. Listen to the full interview [here](#) and [here](#).

[CHCH News](#) asked [David](#) about his legal opinion surrounding the Jian Ghomeshi scandal and its impact in the workplace. Find out his opinion [here](#).

[David](#) led a presentation at the [Canadian Bar Association](#) discussing Contingency Fee Arrangements. See details [here](#).

[David](#) co-chaired and presented for the [Federated Press](#) in a course entitled [6<sup>th</sup> Social Media Risks](#) where he discussed the social media risks involving employee use.

[David](#) presented for [HAPPEN](#) members regarding Employment Agreements: Advanced Negotiating Strategies. To get your HAPPEN membership, find [details here](#).

[Ellen Low](#) led a [HRPA](#) seminar entitled [Disability or Discipline - What Happens When Disability and Performance Needs Collide?](#)

[Daniel Chodos](#) was quoted in [The Huffington Post](#) discussing the use of credit checks to screen job applications. Read what he has to say [here](#).

[Chodos](#) hosted a webinar for the [HR Reporter](#) entitled Mitigation: How to Keep the Damage to a Minimum. Keep an eye out for the on-demand webinar and [how to register](#).

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## UPCOMING EVENTS

On June 12<sup>th</sup>, 2015 [Daniel Chodos](#) will be leading a presentation for the [Canadian Federation of Apartment Associations \(CFAA\)](#) Rental Housing Conference 2015 discussing rules for employees' private social media use. To attend click [here for details](#).

[Ozlem Yucel](#) will be leading a presentation on July 15, 2015 for the [HRPA](#) discussing rules for workplace discipline and performance management. [Register here](#).

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## LAW BLOG