

## Member's Quarterly

Fall 2023 Edition

## Feature

## "Reasonable Alternative Work" and Termination Notice

*Increasing the chances for success*

Section 55 of the *Alberta Employment Standards Code* ("ESC") sets out termination notice requirements for employers when terminating an employee's employment. Subsection 55(2) of the ESC sets out instances where termination notice will not be required. In particular, subsection 55(2)(d) of the ESC states that termination notice is not required when the employee is laid off after refusing an offer by the employer of reasonable alternative work.

However, determining what is considered an offer and reasonable alternative work is not always easy.

### There Must be an Offer to Refuse

In order for there to be a refusal, there needs to be an offer in the first place. In *Manning Forest Products Ltd. v Martens*, 2022 CanLII 50893, the employer decided to change part of its operation, but wanted to retain its employees, albeit in different positions. The employer created an internal job posting and selection process for its employees to obtain alternate work following the elimination of their existing positions. The employee did not apply for any of the postings, as he claimed he liked his former work schedule and was concerned that the alternative jobs posted would aggravate his pre-existing back injury.

The Alberta Labour Relations Board explored whether the internal job posting and selection process constituted an "offer" and found that the employees were not "offered" reasonable alternative work. This was because the employer reserved the right to review applications and select from the applications the candidate to be offered a position and it was unclear whether there were other applications, and if so, who the other applicants were. Ultimately, the internal job postings were not clear and unequivocal offers by the employer to the employee.

This is in line with previous Alberta decisions, such as *Varsity Plymouth Chrysler (1994) Ltd. v Lindsey*, 2005 CanLII 51540 (AB ESA), where the Appeal Body found that, "in order to rely on a refusal of an offer of reasonable alternative work in order to dispense with termination notice, I believe the employer must prove that the offer was formally communicated to the employee and that the consequences of refusing it was made clear to him. Ordinarily, that would require a formal written offer with a description of the work being offered with, perhaps, an explanation of the consequences of refusing the offer."

### Is the Alternative Reasonable?

In determining whether alternative employment is reasonable, the Ontario Labour Relations Board in its decision, *Casino Rama Services Inc. v Paul*, 2007 CanLII 910, referred to *Re Hart & Cooley Manufacturing Co. of Canada Ltd*, which stated that the test for reasonableness is an objective one, and the question is whether a reasonable employee, under the same or similar circumstances, would have considered the employment offered as a reasonable alternative to employment which they held with the same employer. The circumstances to be considered include:

1. nature of the job offered compared with the one which the employee performed,
2. any express or implicit understandings or agreements between the parties,



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3. geographic proximity, or costs of dislocation,
4. comparable wages, benefits, working conditions and security; and
5. any objective personal circumstances which might reasonably militate against the acceptance of the position.

Based on these circumstances, each scenario will need to be assessed based on its own facts.

For example, in *K.O.P.S. Security & Investigations Inc v Miles*, 2014 CanLII 79788 (AB ESA), the employee knew that the employer's contract in Cardston, Alberta would expire soon, and indicated to the employer that he was inclined to accept shifts in the Lethbridge area and in fact worked some shifts at other sites. The Umpire ultimately found that the employee was trained for and was offered shifts at the Lamb Weston job site, and the employee effectively terminated his own employment by his unwillingness to accept shifts at Lamb Weston.

On the other hand, in *Rowlands v Custom Design Installation Ltd.*, 2000 CanLII 13211 (ON LRB), while the duties were not themselves unreasonable, the Vice-Chair found that the position offered represented a substantial reduction of hours of work with little or no overtime opportunities, which the employee previously enjoyed. As a result, it did not qualify as reasonable alternative work.

#### Key Takeaways:

In order to increase the chances of success with the reasonable alternative work exception to termination notice, an employer should ensure that its offer is unequivocal, in writing, and sets out the consequences for refusing the offer. It will be equally important to ensure the alternative position offered is as similar to the employee's previous position as possible. Otherwise, the employee will likely be entitled to at least their statutory termination notice entitlement.

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