REVISITING THE DUTY TO MITIGATE

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In the leading Supreme Court of Canada decision, *Evans v Teamsters Local Union No. 31,* the duty to mitigate is described as a duty to take such steps as a reasonable person in the dismissed employee's position would take in their own interest to maintain their income and their position in their industry, trade, or profession.[1] Employees who do not take reasonable steps to mitigate may disentitle themselves to wrongful dismissal damages. The duty to mitigate also applies to employees who are constructively dismissed. In this article, we explore the obligation on employees to accept alternative positions offered by their employer or to consider an offer of re-employment after dismissal.

ESA Entitlements and Written Employment Contracts

Under the *Employment Standards Act, 2000* ("ESA"), an "employee whose employment is terminated after refusing an offer of reasonable alternative employment with the employer" is not entitled to notice and severance. Although the term "mitigation" is not used, this exemption is the equivalent of a mitigation requirement where there is a job elimination or re-assignment and the employee has to reasonably consider an alternative position with their current employer.

There is no exemption under the ESA if an employee is offered a reasonable alternative position with a *different employer*. If an employee is terminated without notice and is entitled to termination pay and severance, the employer must pay these entitlements even if the employee immediately commences employment elsewhere. However, under the common law standard articulated in the *Evans* case, an employer's notice obligation to a dismissed employee will be reduced by income the employee earns from a comparable job with another employer that they commence during the reasonable notice period.

There are instances where the duty to mitigate will not apply such as in an employment agreement with a contractual termination clause. Where a former employee was employed under an employment contract that contained an express provision providing for fixed or readily calculable notice upon termination, and that contract is silent on the issue of

mitigation, the employee will not be required to mitigate, and the employer will not get credit for mitigation income.[2]

When Does an Employee have to Accept a Job Offer from the Employer?

A reasonable person would be expected to accept re-employment from their former employer where the salary offered is comparable, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious. Other relevant factors include non-tangible elements such as work atmosphere, stigma, and loss of dignity. There is no absolute requirement that an employee must mitigate if offered re-employment by their employer. Terminated employees are entitled to their own self-interests: they are not obliged to mitigate by working in an atmosphere of hostility, embarrassment, or humiliation.

Examples

The following are recent examples where the Courts have considered whether an employee is required to accept a job offer from their employer in order to mitigate their damages.

Refusing a Job Offer is Not a Failure to Mitigate

In *Morgan v Vitran Express Canada Inc.*, the Ontario Court of Appeal upheld the trial judge's findings that a refusal to accept a demotion was not a failure to mitigate because (1) the work environment was unfriendly; (2) the work offered was of lesser importance than the Plaintiff employee's previous job; (3) by accepting the new job, the Plaintiff employee would have suffered a loss of dignity in the eyes of the workers he used to supervise; (4) the Plaintiff employee had been treated in an unacceptable manner by his employer leading up to his constructive dismissal; and (5) the Plaintiff employee's relationships with his supervisors were acrimonious.

In *Preuss v Dr. P. Safari-Pour Inc. (I.Q. Dental)* the court concluded that it was not unreasonable for the plaintiff to decline the defendant's offer of re-employment because the manner chosen by the defendant to terminate the plaintiff was abrupt, dispassionate, and hurtful. The court continued at para. 93:

> ... The plaintiff rightly was shocked by her dismissal and felt betrayed. She was embarrassed, humiliated, and told not to return to the Clinic effective immediately. She no longer trusted Dr. Safari-Pour and the

> relationship between them was frayed. A return to her previous employment would, I conclude, have resulted in an acrimonious and unhealthy relationship between the plaintiff and Dr. Safari-Pour. In these circumstances, a reasonable person in the plaintiff's position would not have accepted the defendant's offer of reemployment.

In *Wong v Polynova Industries Inc.,* the court held that the employee was not required to mitigate his losses by accepting re-employment from his employer because the plaintiff perceived the trust between the parties to have been irreparably broken by the time of the offer of re-employment. The employer made the offer of re-employment *after* the Plaintiff employee threatened legal action against them. It was, therefore, reasonable for the plaintiff to have declined such an offer, given the irretrievably damaged relationship between the parties at that juncture.

In *Bishop v. Rexel Canada Electrical Inc.*, the plaintiff told his manager that he quit; his manager then had the plaintiff escorted from the premises before the end of his shift. Co-workers saw the plaintiff being escorted from the workplace. In addition, even though the plaintiff did not submit a resignation letter, the defendant issued a letter stating that the plaintiff's resignation has been accepted. The court found that there was a clear breach of trust and some animosity between the parties. Therefore, the court concluded "this is not one of those rare cases where the employee should have accepted re-employment in order to mitigate his losses.

Refusing a Job Offer is a Failure to Mitigate

In *Evans v Teamsters*, the plaintiff was notified that his employment was to be terminated and that the employer wanted to commence discussions regarding the timing of his departure and his severance entitlements. The plaintiff stopped working while the discussions continued. After some months without agreement, the employer advised the plaintiff that he was to return to work for the duration of his termination notice period. He refused.

The Supreme Court of Canada held that the evidence did not support the conclusion that the plaintiff's circumstances, viewed objectively, justified his refusal to resume employment with the defendant. The Court observed that while the fears expressed by the plaintiff may have been subjectively justified, there was no evidence of acrimony and no evidence that the

plaintiff would have been unable to perform his duties if he continued to be employed by the dismissing employer.

Ultimately, the court concluded that the plaintiff should have accepted re-employment because the relationship between the plaintiff and the employer was not seriously damaged, and the terms of employment were the same. Therefore, the plaintiff failed to mitigate his losses because it was not objectively reasonable for the plaintiff to refuse to return to work to mitigate his damages.

In *Kitchen v Brandt Tractor Ltd.*, the plaintiff was given four (4) weeks working notice of termination. Before the working notice period expired, the employer offered the plaintiff a further eight (8) weeks of working notice. The plaintiff refused. The New Brunswick Queen's Bench Court reduced the plaintiff's damages by eight (8) weeks due to the plaintiff's unreasonable failure to accept the additional working notice. The Court found that the plaintiff failed to lead evidence that objectively showed that the termination of his employment by a colleague rather than his supervisor was embarrassing and humiliating. In addition, the plaintiff failed to offer examples to prove his claim that accepting re-employment from the dismissing employer would have created a hostile workplace.

In *Davies v Fraser Collection Services Ltd.*, the plaintiff employee was "temporarily" laid off due to a lack of work stemming from the company's loss of a major client. Two months after the layoff, the defendant recalled the plaintiff, but the plaintiff ignored the offer and sued for damages. The court held that the layoff was a constructive dismissal (the Plaintiff did not agree to the lay-off and there was no contractual authority to allow for a temporary lay-off), and that the plaintiff was entitled to damages. The court found that the plaintiff would have been entitled to 6.5 months' notice but held that by declining to return to work the plaintiff failed to mitigate his damages because "there were no conditions arising out of factors such as humiliation, embarrassment, or hostility in the workplace that would render the return to work unreasonable". The court reduced the damages to two (2) months' salary from the time of the lay-off until the time the offer of recall was made.

Conclusion

There is no doubt that employees have a duty to mitigate by accepting re-employment with the dismissing employer in appropriate cases. The onus is

on the employer to prove that an employee has failed to mitigate. Where an offer of employment is made by the dismissing employer, the onus shifts to the employee to demonstrate why they should not be expected to accept the offer. Employers in a position to offer alternative employment or re-hire should consider doing so to reduce their wrongful dismissal liabilities.