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employment and labour relations bulletin

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"Take this job and shove it? Maybe, maybe not": The Supreme Court of Canada Extends a Dismissed Employee's Duty to Mitigate

It is well established that an employee who has been dismissed on a without cause basis, without reasonable notice or compensation, has a duty to mitigate the loss of his employment by seeking new employment. If the employee does not take appropriate steps to find suitable alternative employment, any damages that would otherwise be awarded to him may be reduced.

The Obligation to Continue Employment

In a constructive wrongful dismissal, that is a "dismissal" brought about by an employer's unilateral change to a fundamental term of employment, the duty to mitigate has an additional wrinkle, at least in theory. Several years ago, the Ontario Court of Appeal in *Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701 held that a reasonable person should continue in his current employment notwithstanding a constructive dismissal when "the salary offered is the same, the working notice conditions are not substantially different or the work demeaning, and the personal relationships involved are not acrimonious".

In a surprising decision released last week that follows the reasoning in *Mifsud*, the Supreme Court of Canada held that an employee who had been dismissed without notice was required to accept a subsequent offer of employment from his former employer in order to mitigate his damages.

In *Evans v. Teamsters Local Union No. 31* (S.C.C. – as yet unreported), the plaintiff was employed for over 23 years with Teamsters Local Union No. 31 ("Teamsters") when he was dismissed without cause and without notice. After five months of continued pay while attempting to negotiate a resolution, the Teamsters required the plaintiff to return to his old position for a period of 19 months, essentially providing the plaintiff with fixed-term employment in order to mitigate his damages. The plaintiff did not return and pursued a claim for wrongful dismissal.

A 6 to 1 majority of the Court held that there is no distinction between an employee who has been constructively dismissed and an employee who has been dismissed without sufficient notice. In either case, if the employer offers the employee continued employment or employment in another position, the

dismissed employee may be required to accept such employment in order to mitigate his damages.

Writing for the majority, Mr. Justice Bastarache stated that "in the absence of conditions rendering the return to work unreasonable, on an objective basis, an employee can be expected to mitigate damages by returning to work for the dismissing employer". The majority of the Court indicated that the work atmosphere would be the most crucial element in determining whether it was reasonable for the employee to refuse the position. Other barriers could be a significant reduction in stature, change in the location of work, or a significant change in the employee's duties. It is important that the Court held that any alleged barriers to a return to work must be viewed on an objective basis, and not from the point of view of the particular employee.

What is most surprising about the Court's decision in *Evans* is that it imposed a positive obligation on the plaintiff to accept re-employment with the Teamsters, notwithstanding that his employment had been terminated several months previously.

What This Means for Employers

While the Court's treatment of the facts in this case is somewhat curious, the principle put forward is consistent with cases such as *Mifsud*. While it will likely be the exception when an employer is able to demonstrate that the employee should have accepted the new employment, an employer has the capability of reducing its notice obligation in the right situation.

In our view the Court's decision in *Evans* does not drastically change the law surrounding the duty to mitigate, although the case is helpful for employers who can make a good faith offer of employment to a dismissed employee. Any offer to the employee should take into account the employee's previous compensation and position the employee held, what the working atmosphere would be like and what changes the employer could make to ensure that the working relationships are as cordial as possible.

However, the reality is that trial courts have consistently distinguished *Mifsud*. It is likely that trial courts will treat the Court's decision in *Evans* in the same way: acknowledging the principle as valid but finding on the particular facts that the employee did not have an obligation to accept the same employer's offer of employment.

An additional concern for employers is the Court's comment in *Evans* that so-called "*Wallace*" damages should not be subject to mitigation. *Wallace* damages, which result from a prior Supreme Court of Canada decision, have been characterized as an extension of the notice period in order to take into account an employer's bad faith conduct at the time of termination. The notice period extension recognized that such conduct may impact the employee's ability to seek suitable alternative employment. However, by making such damages exempt from mitigation income, the Court has effectively turned *Wallace* damages into an award of punitive damages against the employer.

Any member of our Employment and Labour Relations Group would be pleased to discuss the duty to mitigate and the Court's decision in *Evans*.

Written by Dave McKechnie

A Cautionary Note

About McMillan LLP

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The firm is agile and flexible, and committed to always striving for excellence.

The members of the Employment and Labour Relations Group have the expertise and experience to deal efficiently and effectively with all matters rising out of employment and labour law, as well as planning for legislative changes, structuring of business activities, and any other related matters.

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