A REFRESHER ON AN EMPLOYEE'S DUTY TO MITIGATE

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The British Columbia Court of Appeal in *Steinebach v. Clean Energy Compression Corp.* provided an excellent refresher on the principles surrounding an employee's duty to mitigate damages after termination.[1] The BC Court of Appeal emphasized that the notice period and damages for wrongful dismissal claims should be assessed in two separate steps. First, the court should determine the notice period. Second, if the court finds that an employee has failed to mitigate, the notice period should remain the same and any damages resulting to the employee within that period should be reduced or in some cases, eliminated.

Steinebach v. Clean Energy Compression Corp. is also instructive on what employers must demonstrate in order to prove that an employee has failed to mitigate. The BC Court of Appeal outlined the following key points:

1. "The duty to mitigate is not a duty owed to an employer, rather it is a duty an employee owes to conduct himself or herself as a reasonable person. In most cases, this necessarily means that the employee must take reasonable steps to find alternative employment upon dismissal".[2]
2. The employer bears the burden of proving that an employee failed to mitigate his or her damages by not acting reasonably.
3. An employee may fail to mitigate when he or she focuses more on personal preferences and objectives, such as pursuing a new career, than what is reasonable.
4. An employee may inadequately mitigate when he or she opts for alternative employment at a lower income when employment in a higher paying position could have been secured.
5. Where an employer proves that an employee failed to mitigate, or took inadequate steps to mitigate his or her damages, the court may either:

a. find that the employee is not entitled to any damages; or
b. reduce the employee's damages based on the estimated period in which the employee failed to mitigate. This can include determining the date by which the employee should have secured alternative employment.

In this case, the respondent, Steve Steinebach, was terminated from his employment as a salesperson with the appellant, Clean Energy Compression Corp dba IMW Industries ("IMW Industries"). Mr. Steinebach initially

sought employment in the same field but was unsuccessful. Approximately three months after his termination, Mr. Steinebach began pursuing a new career as a financial investments advisor. He was hired and began working at an investment firm approximately eight months after his termination.

The trial judge concluded that Mr. Steinebach was wrongfully dismissed and was entitled to 16 months' notice. The trial judge found that Mr. Steinebach failed to adequately mitigate his damages. However, the trial judge simply reduced his notice period by three months and did not explain how he calculated the three month period or if there was a certain point by which Mr.

Steinebach should have secured alternative employment. The trial judge also did not clarify if the timing of Mr. Steinebach's change of career was the event that constituted a failure to mitigate. IMW Industries appealed the decision, arguing that the trial judge failed to properly assess Mr. Steinebach's damages and notice period.

The BC Court of Appeal clarified that the notice period and damages should be assessed separately for wrongful dismissal claims. Further, an employee's failure to mitigate does not reduce the notice period but rather, impacts the damages resulting from the employer's failure to provide adequate notice. Thus, where an employee fails to adequately mitigate, the notice period will remain the same and any damages resulting to the employee within that period will be reduced or in some cases, eliminated if it is established that there was a complete failure to mitigate.

The BC Court of Appeal concluded that the trial judge erred by reducing Mr. Steinebach's notice period by three months in the absence of any factual findings to support this conclusion. Unfortunately for these litigants, the Court of Appeal ordered a new trial on all the issues; a result which none of the parties desired.

by Kaitlyn Meyer

[1] 2016 BCCA 112.

[2] *Coutts v. Brian Jessel Autosports Inc.*, 2005 BCCA 224.

A Cautionary Note