

**DISMISSED ? ... PLEASE RETURN TO WORK**

**SUPREME COURT OF CANADA REINFORCES EMPLOYEE DUTY TO MITIGATE**

*Evans v. Teamsters Local Union No. 31*, [2008] S.C.C. 20

*by Robert M. Bell*

In *Evans v. Teamsters Local Union No. 31*, the Supreme Court of Canada held that dismissed employees may be obligated to mitigate their damages by returning to work for the dismissing employer. In this case, the plaintiff failed to mitigate his damages by refusing an offer of re-employment even though he had been dismissed months earlier.

**The Facts and the Trial Decision**

The plaintiff, Mr Evans, had been employed by the Teamsters Local Union No. 31 (the "Union") for about 23 years as a business agent in the Union's Whitehorse office. The Union terminated his employment following a heated leadership race. Settlement negotiations continued for five months following the plaintiff's dismissal and the Union continued his salary and benefits during this period. At the end of the five months, the parties were unable to reach settlement and the Union requested Mr Evans to return to work for the remainder of his 24 month notice period. While the plaintiff was willing to return to work, he insisted upon certain conditions, which the Union rejected. Consequently, the plaintiff commenced a wrongful dismissal action and was successful at trial. He was awarded approximately \$100,000.00 for damages representing 22 months pay.

**The Court of Appeal Decision**

The Union appealed to the Yukon Territory Court of Appeal, which set aside the damages award. The unanimous Court held that the plaintiff failed to mitigate his damages by refusing the Union's offer of re-employment. The Court found that the plaintiff's refusal was unreasonable because the work was available for the reasonable notice period on the same terms that the plaintiff had previously enjoyed. In addition, there were no other comparable employment prospects available and the plaintiff's working relationship with his employer was not poisoned as he alleged. Lastly, the evidence indicated that the plaintiff was willing to return to work, albeit on conditions unacceptable to the Union.

**The Supreme Court of Canada Decision**

The plaintiff appealed to the Supreme Court of Canada, which upheld Court of Appeal's decision. Writing for the 6 to 1 majority (Abella J. dissenting), Justice Bastarache emphasized that employers who give sufficient working notice of termination are not required to pay employees above and beyond that notice. The Court reinforced the principle that damages are meant to compensate the employee, not to penalize the employer. In addition, an employer's obligation to pay damages is subject to the employee's reasonable efforts to mitigate his or her

losses by seeking an alternative source of income. This principle of mitigation applies regardless of whether the termination is by direct or constructive dismissal.

The Court held that whether an employee should accept an offer of re-employment with the dismissing employer to mitigate his or her damages is an objective inquiry and depends on whether a “reasonable person” would accept such an opportunity. While the subjective concerns and fears of the dismissed employee are not determinative, an employee would not be required to accept an offer of continued employment if he or she would be subject to hostility, embarrassment, or humiliation.

Several factors are relevant in determining whether a “reasonable person” would accept continued employment to mitigate his or her damages. These factors include: whether the salary and working conditions are similar; whether the work is demeaning; whether the personal relationships are acrimonious; whether the employee has commenced litigation; and whether the offer of re-employment was made while the employee was still working for the employer or only after the employee had left.

### **Comment**

*Evans v. Teamsters* is a welcome breath of fresh for employers. The decision reinforces the employee’s duty to mitigate and indicates that an employee’s unreasonable response to an offer of continued employment will undermine a claim for wrongful dismissal damages.

However, the decision clearly articulates that not all damages are subject to mitigation. Specifically, Wallace damages, which may be awarded by a court when an employer acts in bad faith during an employee’s termination, are not subject to mitigation.

Further, an employee will not be obligated to mitigate damages by working for the dismissing employer in every case. The decision suggests that continuing to work post termination may be more reasonable when the termination of employment is the result of restructuring than when it is a result of the employee’s performance. Ultimately, whether a “reasonable person” would mitigate his or her damages by continuing to work for the employer is a factually intensive inquiry dependent upon the circumstances of each case.

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