

EVANS V. TEAMSTERS:
“YOU’RE FIRED, AND I’LL SEE YOU ON MONDAY”

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INTRODUCTION

“You’re fired.” For many employers and employees, these famous last words signify the final working day of the dismissed employee. However, a recent ruling from the Supreme Court of Canada confirms that, in some situations, a dismissed employee may be required to mitigate his or her damages by returning to work for the former employer.

In *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20 (“*Evans v. Teamsters*”), the Supreme Court of Canada ruled that a dismissed employee failed to mitigate his damages by refusing to accept his former employer’s offer to return to work for the remainder of the notice period.

FACTS

Donald Evans was employed by the Teamsters Union (the “Union”) for over 23 years as a business agent in the Union’s Whitehorse office. Prior to his dismissal, Evans supported the incumbent candidate during a heated election to be the next union president. The incumbent, however, was defeated in the election.

After the election, but prior to the incoming president assuming his position, Evans was dismissed from employment without cause and without notice. Evans commenced a wrongful dismissal action against the Union. The parties attempted to settle the claim by engaging in negotiations for five months. During that period, the Union continued to pay Evans his full salary and benefits.

The parties agreed that Evans was entitled to 24 months of notice. However, the Union did not agree to other demands Evans had made. In particular, the Union refused to grant Evans his request that his wife be given his former position as business agent in the Union’s Whitehorse office.

As the parties were unable to reach a settlement, the Union eventually sent a letter to Evans demanding that he return to work at the Whitehorse office to serve out the remainder of his 24-month notice period. Evans refused, and his wrongful dismissal claim proceeded to trial.

PROCEDURAL HISTORY

The Yukon Trial Court

Evans was successful at trial. The Union argued that Evans failed to satisfy his duty to mitigate damages by refusing to return to work for the balance of the 24 month notice period. The trial court rejected this argument and found that it was not unreasonable for Evans to refuse to

return to work. The court awarded Evans approximately \$100,000 representing 22 months of pay in lieu of notice.

The Yukon Court of Appeal

The Union appealed to the Yukon Court of Appeal, which set aside the damages award. The Court of Appeal found that Evans failed to mitigate his damages by refusing to accept the Union's offer of re-employment. The Court of Appeal noted that the trial judge had found that Evans was not qualified for other jobs in the Whitehorse area and that Evans did not even attempt to find alternate employment. Moreover, the Union had offered Evans his former job on essentially the same terms as before. The Court of Appeal concluded that in these circumstances, it was not reasonable for Evans to refuse the offer to return to work. Evans appealed to the Supreme Court of Canada.

THE SUPREME COURT OF CANADA'S DECISION

The Supreme Court of Canada agreed with the Court of Appeal's decision and ruled that Evans failed in his duty to mitigate by refusing to return to work.

Justice Bastarache, writing for a majority of six to one, explained that the rationale behind the notice period is to ensure that the departing employee is provided with sufficient opportunity to seek new employment and arrange his/her personal affairs. The Court emphasized that damages are intended to compensate the employee for lack of notice, and not to penalize the employer for the dismissal itself. Moreover, where damages flow because working notice or pay in lieu of such notice was not given, the employee is obligated to mitigate the damages by making reasonable efforts to seek alternate employment. In some circumstances, a dismissed employee must satisfy the duty to mitigate damages by accepting an offer of temporary work with the former employer.

In each situation, the critical issue is this: under what circumstances would it be reasonable to require a dismissed employee to return to work for the former employer? According to the Supreme Court, this must be answered by considering, on an objective basis, whether a reasonable person in the dismissed employee's position would mitigate his or her damages by accepting an offer of temporary work for the former employer. The Supreme Court stated that a reasonable person should be expected to return to work where the following factors are present:

- the salary offered is the same;

- the working conditions are not substantially different or the work is not demeaning; and
- the personal relationships involved are not acrimonious

The dismissed employee is not expected to accept a re-employment offer if the individual would be subject to an atmosphere of hostility, embarrassment or humiliation. The work atmosphere must be assessed on an objective basis. Relevant factors to consider are the history and nature of the employment, whether or not the individual has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or was made after the individual had left. The Supreme Court noted that the commencement of litigation does not necessarily render it unreasonable to require the dismissed employee to mitigate his or her damages by accepting an offer of re-employment. Each case must be assessed according to the context and facts of that particular situation.

The Supreme Court noted that there is a greater likelihood that individuals who are dismissed as a result of a change to their position or other organizational changes will be required to mitigate by returning to the same employer than those individuals whose employment is terminated for some other reason, such as performance issues. The circumstances surrounding the dismissal of individuals due to organizational changes are likely to be far less personal than when the dismissal relates more directly to the individuals themselves.

The Supreme Court also made it clear that the duty to mitigate by accepting an offer of re-employment may also apply to constructively dismissed employees. Constructive dismissal occurs when an employer unilaterally makes substantial changes to the essential terms of an employee's contract of employment, and the employee does not agree to the changes and resigns in response. In such circumstances, the employer is deemed to have terminated the employment contract and is obligated to provide the constructively dismissed employee with pay in lieu of reasonable notice. If the employer offers re-employment, the constructively dismissed employee may be required to accept such an offer as a way of mitigating damages, depending, as discussed in the foregoing, on the terms of re-employment, the personal relationships involved and the work atmosphere.

Turning to the facts surrounding Evans' refusal to return to work, the Supreme Court concluded that it was reasonable to require him to return to work to mitigate his damages. The work environment had not changed

significantly and the terms of re-employment were the same. The relationship between him and the Union was not acrimonious. In fact, the evidence indicated that the relationship was respectful and friendly. Although Evans believed that his employer would not respect him if he returned, this fear was entirely subjective and there was no objective evidence to demonstrate a reasonable basis for this belief.

Accordingly, Evans had failed to mitigate his damages by not returning to work, and the Supreme Court dismissed his appeal.

CONCLUSION

Evans v. Teamsters is a welcome decision for employers. It is now clear that the possibility exists that employers may be able to reduce their liability in a wrongful dismissal or constructive dismissal claim by offering re-employment for the remainder of the notice period, provided that the salary and terms and conditions of employment are the same, relationships are not acrimonious, and the dismissed employee would not be required to work in an atmosphere of hostility, embarrassment or humiliation.

Practical Considerations

Several practical considerations can be taken from the decision:

- When a former employee has brought a claim for wrongful dismissal or constructive dismissal, consider the viability of offering the individual temporary re-employment as a way of working through the notice period, thereby potentially reducing any liability to which the employer may be exposed.
- Maintain respect when dealing with former employees, even after litigation has commenced. Former employees are not required to return to work to mitigate their damages if there is acrimony between them and the employer.
- Similarly, terminate an individual's employment in a sensitive and respectful manner to avoid the development of any acrimony.

Employers that are mindful of maintaining respectful relations may now have the option of ending termination meetings or settlement negotiations with the words, "I'll see you on Monday."