

Deconstructing the Duty to Mitigate: A New Tool to Manage Costs

By Graeme McFarlane

A WRONGFULLY DISMISSED EMPLOYEE can claim damages equivalent to the amount of working notice of termination that they should have received. These damages flow from the concept of breach of contract and courts have long recognized that their payment is subject to the duty to mitigate. Simply put, a terminated employee has to look for other work, and a failure to do so may limit the amount of damages they can recover. Recently, the Supreme Court of Canada determined that the duty to mitigate may extend to an offer of employment from the terminating employer. While this decision is pleasant news to employers, in reality, its application is likely limited to extraordinary facts.

The Supreme Court of Canada's rationale is found in the decision in *Evans v. Teamsters Local Union No. 31*. Evans was a business agent of 23 years for the Teamsters union in Whitehorse. He was dismissed after the election of a new union executive. He was offered 24 months' working notice based on his years of service and asked to continue working for the union for the remainder of the notice period in a position that held many of the same elements as a way to mitigate his damages. Evans refused to return to work and the union terminated him summarily without notice. The trial judge found that Evans had been dismissed without cause and without reasonable notice. He also ruled that the Union failed to meet the burden of proof necessary to show Mr.

Evans' failure to mitigate his damages. The Court of Appeal reversed the trial decision.

The matter proceeded to the Supreme Court of Canada, and the majority decided that an employee could be required to return to work for the former employer when there are no "significant barriers" to re-employment. When examining this question, the court suggested analysing the following factors:

- Whether a reasonable person in the employee's position would accept the opportunity to mitigate by returning to work for the former employer;
- The history and nature of employment, and whether working conditions and salary are the same;
- Whether legal action against the former employer was started, and whether the offer of re-employment was made while the employee was still working for the employer or after they have left; and
- If the atmosphere at work is hostile, embarrassing or humiliating, the work demeaning or the relationships bitter, the employee will not be obliged to mitigate by accepting employment with the former employer.

In considering all tangible and intangible elements of the Evans case, his refusal to return to work for the Union was found to be unjustified.

The Evans decision clarifies what the duty to mitigate really means. This is practically relevant for HR professionals in areas of industry where workers' skills are rare and

the opportunities to work elsewhere are few. If there are similar opportunities within an organization to place the employee during the notice period, the costs of making a change may be reduced if not eliminated.

Take as an example an employee who is terminated without cause after 15 years of service in Small Town, B.C. This person performs an uncommon job, and cannot realistically find a comparable alternative in his or her field within the city. Presented properly, a dismissed employee may have to accept an offer of re-employment from the former employer for the remainder of the notice period. If the employee fails to do so, he or she may lose the ability to claim for damages.

The message is that employees have a duty to mitigate their damages. This can go as far as returning to work for the same employer in certain circumstances and if the option is practically desirable for the employer. If such is the case and reasonable effort is not made by the employee, the employer can have the amount of damages owed reduced or eliminated.

In the right circumstances, the duty to mitigate by returning to the former employer can be a win-win scenario for both sides. **■**

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