Failure to Mitigate

Following Wrongful Dismissal

A Guide to Understanding the Legal Requirement to Minimize Loss of Income

The law in Canada often requires a harmed person to 'mitigate'. Simply stated, the harmed person must act reasonably in an genuine effort to reduce the extent of the harm. In the employment law context, this 'duty to mitigate' is imposed on the wrongfully terminated employee. Frustratingly to many employees, who misperceive that some form of punishment should be inflicted upon the employer, the employee is unable to simply sit around doing nothing all the while blaming the past employer for the employee's unemployed situation.

When an employee sues an employer for terminating without proper termination pay, the employer often points back alleging that the employee failed to mitigate.

When a wrongful dismissal occurs, that is when an employer fails to provide reasonable notice of termination or proper pay-in-lieu of notice, an employee is generally granted some time to get over the initial shock of unemployment as well as to prepare and implement a job seeking strategy. A few weeks to a few months, depending on the situation, as a grieving period is generally granted by the courts. However, if an employee fails to seek new employment within a reasonable period of time, or fails to keep proof of the effort, the employer may become excused from liability.

Surprising, the law sometimes requires the dismissed employee to mitigate by staying on with the very employer that is terminating the employee. This requirement, where the dismissing employer makes a clear offer for the employee to work out the notice period, or a portion of, was stated in ***Evans v. Teamsters Local Union No. 31***, [2008] 1 S.C.R. 661 at 29 to 31 by the Supreme Court. While unusual that an employer desires a dismissed employee to stay on and work out the notice period, where the employee is at low risk to commit sabotage, breach confidentiality, or cause other difficulties, the employer might make the offer to stay

on. If there is nothing humiliating or embarassing or unduly oppressive or indignifying, the employee may have the duty to stay on and work out the notice period.

As a means of protecting employees from employers that may allege that an employee failed to accept a notice period position, the Ontario Court of Appeal recently stated in ***Farwell v. Citair (General Coach Canada)***, 2014 ONCA 177 at 20 that the employer must offer a, "... clear opportunity ..." to mitigate. Incredulously, if the employee was constructively terminated whereas the employer unilaterally made substantial changes to the employee's position and the employee turned down this new 'alternate position' and advising that the employee is deeming the change as a constructive termination, the employer is required to retable the offer. Essentially, in such a situation, the employer must make the offer twice - the first time when offering the employee the 'alternate employment position' that was turned down and deemed a constructive termination and then again for the second time as a 'mitigation position'. It is important to note that the offer of the 'mitigation position' must happen after the employee declines the 'alternate employment position' that triggered the constructive termination situation. While seemingly odd that the employer must offer the position twice, this actually makes logical legal sense, even if not common sense, simply because the duty to mitigate - and an opportunity to mitigate - fails to exist until after termination occurs. Accordingly, if the event that culminates in termination is the offer of an 'alternate employment position' consistent with a constructive termination, then this offer was originally in the context of employment rather than mitigation. If the employer wishes to rely on a 'failure to mitigate' defence, the employer is required to clearly re-offer the position in the context of a chance to mitigate; as again, the duty to mitigate and a chance to mitigate are unable to exist until after termination first occurs.