

Evans v. Teamsters Local Union No. 31

Labour Group

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The Supreme Court of Canada Rules that Employees May have to Accept Working Notice as a Form of Mitigation

Introduction

It is a common law principle that employees are entitled to reasonable notice of termination. In most cases, employers choose to give this notice by pay in lieu of notice (“severance”), providing the employee either with a lump sum payment or salary continuance through the notice period. However, if the employer offers the employee the opportunity to return to the workplace for some or all of the period of reasonable notice, does the employee have to accept this offer as part of his duty to mitigate or can the employee walk away and insist on severance?

In *Evans v. Teamsters Local Union No. 31*¹, the Supreme Court of Canada held that an employee can be required to accept a period of working notice as a form of mitigation of his damages for being wrongfully dismissed.

Background

In this case, the plaintiff was terminated after 23 years’ service as the business agent for a union in Whitehorse. The parties attempted to negotiate a severance package during which time the employer continued to pay the plaintiff. The plaintiff was looking for 24 months’ notice of termination, consisting of 12 months of working notice and 12 months of severance. He also wanted his wife to replace him as business agent.

The parties were unable to reach agreement and the employer asked that the plaintiff return to his employment and serve the balance of his 24 month notice period. The employer indicated that if the plaintiff refused to do so, it would treat his refusal as just cause and terminate his employment. The employee responded that he would only return if the employer rescinded the termination letter.

The sole issue before the Supreme Court of Canada was whether the plaintiff should have accepted the continued employment as a form of mitigation.

The Duty to Mitigate

The plaintiff argued that the duty to mitigate by continuing to work for the same employer only applied in cases of constructive dismissal. The Supreme Court of Canada held that the same principles should apply to both wrongful dismissals and constructive dismissals noting there was no reason to distinguish between them with respect to the duty to mitigate. As such, employees may be required to mitigate their damages by returning to work for the employer during the notice period. In this regard, the Court stated:

There appears to be very little practical difference between informing an employee that his or her contract will be terminated in 12 months’ time (i.e. giving 12 months of

¹ 2008 SCC 20.

working notice) and terminating the contract immediately but offering the employee a new employment opportunity for a period of up to 12 months. In both situations, it is expected that the employee will be aware that the employment relationship is finite, and that he or she will be seeking alternate work during the 12-month period. It can also be expected that in both situations the employee will find that continuing to work may be difficult. Nonetheless, it is an accepted principle of employment law that employers are entitled (indeed encouraged) to give employees working notice and that, absent bad faith or other extenuating circumstances, they are not required to financially compensate the employee simply because they have terminated the employment contract. It is likewise appropriate to assume that in the absence of conditions rendering the return to work unreasonable, on an objective basis, an employee can be expected to mitigate damages by returning to work for the dismissed employer. Finding otherwise would create an artificial distinction between an employer who terminates and offers re-employment and one who gives notice of termination and offers working notice. In either case, the employee has an opportunity to continue working for the employer while he or she arranges other employment, and I believe is nonsensical to say that when this ongoing relationship is termed “working notice” it is acceptable but when it is termed “mitigation” it is not.²

The Court held that each case must be evaluated on its own merits but the central issue is whether a reasonable person would accept an opportunity to mitigate his or her damages by returning to the work-

place. The Court noted that where the offer to return to work is made to a terminated employee, a reasonable person should accept such an offer if:

- the salary is the same;
- the working conditions are not substantially different;
- the work is not demeaning; and
- the personal relationships are not acrimonious.

Other factors to consider in determining whether it would be reasonable for the employee to return to work include:

- history and nature of the employment;
- whether or not the employee has commenced litigation;
- whether the offer of re-employment was made while the employee was still working for the employer or only after the employee had already left.

However, the court continued:

The critical element is that an employee “not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation” ... and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee’s position would have accepted the employer’s offer ..., it is extremely important that the non-tangible elements of the situation – including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements – be included in the evaluation.³

² *Ibid.*, at para. 29.

³ *Ibid.*, at para.30.

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The Court noted that this analysis would result in the employee who is constructively dismissed as a result of a change in his position being required to mitigate by remaining in the position more often than the employee who is terminated because “the circumstances surrounding the termination of their contract may be far less personal than when dismissal relates more directly to the individual themselves.”⁴

In *obiter dicta*, the Court also held that any *Wallace* damages awarded (the lengthening of the notice period due to the bad faith conduct in the manner of dismissal) should not be subject to the duty to mitigate. This confirms the same finding by the Nova Scotia Court of Appeal in *Jessen v. CHC Helicopters International Inc.*⁵

Applying an objective test in this case, the Court held that the plaintiff should have accepted the offer to return to the workplace and mitigated his damages by working through part of the notice period. The trial judge had found there was no bad faith on the part of the employer during the termination process or in negotiating with the plaintiff for his return to work. In addition there was no evidence of any acrimony and the plaintiff’s work environment had not changed. The Court found that the trial judge applied a subjective test in considering the plaintiff’s concerns about returning to the workplace rather than considering the evidence on an objective basis.

The plaintiff argued that the following factors made him apprehensive about returning to work and should relieve him of his duty to mitigate:

- he was terminated without just cause
 - the termination was planned and deliberate
 - he was “treated like a dog” in a telephone conversation
 - no mention was made of working notice or payment in lieu of notice in the telephone conversation with
 - an audit of the Whitehorse office was commissioned in March 2003 under the guise of assessing property management issues
- he was being treated differently than other

termination by the union was well known in Whitehorse

- he felt ostracized because he had supported the outgoing president
- there was pending litigation and potential difficulty in working with the new executive.⁶

The Court found that the first two concerns were “entirely irrelevant” as there was no finding of any bad faith in the termination. With respect to the other grounds, the Court found there was no evidence to support the plaintiff’s apprehension. The Court noted that the fact that the Plaintiff had commenced legal proceedings did not automatically relieve an employee from the duty to mitigate and each case had to be considered individually.

In addition, the Court held that the most significant factor in this case favouring the Plaintiff’s return to work as mitigation was the Court of Appeal’s recognition that the plaintiff was prepared to return to work throughout the negotiations and it was only the plaintiff’s additional demands of having his wife take over his position on his departure and the rescinding of the termination letter that prevented his return.

The Court upheld the Court of Appeal’s finding that the plaintiff had failed in his duty to mitigate. From a practical point of view, with respect to damages, the employer had continued the plaintiff’s salary for five months following his termination and during the period the parties were negotiating the plaintiff’s return to work. The Court of Appeal allowed the plaintiff to retain this five months severance but held that once the plaintiff had unreasonably refused the offer of reemployment, he had failed in his duty to mitigate and no further damages were awarded. Essentially, the employee with 23 years’ service was given five months notice of termination.

⁴ *Ibid.*, at para. 31.

⁵ [2006] N.S.J. No. 282 (C.A.), leave to appeal to S.C.C. dismissed, [2006] S.C.C.A. No. 385 (February 7, 2007).

⁶ *Supra*, footnote 1, at para. 40.

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Conclusion

While an employer has always had the option of providing a terminated employee with working notice rather than pay in lieu of notice, this decision confirms that an employee who refuses to accept working notice may fail in his duty to mitigate. As a result, any period of working notice offered to the employee can be deducted from the total reasonable notice required to be provided to the employee. However, the Court has indicated that whether the employee is required to accept working notice is to be determined on a case-by-case basis and on an objective standard. However, where the employee's position and salary will remain the same for the period of working notice, it is more likely to be found to be reasonable to require the employee to accept the offer of working notice.

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