

EMPLOYMENT LAW CONFERENCE—2010 (DAY 2)

PAPER 5.1

## Employee's Duty to Mitigate Damages for Wrongful or Constructive Dismissal Post-Evans v. Teamsters Local Union No. 31

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## **EMPLOYEE’S DUTY TO MITIGATE DAMAGES FOR WRONGFUL OR CONSTRUCTIVE DISMISSAL POST-EVANS V. TEAMSTERS LOCAL UNION NO. 31**

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### **I. Introduction**

This paper will discuss the Supreme Court of Canada’s decision in *Evans v. Teamsters Local Union No. 31*, [2008] S.C.J. No. 20 (“*Evans*”), and will consider the implications of that decision.

*Evans* is the most recent pronouncement on the duty to mitigate from this country’s highest court. It is a particularly important decision because of what it says about the application of the duty to mitigate in circumstances where a dismissing employer offers the employee a chance to mitigate his or her damages by returning to work with the employer.

We will address the following in this paper:

- the majority judgment in *Evans*;
- the dissenting judgment in *Evans*;
- subsequent cases in BC and other Canadian jurisdictions that have considered the *Evans* decision; and
- strategic issues for both employer and employee counsel arising out of the *Evans* decision.

## II. The Evans Decision

The *Evans* decision arose out of the wrongful dismissal of a union business agent working in the union's Whitehorse office. The case proceeded through the Yukon Supreme Court and Court of Appeal before making its way to the Supreme Court of Canada.

Shortly after the election and appointment of a new union executive that the plaintiff, Mr. Evans, had not previously supported, the defendant union advised Mr. Evans that his appointment would be immediately terminated. The parties then entered into approximately five months of negotiations that ultimately turned out to be unsuccessful. Throughout this period of time, the defendant continued to regularly pay the plaintiff and, when the negotiations proved to be unfruitful, the defendant demanded that Mr. Evans return to work in the position from which he had been dismissed for the remainder of a 24-month notice period.

One of the key issues at trial and the sole issue on appeal was whether Mr. Evans failed to mitigate his damages by refusing to return to work as demanded by the dismissing employer, the defendant union.

The trial judge found that Mr. Evans was wrongfully dismissed and entitled to 22 months of reasonable notice. The trial judge also held that the defendant had not met the high standard of demonstrating that Mr. Evans failed to mitigate his losses, and specifically that Mr. Evans' refusal to return to work was reasonable in the circumstances.

Mr. Justice Thackray, delivering the unanimous judgment of the Court of Appeal, overturned the trial judge's finding on mitigation and expressly rejected the:

- conceptual distinction between an offer of re-employment following constructive dismissal as opposed to an offer following express dismissal;
- proposition that it would only be the rare case where a terminated employee was required to return to work in order to meet his or her mitigation obligations; and
- notion that it is a purely subjective test that applies in cases of this kind.

Mr. Justice Thackray held that, regardless of whether an offer of re-employment is made in the context of a constructive or an express dismissal, a court should determine the issue of mitigation on the basis of whether it is objectively reasonable for the plaintiff to refuse the offer. Mr. Justice Thackray went on to rule that the trial judge failed to consider relevant evidence, and ultimately determined that it was objectively unreasonable for Mr. Evans to refuse to return to work. He highlighted that Mr. Evans was offered the same position and admitted he was willing to return to work under certain conditions.

### A. Supreme Court of Canada: Majority

A six-judge majority of the Supreme Court of Canada affirmed the Court of Appeal's decision.

Mr. Justice Bastarache, delivering the majority judgment, noted that "there is no principled reason" to distinguish between express and constructive dismissal when assessing the issue of mitigation, and there is "very little practical difference" between working notice and an offer of re-employment

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following wrongful termination (paras. 27-28). No matter the kind of dismissal, the requirement on an employee to take temporary work with the dismissing employer is consistent with the purpose of damages, absent barriers to re-employment (para. 28). The central question in all cases of this kind is whether, viewing the matter objectively, a reasonable person would have accepted the opportunity to mitigate his or her damages by returning to work with the employer (para. 30).

Mr. Justice Bastarache described this as a “multi-factored and contextual analysis” that objectively evaluates whether a reasonable person in the employee’s position would have accepted the offer (para. 30). The analysis includes an examination of both tangible elements, such as the nature and conditions of employment, and non-tangible elements, such as work atmosphere, stigma and loss of dignity (para. 30). In particular, Mr. Justice Bastarache held:

I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-employment is significant. This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so “[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious” (*Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701). In *Cox*, the BC Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not 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 he or she had already left (paras. 12-18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee “not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation” (*Farquhar*, at 94), 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 (*Reibl v. Hughes*, [1980] 2 S.C.R. 880), 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.

I note that the nature of this inquiry increases the likelihood that individuals who are dismissed as a result of a change to their position (motivated, for example, by legitimate business needs rather than by concerns about performance) will be required to mitigate by returning to the same employer more often than those employees who are terminated for some other reason. This is not, however, because these individuals have been constructively dismissed rather than wrongfully dismissed, but rather because the circumstances surrounding the termination of their contract may be far less personal than when dismissal relates more directly to the individuals themselves ... (paras. 30-31)

Applying these principles to the case before the Court, the majority came to the following conclusions:

- there was strong evidence that Mr. Evans was prepared to return to his previous position;
- a reasonable person would, in the absence of comparable work alternatives, view the offer of re-employment as a *bona fide* employment opportunity; and
- there was no evidence of acrimony between Mr. Evans and the defendant or an inability on the part of Mr. Evans to perform his duties in the future.

As a result, the majority held that it was objectively reasonable for Mr. Evans to return to work with the defendant. The evidence established that the terms of employment remained the same and Mr. Evans' relationship with his employer was not seriously damaged (paras. 48-50).

## **B. Supreme Court of Canada: Dissent**

Madam Justice Abella, the sole dissenting judge, strongly disagreed with the decision of the majority as it was, in her view, "unpalatable" and "legally and factually unsustainable" (para. 139), and resulted in the "bizarre consequence of transforming a wrongful dismissal attracting a substantial notice period to a lawful one attracting none" (para. 139).

Emphasizing the uniqueness of employment contracts and an employee's vulnerability at and around the time of termination, the dissenting judge engaged in a lengthy review of the general test for mitigation, the heavy burden on an employer trying to establish an employee's failure to mitigate, and the factual and legal errors made by the Court of Appeal and the majority.

A significant problem identified by Madam Justice Abella was the rejection of the conceptual differences between a constructive and an express dismissal, and between working notice and an offer of re-employment. Madam Justice Abella found the approach endorsed by the majority fundamentally changed the obligations of an employer on termination and had the effect of removing critical employee protection (para. 96). She also cautioned that this approach "has the danger of making routine the requirement to accept re-employment with an employer who acted wrongfully," thereby ignoring the uniqueness of employment contracts and conflicting with the well-known legal principle that an employer is never entitled to specific performance (para. 108). The dissenting judge was also critical of the emphasis placed by the Court of Appeal and the majority on objectivity, given the inherently subjective considerations of work atmosphere, stigma and loss of dignity (para. 109).

According to the dissent, the trial judge applied the correct test by taking into account both subjective and objective considerations, and the Court of Appeal and the majority should have shown deference to the trial judge's key findings of fact (paras. 114-20). It was an error to interpret and reverse factual determinations in the absence of any palpable and overriding error. Madam Justice Abella found that it was wrong for the Court of Appeal and the majority to:

- determine that Mr. Evans' subjective beliefs were irrelevant, considering the burden of proof was on the employer and Mr. Evans' testimony was uncontradicted (para. 126);
- rely on the trial judge's finding that *Wallace* damages were not warranted as evidence of an absence of acrimony in the work relationship (para. 129);
- find that nothing on the record substantiated Mr. Evans' feelings in spite of evidence to the contrary that was accepted at trial (paras. 130-31);
- rely on Mr. Evans' willingness to return to work expressed in the course of negotiations as evidence of an admission that the work relationship was unaffected (a willingness to negotiate a return to work should not be used as evidence that a work relationship is one of mutual understanding and respect, free of hostility, acrimony or humiliation) (para. 136); and
- highlight the paucity of available alternative employment to dictate how Mr. Evans had to mitigate his damages because that had the "perverse effect of requiring a wronged employee to ameliorate the wrongdoer's damages, rather than the other way around" and was inconsistent with cases like *Forsbaw v. Aluminex Extrusions Ltd.* (1989), 39 B.C.L.R. (2d) 140 at 144 (paras. 137-39).

For the above reasons, Madam Justice Abella would have allowed the appeal and restored the trial judge's decision.

### III. Subsequent Cases that Have Considered the Evans Decision

#### A. BC Cases that Have Considered the Evans Decision

##### I. Cases where a Failure to Mitigate Argument was Successful Based on an Application of the Evans Principles

###### a. Besse v. Dr. A.S. Machner Inc., [2009] B.C.J. No. 1912 (S.C.)

*Besse v. Dr. A.S. Machner Inc.*, [2009] B.C.J. No. 1912 (S.C.) (“*Besse*”) is one of the first BC cases in which the full ramifications of the majority decision in *Evans* were felt.

The case involved the wrongful dismissal of a 51-year old dental receptionist, who was employed at a dental clinic for a period of 18 years and, by all accounts, was a valued employee, well-liked and respected by those with whom she worked.

In early 2008, the employee was placed on what her employer described as a “temporary lay-off”—a lay-off that was to only last for a period of twelve weeks and six days. She was told by the employer that the lay-off was purely a financial decision and was necessary to deal with a loss in momentum of the dental practice.

Because the employer had no express or implied right to impose a temporary lay-off under the employee’s employment contract, Mr. Justice Slade of the BC Supreme Court held that the temporary lay-off constituted a wrongful dismissal (paras. 78 and 80). That was not, however, the end of the matter.

Shortly after the employer imposed the temporary lay-off on the employee, it had obtained legal advice and learned that it did not have the right to temporarily lay her off. The employer then promptly followed up with the employee, offering her the opportunity to immediately return to her job and to make her whole for any loss of pay or benefits she had suffered as a result of the employer’s mistake. The employer’s offer was rejected by the employee.

The employer’s principal defence before the Court—and the defence on which most of the evidence and argument at trial focused—was that the employee failed to mitigate damages arising out of the employer’s failure to provide proper notice. The employer said that the employee failed to mitigate her damages by:

- refusing to return to her job; and
- failing to seek and accept reasonably similar employment with another employer.

The Court found in favour of the employer on both issues.

With regard to the issue of the employee’s refusal to return to her job, Mr. Justice Slade, applying *Evans*, held that she had not conducted herself reasonably. The trial judge reviewed the circumstances surrounding the imposition of the employee’s lay-off:

- the employer’s actions had been motivated solely by financial considerations (para. 52);
- the temporary lay-off had been imposed on the employee because of the employer’s “incorrect understanding of [its] rights and responsibilities as an employer” (para. 52);
- the employer “offered Mrs. Besse the opportunity to return to employment on the same terms as previously applied, and to make good on any loss of income sustained in the interim” (para. 90); and
- the tone of written communication from the employer to the employee was at all times “considerate and caring” and “courteous and respectful” (paras. 55 and 91).

According to Mr. Justice Slade, the employer's conduct, when viewed objectively, "reveal[ed] no good reason why a reasonable person in Mrs. Besse's specific circumstances" would, on a return to her job, "have experienced stigma or loss of dignity" or "have valid concerns for the workplace atmosphere" (para. 92).

Because of the employee's failure to mitigate her damages, the Court *substantially* reduced the damages award to which she was entitled on account of her wrongful dismissal. She was only awarded damages for the period of time from the effective date of the temporary lay-off to the date on which it was made clear to her that she could return to her job, "on the same terms as previously applied" with compensation for "any loss of income sustained in the interim."

#### **b. Davies v. Fraser Collection Services Ltd., [2008] B.C.J. No. 1368 (S.C.)**

*Davies v. Fraser Collection Services Ltd.*, [2008] B.C.J. No. 1368 (S.C.) is a decision very similar factually and in its result to *Besse*. On September 25, 2006, the employer "temporarily laid off" a long-term employee. This was done as a cost-cutting measure due to a reduction in business. At the time, the employer indicated to the employee its reason for the lay-off and also said it hoped to be able to "recall" the employee to work when business improved. The employer communicated that it did not know when this might be, but hoped to have a better idea in a few weeks' time.

The plaintiff retained legal counsel and wrote to the employer, presumably demanding pay in lieu of notice. On November 20, 2006, the employer attempted to recall the plaintiff to his former position with the same salary and benefits. The plaintiff disregarded the employer's request, and commenced litigation shortly afterward.

Madam Justice Humphries of the BC Supreme Court held that the employee had been wrongfully dismissed.

However, relying on the majority decision in *Evans*, Madam Justice Humphries ruled that the plaintiff failed to mitigate his damages by not accepting the employer's offer of re-employment in the circumstances:

On the evidence before me, I am satisfied that there were no conditions arising out of factors such as humiliation, embarrassment, or hostility in the workplace that would render the return to work unreasonable, despite Mr. Davies' statement to the contrary. I accept Mr. McCann's evidence respecting the tenor of the meeting and his eagerness to have Mr. Davies return as soon as possible. As well, Mr. Davies was being asked to return at the same salary, at the same status and with the same benefits, which had never been cut off. I note the comments in *Evans, supra*, at para. 31 that individuals who are dismissed as a result of legitimate business needs will be required to mitigate by returning to the same employer more often than those employees who are terminated for some other reason. (para. 43)

## **2. Cases where a Failure to Mitigate Argument was Unsuccessful Based on an Application of the Evans Principles**

### **a. Palmer v. Clemco Industries Inc., [2010] B.C.J. No. 305 (S.C.)**

*Palmer v. Clemco Industries Inc.*, [2010] B.C.J. No. 305 (S.C.) ("*Palmer*") is another case in which an employer, relying on the majority decision in *Evans*, argued that an employee did not behave reasonably when he refused to return to the workplace from which he had been wrongfully dismissed.

The facts of the case were as follows. Two employees, a husband and wife, who had worked as senior employees for the employer for nearly 15 years, had their employment terminated on the same day without notice. The termination meeting occurred during work hours in the presence of security



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personnel. To make matters worse for the employees, unfounded cause allegations were levelled against them by the employer. Also, within a matter of days, four of their family members, who worked for the same employer, were dismissed from employment on a “without cause” basis without notice.

The employees commenced a wrongful dismissal action against the employer, claiming, among other things, damages in lieu of notice and also damages based on bad faith conduct.

The employer argued, as part of its defence, that the husband failed to mitigate damages by refusing to return to work with his former employer. The employer accepted that the wife had mitigated her damages.

Mr. Justice Savage of the BC Supreme Court rejected the employer’s argument, concluding that the husband “did not fail to mitigate his damages” (para. 133) and specifically that “[e]fforts to mitigate damages commenced in reasonably short order following termination” (para. 123).

Focusing on *Evans*, Mr. Justice Savage held:

... [I]n some cases, it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Such a position is consistent with the notion that damages are meant to compensate for lack of notice, and not to penalize the employer for the dismissal *per se*. (para. 98)

The trial judge went on to say that the question of “[w]hether an employee is required to return to work with the same employer requires a multi-factored and contextual analysis” (para. 99).

Using the language of the majority in *Evans*, Mr. Justice Savage concluded that, in the case before the Court, “there were significant barriers to re-employment with the same employer” (para. 100). In reaching that conclusion, the trial judge reviewed the circumstances surrounding termination:

- the employees were dismissed from employment “at the offices of Clemco during working hours with security personnel present” (para. 101);
- the allegations of cause and after-acquired cause levelled against the employee and his wife (which included allegations of fraudulent or dishonest behaviour) were unfounded and, under those circumstances, “[t]o return to work for the same employer could not help but cause Gavin Palmer embarrassment” (para. 102);
- shortly after the employees’ employment terminated, four of their family members were dismissed from employment (para. 101);
- with regard to a potential return to work with the employer, “there was never any specific position offered at a defined salary and benefits” (para. 97); and
- “there was no offer [involving a potential return to work with the employer] made prior to termination” (para. 103).

Mr. Justice Savage said that an offer of potential re-employment with the same employer has to be made in clear and unambiguous terms not by the employee *but by the employer*. He said:

... [T]here is no evidence that there was an offer made capable of acceptance with well defined terms. There were discussions on several occasions, none of which resulted in anything concrete. Mark Cumming [an individual acting on behalf of the employer] testified that he met Gavin Palmer on May 10, 2007 and encouraged Gavin Palmer to make an offer to Clemco. I do not think it incumbent on a dismissed employee, after termination, to make offers to his former employer.

In my view the mere fact that an employer offers to enter into discussions concerning possible re-employment, and discussions ensue, is insufficient to prove a failure to mitigate, should those discussions subsequently be broken off. There must be a concrete offer with well-defined terms, especially those concerning compensation. Only such an offer is capable of reasoned consideration in the context of a wrongful dismissal claim. (paras. 103 and 104)

**b. Borsato v. Atwater Insurance Agency Ltd., [2008] B.C.J. No. 1039 (S.C.)**

*Borsato v. Atwater Insurance Agency Ltd.*, [2008] B.C.J. No. 1039 (S.C.) is a classic constructive dismissal case. The 54-year old plaintiff was a long-term manager of the defendant insurance agency. Under her longstanding written employment contract, the plaintiff was only required to work 30 hours per week. Over the years, she worked four or five days per week. The plaintiff often put in extra hours for which she was not compensated because she was a salaried employee.

In 1996, the agency was sold to new owners who continued to employ the plaintiff. The trial judge found as a fact that the new owners were not entirely familiar with the “precise” terms and conditions of the plaintiff’s employment, and did not make any further inquiries in that regard. They simply “assumed” she was expected to work full-time (para. 11).

The plaintiff continued working under her new employer for many years. While it is not entirely clear from the evidence, it appears she was *generally* working five days per week. The evidence was undisputed that the new owners were satisfied with the plaintiff’s performance during this time.

In 2006, the new owners learned that the plaintiff was only working four days per week. The plaintiff acknowledged this. She advised the employer that she was attempting to get back to a “four day per week” work schedule and had been working four days per week for some time.

The employer responded by writing the plaintiff a letter, in which it indicated that the plaintiff had unilaterally changed her work week. The employer indicated that it was prepared to accept this arrangement, but because the employee would then be a part-time employee, her salary would have to be adjusted. The employer indicated that the plaintiff’s salary would be reduced by 20%, and her commission income would also be reduced.

In its letter, the employer also made various critical comments about the plaintiff’s management style, interpersonal skills and compliance with head office requirements. The employer further recommended that the plaintiff take further management training, and concluded by saying that it “hope[d] [the parties could] work together and [it could] assist [the plaintiff] in becoming a good, positive member of [the] team again” (para. 19).

In her reply to the employer’s letter, the plaintiff indicated that her employment contract required her to work 30 hours per week. She added that she had often worked extra hours without pay in the past in order to ensure her work was completed (para. 21). The plaintiff ultimately ended up going on stress leave and never returned to work.

Madam Justice Fenlon of the BC Supreme Court held that the plaintiff had been constructively dismissed.

At trial, the employer, relying on the majority decision in *Evans*, argued that the plaintiff should have stayed on the job until she found alternative employment in order to mitigate her damages. The plaintiff argued that *Evans* did not require her to continue working for her employer when the salary for her position had been significantly reduced (para. 66).

Madam Justice Fenlon accepted the plaintiff’s argument, finding that it was “not reasonable to expect Ms. Borsato ... to mitigate her damages by returning to work at a salary that was 20% lower than her previous compensation” (para. 67).

Significantly, it appears from a review of the case that the employer never offered to keep the plaintiff on the job at her full salary during a working notice period.

**c. Sifton v. Wheaton Pontiac Buick GMC (Nanaimo) Ltd., [2010] B.C.J. No. 484 (S.C.)**

*Sifton v. Wheaton Pontiac Buick GMC (Nanaimo) Ltd.*, [2010] B.C.J. No. 484 (S.C.) is another constructive dismissal case. In this case, the plaintiff was employed for 16 years, initially as a

technician for the defendant automobile dealership but, for the last 11 years, as a shop manager. The dealership was taken over by new owners, who immediately and unilaterally implemented changes to the terms and conditions of employment of a number of employees. Changes were made to job titles, duties and compensation packages.

With respect to the plaintiff, his position was changed from shop manager back to technician, a position he had not occupied for 11 years. This involved a significant change in his job status and duties. The plaintiff's compensation package was also changed. Previously, he had been paid a base salary plus a percentage of the gross service department profits. The new owners changed his compensation package to an hourly rate plus a flat rate for each technical task performed. This amounted to a reduction in the plaintiff's annual income of around \$18,000. There was also no longer any guaranteed base salary for the plaintiff.

The changes were conveyed to the plaintiff in what can only be described as an abrupt manner. The plaintiff was told "that's just the way it was going to be" and there would be no discussion regarding the changes. The plaintiff worked approximately two weeks in this new position, which he viewed as a demotion. During that time, he attempted to discuss his concerns with management, and was told not to be negative. He was also told that negativity would be dealt with by management "quickly and severely." Ultimately, the plaintiff refused to return to work, asserting constructive dismissal.

At trial, Mr. Justice MacKenzie of the BC Supreme Court held that the employee had been constructively dismissed.

The employer alleged a failure to mitigate on account of the plaintiff's refusal to return to work as a technician and his failure to apply for technician positions at other dealerships. Mr. Justice MacKenzie found that the plaintiff had conducted himself reasonably. The trial judge distinguished the majority decision in *Evans*, noting that in that case the plaintiff was offered "the same job at the same salary for a period of time" (para. 66). In contrast, in this case:

... Mr. Sifton was offered a job that was dramatically different than the job he had been doing for 11 years at a significantly lower rate of pay. Further, the relationship between Mr. Sifton and Mr. Gordon [one of the employer's managers] was not "cordial." Mr. Braun described the meeting between the two as "tense" ... [I]t is clear that [Mr. Gordon] was an assertive and, at times, insensitive individual. There is no question that Mr. Sifton was unhappy about the change to his position and had difficulty hiding it; since Mr. Gordon would not "tolerate negativity" it is unclear how he and Mr. Sifton could have functioned harmoniously in the workplace ... (para. 67)

## **B. Cases in Jurisdictions Other than BC that Have Considered the Evans Decision**

Courts in jurisdictions other than BC have, for the most part, interpreted and applied the *Evans* decision in the same way as, or a substantially similar way to, the courts in this province.

In determining when an employee is reasonably required to accept an offer of re-employment, courts in other Canadian jurisdictions, like the courts in BC, have relied primarily on the passages in the majority judgment in *Evans* that we quoted above (see *Evans*, paras. 30-31).

We summarize below cases from across this country in which *Evans* has been considered and applied. We do this not because the law is applied differently in those cases (except perhaps with regard to the question of whether an employee has a duty to accept an offer of re-employment in a demoted capacity), but because we wish to provide employer and employee counsel in this province with further examples of the factors courts find persuasive in reviewing the reasonableness of an employee's rejection of an offer of re-employment.

## **I. Cases where a Failure to Mitigate Argument was Successful Based on an Application of the Evans Principles**

In *Boutcher v. Clearwater Seafoods Limited Partnership*, [2009] N.S.J. No. 138 (S.C.) (“*Boutcher*”), the Nova Scotia Supreme Court held that, following his wrongful dismissal, an employee’s refusal to accept an offer of re-employment in a different position at a significantly reduced salary was objectively unreasonable because the employee’s salary in his former position had fluctuated frequently anyway, and the position offered by the employer gave the employee some degree of certainty and provided him with at least the potential for significant income.

The Nova Scotia Court of Appeal upheld the trial judge’s interpretation and application of *Evans*, but allowed the employee’s appeal on the basis that the position offered to him by the employer only commenced *after* the expiry of the reasonable notice period. This reaffirms the principle that an employee’s responsibility to mitigate his or her damages only applies during the reasonable notice period. See *Boutcher v. Clearwater Seafoods Limited Partnership*, [2010] N.S.J. No. 79 (C.A.).

Similarly, albeit in the context of a constructive dismissal, in *Loehle v. Purolator Courier Ltd.*, [2008] O.J. No. 2462 (S.C.J.), the Ontario Superior Court of Justice determined that an employee’s refusal to accept an offer of re-employment, in what the Court accepted was a demoted position, was objectively unreasonable. The Court held that there was no evidence to support the employee’s subjective feelings of embarrassment, and a reasonable person would have realized that searching for a comparable position with another employer while employed would be less difficult than during a period of unemployment.

## **2. Cases where a Failure to Mitigate Argument was Unsuccessful Based on an Application of the Evans Principles**

In *Magnan v. Brandt Tractor Ltd.*, [2008] A.J. No. 1109 (C.A.), the Alberta Court of Appeal, in a unanimous judgment, upheld a trial decision that found an employee had been constructively dismissed, and had not failed to mitigate his damages by refusing to return to work in a different position. The Court of Appeal held the employee’s refusal was reasonable given that the employer accused the employee of misrepresenting his intention to retire and of accepting retirement gifts on what the employer considered to be false pretences.

In *McKee v. Reid’s Heritage Homes Ltd.*, [2009] O.J. No. 5489 (C.A.), the Ontario Court of Appeal, in a unanimous judgment, upheld a trial decision in which it was determined that an employee had been constructively dismissed, and had not failed to mitigate her damages when she refused the employer’s offer of a six-month contract. The Court of Appeal held that it was reasonable for an employee in her mid-sixties to refuse an offer of re-employment where the position offered to her by the employer was only of a short duration, and the employment relationship had been irreparably damaged by angry, hurtful and accusatory correspondence from the employer. Interestingly, the Court found these factors more persuasive than the employee’s admission that she was initially prepared to return to work with the employer.

*Colwell v. Cornerstone Properties Inc.*, [2008] O.J. No. 5092 (S.C.J.) is a case in which the Ontario Superior Court of Justice agreed with an employee that it was unreasonable for her to return to work with an employer that surreptitiously videotaped her at work. The Court said that if the employee were to return to work, she would have to continually question whether the employer was engaging in invasive action without her knowledge.

In *Walsten v. Kinonjeoshtegon First Nation*, [2009] M.J. No. 148 (Q.B.), the Manitoba Court of Queen’s Bench held that two employees, who were sisters, did not fail to mitigate their damages by refusing to return to work after they were wrongfully dismissed from employment. The Court found their refusal reasonable on the basis of the following factors: the employees had been wrongfully dismissed rather than constructively dismissed (it is unclear why this was viewed by the Court as a relevant

factor); the offer of re-employment was made a few months after dismissal; one of the employees had already started school and a part-time job at the time of receiving the offer; and, most significantly, a personal relationship between one of the employees and her superior had ended badly, and would likely have resulted in an awkward return to work for the employee and her sister given the small size of the First Nation's community.

*McBrearty v. Cerescorp Company*, [2009] Q.J. No. 6954 (Sup. Ct.) is a case in which the Quebec Superior Court held that an employee, who had his bonus dramatically reduced by his employer and was, as a result, constructively dismissed from employment, did not fail to mitigate his damages by refusing to return to work with the employer. Applying *Evans*, the Court determined that the employee's refusal to return to work was reasonable given the lack of mutual understanding and respect between him and the employer. The Court expressly found that the employee no longer trusted executive members of the employer, had no information concerning the criteria the employer would use in calculating his bonus in the future, and was suddenly in a position where his remuneration had been substantially reduced retroactively.

As is clear from the above cases, the question of whether an employee has failed to mitigate his or her damages by returning to work with his or her employer is primarily a question of fact.

In light of that, cases in which failure to mitigate arguments are made in accordance with the *Evans* principles are generally shown a great deal of deference at the appellate level, and conclusively won or lost at trial. This means that, in such cases, counsel for both employers and employees are well advised to pay close attention to the kind of evidence they put before the finder of fact.

## **IV. Implications of the Evans Decision**

### **A. Post-Evans: Summary of the Current Duty to Mitigate by Returning to Work with the Employer**

After *Evans*, it is clear that an employee's duty to mitigate may, in certain circumstances, include an obligation to accept an offer of re-employment from the dismissing employer. This applies in the context of both express and constructive dismissals. It is also clear that the test is to be applied in an objective way and calls for, as the majority described it in *Evans*, a "multi-factored and contextual analysis" that is sensitive to both tangible and intangible factors viewed from the perspective of a reasonable person.

The following factors identified by Mr. Justice Bastarache, which are not exhaustive, may be relevant and weighed in the application of the *Evans* test:

- the salary being offered;
- the nature of the work being offered and the similarity of the terms and conditions of employment;
- any acrimony in the relevant personal relationships or the general work relationship;
- the history and nature of the employment;
- whether or not the employee has commenced litigation;
- whether the offer of re-employment is made while the employee is still working for the employer or only after he or she has departed from employment; and
- the underlying "critical" factor that an employee does not have to work in an "atmosphere of hostility, embarrassment or humiliation" (para. 30).

In these kinds of cases, employers will more frequently be successful where:

- an employee is laid off for legitimate business or operational reasons as opposed to personal or other reasons;
- there are no allegations of cause or general misconduct or wrongdoing;
- the offer of re-employment is conveyed clearly, ideally in writing, and preferably shortly after the express or constructive dismissal takes place;
- the offer of re-employment is clear in terms of the specific position and compensation being offered; and
- the employee is being offered the same or a substantially similar position, taking into account, among other things, his or her salary and benefits.

Employees will more often be successful where:

- the employer has behaved in a rude, abrasive or demeaning way in relation to the employee or has, in some other way, seriously damaged the employment relationship;
- the employee is expressly or constructively dismissed for personal reasons or for alleged cause or general misconduct or wrongdoing;
- the offer of re-employment is unclear, ambiguous or equivocal (e.g., there were discussions about re-employment but, to use the language of Mr. Justice Savage in *Palmer*, the employer failed to make “a concrete offer with well-defined terms ... capable of reasoned consideration”);
- the offer of re-employment is for a different and, specifically, lesser position or involves unacceptable or undesirable terms and conditions of employment; and
- the employee’s compensation is significantly reduced (especially if his or her previous compensation levels were consistent and did not, as in *Boutcher*, fluctuate).

## **B. Has the Duty to Mitigate Become More Burdensome?**

### **I. Employer Perspective**

Boiled down to its essentials, *Evans* stands for the following proposition. As long as there are no barriers to re-employment, an employee who is offered the chance to mitigate his or her damages by returning to work with a dismissing employer is *required* to accept the offer.

This is significant. Even if an employee is able to establish that he or she was wrongfully or constructively dismissed from employment, he or she may not have won the proverbial war.

Failure on the part of a dismissed employee to discharge his or her duty to mitigate can have an important impact on the outcome of employment litigation. A damages award to which he or she would otherwise be entitled can be substantially reduced or even eliminated.

If the employee was made a reasonable offer of re-employment by the dismissing employer and he or she rejected the offer, the employee will have to persuade the court, viewing the matter objectively, that he or she behaved reasonably in rejecting the offer.

The approach taken by the majority in *Evans* makes good sense in light of what was said in the Supreme Court of Canada case of *Red Deer College v. Michaels* (1975), 57 D.L.R. (3d) 386 (S.C.C.). In that case, in the course of describing the duty to mitigate, the majority of the Court spoke of “[t]he rule of avoidable consequences”:

The rule of avoidable consequences here finds frequent application ... If ... the employee can obtain other employment, he can avoid part at least of [his] damages. Therefore, in an action by the employee against the employer for a wrongful discharge, a deduction of the net amount of what the employee earned, or what he might reasonably have earned in other employment of like nature, from what he would have received had there been no breach, furnishes the ordinary measure of damages. (at 391)

In the absence of a barrier or barriers to re-employment, if a dismissed employee has the opportunity to avoid part of his or her damages, on what basis should he or she be permitted to refuse to do so? If there is no such barrier, on what basis should the employee be allowed to turn down an offer of employment that is reasonable in all of the circumstances? At the end of the day, it is important to remember that damages in wrongful or constructive dismissal litigation are, as the majority explained in *Evans*, “meant to compensate for lack of notice, and *not* to penalize the employer for the dismissal itself” (para. 28).

It is difficult to see how the majority judgment in *Evans* has the effect of undermining the protection of employees. To the contrary, by creating the incentive for an employer to make the dismissed employee an offer of re-employment, *Evans*, in effect, creates conditions conducive to continuing employment for the employee. Even if that continuing employment is only for the duration of a working notice period (and it may not be limited in such a way), is it not preferable for the dismissed employee to be earning a regular pay cheque, and insulated from a period of unemployment, while searching for alternative employment? These comments apply with particular force in today’s economy where entire industries are being eliminated, jobs are being forever lost, and it is not unusual for a dismissed employee to be unemployed for a lengthy period of time.

## 2. Employee Perspective

There is no doubt that, from an employee perspective, the duty to mitigate has become more burdensome (even though the onus of proving a failure to mitigate is still technically on the employer). This is unfortunate given that litigation was already difficult, expensive and risky for most employees prior to *Evans*.

However, on a more positive note, now that the *Evans* decision has been judicially considered and applied in subsequent cases, it is clear that some clarity and consistency is emerging in the law regarding when, applying an objective standard, an employee will or will not be expected to accept an offer of re-employment. The clarity and consistency that is developing will likely minimize (although not altogether eliminate) one of the greatest negative impacts that *Evans* has had on employees—the increased uncertainty and concomitant litigation risk where there has been an offer of re-employment and the employee does not feel he or she can reasonably accept the offer.

When dealing with a wrongful dismissal, it is now relatively clear that, at a minimum, the employer must make a clear offer of re-employment, spelling out the terms and conditions of the offer in a frank and straightforward manner. If the employer fails to do this, the employee’s risk of being found to have failed to mitigate by not returning to work is considerably reduced.

With respect to both an express and a constructive dismissal, where the employer offers re-employment with significantly reduced responsibility and compensation, an employee also has a very good chance of successfully arguing that refusal of the employer’s offer was reasonable in the circumstances. It is currently uncertain how the law will develop in this province where the terms and conditions of employment being offered are inferior, but less dramatically so than in the cases that have been litigated post-*Evans*.

That said, the courts have repeatedly held that the most critical factor in the analysis is whether returning to work would mean the employee would have to work in an “atmosphere of hostility, embarrassment or humiliation.” The courts have also said that this is to be assessed objectively and

not on the basis of whether the individual employee subjectively feels a return to work would require him or her to work in a hostile, embarrassing or humiliating environment. However, it should be emphasized that this objective analysis is not only on the basis of what a reasonable person would do, but a reasonable person *in the position of the employee*.

Cases arising out of BC and other Canadian jurisdictions suggest that courts will be more likely to find an environment of hostility, embarrassment or humiliation where the employer has said or done something to irreparably harm the employment relationship. Where the employer has harshly criticized the employee, expressed anger or displeasure with regard to the employee's behaviour, or expressly or even impliedly alleged culpable conduct such as theft, dishonesty or misrepresentation, a court will likely find a refusal to return to work reasonable. This is also the case where the employer has acted in an abrasive manner or significantly breached the employee's trust. The employee will also likely succeed in establishing an "atmosphere of hostility, embarrassment or humiliation" where a personal relationship involving an employer's representative has ended badly.

Unfortunately, while an "atmosphere of hostility, embarrassment or humiliation" has been described as the most "critical" factor, *it is also the most subjective* on the part of the finder of fact. From the limited post-*Evans* jurisprudence, it is very difficult to anticipate in advance what kind of facts, using an objective standard, will persuade a court that a hostile, embarrassing or humiliating atmosphere exists. This difficulty, of course, significantly increases the litigation risk for an employee, especially in borderline cases, and results in a commensurate increase in the employer's bargaining power during settlement negotiations.

### **C. Strategic Issues**

In addition to the legal issues arising out of *Evans*, counsel for both employers and employees should be alive to the strategic implications of the case.

As the question of whether an employee has failed to mitigate his or damages by returning to work for his or her employer will be evaluated on an objective basis and, importantly, will generally be conclusively determined at trial, it is extremely important that both employer and employee counsel advise their clients as to the importance of documenting relevant incidents and/or communications between the employee and employer, not only at and around the time of dismissal but also during any ensuing negotiations. Such evidence will be critical if the employee later attempts to establish a breakdown in the work relationship, or if the employer tries to establish the reasonableness of a return to work by the employee.

Both employer and employee counsel should consider, as in any case, whether expert evidence will be helpful in making out a client's case. One can readily think of instances in which expert evidence would be valuable. Suppose an employer behaved particularly egregiously in the course of dismissal and the employee was emotionally or psychologically harmed as a result. Expert evidence would go a long way in establishing the unreasonableness of a return to work with the dismissing employer. Imagine another situation where the dismissed employee lives in a small, remote community. Expert evidence regarding limited job prospects in the community and its surrounding area would be useful in showing that it would have been reasonable for the employee to return to work for his or her employer, even if only for a working notice period.

Expert evidence is, of course, not justifiable in every case. It may not be expedient in the circumstances of a particular case to retain an expert. A party may simply not have the resources to do so.

Employer counsel should advise their clients to think carefully before, to put it colloquially, pulling the trigger and dismissing an employee from employment. If an employer can productively use the services of the employee during a working notice period and there is no compelling reason for not offering the employee the opportunity to work out the notice period, the employee should probably be dismissed from employment with working notice. This is a relatively straightforward approach, and really makes redundant any analysis predicated on the majority judgment in *Evans*.



If an employee is dismissed from employment without working notice (which may well occur where the employer is acting without the benefit of legal advice), the employer is well advised to act quickly on the heels of the express or constructive dismissal if it wishes to take advantage of the “offer of re-employment” approach sanctioned by the majority in *Evans*. A written offer of re-employment, clearly setting out the terms and conditions of the offer, should be promptly made to the employee. The position offered to the employee should not significantly differ from the position previously held by the employee and, importantly, should commence during, and not after, the reasonable notice period. If an employer cannot place the employee in the same or a substantially similar position, in terms of duties, working conditions and compensation, the employer should be cautioned by legal counsel that the courts will likely not require the employee to return to work in order to fulfill his or her duty to mitigate.

Employer counsel should impress on their clients—and at all times remain mindful of—the importance of behaving fairly, respectfully and courteously in relation to a dismissed employee to whom an offer of re-employment is made. Not only does that go a long way toward satisfying the law’s expectations of a dismissing employer, but that will also be immensely helpful to an employer that is trying to establish there are no reasonable barriers to the employee’s return to work. Needless to say, hardball tactics should be avoided to the greatest extent possible, and baseless allegations of cause or general misconduct or wrongdoing by the employer should be avoided at all costs.

By the same token, employees who are subjected to objectionable conduct on the part of a dismissing employer (or, for that matter, employer counsel) will be well served by documenting the conduct and, ideally, by making reference to it in written communications with the employer.

The courts seem to view “who acted first” as a relevant factor in assessing the viability of a future work relationship between the parties, and the reasonableness of the employee’s actions (and perhaps, impliedly, in assessing the legitimacy or good faith of the employer’s offer). Where an employer makes an offer of re-employment soon after the express or constructive dismissal, employee counsel should carefully consider the risks of not accepting the offer and the advice they provide to their clients in that regard. In the face of a reasonable offer from the employer, the litigation risk for an employee is, of course, considerably increased. If, on the other hand, the employer provides an offer of re-employment long after the dismissal or at the outset or during the course of litigation, the employee will have a strong argument to the effect that a return to work with the dismissing employer would have been unreasonable. This, then, will likely be a factor that an employee and his or her counsel will weigh when considering the question of whether to commence litigation quickly.

An employee who is offered a position that is much inferior to the position he or she previously occupied is well advised to offer to return to work under terms and conditions of employment that are the same as or substantially similar to the terms and conditions that previously applied. This, needless to say, is on the condition that the employee is willing to return to work with the dismissing employer (because there is the chance, perhaps a remote one, that the employer will accept the employee’s offer).

## V. Conclusion

There is no question that when the *Evans* decision was first issued, it made a splash.

It was touted as being a major victory for dismissing employers that would have available to them a powerful mitigation defence, a defence that could be deployed to substantially reduce a damages award arising out of an express or constructive dismissal. At the same time, the decision was criticized by employees and employee counsel as, among other things, not properly recognizing the power imbalance in the employment relationship and the vulnerability of an employee at and around the time of termination.

#### 5.1.16

While *Evans* certainly represents a shift in the law, the ramifications of the decision have been tempered by the emphasis that courts across this country have placed and continue to place on the presence or absence of “barriers to re-employment.”

Courts in BC and other Canadian jurisdictions have started to develop a post-*Evans* body of jurisprudence that speaks to the circumstances in which an employee will or will not be expected to accept an offer of re-employment. The guidance that the courts are providing in this regard is very welcome. It is not in the interests of the employment community as a whole to have legal standards that are inconsistent, imprecise or vague.