MANAGEMENT
COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

In the absence of conditions rendering the return to work unreasonable, an employee can be expected to mitigate damages by returning to work for the dismissing employer even in the case of a wrongful dismissal.

Dismissed Employee Obliged to Return to Job to Mitigate Damages

In a recent decision of the Supreme Court of Canada, the Court addressed the issue of an employee's duty to mitigate his or her losses resulting from wrongful dismissal. In a 6-1 ruling the Court held that the duty to mitigate may include returning to work for the dismissing employer.

The Facts

For 24 years, Donald Evans worked as a business agent for the Teamsters Local Union No. 31 in Whitehorse, Yukon. On January 2, 2003 Mr. Evans was dismissed from his employment. He responded by seeking the equivalent of 24 months' notice – 12 months of working notice and 12 months of salary in *lieu* of working notice.

Negotiations between Mr. Evans and the Union ensued but were to no avail. Throughout it all the Union continued to pay Mr. Evans' salary. Meanwhile Mr. Evans made limited efforts to find alternate employment based upon his view that few, if any, jobs were available to him in Whitehorse.

Ultimately, the Union requested that Mr. Evans return to his employment as of June 2, 2003 in order to serve out the remainder of the 24 month notice period he had requested. Mr. Evans refused, choosing instead to sue for wrongful dismissal. The Union defended the action, taking the position that Mr. Evans' failure to return to work was a failure to mitigate his loss.

The Trial Decision

The trial judge found that Mr. Evans had been wrongfully dismissed and was entitled to 22 months' notice. The judge accepted Mr. Evans' evidence that he was not qualified for other jobs in Whitehorse. Therefore his failure to look for another job did not mean he had failed to mitigate his damages. The judge also accepted Mr. Evans' argument that the relationship between he and the Union had irrevocably broken down. Thus it was not reasonable for him to have returned to work for the Union.

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The Yukon Court of Appeal

The Yukon Court of Appeal overturned the decision of the trial judge. The Court rejected Mr. Evans' argument that the cases requiring an employee to mitigate damages by returning to work for the dismissing employer dealt primarily with constructive dismissal, not wrongful dismissal. The difference being, Mr. Evans had argued, that in the case of a wrongful dismissal, the relationship between the parties cannot be repaired. The Court also found that Mr. Evans had not acted reasonably when he rejected the Union's offer to return to work throughout the remainder of his notice period.

The Supreme Court of Canada

The Supreme Court of Canada agreed with the Court of Appeal (and the Union) both in fact and in law.

In law, the Court affirmed two key propositions: first, 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; and second, in the absence of conditions rendering the return to work unreasonable, an employee can be expected to mitigate damages by returning to work for the dismissing employer even in the case of a wrongful dismissal:

> *"In some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to re-employment ... requiring an employee to mitigate by taking ... work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and not to penalize the employer for the dismissal itself."*

And further:

> *"... there is no principled reason to distinguish between [wrongful and constructive dismissal] when evaluating the need to mitigate. Although it may be true that in some instances the relationship between the employee and the employer will be less damaged where constructive rather than wrongful dismissal has occurred, it is impossible to say with certainty that this will always be the case."*

The Court also affirmed that there is little practical difference between informing an employee that his or her contract will be terminated in 12 months' time (i.e. giving 12 months working notice) and terminating the contract immediately but offering the employee a new employment opportunity for a period of 12 months:

> *"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..."*

The central issue, the Court said, is whether applying an objective test, a reasonable person would accept such an opportunity. In the Court's view, *"a reasonable person should be expected to do so where 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"* .

Factors which might influence whether an employee has acted reasonably in refusing an offer of re-employment during the notice period include: the history and nature of the employment, whether 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 he or she had already left, work atmosphere, stigma and loss of dignity. Significantly, no single factor is determinative.

In Mr. Evans' case, the Court accepted that there was strong evidence that he could have resumed his old job. He had attempted to negotiate the conditions under which he was willing to return, understood that the offer to return was *bona fide* and never voiced to the Union any concerns about resuming his employment. In other words, viewed objectively, Mr. Evans was not justified in refusing to return to work with the Union.

Lessons Learned

The Supreme Court of Canada's decision confirms the following important propositions:

1. A dismissed employee's obligation to mitigate damages may include returning to work for the dismissing employer.
2. This obligation may exist even where the employee has been wrongfully dismissed, and even where a wrongful dismissal action has been commenced.
3. When evaluating the obligation to mitigate there is no reason to distinguish between wrongful dismissal and constructive dismissal.
4. In terms of an employee's obligation to mitigate, there is little practical difference between notifying an employee that his or her contract will be terminated as at a specific date in the future, and terminating the contract immediately but offering new employment for the same period of time.
5. 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.
6. Applying an objective test, a reasonable person should be expected to return to his or her former employer where the salary offered is the same, the working conditions are not substantially different or the work demeaning, and the personal relationships involved are not acrimonious.

Finally, although not expressly stated by the Court, the decision confirms what many employers already know: to the extent possible and appropriate in the circumstances, it may be in the employer's interests when dismissing an employee, to create an environment that is ripe for the employee to work through all or part of the notice period.

For more information about the Evans *decision and how it may impact on your workplace please contact a member of the Sherrard Kuzz LLP team.*

Modifying an Existing Employment Contract – How and When?

A written employment contract is one of the most effective tools an employer has to quantify and contain employment-related liabilities and expectations.

But what happens when an employer wants to change, or introduce, a term or condition regarding an existing employment agreement? For example: compensation, duties and responsibilities, entitlement upon termination, non-solicitation, intellectual property protection, etc.

If done properly, the employer will have put itself in a position to achieve its business objectives. If done improperly, the change may be unenforceable or result in the employee claiming that he or she has been constructively dismissed, resulting in a wrongful dismissal lawsuit.

A recent decision of the Ontario Court of Appeal has clarified the options available to both the employer and employee in this type of situation. The Court ruled that if an employer seeks to unilaterally change a "fundamental" provision in the contract and the parties cannot agree: a) the employee can seek damages for constructive dismissal, or b) the employer can provide working notice of termination and thereafter offer re-employment under the modified terms. The ruling overturns previous court decisions which permitted an employer to amend an existing employment agreement merely by giving reasonable notice of the change.

Wronko v. Western Inventory Service Ltd.

Seventeen years into his employment, Mr. Wronko was presented with an amended employment contract. The amendment sought to reduce his pay in *lieu* of notice of termination from two years to thirty weeks. Not surprisingly, Mr. Wronko did not sign the amended contract. Instead, he insisted that the employer abide by the existing terms.

In response, the employer gave Mr. Wronko formal notice that in two years' time the amended contract would come into effect. Mr. Wronko refused to acknowledge the pending change.

At the conclusion of the notice period, the employer reminded Mr. Wronko that he had been given two years' notice of the change to his contract and, as such, the amended contract was now in force. The employer also advised Mr. Wronko that if he was unwilling to work under the new terms "[the employer did] not have a job for [him]". Mr. Wronko refused to work under the amended contract. He took the position that he had been wrongfully dismissed and sued for damages.

The Trial Decision

The trial judge decided against Mr. Wronko. The judge upheld the then prevailing law that an employer is permitted to unilaterally change a fundamental term in an employment contract provided the employer gives to the employee reasonable notice of the change. Reasonable notice is typically measured by the amount of notice to which an employee would be entitled in the event of an outright dismissal. In this case, the employer had provided two years' notice to Mr. Wronko. In the circumstances the judge found that Mr. Wronko had resigned from his employment when he refused to work under the new terms. His claim was dismissed.

According to the Court of Appeal, the employer erred in failing to include explicit notice of termination in the two years' notice of the proposed change to the employment contract.

The Ontario Court of Appeal

The Court of Appeal overturned the trial judge's decision. The critical difference between the two decisions is the way in which the respective courts interpret the concept of "notice".

According to the Court of Appeal, the employer erred in failing to include explicit notice of *termination* in the two years' notice of the proposed change to the employment contract. In other words, the employer had not appropriately notified Mr. Wronko that, if he would not agree to the change, at the end of the two years notice his employment would be at an end.

The Court awarded Mr. Wronko two years' pay in *lieu* of notice as provided for in the original employment contract.

Practical Considerations

In light of the Court's decision in *Wronko*, we offer a few practical tips related to the making and amending of an employment agreement:

1. Ensure that an employment agreement references every material term and condition of employment.
2. The agreement should be signed by the employee prior to the commencement of work. This does not mean at the beginning of his or her first day, or when the employee commences training. We recommend having a signed employment agreement in hand at least two (2) days prior to the employee commencing any type of work.
3. Should it be necessary to change a provision in the employment agreement, plan the change to coincide with appropriate "consideration" including, for example, a wage increase, benefit increase, discretionary bonus payment or promotion.
4. If the proposed change negatively impacts the employee (i.e. a demotion or reduction in salary) and the employee rejects the proposal, consult legal counsel concerning the appropriate period of notice applicable to the employee involved. At that point, the employee must be given written notice of his or her termination, and then offered new employment on the amended terms.

To learn more about the Wronko *decision or for assistance planning, implementing and/or amending employment agreements in your workplace, please contact a member of the Sherrard Kuzz LLP team.*

MANAGEMENT COUNSEL

DID YOU KNOW?

Both Barack Obama and Hillary Clinton have promised that as President they would sign into law the *Employee Free Choice Act*. The Act would allow American workplaces to become unionized on the basis of signed union cards. Currently, American workers are allowed a secret ballot election when deciding whether or not they wish to be represented by a trade union in their relationship with an employer.

HReview Seminar Series

Please join us at our next *HReview* Breakfast Seminar:

Overtime Pitfalls & Wrongful Dismissal Update

1. "Going Into Overtime" - Damages and Strategies

- Overview of *The Employment Standards Act* Hours of Work Provisions
- Recent Overtime Class Action Litigation
- How to Protect Against Overtime Claims

2. Wrongful Dismissal Update

- What's New in the Case Law?
- The Evolution of *Wallace Damages*

DATE: Tuesday September 9, 2008, 7:30 – 9:30 a.m. (program at 8:00 am; breakfast provided)

VENUE: **Holiday Inn Hotel & Suites, 7095 Woodbine Avenue, Markham** (Woodbine and Steeles) 905.474.0444

COST: Please be our guest

RSVP: By Friday August 29, 2008 to info@sherrardkuzz.com or 416.603.0700

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