CURRENT ISSUES IN MITIGATION: THE DUTY TO MITIGATE IN THE FACE OF A CONSTRUCTIVE DISMISSAL OR RE-EMPLOYMENT OFFER

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INTRODUCTION

This paper focuses on the following current mitigation issues:

i. What is an employee's duty to mitigate her[2] losses by accepting an offer of a different position with the employer in the context of a possible constructive dismissal?

ii. What is an employee's duty to mitigate her losses by accepting an offer of re-employment made after an express termination of employment by the employer?

GENERAL PRINCIPLES OF MITIGATION

It is trite law that all plaintiffs have a duty to mitigate their damages to the greatest extent that is reasonably possible in the circumstances. In the context of employment law cases, a defendant employer almost invariably claims that its former employee has not fulfilled her duty to mitigate and that there should be a corresponding reduction in the amount of damages awarded to her as a result of her lack of reasonable efforts.

The case law clearly establishes the following two main principles of mitigation:

> 1. that the reasonableness of a former employee's search for alternate employment must be assessed with reference to what would be reasonable for a person in her shoes, and not what would be reasonable from the former employer's standpoint;[3] and
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> 2. that the onus is on the employer to prove that: a) the employee failed to take reasonable steps to mitigate her losses; and b) had she taken reasonable steps to mitigate, she would have likely obtained alternative employment.[4]

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[2] In this paper, for ease and simplicity, the feminine is used when referring to fictional persons.

[3] *Forshaw v. Aluminex Extrusions Ltd.* (1989), 27 C.C.E.L. 208, 39 B.C.L.R. (2d) 140 (C.A.)

[4] *Michaels v. Red Deer College* (1975), 44 D.L.R. (3d) 447, [1976] 2 S.C.R. 324; *Jorgenson v. Jack Cewe Ltd.*, [1979] 1 A.C.W.S. 138 (B.C.S.C.), appeal dismissed, cross-appeal allowed (1978), 9 B.C.L.R. 292, 93 D.L.R. (3d) 464 (C.A.), affirmed [1980] 1 S.C.R. 812

As stated recently by the British Columbia Supreme Court:

> Generally, to determine what constitutes reasonable mitigation efforts, the Court should consider her age, her length of service, her physical condition and the economic condition of the marketplace. However, what will constitute reasonable mitigation will depend on all of her circumstances.[5]

What the employer must prove to discharge its burden of proof in this regard has been the subject of much debate. Recently, the Court has attempted to clarify what is required:

> [the employer] is not required to show that a "specific" job was available to [the employee] in the sense that a specific company had offered her a job beginning on a given date, at a certain salary. However, it is required to show that "specific" opportunities were available to her in the sense that, had she attempted to mitigate, she would have likely found alternative employment.[6]

WHAT IS AN EMPLOYEE'S DUTY TO MITIGATE HER LOSSES BY ACCEPTING A DIFFERENT JOB OFFER MADE BY THE EMPLOYER DURING THE COURSE OF A CONSTRUCTIVE DISMISSAL?

Often, an employer's assertion that a former employee has failed to mitigate her damages arises in conjunction with an employee's claim that she was constructively dismissed. This occurs most often when an employee claims that the employer's changes to her remuneration, position, title or duties and responsibilities effectively altered the fundamental nature of her employment, thereby breaching the employment contract.

According to the Court in *Farber v. Royal Trust Co. ("Farber")*, constructive dismissal of an employee occurs when:

> an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment - a change that violates the contract's terms - the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed.[7]

When an employer commits a present or anticipatory breach of a fundamental term of the employment contract, an employee has a right, but not necessarily an obligation, to treat the employment contract as terminated: see *Farquhar v. Butler Brothers Supplies Ltd.* ("*Farquhar*"). [8] According to *Farquhar*, an employee has a "reasonable" time in which to decide whether to condone the changes to the employment contract or accept the employer's actions as a repudiation of the contract. As with most issues in employment

[5] *Stuart v. Navigata Communications Ltd*., 2007 BCSC 463
[6] Ibid, at para. 50
[7] [1997] 1 S.C.R. 846 at 864
[8] (1988), 23 B.C.L.R. (2d) 89 (B.C.C.A.)

law engaging the concept of "reasonableness", what period of time will be found to be reasonable is dependent on the circumstances.[9]

Author David Harris identifies several factors that are relevant in the calculation of reasonable time:

a) the employee's persistence in objecting to the unilateral change;
b) the employee's age, education and work experience; and
c) the employee's mitigation strategy.[10]

Mr. Justice Lambert in *Farquhar*[11] explored the overlap between the concept of constructive dismissal and the duty to mitigate one's damages. In that case, the defendant suffered business setbacks and decided to cut salaries by amounts ranging from 5%, for lower paid employees, up to 30%, for senior employees. The plaintiff's salary was cut by 30%. Subsequently, he was also advised that his director's fees would no longer be paid and that his motor vehicle benefit was being eliminated, at which time he discontinued providing services to the defendant company. The time between the initial salary cut and the plaintiff's decision to leave was approximately three weeks.

It is noteworthy that Mr. Justice Lambert made specific reference to the fact that "all of the other employees accepted the unilateral salary cuts that were imposed on them; the company got its working capital; its viability was restored; and, in the course of time, most of the former salaries were reinstated." [12] In the circumstances, it is not surprising that the defendant argued that it was unreasonable for the plaintiff to leave the company so hastily and that his refusal to accept the changes and remain working there, at least until he found a new job, was unreasonable and constituted a failure to mitigate his damages.

In respect of the obligation to remain with one's employer in order to mitigate one's damages following a constructive dismissal, Mr. Justice Lambert stated that:

> The employee is only required to take the steps in mitigation that a reasonable person would take. Sometimes it is clear from the circumstances that any further relationship between the employer and the employee is over. One or the other or both of them may have behaved in such a way that it would be unreasonable to expect either of them to maintain any new relationship of employer and employee. The employee is not obliged to mitigate by working in an atmosphere of hostility, embarrassment, or humiliation. But once the employer is clearly told, by words or equivalent action, that the termination is accepted by the employee, then, if the employer continues to offer a position to the employee, and the

[9] In *Streight v. Dean*, 2002 BCSC 399, Macaulay J. reviews several B.C. cases where courts have found that periods ranging from three weeks to three months constituted a reasonable time period in which the employee could claim that a fundamental change in her employment constituted a breach of her employment contract.
[10] Wrongful Dismissal, looseleaf (Thomson Carswell, 2006) Vol. 1 at 3.8
[11] *Farquhar*, supra at note 2 at p. 91
[12] *Farquhar*, supra at note 2, at p. 90

> position is such that a reasonable employee would accept it, if he were not counting on damages, then the duty to mitigate may require the employee to accept the position, on a temporary basis while he looks for other work, even if it is roughly his old position before the constructive dismissal. Such circumstances may not arise frequently. Very often the relationship between the employer and the employee will have become so frayed that a reasonable person would not expect both sides to work together again in harmony. But sometimes it would be unreasonable for the employee to decline to continue in employment through the period equal to reasonable notice, while he looks for other work. That *was* so in Lesiuk, where the constructive dismissal, if any, was caused only by the hard times facing the employer. Indeed, in the Lesiuk case, the employer frequently expressed satisfaction with the employee, and the hope that the employment relationship would continue at no reduction in salary, but at different duties forced by the economic climate.
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> The cases where there is an obligation to continue in the work force of the employer, under a new employment relationship, following a constructive dismissal, will roughly correspond with those cases where it is reasonable to expect the employment relationship to continue through a period of notice, rather than to end with pay in lieu of notice. There must be a situation of mutual understanding and respect, and a situation where neither the employer nor the employee is likely to put the others' interests in jeopardy. But if there is such a situation, then a reasonable employee should offer to work out the notice period, either where notice is given, or where there is *a* constructive dismissal and an offer of *a* new working relationship.[13]

It is interesting to note the way in which the Court phrased the reasonableness of the plaintiff's actions in *Farquhar.* The Court commented that he had "walked out" following an effective reduction in his compensation by 47% and that it would have been unreasonable to expect him to "walk back in again" in order to mitigate his damages, as this would have likely been humiliating and affected his capacity to act in a supervisory role.[14] In that vein, when considering the issue of mitigation, the Courts have frequently emphasized the humiliation an employee would likely have to endure if she returned to the workplace following a constructive dismissal. Whether it is a situation replete with hostility or humiliation is a question of fact and one that will not lightly be overturned by the Court of Appeal.[15]

In contrast to the Court's decision in *Farquhar,* the more recent decision of C*arstensen v. Arbutus Management Ltd. ("Carstensen")* [16] indicates that an employee may well be acting too hastily if she leaves almost immediately after having her compensation significantly reduced or her duties altered. In that case Mr. Justice Finch considered the plaintiff's application for an extension of time to file and serve the appeal record. The respondent opposed the application on the basis that the appeal was without merit. The plaintiff sought to appeal the dismissal of her claims for damages for wrongful dismissal.

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[13] *Farquhar*, supra at note 2, commencing at p. 93
[14] *Farquhar*, supra at note 2 at p. 96
[15] See for example, *Wood v. Owen De Bathe Ltd*., 1999 BCCA 29
[16] 2003 BCCA 88 (In Chambers)

In particular, the plaintiff alleged that she had been constructively dismissed when she received a letter advising her of a change in duties. The learned trial judge reviewed the evidence and held that the defendant's letter did not amount to an irrevocable notice of a settled intention to demote the plaintiff and to reduce her salary. Interestingly, in that case, the trial judge took into account evidence that the defendant subsequently changed its mind, and proposed to offer the plaintiff a different position. However, prior to communicating the offer to the employee, the employer received a letter from the plaintiff's lawyer advising that the plaintiff took the position that she had been constructively dismissed. In the chambers application to extend the time to file and serve the appeal record, the plaintiff argued that the appeal had merit in that the trial judge had committed an error when he considered evidence of an offer that had not been communicated to the plaintiff prior to her decision to accept the changes as a repudiation of the employment contract.

In dismissing the application, Mr. Justice Finch relied on the trial Court's findings with respect to the issue of mitigation:

> The learned trial judge also held the plaintiff had failed to mitigate her losses. He said:
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> > It is not strictly necessary for me to deal with the issue of mitigation. I propose to do so, however, because if I am wrong on the question of constructive dismissal, I am of the view that the plaintiff failed to take reasonable steps to mitigate. She was given the opportunity to work for at least six weeks at her regular wage. There is no evidence Mr. Tennant, or anyone else in a management position, did not want he plaintiff to continue to work for the defendant. Considering the fact that virtually all of the workforce was impacted by the economic circumstances affecting the defendant, and considering the nature of the plaintiff's duties under her current and proposed positions, I am not satisfied a reasonable person in the plaintiff's position would have been humiliated by staying with the defendant while searching for other employment.
> >
> > Had the plaintiff mitigated in this matter, I am satisfied her mitigation would have been total. Within a month, the market had turned around and the defendant was back to full strength. I am satisfied the plaintiff would have been back at her old job. She would have suffered no damages.
> >
> > I conclude, therefore, that, unfortunately, the plaintiff acted prematurely in treating the defendant's actions as constituting a constructive dismissal of her employment and I must dismiss her action. [17]

In the result, Mr. Justice Finch accepted the defendant employer's arguments regarding the plaintiff's duty to mitigate and held that the appeal was without sufficient merit.

[17] Ibid, at paras. 5 and 6.

As can be seen from the above cases, when determining the issues of whether there has been a constructive dismissal and the failure of a plaintiff to mitigate her losses in some manner, the Courts often take into consideration similar factors. For example, in both situations, the Courts have made explicit reference to the economic health of the industry in which the employee works as well as the degree of change in the employee's duties or remuneration package. What is interesting to note is the apparent change over time in respect of the Court's emphasis on the aspect of economic circumstances of the employer.

The trial judge's comments in *Carstenten* are particularly noteworthy considering the Court of Appeal's rather unequivocal statements of the Court in *Farquhar* regarding the rights of an employer facing difficult economic decisions. Mr. Justice Lambert stated:

> Counsel for the employer argued that the poor financial position of the company justified the company's decision to cut salaries and other benefits. He said that if the decision had not been taken the company might have been forced out of business. That might well have been so. The company's poor financial position constituted a persuasive reason why the employees might each have agreed to salary cuts, and perhaps to other modifications in their contracts of employment. But it does not justify a unilateral change in the contracts of employment. Nothing does. Mutuality is required for every change in the basic terms of employment unless, of course, the contract of employment itself gives the employer the right to make unilateral changes in its terms.
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> …The loss suffered by the employee as a result of the breach is not lessened by adverse economic circumstances generally, or by the poor financial position of the employer in particular. (underline added)[18]

It is clear that in both its determination of whether there has been a constructive dismissal or a failure to mitigate, the Court attempts to discern what the fictitious "reasonable" person would do in the shoes of the plaintiff. As can be seen by the examples above, what might be reasonable in some cases will not be reasonable in others.

What is clear is that an employee must make more than minimal efforts to secure alternate employment that is comparable to her former job. For example, in a recent case, it was commented by the Court that it was not a reasonable mitigation strategy for a plaintiff to take her time to find a new job because she was admittedly "not starving" due to her husband's ability to support her.[19]

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[18] *Farquhar*, supra at note 2 at p. 92

[19] In *Lelievre v. Commerce and Industry Insurance Company of Canada*, 2007 BCSC 253 Madam Justice Boyd considered a situation in which the defendant argued that the plaintiff had resigned from her employment and that she had failed to mitigate. In that case, the Court found that a demand to return all company property, including keys and office passes, and supervising a signing off on her computer account, prevented the plaintiff from accessing the workplace. Additionally, the defendant had requested that she return the company car. In light of those events, the Court held that the defendant terminated the plaintiff's employment without reasonable notice. The plaintiff was a 53-year-old sales manager with six years experience with the defendant, working in a rather specialized field of the insurance industry. The

That said, what actions will constitute more than minimal efforts (and therefore reasonable steps) remains illusive, as can been seen in the recent case of *Hainsworth v. World Peace Forum Society* ("*Hainsworth*").[20] In that case the Court again considered a situation of alleged constructive dismissal and the employer's argument that it was not reasonable for the plaintiff to leave before securing alternate employment.

In *Hainsworth*, Mr. Justice Warren accepted the plaintiff's arguments that it was not reasonable to expect her to remain in the workplace, as the office was small with only a handful of employees and the relationship between her and the defendant was severely frayed. Moreover, she had been demoted and thus it would have been humiliating for her to continue working there while searching for a new job. The plaintiff's efforts to mitigate in that case consisted of applying for "several jobs" in Vancouver and elsewhere. Although the Court does not mention the exact number of jobs she applied for, there is the sense that the plaintiff did not make a very extensive search. [21] Regardless, the defendant was unsuccessful with respect to its claim that the plaintiff failed to mitigate her damages, either in her job search efforts or her lack of willingness to remain in the workplace until she found new employment.

Similarly, in *Stuart v. Navigata Communications Ltd.* ("*Stuart*")[22], Madam Justice Martinson found that the employer had not proven a failure to mitigate despite the fact that the plaintiff had taken the summer off and had restricted her search to part-time employment in the same industry. In this regard, the Honourable Madam Justice concluded as follows:

> I am satisfied that it was reasonable for Ms. Stuart to look only for part-time employment. She had been working part-time for the last several years so that she could spend more time taking care of her children. This became particularly important when her son became ill in February 2006.
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> I conclude that her efforts were reasonable until the end of the summer. Both the fact and the manner of the dismissal were devastating to her. The dismissal happened while she was still on leave, so as to deal with her son's illness. Her initial efforts were what she referred to as "networking". Networking is not uncommon in a position such as hers and it made sense to pursue employment opportunities through people she knew in the industry. She, thereafter, took the recruiting firm route. In my view, it was not unreasonable for her to take time

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Court held that she was entitled to 6 months notice of termination. The defence successfully argued that she failed to mitigate. In this case the Court found that the only thing the plaintiff did to find a new job was send some "brief" emails to three insurance industry employers inquiring about the availability of work; she did this approximately four months after her termination. Further, the plaintiff admitted on discovery that she had a husband and thus she "wasn't starving at that point". Since her "actual employment opportunities went well beyond the three companies she approached" the defendant met the onus of proving that the plaintiff did not act reasonably and take such steps as a reasonable person would have in the circumstances. As a result, the notice period was reduced by half (to three months).

[20] 2006 BCSC 809

[21] Ibid, at para. 71, the Court stated that the plaintiff "presented some evidence of her efforts to mitigate" and the defendant had "not met the burden on it of establishing that she failed to take all reasonable steps".

[22] Supra, at note 3.

> off in the summer. I accept her evidence, based on her 24 years of experience, that the summer is a slow time for hiring in the telecommunications business. There was no evidence to the contrary presented.
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> By November 2006, though, she had not directly contacted many of Navigata's competitors, nor was she looking for employment in other industries. She could have done more.
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> Nevertheless, I am not satisfied that Navigata has proven that, had she further attempted to mitigate her damages, she would have likely found suitable alternative employment. Navigata emphasized the downturn in the economy, as it relates to this industry, in explaining why Ms. Stuart's employment was terminated. While there is some evidence that two other employees found employment, that evidence does not show it was employment suitable for Ms. Stuart. The fact that Mr. Gilbert recommended her for one job is not enough to show that it was, in fact, available to her and suitable.[23]

From the foregoing cases it would seem that, despite the monumental efforts of employers, the success rate regarding an employer's argument that an employee has failed to properly mitigate her damages because she made minimal efforts to look for new employment or refused to say at the workplace until finding a new job elsewhere has not increased significantly. This appears to be the case, even with the Court's noticeable and increasing emphasis on the economic health of the defendant company and the industry in which it operates. The Court remains somewhat vigilant that an employee has the right to work in an environment that free from hostility and humiliation and that it is not reasonable to expect that an employee will agree to work in a less than amicable environment following a dismissal, constructive or otherwise. Accordingly, it is important for employers to keep the general atmosphere and work environment in mind when deciding whether to alter the terms of someone's employment or argue a lack of reasonable efforts to mitigate in the course of a wrongful dismissal claim.

WHAT IS AN EMPLOYEE'S DUTY TO MITIGATE HER LOSSES BY ACCEPTING AN OFFER OF RE-EMPLOYMENT MADE AFTER A CLEAR WRONGFUL DISMISSAL?

This part of the paper examines a very specific topic: in what circumstance does an employee have an obligation to accept re-employment after she has been clearly wrongfully dismissed?

There are surprisingly few cases that discuss this issue, perhaps because employer's who have decided to terminate an employee rarely make re-employment offers. However, there are at least three relatively recent cases in British Columbia on this issue:

1. The 1999 decision of the British Columbia Court of Appeal decision in *Cox* v. *Robertson*[24] *("Cox")*;

[23] Ibid, at paras. 51 to 54
[24] [1999] B.C.J. No. 2693 (C.A.)

2. The 2006 decision of the British Columbia Supreme Court in *Stant* v. *Elaho Logging Ltd.*[25] *("Stant")*; and
3. The 2006 decision of the British Columbia Court of Appeal in *Evans* v. *Teamsters Local Union No. 31*[26], currently under appeal to the Supreme Court of Canada ("*Evans*").

Cox is a 1999 decision of the British Columbia Court of Appeal in which the plaintiff, a dental assistant, was terminated after eighteen years of employment with the provision of only one month's working notice and no pay in lieu of notice. The plaintiff worked out the one month working notice, without incident, at the end of which she commenced a claim for wrongful dismissal.

Approximately two and a half months after her termination, the defendant contacted the plaintiff and offered to re-employ her on the same terms and conditions. The plaintiff declined this offer.

After examining the evidence, and in particular the fact that the plaintiff had worked out the one month of working notice without incident, the trial judge concluded that the plaintiff failed to take reasonable steps to mitigate her loss by rejecting the re-employment offer made by the defendant.

On appeal, former Chief Justice McEachern starts off by distinguishing this situation from one where the employee has been constructively dismissed, but notes that while this is not strictly a constructive dismissal case, some of the principles emerging from constructive dismissal cases are helpful "in defining the approach that should be taken in a case such as this one."

Chief Justice McEachern then goes on to overturn the trial judge's decision on this issue, finding that it was reasonable for the plaintiff to refuse the offer of re-employment for the following reasons:

a) the plaintiff and defendant worked very closely together in the office;
b) the plaintiff had attempted to resolve the matter with the defendant prior to litigation, to no avail;
c) the defendant had provided the plaintiff with very inadequate reasonable notice; and
d) the defendant only made the offer of re-employment after an action was commenced.

This issue was considered more recently in *Stant*, a 2006 decision of the British Columbia Supreme Court. In *Stant*, the plaintiff employee had been laid off indefinitely in a fairly egregious fashion, shortly after a brief period of disability. The plaintiff hired legal counsel, who wrote a demand letter to the defendant employer. Shortly thereafter,

[25] [2006] B.C.J. No. 1014 (S.C.)
[26] [2006] Y.J. No. 90 (C.A.)

approximately one month after being terminated, the plaintiff was advised that he could return to his previous position indefinitely on the same terms and conditions. The plaintiff rejected this offer, noting at trial that he felt the defendant would be looking for the first available opportunity to fire him again.

After examining the evidence, Mr. Justice Garson determined that there was not a failure to mitigate. His decision focuses less on the fact that the offer was made only after counsel was retained and sent a demand letter to the defendant. Instead, it focuses more on the fact that the circumstances were too frayed to expect the employee to accept the offer of re-employment. In particular, J. Garson notes that it was reasonable for the plaintiff to refuse the offer of re-employment for the following reasons:

a) the defendant terminated the employee when he was vulnerable due to his disability;
b) the employee was terminated in a very rude and abrupt fashion; and
c) the defendant made an allegation of theft against the plaintiff, which it pursued unsuccessfully at trial.

Evans is a 2006 decision of the British Columbia Court of Appeal, sitting on an appeal from a decision of the Yukon Supreme Court. *Evans* involved the wrongful dismissal of a business agent working in the union's Whitehorse office. After an election, a new union executive was appointed. The newly-elected president, who had not been supported by the plaintiff in his election campaign, contacted the plaintiff and advised him that his appointment was being terminated as of that date.

The defendant almost immediately commenced negotiations with the plaintiff about what reasonable notice he would receive and in what fashion, during which time the employee continued to receive his salary and benefits. After approximately five months, when the negotiations were ultimately unsuccessful, the defendant demanded that the employee return to work to serve out the remainder of a twenty-four month working notice, in the same position and with the same salary and benefits. One of the key issues at trial was whether the plaintiff failed to mitigate his damages by refusing this offer.

The trial judge ultimately held that the offer was couched in the form of a demand letter and thus did not constitute a real offer of re-employment. The trial judge further held that it was not unreasonable for the employee to be apprehensive about returning to a hostile work environment. In particular, the trial judge noted at para. 93 that " it appears that it is truly the rare case when wrongfully dismissed employees will be considered in breach of their duty to mitigate their damages by failing to return to the employment from which they had been dismissed."

On appeal, the sole issue was whether the plaintiff failed to mitigate his damages by refusing the offer of re-employment. Mr. Justice Thackray for the Court stated that the correct test to be applied by the Court's to this issue is whether it was reasonable for the plaintiff to refuse the offer of re-employment, taking into consideration what would be in her own interest to maintain her income and position in her industry, trade or profession.

In other words, essentially the same test is to be used in these circumstances as in a constructive dismissal situation, discussed above.

Mr. Justice Thackray goes on to expressly reject the distinction drawn by the trial judge regarding mitigation in the context of a constructive dismissal versus a re-employment offer, stating as follows:

> I cannot find any support in the case law for the proposition that constructive dismissal cases are distinguishable from express dismissal cases *per se*. While it is a distinguishing factor, the principles are the same in both types of dismissal. Nor do I find support for the proposition that it will only be the "rare" case where a terminated employee is not obliged to return to his former employer in order to mitigate his damages. Where the facts of the case, viewed objectively, warrant it, mitigation requires just that.

On the facts of the case, Mr. Justice Thackray then goes on to note that the plaintiff failed to mitigate his damages for the following reasons:

a) the plaintiff was offered the same job with the same salary and benefits; and
b) the plaintiff admitted he was willing to return to his old job, if certain conditions were fulfilled (unrelated to the working environment).

It is the authors' view that the Court in *Evan*s seemed to ignore a number of other factors that indicated that a continued working relationship would have been quite difficult. Perhaps this was the Court's approach because the plaintiff acknowledged that he would have been willing to return to the position if certain conditions were fulfilled by the union.

CONCLUSION: WHERE DOES THIS LEAVE US?

It is clear now that the Court will likely apply the same general test when determining the issues of constructive dismissal and mitigation (through re-employment). The foregoing cases demonstrate that the Court will examine all of the circumstances of the employee and the workplace in order to decide whether it was reasonable for the plaintiff to refuse a different position amounting to a constructive dismissal or an offer of re-employment following an express termination. The test applied by the Court is an objective one, but it also imports a subjective element by taking into consideration what would be reasonable in the plaintiff's particular circumstances to maintain her income and status in her industry, trade or profession.

While *Cox* appears to draw a greater distinction between constructive dismissal and re-employment situations, *Evans* appears to reject this distinction and states that the same principals should apply.

However, either way, it is clear that the relationship between the employer and the employee in the time leading up to when the re-employment offer was made will be critical.

We would argue that *Evans,* while explicitly rejecting the proposition that only in rare cases will an employee have to accept a re-employment offer, is actually an example of a very rare factual scenario in that the Court determined that there had been a wrongful dismissal but the employer continued the plaintiff's salary and benefits right up to the date when it offered the plaintiff a lengthy working notice period. Thus, factually *Evans* was much more similar to a constructive dismissal case or even a case dealing with whether an employee has an obligation to work through a period of working notice.

Two significant differences between *Evans* and the other two cases discussed above, is that the employee was not left suffering financial hardship for a significant length of time, with mounting anger towards the employer, before a re-employment offer was made and the employee was not forced to hire a lawyer or commence litigation before there was any discussion of re-employment. Perhaps these circumstances partly explain the less sympathetic tone of the Court in *Evans,* as compared to *Cox* and *Stant*.

We should note that the Supreme Court of Canada has granted leave to appeal the *Evans* decision, and thus it is possible that that some clarity on the current state of the law in this area will be forthcoming shortly. In the authors' view, the Supreme Court of Canada should take this opportunity to clarify the circumstances in which an employee will have an obligation to accept re-employment. Moreover, it would afford the Supreme Court to offer some direction to lower courts as to how they should be analyzing offers of re-employment job following express terminations as compared to offers of alternate employment made in a constructive dismissal scenario.

While the authors recognize that there a general prohibition on an employee's obligation to accept re-employment offers after the employee has sent a demand letter or commenced litigation might be too limiting, it is time that the Supreme Court of Canada provided some clear guidance on this issue. It is the authors' hope that employees' rights to a healthy and dignified work environment will be afforded significant weight and that the Supreme Court will make it clear that only in exceptional circumstances will an employer be able to limit its liability by making an offer of re-employment. This would be especially so if the employer has not provided any salary continuance up to the date of the offer of re-mployment or if the employee has been forced to hire a lawyer and commence litigation to enforce her rights as against the employer.