

Application of the Duty of Mitigation in Constructive Dismissal - Recent Case Law

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The primary principle of compensation for losses for breach of contract is qualified by the duty of the claimant to take all reasonable steps to mitigate damages. In cases of wrongful dismissal, a terminated employee is obligated to mitigate his or her loss by taking reasonable steps to gain comparative employment. The plaintiff may reject alternative employment only if it is reasonable to do so in the circumstances. Recent case law has raised inconsistent circumstances where an employee, while successfully establishing constructive dismissal, must nonetheless accept the demoted posting offered by the employer in order to fulfil his or her obligation to mitigate damages.

I. CONSTRUCTIVE DISMISSAL

Termination of employment occurs where an employer by some form of action repudiates an essential obligation of the contract of employment. A breach of a fundamental term of the employment contract by the employer permits the employee to treat the breach as a repudiation of the contract. This principle prevails despite an employer's intention to continue the employment arrangements. As a result, a dismissal at law occurs despite the absence of a formal discharge. The majority of case law pertaining to constructive dismissal addresses the issue of whether the alteration of employment conditions constitutes a major fundamental breach thereby providing grounds for constructive dismissal. As well, constructive dismissal actions have occurred in situations of forced geographic transfers and changes in reporting functions.

II. OBLIGATION TO MITIGATE

A terminated employee has an obligation in effect to lower the employer's liability for damages by actively pursuing comparative employment. The doctrine of mitigation in wrongful dismissal actions was summarized by Chief Justice Laskin in *Red Deer College v. Michaels* where he stipulated:

The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for

*avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff.*¹

In summary, a plaintiff in a wrongful dismissal case is entitled to recover damages for losses suffered to the extent that he or she has taken reasonable steps to avoid unreasonable accumulation of losses. An employee may reject alternative employment only if it is reasonable to do so under the circumstances. Generally, an employee is entitled to hold out until a position analogous to his or her former employment is offered at a comparable salary. Laskin, C.J. in *Red Deer* reiterated that the onus is on the defendant to establish that the claimant\employee could have reasonably avoided some portion of the loss alleged.

III. EARLIER DECISIONS

Initially, many courts declined while others have been content to extend the duty to mitigate to the requirement of accepting alternate or continued employment with the former employer. The British Columbia Supreme Court in *O'Grady v. Insurance Corporation of British Columbia*,² stipulated that a plaintiff does not have to mitigate by accepting a new appointment with the defendant where the employee would suffer a substantial loss of prestige with consequent embarrassment and humiliation. In *Reber v. Lloyds' Bank International Canada*,³ the defendant-employer argued that the employee was obliged to accept the demotion and pursue new employment at his leisure from that position. The Court dismissed the argument stating the new posting constituted a demotion and that in law the plaintiff was justified in refusing to accept it.

In *George v. Hardman Group Ltd.*,⁴ the defendant-employer contended that the plaintiff, once wrongfully dismissed, had a duty to accept employment with the defendant for the four month notice period given by the employer at the time of discharge. The Nova Scotia Supreme Court stipulated that considering the position of the claimant and the prospective change in his employment conditions, it was not reasonable to insist that, once wrongfully terminated, the worker was obliged to mitigate his loss by continuing to work for the defendant for an inadequate notice period.

The Ontario Supreme Court in *Tymrick v. Viking Helicopters Ltd.*⁵ asserted that the employee was not under a duty to accept an assignment from his employer which involved a demotion in status or position and was not a reasonable substitute of his prior employment. As well, in *Eyers v. City Buick Cadillac*⁶ the duty to mitigate argument was dismissed on the basis that the employee would have, in all likelihood, been fired from the new position when he initiated the action for wrongful dismissal.

However, at the same time, the New Brunswick Court of Queen's Bench, Trial Division, imposed a duty on the employee to mitigate where he refused to accept an alternative position of the defendant. In *Duplessis v. Irving Pulp and Paper Limited*,⁷ the plaintiff, previously employed as a general manager of the company, was requested to assume the position of vice-president of sales and marketing at equal salary. The new assignment required an alteration in the chain of command. The Court concluded that while wrongfully dismissed, the claimant failed to mitigate his damages by refusing to assume the new posting offering a comparative salary. The Court, in its considerations, referred to the fact that there was no evidence of dissatisfaction in the employee's work or any personality conflicts in the employment situation, but only a loss of personal pride and unwillingness on the part of the plaintiff to work subordinate to a younger general manager. It should be noted, however, that the trial judge's reasoning on the issue of mitigation was reversed on appeal.⁸

A breach of the duty to mitigate was also found against the 38 year old plaintiff in *Ritchie v. King Truck Engineering Ltd.*,⁹ who commenced employment as the Toronto sales manager, and was subsequently demoted three months later to the position of sales representative. The Supreme Court found that the employee was constructively dismissed without cause. However, the claim was rejected on the basis that the worker was unreasonable in refusing the defendant's offer of the sales position.

IV. RECENT CASE LAW

The British Columbia Court of Appeal, in *Lesiuk v. British Columbia Forest Products*,¹⁰

confronted the issue of whether constructive dismissal occurred in the fact situation and if so, whether there was a failure on the part of the employee to mitigate his damages. It concluded that although changes were made in the plaintiff's duties and in the management structure as a result of economic circumstances, the modification did not amount to a breach of a fundamental term of the contract of employment. In dismissing the action, the Court of Appeal was not required to speak to the issue of mitigation.

However, Mr. Justice Lambert, in his analysis, agreed with the lower Court's conclusion that the plaintiff was obliged to mitigate his loss by accepting the position offered and working out his period of reasonable notice in that position at the same salary as previously earned. Justice Lambert found that the new assignment was within Mr. Lesiuk's competence and that he was made subject to degrading work or humiliating relationships. Lambert, J. summarized the final result as it affected the employer:

You wish to change this employee's terms of employment substantially. You cannot do it without his consent. If he will not consent, then you do not have to find work for him as a project engineer [prior position] if none is available; if you give him work as a maintenance engineer, [alternate position] he is obliged to take it, and to work as a maintenance engineer throughout the period of reasonable notice.

In November 1989, the Ontario Court of Appeal stipulated, in *Mifsud v. MacMillan Bathurst Inc.*,¹¹ that while a job transfer may constitute constructive dismissal, an obligation remains on the employee to consider the new position offered and evaluate it as a means of mitigating damages. In *Mifsud*, the plaintiff was employed by the defendant for eighteen (18) years. During that time, the employee was promoted to the position of foreman and subsequently, that of supervisor. After some dissatisfaction with the claimant's work, the defendant reassigned Mr. Mifsud to the foreman posting.

The Court of Appeal concluded that the reassignment did not constitute constructive dismissal. The Court also found that, in any event, the employee failed to act reasonably to mitigate his losses by refusing the new terms of employment. Mr. Justice McKinlay stated:

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, it is reasonable to expect the employee to accept the position offered as mitigation of damages during a reasonable notice period, or until he finds acceptable employment elsewhere.

The Court of Appeal did acknowledge that circumstances may arise which would substantiate constructive dismissal and where it would be clearly unreasonable to expect the worker to fulfil his mitigation responsibility by continuing employment with the employer.

The Saskatchewan Queen's Bench followed the judgment of *Mifsud in Larochelle v. Kindersley Transport Ltd.*,¹² where it concluded that though the employee was constructively dismissed, the plaintiff failed to mitigate his damages by refusing to accept the defendant's alternate employment proposal. In 1982, the plaintiff accepted an offer of employment for the position of terminal manager in Regina for the K.T.L. organization. However, in 1985 the claimant's duties were diminished when another employee became the operations manager in Regina and the claimant assumed responsibility for the remainder of the operations at the Regina terminal. The defendant owned an additional company, Tiger Transport Ltd., which operated out of the same facilities in Regina but employed fewer employees. A decision was made to restructure both organizations, and the plaintiff's position was being advertised while the claimant himself was being offered a managerial posting at "Tiger".

The Court held that the position at Tiger was not comparable to the claimant's previous appointment and could not be considered a lateral transfer. At the same time, the Court recognized that the level of benefits of the two assignments was similar in nature and that there was no significant difference in the status which existed between the two managerial positions. However, the Court did note some disparity in the organization of the work and level of responsibility between the two postings.

In addressing the issue of mitigation, the Court found that the likelihood of the claimant procuring comparable employment was remote considering his age and his reluctance to move. It also stated that such conditions must have been known to the claimant at the time of

termination. Had the claimant accepted the alternate position of the defendant, he would have received the same salary, with the exception of the Christmas bonus, and the difference in the managerial positions was a matter of degree and objectively similar. As a result, the Court concluded that Mr. Larochelle failed in his duty to mitigate in that he failed to take reasonable steps to avoid the unreasonable accumulation of damages which would otherwise have been payable by the defendant.

In February 1991, the Ontario Court of Justice - General Division - followed the ruling of *Mifsud* in *Sotnick v. Lyphomed Inc.*¹³ In *Sotnick*, the 36 year-old plaintiff was hired by the defendant to commence its Canadian operations. At that time, the plaintiff was the president and general manager. Five years later, the defendant entered into a joint venture with a large Canadian company and the claimant was offered the position of general manager of the Canadian division of the partnership. The employee subsequently left the company in July 1987, and immediately began organizing his own business.

The General Division found that Mr. Sotnick was technically terminated when he was forced to become an employee of a new legal entity and as a result, was constructively dismissed. Adopting the analysis of *Mifsud*, The Court reviewed the duty to mitigate. It found, in the circumstances, that the salary offered in the new position was substantially similar to his previous earnings, the working conditions were not significantly different, there was no evidence of demeaning work and there were no acrimonious personal relationships in the work environment.

The judgment in *Mifsud* was again adopted by the General Division in *Jervis v. Raytheon Canada Limited.*¹⁴ The Court concluded that, having regard to the plaintiff's good relationship with his peers and superiors, Mr. Jervis could have continued employment without undue emotional upset or retaliation by management.

The Ontario District Court in *Laakso v. Valspar Inc.*¹⁵ found that an employee was constructively dismissed when he was required by the defendant to work night shifts contrary to a term of the employment contract. The employer's arguments on mitigation were dismissed on

the basis the plaintiff did not act unreasonably in refusing to work as directed in the circumstances. In the facts of the case, the acceptance of shiftwork would have resulted in aggravating a medical condition of the plaintiff and jeopardizing his health.

The plaintiff in *Pelliccia v. Pink Pages Advertising Ltd.*¹⁶ was a divisional manager of the defendant when she was demoted to the level of sales representatives, two levels below her current position at a lower salary. Ms Pelliccia was divested of all her managerial duties and responsibilities, including supervision of subordinates. Her monthly income dropped from an average of \$5,260 per month to a salary of \$1,000 to \$1,500 per month. The Supreme Court found that the claimant's demotion was not the result of her lack of qualifications but rather constituted punishment for a personal affair with a co-worker. The Supreme Court also concluded that the modification in the duties of the plaintiff together with the significant change in remuneration and other benefits formed a constructive dismissal. The Court also concluded that the claimant had been demoted from two levels of management in a manner which resulted in embarrassment and humiliation.

Considering the circumstances of the case, the Court found that Ms. Pelliccia was not obliged to mitigate her damages by accepting the position of sales representative. It concluded that it was not reasonable to require the plaintiff to continue employment in circumstances where it was evident that she was, in effect, being punished for unpopular behaviour.

The issue of mitigation in a constructive dismissal case was again addressed by the British Columbia Supreme Court in *Allen v. C.P. Express & Transport Ltd.*¹⁷ Mr. Allen was employed by the defendant for 19 years of which 11 years were as a terminal manager of its operations in Port Alberni, B.C. Mr. Allen was subsequently offered the position of tractor trailer driver in Nanaimo, in accordance with the seniority rights of the collective agreement which governed the plaintiff prior to his management assignment 11 years previous. The defendant's plea of lack of mitigation in the constructive dismissal action was dismissed by the Court. In his judgment, Mr. Justice Bouck held that the change in status from a managerial assignment to that of a union position was of a nature that the plaintiff would reasonably have refused and that the requirement

to commute or relocate to the new position was unreasonable.

In February 1991, the Saskatchewan Court of Queen's Bench dismissed an action for wrongful dismissal on the basis that the employee failed to mitigate his loss. In *Miller v. Gateway Co-Operative Ltd.*¹⁸ the Court initially found that redundancy in times of economic uncertainty was not a cause for dismissal and concluded that the employee was wrongfully dismissed. Reasonable notice was set at eight weeks. However, the Court continued to find that the claimant failed to fulfil his duty to mitigate. In the case, the claimant accepted employment with another employer at a lower salary two months following his dismissal. At that time, the employee received an offer from the defendant of a non-management position and subsequently, received an additional offer of a position similar to his prior employment. Acceptance of either assignment with the defendant would have restored the plaintiff's benefits without interruption. By refusing such offers, the Court established that the worker failed to mitigate his loss. The Court also noted that the claimant refused to avail himself of the services offered by the co-operative associations for placements in other organizations.

The claimant in *Johnson v. Moncton Chrysler Dodge (1980) Ltd.*¹⁹ was a used car sales manager for twenty (20) years with the defendant when he was reassigned as a sales representative. His income structure was altered from salary plus commission to commission only. The plaintiff initiated legal action on the matter and subsequently was offered his original sales manager position. However, the claimant refused to return to his former employer on the grounds that he was denied his claim for back pay and reimbursement of legal expenses.

The New Brunswick Court of Queen's Bench concluded that the reallocation of duties was substantial enough in nature to constitute constructive dismissal. Mitigation was raised in two aspects in this decision. Firstly, was the plaintiff justified in not accepting the offer of the former position of used car manager? In answering in the positive, the Court concluded that the claimant was justified in requiring reimbursement for back pay and legal fees. As well, the Court considered the fact that the employee would have been working for the employer at the time he was seeking recovery of wages. Secondly, the Court addressed the question of whether the

employee mitigated his damages properly by not accepting the position of sales representative. The Court contended that the duty to mitigate extends only to comparable positions. While the claimant could have easily retained employment as a sales representative, he was under no obligation to do so in order to mitigate losses. At the same time, the Court did, make an adjustment in damages on the basis that the plaintiff's efforts were not as thorough as they should have been in the circumstances.

The New Brunswick Court of Appeal, in the appeal of *Johnson v. Moncton Chrysler Dodge*, found that the trial judge was too restrictive in his definition of "comparable employment". The appellate court stipulated that any work in the field of car sales would be comparable provided adjustments are made for differences in income and working conditions. However, the court continued to find that the sales position offered by Mr. Johnson's employer was unreasonable in the circumstances.

In Newfoundland, the Supreme Court, Trial Division, refused to extend the duty to mitigate to the acceptance of alternative employment in circumstances of constructive dismissal. In *Windsor v. Canada Trust Company*,²⁰ the claimant was employed for twenty-three (23) years as the secretary to the manager when she was requested to complete assignments which she subsequently refused to perform. The Trial Division held that the employee established a significant and fundamental change of the work responsibilities of the employment and distinguished the facts of the case from those of *Lesiuk v. British Columbia Forest Products Ltd.* The modified duties when viewed objectively constituted a demotion, and the plaintiff could reasonably have been humiliated by such changed duties. Mr. Justice Lang stated:

*Mitigation involves reasonable efforts to mitigate damages and therefore the plaintiff cannot be faulted or denied damages in lieu of proper notice by not staying with the company till she found alternate employment.*²¹

In summary, recent case law demonstrates that courts are willing to extend the duty to mitigate to acceptance of alternative positions in circumstances of constructive dismissal. The courts, in their analysis, focus on the following factors:

- i) whether the new employment position offers similar salary and benefits;
- ii) whether any acrimonious relationships exist in the circumstances; and
- iii) whether there exists any dissatisfaction or criticism of the employee's work.

V. CONDONATION

An issue related to the question of mitigation in constructive dismissal is that of condonation or waiver of breach by delay. Where an employee, for any reason, assumes the posting which is a demotion, a court may find that the innocent party has accepted the breach of the employment contract and thereby waived the right to claim constructive dismissal. Generally, a worker is entitled to initially accept the new conditions of employment and is allowed a reasonable opportunity to decide whether the change will be accepted on a permanent basis.

The Federal Court of Canada discussed the interaction of the issues of constructive dismissal, mitigation and condonation in *Anstey v. Fednav Offshore Inc.*²² In the facts, the plaintiff was employed as a ship master by the defendant for five years. Subsequently, the defendant instituted fundamental changes to Mr. Anstey's employment which resulted in a reduction of remuneration, vacation pay entitlement and pension plan contributions. The worker continued his employment and legal action for damages was commenced two years later for breach of contract. Mr. Anstey was later terminated and a second action was commenced for wrongful dismissal.

In its judgment, the Federal Court of Canada recognized that the duty of mitigation may include the acceptance of the alternate position offered by the employer in a case of constructive dismissal. At the same time, the Court also acknowledged that an employee who remains in a position fundamentally altered by the employer may, after a reasonable period of time, be viewed as having condoned the changes made and by his or her conduct be deemed to have accepted the new employment arrangement. In addressing the interaction of these two principles, the Federal Court stated:

An employee who remains in the new position, changed unilaterally by the employer, with a view to mitigating his or her damages may be expected to do so only for a period constituting reasonable notice or until within that period they secure alternative employment. What will constitute a reasonable notice period will of course depend upon a variety of factors. For the employee to remain in the position without indicating to the employer his or her dissatisfaction with the altered employment relationship, may be seen as condonation of the change and acceptance by the employee of the new position, particularly after a reasonable time. Indeed, an employee who remains in the new position for an extended period of time, beyond what could be a reasonable notice period in the circumstances, even if expressing continuing dissatisfaction with the change in employment, may well be viewed as having condoned the change. The employee's act of remaining may ultimately speak louder than voicing dissatisfaction for, though discontented, he or she may well be seen as having accepted the change.

The plaintiff in the case was only employed for six years and remained in the new position for 25 months. The Court rejected Mr. Anstey's contention that he was merely mitigating his losses when he remained in the altered position. It stipulated that an employee should only mitigate his losses for a duration of time approximating that of a reasonable notice period. Otherwise, the action of continuing employment will be deemed to be condonation of the changes made to the terms of employment.

VI. ESTABLISHING DAMAGES FOR CONSTRUCTIVE DISMISSAL

An employee who alleges constructive dismissal has the onus of validating his or her claim by proving that the change in employment terms constitutes a fundamental breach of the contract. If he or she is successful in establishing constructive dismissal, the onus then shifts to the defendant-employer to demonstrate that the employee failed to mitigate his or her damages. In addressing a claim of constructive dismissal, the employer may contend that the employee's refusal to accept the fundamental changes of employment comprises a failure to mitigate that breach of the employment contract.

In light of the case law extending the duty to mitigate, the employee, when faced with circumstances giving rise to constructive dismissal, must not only evaluate the new position as to

whether it constitutes constructive dismissal, but also at that point in time must determine whether the conditions of the reassignment constitute a means of mitigation. While the onus remains on the employer to establish that the plaintiff failed to mitigate the losses, the employee must address the issue at the point of refusal and must rebut the employers case for mitigation.

An employee who accepts the alternative position as a means of mitigation must, at that point in time, demonstrate to the employer his or her dissatisfaction with the change in the employment and ensure that he or she remain only in that position for a period of time which constitutes reasonable notice.

SUMMARY

There are certain terms in an employment contract which are fundamental to the underlying relationship. A breach of a fundamental term of the employment relationship by the employer gives rise to liability of the employer where the employee chooses to accept the breach as an outright dismissal or a constructive dismissal.

Where an employer wishes to terminate an employee, the employer has the option to provide the worker with a reasonable notice of the dismissal and require that he or she work out the notice period. Alternatively, the employer may request the employee to leave the employment immediately and thus remain liable for damages equal to benefits for the reasonable notice period.

Recent case law has taken the position that an employer's liability differs in circumstances where the employer does not wish to dismiss an employee, but rather desires to place the worker in a different position at comparable rates of salary and benefits. Arguably, in such situations, it is considered reasonable for the worker to mitigate his or her damages by remaining in the alternative position for a reasonable period of notice.

Thus, in circumstances of constructive dismissal, the employee is required to evaluate the alternate position of the defendant-employer in order to fulfil the duty to mitigate. Where the new

position offered by the employer includes similar salary, substantially similar working conditions, and no acrimonious relationships, the employee, while successful in demonstrating constructive dismissal, may be obliged to accept the offered position as a means of mitigation.

However, many situations may arise where the facts substantiate a constructive dismissal and where it would also be unreasonable to expect an employee to continued his or her employment with the former employer. Where the acceptance of the new position would result in an aggravation of a medical condition, the worker is reasonable in refusing the alternative position. As well, a demotion from two levels of management to a position of sales representative in a manner which is embarrassing and humiliating to the employer does not constitute reasonable circumstances which require the employee to accept continued employment to discharge his or her duty to mitigate.

At the same time, an employee who remains in a position fundamentally altered by the employer may, after a reasonable period of time, be viewed as having condoned the breach of contract. Thus, the claimant will be deemed to have accepted the new employment arrangements, thereby defeating any claim of constructive dismissal. As a result, the employee at a point of demotion must not only evaluate the alternate position to determine whether the conditions give rise to constructive dismissal, but also must evaluate the new employment to determine whether the conditions of reassignment constitute a means of mitigation. At the same time the employee must demonstrate to the employer his or her dissatisfaction with the change in employment and remain in the new position only for an interval which constitutes reasonable notice.

FOOTNOTES

1. *Red Deer College v. Michaels* (1975), 57 D.L.R. (3d) 390 (S.C.C.).
2. *O'Grady v. Insurance Corporation of British Columbia* (1975), 63 D.L.R. (3d) 370.
3. *Reber v. Lloyds' Bank International Canada* (1984), 52 B.C.L.R. 90 (B.C.S.C.).
4. *George v. Hardman Group Ltd.* (1984), 5 C.C.E.L. 297 (N.S.S.C.).
5. *Tymrick v. Viking Helicopters Ltd.* (1985), 6 C.C.E.L. 225 (Ont. H.C.).
6. *Eyers v. City Buick Cadillac* (1984), 6 C.C.E.L. 234 (Ont. H.C.).
7. *Duplessis v. Irving Pulp and Paper Limited* (1982), 39 N.B.R. (2d) 584.
8. *Duplessis v. Irving Pulp and Paper Limited at* (1983), 47 N.B.R. (2d) 11.
9. *Ritchie v. King Truck Engineering Ltd.* (1983), 1 C.C.E.L. 102 (Ont. H.C.).
10. *Lesiuk v. British Columbia Forest Products* (1986), 33 D.L.R. (4th) 1 (B.C.C.A.).
11. *Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. 701 (Ont. C.A.).
12. *Larochelle v. Kindersley Transport Ltd.* (1980), 33 C.C.E.L. 236 (Sask Q.B.).
13. Unreported.
14. *Jervis v. Raytheon Canada Limited* (1990), 35 C.C.E.L. 73.
15. *Laakso v. Valspar Inc.* (1990), 32 C.C.E.L. 72.
16. *Pelliccia v. Pink Pages Advertising Ltd.* (1989), 28 C.C.E.L. 261 (B.C.S.C.).
17. *Allen v. C.P. Express & Transport Ltd.* (1989), 29 C.C.E.L. 279 (B.C.S.C.).
18. Unreported.
19. *Johnson v. Moncton Chrysler Dodge (1980) Ltd.* (1990), 104 N.B.R. (2d) 315 (N.B.Q.B.).
20. *Windsor v. Canada Trust Company* (1988), 68 Nfld. & P.E.I.R. 328 (S.C.T.D.).
21. *Supra* note 10.
22. *Anstey v. Fednav Offshore Inc.* (1990), 34 F.T.R. 193 (F.C.C.).