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LABOUR AND EMPLOYMENT COMMUNIQUÉ

SUPREME COURT OF CANADA SAYS TERMINATED EMPLOYEE SHOULD HAVE GONE BACK TO WORK FOR TERMINATING EMPLOYER

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Mr. Evans was a business agent of the Teamsters union in Whitehorse, Yukon Territory. He had over 23 years of service. After a union election, the new union executive terminated Mr. Evans' employment without cause, and subsequently offered him a fixed term of employment with the union to serve out the balance of his notice period. Mr. Evans refused to take up the position.

At trial, the judge found that Mr. Evans had not failed to mitigate his damages by refusing the fixed-term position. The Court of Appeal for the Yukon Territory overturned the trial decision, holding that Mr. Evans failed to mitigate his damages.

In a six to one decision, the Supreme Court of Canada upheld the decision of the Court of Appeal. In doing so the Supreme Court held that:

(a) there is no principled reason to distinguish between wrongful dismissal and constructive dismissal when evaluating the need to mitigate;

(b) requiring an employee to mitigate by taking temporary 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. Not imposing such a requirement would create an artificial distinction between an employer who terminates and then offers re-employment and one who gives working notice of termination;

(c) 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;

(d) the return to work with the dismissing employer is subject to the "significant" qualification that this should only occur where there are no barriers to re-employment. The barriers should be assessed by asking whether a reasonable person in the situation would accept the job opportunity in an effort to mitigate. Factors to be taken into account in the assessment include whether the salary is the same, the working conditions are substantially different and the relationship between the employee and employer is acrimonious. Also to be taken into account is whether the employee has commenced litigation at the time of the offer, and whether the offer was made before or after the employee left the employment. Intangible elements such as stigma, embarrassment and loss of dignity should be considered as well.

The Supreme Court held that there was no barrier to re-employment with the union because Mr. Evans was offered the position immediately after he was terminated, and because the terms of employment had not changed. Furthermore, there was no evidence of acrimony between the parties, and no evidence of bad faith on the part of the union. The Court also noted that Mr. Evans had in fact offered to return to work, albeit on conditions that were unacceptable to the union. As a result, the Court held that the relationship between Mr. Evans and the union was not seriously damaged, and that a reasonable person would have returned to work to mitigate damages.

Interestingly, the Court pointed out that Mr. Evans had no work alternative if he were to remain in Whitehorse. As well, there were only two employees in Mr. Evans' office: Mr. Evans and his wife. This raises the question of how this case would have been decided had Mr. Evans worked in a larger office in an urban centre. It may be that this case is of less significance than is initially apparent, as it turns on somewhat unusual facts.

A B O U T T H E A U T H O R S :

Robert England and Meredith Wain are members of our Labour and Employment Group in Toronto. They provide legal services and advice to a wide range of clients in the private and public sectors.

Our Labour and Employment Practice Group is dedicated to providing comprehensive and integrated legal services, and advises management in all aspects of labour relations and employment law. For more information about our Group, visit our website at www.millerthomson.com.

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