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WESTERN CANADIAN BUSINESS LAW

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Supreme Court of Canada Consider Duty to Mitigate

May an employer fire an employee without cause, and then avoid paying damages by offering him temporary work? 'Yes, sometimes' declared the Supreme Court of Canada in *Evans v. Teamsters Local Union No.31* in an 6-1 ruling released in May 2008.

Background Facts

Mr. Evans worked as a business agent for the Teamsters for twenty-three years. He was dismissed following the election of new union leadership. Mr. Evans had supported the incumbents during a hard fought campaign. Mr. Evans continued to receive salary and benefits during the ensuing negotiations with the Teamsters. Nearly five months after receiving the letter of termination, Mr. Evans was asked to return to work for the balance of his notice period. The Teamsters warned that his failure to do so would be treated as cause. He refused.

The Duty to Mitigate

A dismissed employee must act reasonably to avoid losses ('the duty to mitigate'). Mitigation requires the employee to diligently seek other work. Courts have sometimes required an employee to remain working for an employer pursuant to his/her duty to mitigate where the employee is alleging a constructive dismissal. However, where the employee has actually been dismissed by an employer, as was Mr. Evans, the courts have consistently ruled that an employee had no obligation to return to work with the dismissing employer as part of his/her duty to mitigate.

The Supreme Court Weighs In

In *Evans*, the Supreme Court held that the form of dismissal (whether actual or constructive) is irrelevant to the duty to mitigate. Rather, the court will consider the relationship between the employee and the dismissing employer when determining the employee's duty to mitigate.

The employee should accept the work where the salary is the same, working conditions are not substantially different or demeaning, and the personal relationships are not acrimonious. The employee will not be required to mitigate by working in an atmosphere of hostility, embarrassment or humiliation. All of these factors must be assessed objectively.

The Supreme Court found that there was no objective evidence substantiating Mr. Evans' fears of acrimony with the new leadership and he should have returned to work and worked out the balance of his notice.

Wallace Damages Postscript

Evans also clarified the nature of *Wallace* damages, which are awarded to compensate for an employer's bad faith conduct in the manner of dismissal. The Supreme Court confirmed that these damages are never reduced because of an employee's ability to mitigate.

Good News for BC Employers

On May 1, 2008, the BC Court of Appeal in *Macaraeg v. E Care Contact Centres Ltd.*, 2008 BCCA 182 ruled that employees are not entitled to enforce statutory rights under the *Employment Standards Act* (the "Act") in civil actions through our court system. The Court of Appeal determined that when a statute provides an adequate administrative scheme for conferring and enforcing rights, there is a presumption that no civil action will be available to enforce those same rights. The court found that the Act provides a complete and effective administrative structure and that there is no intention that statutory rights (such as overtime claims) should be enforced in a civil action.

In the lower court decision, Madame Justice Wedge of the BC Supreme Court had ruled that the terms of the employment standards legislation, including overtime, were implied terms of the employment contract and that the plaintiff could bring a claim for breach of those terms in court.

In a second decision, the BC Supreme Court ruled that while the claims based on the Act could be pursued in court, they were not subject to the limitation period in the Act. Under the Act, a claim can only be brought for 6 months of unpaid wages. The court had ruled that claims could be brought for periods in excess of the 6 month period and arguably relating to the whole period of employment.

As a result of the Court of Appeal decision, claims such as overtime claims founded solely on provisions in the Act will only be enforceable through the Employment Standards Branch and the Branch can only order compensation for loss of overtime for a 6 month period.

Unilateral Changes to the Employment Contract

The courts have, in the past, suggested that changes to an employee's terms and conditions of employment could be properly introduced by giving the employee sufficient notice of the changed terms. If the employee worked through the notice period and continued to work at the end of that period, it was accepted that the employee had implicitly accepted the new terms through his or her continuing to work for the employer.

A recent Ontario Court of Appeal decision has established that employers must do more than just give reasonable notice of the change of terms of employment. In an April 2008 decision of the Ontario Court of Appeal *(Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327), the court said that employers must actually give notice of termination of employment and offer new employment on the changed terms.

The employee, Wronko, had an employment contract that provided for 24 months pay on termination of employment. The employer wished to change the contract to provide for a 30 week payment on termination. The employer gave the employees, including Wronko, notice that the new contract would be effective in 24 months time. Mr. Wronko objected to the terms of the new contract at the time it was introduced and throughout the 24 month notice period. At the end of the 24 months, the employer took the position that the new contract was now in effect and if Mr. Wronko did not accept the terms he would be considered to have resigned from his employment. Wronko refused to sign the agreement, quit and sued for damages.

The lower court in Ontario dismissed Mr. Wronko's claim on the basis that the employer had given him reasonable notice of the change and no further damages were owed to him. The Court of Appeal, however, said that Mr. Wronko never accepted the new term and the employer had two options:

(a) To allow the employee to continue working and accept his refusal to accept the amended contract; or

(b) Terminate the employee with proper notice and offer re-employment with the new terms of the agreement.

As a result of the Ontario Court of Appeal decision, employers must be

very careful when introducing new terms and conditions of employment. Giving notice of the change may not be sufficient and employers may be required, when introducing new terms and conditions of employment, to provide the employee with an actual notice of termination (for a date in the future) and an offer of re-employment, at that date, on the revised terms and conditions of employment.

Changes to the *Employment Standards Act*

New BC legislation requires employers to grant unpaid leave to military reservists. Amendments to the *Employment Standards Act*, which were effective May 29, 2008, require BC employers to grant an unpaid leave to employees while they are serving (on active duty or in training) with the military, or recovering from injuries suffered during service. The employer must restore the worker to a comparable position at the end of the leave. The right to leave accrues once an employee has worked for the employer for six consecutive months.

Parliament has recently passed legislation with similar terms. Bill C-40 received Royal Assent April 17, 2008 and applies to federally regulated employers. The federal legislation is more stringent in that it expressly prohibits an employer from refusing to hire an individual because he or she is a reservist.

Alberta and the Northwest Territories do not have reservist leave in their employment standards legislation. Ontario, Saskatchewan, Manitoba, and Nova Scotia have passed reservist leave legislation.

First Application of the Criminal Code Provisions Relating to Occupational Health & Safety

On March 17, 2008, the Quebec Court fined Transpavé Inc., a Quebec company, $110,000 after it plead guilty to a charge of criminal negligence causing death. This is the first time in Canada since the *Criminal Code* was amended that an organization has been found guilty of criminal negligence in occupational heath and safety matters.

Transpavé operates a plant that manufactures concrete slabs and blocks. While trying to clear away a jammed conveyor, an employee lost his life when he was crushed by a piece of heavy equipment. When the accident occurred, the safety system had been disabled without the knowledge of Transpavé or its senior officers.

The changes to the *Criminal Code* came into effect November 7, 2003. Under the revised *Criminal Code*, everyone who undertakes or has the authority to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person or to any other person arising from that work or task.

A corporation or an employee can be found to be criminally negligent if, in doing any task or omitting to do anything that is its or his duty to do, the corporation or the individual shows a wanton or reckless disregard for the lives or safety of other persons.

The Transpavé case is the first instance where an organization has been found guilty of criminal negligence under the revised *Criminal Code*.

Work Permits for International Students

Organizations which employ international students will be interested in improvements to the post-graduation work permit program announced by Citizenship and Immigration Canada. Effective April 21, 2008, international students are eligible on graduation to obtain an open work permit for a term of up to three years. An open work permit has no restrictions on the type of employment that may be obtained and the student is not required to have a job offer in order to apply. These changes are an improvement over the previous post-graduation program which required graduates to have an offer of employment in their field of study prior to obtaining the work permit. Post-graduation work permits were previously issued for a maximum term of one or two years depending on the location.

To be eligible for a post-graduation work permit students must have: (i) studied full-time for the eight months preceding the completion of their program of studies; (ii) graduated from an eligible post-secondary institution; (iii) applied for a work permit within 90 days of receiving written confirmation of the satisfactory completion of their academic program; and (iv) a valid study permit when they apply for a work permit. Students and employers should take particular note of the expiry date of the student's study permit and ensure that the work permit application is submitted before the study permit expires. If a graduate is working with a work permit issued under the previous program, the graduate may apply to extend the term of the work permit.

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