MITIGATION OF DAMAGES: THE APPROACH OF THE COURTS WHEN CONSIDERING THE DUTY TO MITIGATE IN WRONGFUL DISMISSAL ACTIONS

INTRODUCTION

It is a general principle of contract law that an injured party must make reasonable efforts to mitigate their damages. In *Red Deer College v. Michaels*[1] the Supreme Court of Canada held that this general principle of contract law requires that a dismissed employee must mitigate their damages by making reasonable efforts to obtain alternate employment. The onus of proof is on the employer to establish on a balance of probabilities that the employee has failed to make reasonable efforts to mitigate their damages and that alternate employment would have been obtained if such efforts had been made by the employee. In these circumstances, the Court will reduce the amount of reasonable notice of termination which the employee is entitled to.

As a result of the approach taken by the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.*,[2] employers have become more reluctant to allege just cause for dismissal at the time an employee is terminated. The obligation of the terminated employee to mitigate their damages has become even more important to employers as frequently this is the only defence available when responding to a claim for wrongful dismissal.

This paper shall examine the onus which the employer must meet to establish that the terminated employee has failed to make reasonable efforts to mitigate their damages. This issue shall also be examined in the context of a constructive dismissal, where in some circumstances, the Courts have held that an employee who has been constructively dismissed must accept the new position in an effort to mitigate their damages.[3]

The Court reforms which have produced quicker and more cost efficient resolution of claims have created a unique problem when considering the mitigation of damages by a terminated employee. Actions may proceed to mandatory mediation, to a summary judgment motion, or to trial under the Simplified Procedure, prior to the expiration of the reasonable notice period. This

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[1] *Red Deer College v. Michaels (1975), 57 D.L.R. (3d) 386 (S.C.C.).*

[2] *In Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701,* the majority judgment of the Supreme Court of Canada written by Iacobucci, J. held that a Court should impose a duty of good faith and fair dealing on employers to encourage employers to deal fairly and in good faith with employees during the termination process. The majority decision of Iacobucci, J. held that where a Court finds bad faith and unfair dealing, the reasonable notice period should be extended.

[3] See *Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701 (C.A.), leave to appeal to S.C.C. refused 73 O.R. (2d) x.

paper shall examine the manner in which the Courts have handled this unique problem[4] and shall recommend that the Courts continue to use an approach which requires the terminated employee to make reasonable efforts to mitigate their damages as an obligation of a judgment rendered by the Court.

THE DUTY TO MITIGATE

There is a responsibility of the terminated employee to mitigate any damages arising as a result of the termination, without notice, by the employer. The doctrine of mitigation in wrongful dismissal cases was set out by Chief Justice Laskin in *Red Deer College v. Michaels* as follows:[5]

> "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.
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> The burden is on the defendant to show an employee could have avoided a portion of the loss. An employee may reject alternate employment if it is reasonable to do so. Generally, an employee is entitled to await a position analogous to his or her former employment."

Although a terminated employee has an obligation to make reasonable efforts to mitigate damages, the burden of proof with respect to the question of lack of mitigation is upon the former employer. This burden of proof was dealt with by Finlayson, J.A. in *Peet v. Babcock & Wilcox Industries Ltd.*[6] as follows:[7]

> "The burden of proving that the respondent had either failed to mitigate, or had insufficiently mitigated, his salary loss rested with the appellant. That is, the onus at trial was on the appellant to show that the respondent did not minimize his salary loss by a reasonable course of action designed to avoid the unreasonable accumulation of the loss."

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[4] For a discussion of the manner in which the British Columbia Courts have dealt with this issue, see Steve Winder *"Swift Justice in Wrongful Dismissal Cases: The Difficulty of Assessing Damages for the Post-Judgment Period of Notice"* (1999), 57 The Advocate 513.

[5] *Red Deer College v. Michaels,* supra, note 1 at p.390.

[6] *Peet v. Babcock & Wilcox Industries Ltd. (2001), 12 C.C.E.L. (3d) 5 (Ont.C.A.).*

[7] Ibid., at p.7.

The Courts have held that the "duty" to take reasonable steps to obtain alternate employment elsewhere and to accept such employment, if available, is not an obligation owed by the terminated employee to the former employer to act in the employer's interests.[8]

In *Peet*, Finlayson, J.A. accepted the Trial Judge's finding that the employee's refusal to relocate to Ohio to join another division of the employer, was reasonable in the circumstances. Finlayson, J.A. also held that the terminated employee's establishing a new consulting business was clearly a means of mitigation. In considering this issue he stated:[9]

> "An employee who has been terminated is entitled to consider his or her own long-term interests when seeking another way of earning a living. The respondent's efforts at mitigation cannot be classified as unreasonable simply because his actions did not neglect all other interests while focusing exclusively on his short-term obligation to mitigate damages for the sake of his former employer."

In *Wallace v. United Grain Growers Ltd.*, Justice Iacobucci noted that a termination of employment is an extremely stressful and sometimes traumatic event.[10] Courts have held that the effect of a termination on an employee may be such that the terminated employee is unable to consider rationally the possibility of re-employment for a period of time after the termination.[11]

The Courts have also held that an employer must also be able to establish a connection between the failure of the terminated employee to take reasonable steps to mitigate their damages and the loss suffered.[12]

In *Monti v. Hamilton-Wentworth (Regional Municipality)*, Mr. Justice Riley stated this obligation

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[8] See *Mitchell v. Westburn Supply Alberta* (2000), 2 C.C.E.L. (3d) 87 at 106 (Alta.Q.B.) citing the passage of Taylor, J.A., in *Forshaw v. Aluminex Extrusions (Ltd.)* (1989), 39 B.C.L.R. (2d) 140 (B.C.C.A.).

[9] *Peet*, supra, note 6 at p.8.

[10] *Wallace*, supra, note 2.

[11] See *Barakett v. Lévesque Beaubien Geoffrion Inc.*(2001), 8 C.C.E.L. (3d) 96 (N.S.S.C.), affirmed by N.S.C.A. at (2001) 12 C.C.E.L. (3d) 24.

[12] See *Monti v. Hamilton-Wentworth (Regional Municipality)* (1999), 45 C.C.E.L. (2d) 230 (Ont.Gen.Div.), *Rowe v. General Electric Canada Inc.* (1994), 8 C.C.E.L. (2d) 95 (Ont.Gen.Div.) and *Petersen v. Labbatt Breweries of British Columbia* (1996), 25 C.C.E.L. (2d) 241 (B.C.S.C.).

of the employer as follows:[13]

> "The defendant/employer has a further onus, and that is to demonstrate a nexus between a failure to take reasonable steps to mitigate and the loss suffered, that the failure to mitigate was "causative" of the damages claimed. Otherwise expressed, the defendant must show by the evidence, or by inference from the evidence, that the plaintiff not only failed to take reasonable steps to find alternate employment, but that had she taken such steps, she would have obtained alternate employment...".

In appropriate circumstances, Courts have reduced the notice period for failure by the terminated employee to properly mitigate their damages.[14] In *Ceccol v. Ontario Gymnastic Federation*[15], the Ontario Court of Appeal upheld the trial decision of Mr. Justice Pitt[16] which allowed the employee's action for wrongful dismissal but reduced the reasonable notice period from 16 months to 12 months because of Ceccol's failure to properly mitigate her damages.

In *Ceccol*, the terminated employee decided to start-up her own business and made no profit during the first 16 months. The evidence at trial indicated that she did not consider or seek employment of any other kind, including in the sports administration field where she had worked for her entire career.

The judgment of the Court of Appeal in *Ceccol*, delivered by MacPherson, J.A., acknowledged the case law supporting decisions by employees to attempt to start their own businesses as appropriate mitigation strategies in certain circumstances.[17] The decision of MacPherson, J.A. accepted the approach of Mr. Justice Pitt in deciding the mitigation issue. The Court of Appeal held that although the Federation led no direct evidence on the mitigation issue, its counsel's cross-examination of the plaintiff provided a sufficient evidentiary basis to support the Trial Judge's conclusion on the mitigation issue.

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[13] *Monti v. Hamilton-Wentworth (Regional Municipality),* supra, note 12 at p.245.

[14] For examples of this approach by the Courts, see *Guerre v. Alexander Metal Products (1965) Ltd.* (1998), 33 C.C.E.L. (2d) 301 (Ont.Gen.Div.), *Cain v. Roluf's Ltd.* (1998), 34 C.C.E.L. (2d) 184 (Ont.Gen.Div.), and *Ally v. Institute of Chartered Accountants (Ontario)* (1999), 37 C.C.E.L. (2d) 212 (Ont.C.A.).

[15] *Ceccol v. Ontario Gymnastic Federation*, 11 C.C.E.L. (3d) 167 (Ont.C.A.).

[16] *Ceccol v. Ontario Gymnastic Federation* (1999), 41 C.C.E.L. (2d) 312 (Ont.S.C.J.).

[17] *Ceccol*, supra, note 15 at p.182. Also, see *Peet v. Babcock,* supra, note 6 and *Gillespie v. Union Optics Corp. (Can.)* (1987), 18 C.C.E.L. 58 (Ont. H.C.) affirmed at (1989) 26 C.C.E.L. xxiv (Ont.C.A.).

The Appellate Courts have taken the approach that the issue of mitigation is one which must be assessed on the facts of each case. Accordingly, the Appellate Courts have shown considerable deference to the findings of the Trial Judge in this area.[18]

In considering the issue of mitigation in *Peet*, Finlayson, J.A. stated:[19]

> "The Trial Judge considered all of the arguments that were made in this Court on the subject of mitigation. The Trial Judge was in the best position to assess the evidence, its relevance, and the weight to be attributed to it. I can find no reason to disagree with his findings on this matter."

MITIGATION OF DAMAGES IN CONSTRUCTIVE DISMISSAL CASES

An employee who has been constructively dismissed may be placed in an unique position when attempting to mitigate damages. The employee who has been constructively terminated must consider whether it is necessary to continue employment in the new position in order to satisfy the obligation of mitigating their damages.[20]

The Ontario Court of Appeal considered the duty of an employee to mitigate their damages when faced with a constructive dismissal in *Mifsud v. MacMillan Bathurst Inc.*[21] In *Mifsud*, the Court of Appeal found that by refusing to accept a demoted position at a lower level of pay, the employee had failed to make reasonable efforts to mitigate his damages.

In considering the obligation of the employee to mitigate his damages, in *Mifsud*, McKinlay, J.A. stated:[22]

> "Where the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal

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[18] See for example *Ceccol,* supra, note 15 and *Cowper v. Atomic Energy of Canada Ltd.* (2000), 1 C.C.E.L. (3d) 180 (Ont.C.A.).

[19] *Peet*, supra, note 6 at p.8.

[20] See *Ferdinandusz v. Global Driver Services Inc.* (2001), 5 C.C.E.L (3d) 248 (Ont. S.C.J.).

[21] (1989) 70 O.R. (2d) 701 (C.A.), leave to appeal to S.C.C. refused (1990) 73 O.R. (2d) x.

[22] *Mifsud v. MacMillan Bathurst Inc.,* supra, note 21 at p.710.

> relationships involved are not acrimonious (as in this case), it is reasonable to expect the employee to accept the position offered in mitigation of damages during a reasonable notice period, or until he finds acceptable employment elsewhere."

In order for a Court to apply the approach used in *Mifsud*, the Courts shall generally require that all factors set out in the passage quoted from McKinlay, J.A. are satisfied. When faced with the issue of mitigating damages in these circumstances, the Courts have examined factors personal to the employee, rather than the approach to mitigation which would be adopted in the commercial context.[23]

A more narrow approach to the mitigation of damages in the constructive dismissal context has been adopted by the British Columbia Court of Appeal. In *Farquhar v. Butler Brothers Supplies Ltd.*[24], the British Columbia Court of Appeal stated that it would only be in infrequent circumstances where the duty to mitigate would require an employee to accept an alternative position with the employer to mitigate damages.

In considering this issue, the British Columbia Court of Appeal stated:[25]

> "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 obligated to mitigate by working in an atmosphere of hostility, embarrassment or humiliation...
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> In cases where there is an obligation to continue in the workforce 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 other's interest in jeopardy."

Mr. Justice LaForme gave a broad application to the principles enunciated in *Mifsud* in

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[23] *Yetton v. Eastwoods Fray Ltd.*, [1967] 1 W.L.R. 104 (Alta. Q.B.).

[24] *Farquhar v. Butler Brothers Supplies Ltd.,* [1988] 3 W.W.R. 347 (B.C.C.A.).

[25] Ibid., at p.352.

Ferdinandusz v. Global Driver Services Inc.[26] In *Ferdinandusz*, the employee had worked for a transport company for approximately seven years on a full-time assignment as a driver to a particular customer. After the customer complained about the employee's performance and attitude, the employer removed him from that assignment and assigned him to drive on "spare board" assignments. The employee rejected this transfer and commenced an action claiming damages for constructive dismissal. In rejecting the wrongful dismissal claim, Mr. Justice LaForme stated:[27]

> "While a transfer to a new assignment could, in some circumstances, constitute a constructive dismissal, it is none the less an obligation of an employee to consider the new position and evaluate it as a means of mitigating his damages. In such circumstances, the Court of Appeal has held that the employee must consider the employer's right to retain the employee in his current position and give reasonable notice. As a result, unless there are other reasons, such as the new position being demeaning, the employee should accept the position."

It is also interesting to note that after the employee had rejected the "spare board" position, in response to threatened litigation, the employer through their counsel offered the employee a permanent position. Mr. Justice LaForme expressed a willingness to take this offer into consideration stating[28] "the fact that it was offered in the face of a threatened lawsuit is, in the circumstances of this case, irrelevant."

In a decision delivered by Austin, J.A.[29], the Ontario Court of Appeal upheld the decision of Justice LaForme in *Ferdinandusz*. Austin, J.A., held that the case in *Ferdinandusz* was "a fact driven case" and that the Trial Judge had made a thorough analysis of the evidence and clear findings of fact.

The approach of Justice LaForme in *Ferdinandusz*, which was approved by the Court of Appeal, indicates that in Ontario, Courts shall continue to use the approach taken by the Court of Appeal in *Mifsud*. An employee who has been constructively dismissed must carefully consider the criteria set out in *Mifsud* to determine whether or not the employee must accept the altered position in order to comply with their obligation to mitigate damages.

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[26] Supra, note 20.

[27] Ibid., at p.261.

[28] Ibid.

[29] *Ferdinandusz v. Global Driver Services Inc.* (2001), 5 C.C.E.L. 264 (Ont.C.A.).

MITIGATION OF DAMAGES DURING THE POST-JUDGMENT PERIOD OF NOTICE

On occasion, the Courts have been called upon to decide a wrongful dismissal action, and determine the damages to be awarded, prior to the expiration of the reasonable notice period. This has placed the Court in the difficult position of assessing damages, including the efforts of the former employee to mitigate damages, prior to the expiration of the notice period.

There are two approaches available to the Courts when considering the issue of mitigation of damages by a terminated employee in the post-judgment period. Under the first approach, a Court may choose to fix the period of reasonable notice and discount the notice period, if it deems appropriate, when considering the possibility the employee may obtain alternate employment prior to the expiration of the notice period.

This approach has been favoured by the Courts in British Columbia.[30] The British Columbia Court of Appeal approved of this approach in *Foster v. Kockurns Can Car Division Hawker-Siddeley Canada Inc.,*[31] stating: "there must be built into the notice period a contingency factor that recognizes the possibility that the employee will obtain employment within the notice period."

In another case, the British Columbia Court of Appeal upheld the Trial Judge's decision not to discount an award even when there was approximately 12 months remaining on the notice period.[32]

A different approach available to the Courts when considering the obligation to mitigate in the post-judgment period is to fix the amount payable for the notice period but to require the employee to account for all income earned up to the expiration of the notice period (including the post-judgment period).

This approach was adopted by the Ontario Court of Appeal in *Cronk v. Canadian General Insurance Co.*[33] In *Cronk*, when considering the post-judgment duty to mitigate, Lacourcière, J.A. stated:[34]

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[30] Supra, note 4 at p.514.

[31] *Foster v. Kockurns Can Car Division Hawker-Siddeley Canada Inc.*, [1993] 8 W.W.R. 477 (B.C.C.A.).

[32] See *Carlson v. Ideal Cement Co.* (l987), 18 B.C.L.R. (2d) 24 (B.C.C.A.).

[33] *Cronk v. Canadian General Insurance Co.* (1995), 14 C.C.E.L. (2d) 1 (Ont.C.A.).

[34] Ibid.,at p.12.

> "I reject the appellant's submission that the judgment unfairly releases the respondent from her obligation to mitigate her damages by seeking other employment. That obligation continues during the period of notice set by the Court, even if it extends beyond the date of the judgment. The respondent remains accountable to the appellant for any income earned during that post-judgment period

In other cases, the Ontario Courts have ordered the employee to hold in trust any monies received from other employment during the notice period and to repay these monies to their former employer to avoid double recovery. This approach was adopted by Mr. Justice Osborne (as he was then) in *Thomson v. Bechtel Canada Ltd.*[35] In *Thomson*, Justice Osborne conducted the trial of an action at which he fixed an eleven month notice period which had approximately six months left to run. In considering this issue, Justice Osborne stated:[36]

> "The plaintiff may obtain employment in the next five or six months. I hope he does. The contingency of new employment within the notice period could be somewhat speculatively assessed and imposed upon the notice period to reduce it. In the circumstances of this case, I think it is preferable to impose upon the plaintiff a trust, whereby any earnings of the plaintiff until the expiry of the eleven month notice period will be impressed with a trust in favour of the defendant. I am satisfied that the plaintiff has endeavored to obtain employment throughout and that he will continue with his sincere endeavors to obtain employment."

After the decision of the Ontario Court of Appeal in *Cronk,* the Courts in Ontario have continued to use the approach of making a lump sum order while requiring the employee to continue searching for new employment and account for any monies earned during the post-judgment period.[37]

It is submitted that the approach taken by the Ontario Courts produces a fair result for the terminated employee and the former employer. By adopting this approach, the Courts have required employees to continue making reasonable efforts to find new employment even after the Court has delivered its judgment. The employee is held accountable for any earnings received

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[35] *Thomson v. Bechtel Canada Ltd.* (1983), 3 C.C.E.L. 16 (Ont.H.C.J.) affirmed by Ontario Court of Appeal at [1985] O.J. No.1401.

[36] Ibid., at p.23.

[37] See *Bullen v. Proctor & Redfern Ltd.* (1996), 20 C.C.E.L. (2d) 36 (Ont.Gen.Div.), *Correa v. Dow Jones Markets Canada Inc.* (1997), 35 O.R. (3d) 126 (Ont.Gen.Div.) and *Brouitlard v. Rostrust Investments Inc.* (1997), 31 C.C.E.L. 55 (Ont.Gen.Div.).

during the balance of the notice period, in the same manner that the employee was accountable for any monies earned during the notice period up to the time of trial.

It is suggested that the approach used by the Ontario Courts is more accurate than the approach which has been adopted in British Columbia. The British Columbia Courts have used the approach of modestly reducing the notice period, when deemed appropriate, to provide for the contingency that the employee may obtain alternate employment prior to the expiration of the notice period. This approach could produce a windfall for the terminated employee if they were able to mitigate their damages shortly after trial. In any event, it is only an estimate of what may happen in the future, and may or may not be accurate depending upon the ability of the terminated employee to mitigate their damages during the post-judgment period of notice.

It is also submitted that the approach taken by the Courts in Ontario is fair as the timing of the trial of the action does not prejudice either the plaintiff or the defendant. If the Ontario Courts were to adopt the British Columbia approach and only modestly reduce the notice period or not reduce the notice period at all, a defendant employer would seek to delay the trial of the action until as late in the notice period as possible.

It is suggested that the timing of a trial should not affect the damages to be awarded to the plaintiff. A plaintiff should not be expected to wait until the notice period has expired before an action may be tried. The approach used by the Courts in Ontario is a balanced one, as it requires the employee to hold in trust for the employer monies earned in mitigation during the post-judgment notice period. This ensures that employees receive the full damages to which they are entitled and employers receive the benefit of the employee's duty to mitigate damages.

CONCLUSION

The mitigation of damages is an important issue in many wrongful dismissal actions. With the increasing reluctance of employers to allege cause for dismissal and face a claim of bad faith discharge, the issue of mitigation of damages by the terminated employee shall continue to become even more important.

Court reforms such as Case Management and the Simplified Procedure have led to a quicker resolution of claims through speedier trial lists, summary trial and the expansion of summary judgment. It is important that the more expeditious resolution of claims does not prejudice any of the parties involved.

With respect to the mitigation of damages in wrongful dismissal cases, it is submitted that the Courts should continue to require terminated employees to hold in trust for the former employer, monies earned in mitigation during the post-judgment period. If this approach is not maintained, the timing of the trial in a wrongful dismissal action may produce a great benefit to one party, to the detriment of the opposing party. The possibility of such a result can only lead to delay in the litigation process and accordingly, increased expense to the parties.

The recent Court reforms have been designed to make the litigation process quicker and more cost efficient. In order to achieve these results, it is submitted that the Courts must continue to ensure that the timing of the trial does not impact upon the rights or obligations of the parties. This issue must be considered by the Courts in Ontario when fixing damages, and when considering the issue of mitigation, during the post-judgment period of notice of a terminated employee.

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