A Rare Success For Employers: An Employee's Failure To Mitigate



It is well-established that employees have a legal obligation to minimize damages post-termination by attempting to find comparable alternative employment. If an employee brings a wrongful dismissal action, employers will often include an allegation that the employee failed to mitigate their damages as part of their defence. The onus for proving a failure to mitigate rests on the employer. It must be shown that:

1. the employee failed to make reasonable efforts to find new employment, and
2. that if reasonable efforts had been exerted, other employment would have been successfully secured.

The burden is exceptionally high for an employer to prove an employee's failure to mitigate. Rarely do Courts find that a wrongfully terminated employee failed in his or her duty to mitigate; however, in *Steinebach v Clean Energy Compression Corp*, 2015 BCSC 460, the employer was successful in proving the employee had failed to mitigate his damages.

In that case, the employee was terminated without cause after 19.5 years of employment at Clean Energy Compression Corp, a supplier of equipment in the compressed natural gas (CNG) industry. Prior to termination, the employee had been promoted to the position of, "Vice President Business Development Canada"; a high level sales position requiring a specialized set of skills, expertise and experience pertaining to the CNG industry.

The Court determined that the employee had been terminated without just cause and awarded a reasonable notice period of 16 months.

The Court then addressed the allegation of failure to mitigate. The employee had been terminated on May 2, 2014. He started his search for new employment in mid-June 2014. The Court considered a variety of case law concerning the appropriate adjustment period an employee is entitled to before commencing a new job search following dismissal. The time taken by the employee before starting his job search was found to be acceptable.

The Court then examined the details of the employee's job search efforts. The employee searched for an opportunity similar to the position he had held prior to termination; that being one of a senior title in business development and sales

management in the CNG industry. He was not successful in finding a similar position as he believed each opportunity encountered to be a poor match for his qualifications, experience and desired job location.

By the end of July 2014, the employee had made the decision to undergo a career change. He was told that a job would be available for him with CIBC Wood Gundy upon completion of the Canadian Securities Course. The employee completed the course on October 2, 2014 and was offered a Sales Assistant position on December 15, 2014. He started work at CIBC Wood Gundy on January 2, 2015, 8 months after his termination. The employee argued that these efforts discharged his duty to mitigate.

The employer argued that the employee had not made reasonable attempts at securing similar employment, and put forth evidence of many available job opportunities that met the employee's qualifications and were in the same community.

The Court held that the employee had **not** adequately discharged his duty to mitigate. In particular, it found the employee's search for new employment had been too narrow. This was explained at para 82:

I am of the view that the plaintiff's criteria were too narrow, that it would have been reasonable for him to make greater efforts to find new employment, and that if he had done more he would likely have achieved greater success in finding employment in the industry that he had spent the major part of his working life. In my further view, the plaintiff failed to pursue available opportunities that fell within his skill and experience, conducted too limited a job search, and placed a greater emphasis on his personal preferences and career objectives than was reasonable in all of the circumstances.

The Court reduced the 16 month notice period by 3 months to account for the employee's failure to mitigate.

What This Means for Employers

When an employee brings a wrongful dismissal action, it is prudent to include an allegation that the employee failed to mitigate his/her damages in the employer's defense, even if this argument is rarely successful.

The likelihood of successfully establishing a failure to mitigate increases where there is evidence that an employee conducted a very narrow search for new employment and/or the employee discontinued his/her search for employment in the industry in which they were formerly employed.

If alleging a failure to mitigate, the employer will be required to provide evidence of job vacancies that were available, and which match the employee's skills and qualifications.

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