

FOCUS ON

LABOUR & EMPLOYMENT LAW

Employers taking creative approaches to mitigation

Waters muddied as companies offer alternative positions, job search help

BY MICHAEL MCKIERNAN

Law Times

Employers are getting creative with the duty to mitigate for constructively and wrongfully dismissed employees as they search for savings in a tough market, say lawyers in the field.

Richard Worsfold, a partner at Basman Smith LLP, says employers will muddy the waters for terminated employees by offering alternative positions at the same company or forwarding suitable openings with other companies.

"It plants the seed of doubt that the court could find they have not properly mitigated their damages," he says.

"I've had a few matters where employees have raised it as a concern. They want the thing dealt with quickly so they can get on with their lives and if the employer starts creating doubt, the employee may be willing to settle perhaps less favourably."

Erin Kuzz, a founding member of employment law firm Sherrard Kuzz LLP, says that traditionally in wrongful dismissal cases, employees would present a long list of jobs they had applied for without success and the courts would accept that they had made significant attempts to mitigate their damages.

In recent years, according to Kuzz, employers have realized they can relatively easily boost their case that employees didn't seriously pursue their job search by pointing to suitable positions and checking to see whether or not they applied.

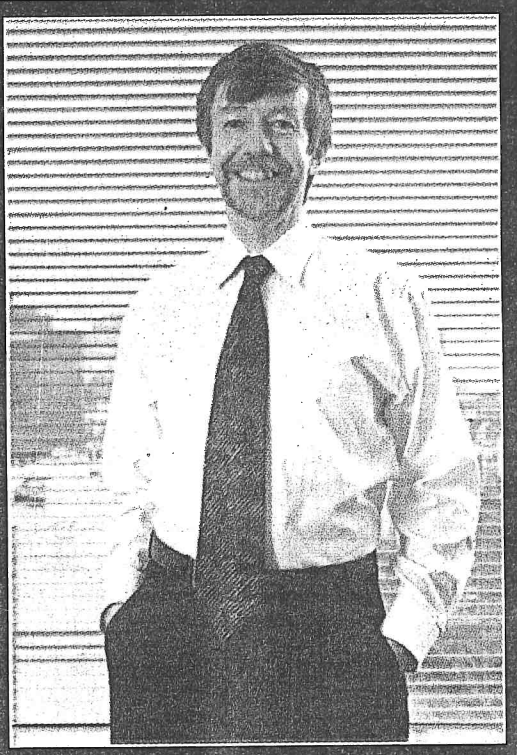
"I would say to clients there's no downside," she says.

"Spend a little time and you can hopefully create leverage for a more reasonable settlement down road, if nothing else. It's in everybody's interest at the end of the day that they get another job."

Worsfold sees the economic downturn as the catalyst for employers taking a more proactive role in the job search for former employees, particularly those with longer periods of service.

"Employers prefer not to pay a year or eight months in salary to a long-term

'Employers prefer not to pay a year or eight months in salary to a long-term employee, especially if they feel they could get another job,' says Richard Worsfold.



employee, especially if they feel they could get another job," he says.

"That's quite a financial hit to take for someone who is no longer there. They have to be competitive, so it's a matter of the bottom line for them."

Jason Beeho of Toronto's Rubin Thomson LLP says employees expecting an easy payday are in for a rude awakening. "Employees, to the extent that they ever did figure that constructive dismissal was a way to pull the trigger on a big windfall, are increasingly finding that may not be the case, certainly the ones that get to court."

A number of recent cases have encouraged the belief that the courts will take a close look at mitigation and are prepared to curtail damages.

The Supreme Court's 2008 decision in *Evans v. Teamsters Local Union No. 31* set the standard for mitigation with the same employer in a case in which a terminated employee refused an offer to work his 24-month notice period.

The top court found that while employees shouldn't be "obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation," Evans

had acted unreasonably in turning down the offer to return. The court allowed him to keep the five months of severance he had collected up until the point he rejected the offer.

More recently in July this year, an Ontario Superior Court judge dismissed a man's wrongful dismissal claim for failure to mitigate. In *Chevalier v. Active Tire & Auto Centre Inc.*, the employee was a manager with 33 years of experience who clashed with Active Tire when it acquired his workplace in 2007. The firm laid him off before rescinding the decision on the basis of legal advice and inviting him back to his old job.

Justice Richard Lococo concluded a reasonable person would have accepted the job back. The employee refused.

"Therefore, he failed to take reasonable steps to mitigate his damages, with the result that his damages in lieu of notice would be nil," Lococo wrote, adding that he reached his conclusion "with some regret" since the employee struck him as an honest witness.

Another case decided in June, *Ghanny v. 498326 Ontario Ltd.*, saw an 18-year

employee of a Toyota dealership denied damages for his failure to accept a similar position at a Suzuki dealership owned by the same company.

"One day you're told that your position is being eliminated at the end of the month but that another job at a related company is available — the same kind of position with the same pay," wrote Superior Court Justice Edward Belobaba in summing up the case.

"You're upset and not thinking clearly and you turn down the replacement job offer. You sue for wrongful dismissal. You eventually find other work but at a much lower position and salary. When the events are replayed at trial and are viewed more objectively, you realize that you should have taken the offered position, that in failing to do so you didn't mitigate your losses."

Beeho echoes Belobaba's sentiment. He suggests terminated employees take a step back and try to remove themselves from the emotion of the situation.

"*Evans*, and the case law that has followed, supports the proposition that individuals need to think very carefully about the application of the reasonable person test," he says.

Beeho says taking an active role in a former employee's job search doesn't just result in a stronger bargaining position against an unwilling job seeker. He says an investment in transition for more enthusiastic searchers can pay off with a job offer that will also limit payable damages.

"Placement counselling can be a fairly modest expense as against the proposition that the individual may remain unemployed for a considerable amount of time and rack up considerable damages," he says.

"The employer is turning its mind to the mitigation issue very quickly and wants to ensure the employee's mind is turned in a similar direction."

Kuzz says employers can help stave off concerns about a hostile or humiliating environment by involving employees in the process of changing their position.

"Ask the employee how they would like it to be announced. It's a lot harder for them to poke holes in the process if they were involved in it."

LT