COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Evans v. Teamsters Local Union No. 31,***
2006 YKCA 0014

Date: 20060925
Docket: CA05-YU550

Between:

Donald Norman Evans

Respondent
(Plaintiff)

And

Teamsters Local Union No. 31

Appellant
(Defendant)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Thackray

L.B. McGrady, Q.C.	Counsel for the Appellant
G. Macdonald, Q.C.	Counsel for the Respondent
Place and Date of Hearing:	Whitehorse, Yukon Territory May 31, 2006
Place and Date of Judgment:	Vancouver, British Columbia September 25, 2006

Written Reasons by:
The Honourable Mr. Justice Thackray

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Smith

Reasons for Judgment of the Honourable Mr. Justice Thackray:

[1] The appellant Teamsters Local Union No. 31 appeals the order of the Supreme Court of the Yukon Territory ordering the union to pay $100,008.79 plus interest to Donald Norman Evans. The order was entered on 19 January 2006. The order is pursuant to reasons for judgment of Mr. Justice Gower (see ***Evans v. Teamsters Local Union No. 31*** (2005), 2005 YKSC 71, [2005] Y.J. No. 106 (Q.L.) (Y.T.S.C.)).

[2] Mr. Evans was employed for over 23 years as a business agent in the union's Whitehorse office. He was dismissed on 2 January 2003 after a new union executive took office. The only issue in this appeal is whether Mr. Evans' damage award ought to be reduced or eliminated because of his failure to mitigate his damages by accepting a new offer of employment from the union.

FACTUAL BACKGROUND

[3] The union's head office is in Delta, British Columbia and it has branch offices in Nanaimo, Prince George and Whitehorse. Mr. Evans was one of two employees in the Whitehorse office; the other was his wife Ms. Barbara Evans. During the union election campaign held in December 2002, Mr. Evans supported the incumbent president who was defeated.

[4] Prior to taking office on 1 January 2003, the incoming president, Mr. S. Hennessy, asked the union's legal counsel, Mr. Leo B. McGrady, Q.C., for an opinion regarding the termination of six employees, including Mr. Evans and three

other business agents. In a letter dated 31 December 2002 counsel advised that the union's severance pay plan was "not a substitute for the Local's obligation to provide working notice or pay in lieu of notice." Counsel further canvassed the possibility of the union taking the position that Mr. Evans had a "fixed term position." That is, that his term necessarily terminated upon the election of a new executive. He tendered the opinion that this course should not be followed "for a number of reasons" including the fact that Mr. Evans had never previously been terminated upon the election of a new executive. Therefore, Mr. McGrady suggested that a court would find that Mr. Evans was an "indefinite term employee" and that the union's severance pay plan was "not a substitute for the Local's obligation to provide working notice or pay in lieu of notice."

[5] Mr. McGrady explained the difference between "working notice" and "pay in lieu of notice":

> The Local has the option of providing working notice to the six employees, or to provide them with pay in lieu of notice. Working notice is obviously desirable from a purely economic perspective. However, it may not be practical if there is any concern about the employees' reliability, loyalty or commitment.

[6] After noting that during a period of working notice employees "are to continue to work as normal", Mr. McGrady suggested the wording of a letter to be sent to the four business agents. It read:

> As you know, a new executive board was elected and took office today, January 2, 2003. Pursuant to Section 13 of the Bylaws your appointment as a Business Agent ceases as of this date.

> As a member of the Teamsters' Joint Council No. 36 Severance Pay Plan, you are entitled to a significant severance payment.
>
> In addition, we are prepared to meet and discuss with you the time required for you to wind up outstanding matters.

However, Mr. McGrady added as follows:

> Additional clauses can be added depending on the decision you make as to how you wish to approach this matter. For example, if you are going to provide them with working notice the following clause can be inserted:
>
> > "Our expectation is that you will remain in your current position receiving your current wages and benefits during the period of working notice. We should also point out that we expect that you will perform your duties in the normal course during this period."

[7] On 2 January 2003 Mr. Hennessy faxed a letter to Mr. Evans. This letter was, apart from two minor changes, in the form suggested by counsel, but did not include the clause regarding working notice. The letter could not have come as a surprise to Mr. Evans because earlier that day he had received a copy of Mr. McGrady's opinion letter, "leaked" by somebody at the union's main office in Delta.

[8] As promised in his letter, Mr. Hennessy telephoned Mr. Evans later that same day to "commence discussions." This conversation was surreptitiously tape recorded by Mr. Evans. I will repeat a portion:

> Stan [Hennessy]: … I'll tell you what I wanted to discuss and get your feelings on it.
>
> Don [Evans]: Yup.

Stan: I'm not going to close the office down. I was going to leave the office as is with Barb [Mr. Evans' wife] continuing her employment.

Don: Right.

Stan: … I was under the understanding earlier that you were gong to retire. The call today was to find out how much time you needed …

…

Stan: … the bylaws are clear that we have to make a decision whether to continue employment or not. We have that ability to do it on the, on the heels of the election.

Don: Well, I'll be honest with you and off the record?

Stan: Yup.

Don: If you guys were to keep me on to the end of the year, just give me some – okay, and put Barb on as, when I retire at the end of the year, as, uh, put Barb up as business agent and secretary, then I wouldn't have a problem.

Stan: I guess you wouldn't.

Don: Well, you asked me my opinion.

Stan: [laughter].

Don: I mean, I'm reaching for gold here, guys …

…

Don: Stan, to say to you that I need three months to wrap things up, I couldn't give you that estimate. I'm being honest with you Stan, I mean, how do I justify that when I have contracts coming open, and you guys have got stuff to do down there …

Stan: I may have to come and sit and talk with you next week, I guess.

Don: Yup. Well, that's fine too.

…

Don: Okay, so am I on the payroll as of five o'clock or am I off the payroll?

Stan: No, your appointment has been terminated, but I guess I wanted to discuss was a, uh, basically – what I want to do, Don is give you

some lead time. I understand both you and Barb are wrapped up with this Local and you derive your wages from the Local, eh? So, I didn't want to all of a sudden just whack you and do that, so that's why I was saying if you needed some lead time, I was going to commit to you to keep Barb in her position there and keep the building open, albeit, we're going to have to seriously get somebody into that building.

…

Don: … Stan, if you've got to terminate me, you got to terminate me. I understand where you're coming from. You got to understand too, that I will be fighting it as an unfair dismissal. …

…

Don: … I will be going for an unfair dismissal. I think you guys are treating me like dirt and I – uh, I'm being suspended, fired, even after all of the years that I've campaigned for both you guys on your behalf and to be treated like this is not right.

…

Don: …I'm saying that I could be terminated anytime – I understand where you're coming from. You guys take over power today, I could be terminated today. But there is nothing in [the bylaws that] says I can't be held on, then let go a year down the road, is there?

Stan: What I said to you Don – that's how I started the conversation out – if you can give me some general idea what you would like as far as clean up time, then I would make the commitment to keep you on for that time as well as I would keep the building open and Barb in place in her position …

…

Don: …Maybe I can work a date out that might be of satisfaction to you and Ross and I and we can go from there, and agreeable to you guys, or work out something – I'll work it out. Talk to you tomorrow. There will be no pissing around. I'll make my offer to you, that will be my offer, if it's not acceptable, when you guys discuss it, then we'll go our separate ways.

[9] Mr. Evans' legal counsel, Mr. G. Macdonald, Q.C., wrote to Mr. Hennessy in a letter dated 3 January 2003. He submitted that Mr. Evans was entitled to

reasonable notice of termination of his employment. He said that Mr. Evans was prepared to accept 24 months notice of termination of his employment and suggested that this could be granted through 12 months of continued employment followed by a payment of 12 months of salary in lieu of notice.

[10] There was a continuing exchange of correspondence between the lawyers, but nothing of substance occurred as Mr. McGrady insisted that the 2 January 2003 letter "was not intended as termination without notice" while Mr. Macdonald questioned that position, but pushed for negotiations. In the meantime, the union continued to pay Mr. Evans his salary and benefits.

[11] Ms. Evans' continued employment with the union added a wrinkle to its ongoing negotiations with Mr. Evans who wanted a settlement that would see him retire after a determined period and his wife replace him as the union's business agent. On 10 April 2003 Mr. Macdonald informed Mr. McGrady that the "potential appointment of Ms. Evans is inextricably related to the potential settlement of Mr. Evans wrongful dismissal claim." He then asked that there be a written employment contract for Ms. Evans and he set forth some of the conditions to be included. Mr. McGrady replied on 5 May 2003 and enclosed a contract for Ms. Evans' signature.

[12] Mr. Macdonald replied on 12 May 2003, saying that "Ms. Evans is prepared to accept an appointment as Business Agent" pursuant to the draft contract subject to amendments that he set forth in detail. He added that subject to a resolution of Ms. Evans' employment, Mr. Evans would "retire from the public perspective" subject to

a further set of conditions. This brought the following response from Mr. McGrady in a letter of 23 May 2003:

> I am replying to your letter of May 12, 2003. My client is unable to agree to Ms. Evans' demands, for reasons that are too extensive to enumerate. There appears to be no basis for further negotiations.
>
> On behalf of the Local, we request that Mr. Evans return to his employment no later than June 1, 2003, to serve out the balance of his notice period of 24 months. To be clear, the total notice period is the 24 months from January 1, 2003 until and including December 31, 2004.
>
> If Mr Evans refuses to return no later than June 1, 2003, my client will treat that refusal as just cause, and formally terminate him without notice.
>
> We will also amend the Statement of [Defence] adding a claim, amongst others, that he has failed to mitigate his loss by rejecting this return to work.

[13] Mr. Macdonald, in a letter dated 23 May 2003 asked to be provided with documentation "evidencing that Mr. Evans was ever given 24 months notice of termination of his employment." Mr. Macdonald wrote a second letter to Mr. McGrady on the same date in which he said:

> At this time, we consider the employer's position outlined in your May 23, 2003 letter to be an attempt to accept the settlement proposal that was conveyed to Mr. Hennessy by our letter dated January 3, 2003. You will recall that in that letter we indicated that Mr. Evans was prepared to accept 24 months notice of termination of employment as an alternative to litigation.
>
> If Mr. Evans is now to consider accepting the employer's offer to mitigate his damages by continuing his employment for 24 months commencing January 1, 2003, one issue that must also be resolved is the continued status of Ms. Evans.

[14] Mr. McGrady replied on 27 May 2003 that the union had "no plans to suspend, discipline or lay off Ms. Evans", but it was not prepared to negotiate any special arrangements with her. It thus appeared to Mr. McGrady that "there is no further point in negotiating with respect to Ms. Evans, or Mr. Evans." In a second letter of the same date Mr. McGrady informed Mr. Macdonald that the union was requesting that Mr. Evans return to work on 1 June 2003 and that in doing so he would "be working through the 24-month notice period from January 1, 2003 through to December 31, 2004."

[15] Mr. Macdonald responded on 30 May 2003 saying that Mr. Evans would return to work provided the union "immediately rescinds and withdraws" its termination letter of 2 January 2003. Mr. McGrady replied that the union was not prepared to withdraw its notice of termination. Mr. Macdonald responded that Mr. Evans had never "received 24 months notice of the termination of his employment" therefore "he cannot rationally be expected to respond positively to your client's directive to return to work."

[16] The exchange of correspondence ended with a letter from Mr. McGrady to Mr. Macdonald dated 2 June 2003 in which he stated that the union would be pleading that Mr. Evans failed to mitigate his loss by declining to return to work.

REASONS FOR JUDGMENT

[17] Mr. Justice Gower set forth five issues to be determined. On these issues he held that: (1) Mr. Evans was wrongfully dismissed on 2 January 2003; (2) he should have received 22 months of notice; (3) there was no misconduct on the union's part

that would justify a *Wallace* extension of this notice period; (4) Mr. Evans did not fail to mitigate his damages; and (5) damages should be assessed at $100,008.79. While only the fourth issue is before this Court there was evidence presented on the others that is relevant to this appeal.

[18] On the first issue, the judge held at paragraph 23 that "the termination letter had the effect of repudiating the employment contract and putting it to an end." He noted at paragraph 12 that counsel for the union conceded that "at no point did the Union ever expressly say to Mr. Evans 'you've got 24 months notice', or any other words to that affect." He added at paragraph 19 that the union's offer to discuss the time required for Mr. Evans to wind up outstanding matters was "hardly a clear invitation to discuss a period of working notice."

[19] The judge then turned to the telephone conversation between Mr. Hennessy and Mr. Evans and pointed out that nowhere was it suggested that Mr. Evans was not terminated as of 2 January 2003. He held at paragraph 27 that "Mr. Hennessy intended to terminate Mr. Evans as of January 2, 2003, and that he was [in the telephone conversation] attempting to negotiate a renewal of Mr. Evans' employment for a fixed term." The reasons for judgment conclude on this issue as follows:

> [39] To summarize, I conclude that what the Union did was terminate Mr. Evans and then attempt to re-hire him for an additional term. However, the negotiations to enter into such a new contract of employment ultimately failed. Thus, the Union's termination of Mr. Evans' employment on January 2, 2003 was without cause and without reasonable notice and therefore constitutes a wrongful dismissal.

[20] This conclusion is not under appeal. The judge correctly held that Mr. Evans had been wrongfully terminated and that the efforts of Mr. Hennessy had to be categorized as a new job offer.

[21] On the issue of the length of the notice period, Mr. Justice Gower noted that Mr. Evans had been a business agent for the union for over 23 years, and that "[t]here was virtually no evidence of other similar employment available in the Yukon" (para. 42). He referred back to Mr. McGrady's opinion letter of 31 December 2002 and agreed that 24 months would be the maximum period of notice. He dealt with comments indicating that Mr. Evans was considering retiring at age sixty, but held that these were simply "musings" on the part of Mr. Evans. He concluded as follows:

> [53] Having considered all the cases submitted by counsel, the evidence and the factors noted in the [*Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140, [1960] O.J. No. 149 (Q.L.) (Ont. H.C.J.)] and [*Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33, [1986] 4 W.W.R. 123, [1986] B.C.J. No. 3005 (Q.L.) (S.C.), aff'd (1986), 55 B.C.L.R. (2d) xxxiii, [1986] B.C.J. No. 3006 (Q.L.) (C.A.)] cases, I find that an appropriate period of notice for Mr. Evans is 22 months.

[22] There is no appeal of this finding, or of the finding of the trial judge on the issue of whether this period should be extended; the judge declined to do so because he was "unable to conclude that the Union acted in bad faith" (para. 60).

[23] In discussing the third issue, however, the judge said as follows:

> [58] … While I have already found that what Mr. Hennessy was doing was attempting to negotiate with Mr. Evans the length of a renewed

> period of employment, nevertheless, he was attempting to negotiate an alternative to the immediate cessation of employment.

[24] The judge divided the topic of mitigation into several sub-issues. He first discussed whether Mr. Evans engaged in a meaningful job search. He held at paragraph 67 that the union had a "relatively high standard of proof" on this question and while Mr. Evans "put minimal effort into the task … there is little or no evidence that it would have made a difference if he had done more."

[25] The judge then considered whether Mr. Evans could have mitigated his losses by "bumping" a business agent in Prince George, but he did not consider this to be a realistic option. The only real option was to return to work with the union in Whitehorse, but the judge found that the union had never actually made Mr. Evans an offer of employment after terminating him. He characterized the 23 May 2003 letter from Mr. McGrady as being more properly characterized as a "demand letter" (para. 81). Furthermore, he held at paragraph 88 that it was "not unreasonable" for Mr. Evans to be apprehensive about returning to work in a "poisoned" environment. On the overall issue of mitigation the judge held as follows:

> [101] Having considered all of the Union's arguments on this issue, I find that it has not satisfied the relatively high standard of proof required to show that Mr. Evans failed to mitigate his damages in any of the ways suggested.

[26] The judge concluded his reasons with the issue of quantification of the damages. He held that Mr. Evans was entitled to allowances that are not in dispute

plus his salary for 22 months less what he was paid from January to May 2003. The award thereby amounting to $100,008.79.

ANALYSIS

[27] The issue on this appeal is mitigation. In its opening statement the union alleged that there was no basis for the judge to find that it was reasonable for Mr. Evans:

> … to refuse to mitigate his damages by returning to work for the Union in his same position, with the same salary and benefits, in the same location, where he was "virtually autonomous"**,** working side by side each day with the only other person in the Union's Whitehorse Office: his wife.

[28] In its factum the union alleged errors as follows:

> i. The learned Trial Judge erred in law because he applied a subjective test rather than an objective test or misapplied the objective test by not considering whether Mr. Evans' subjective concerns for refusing to return to work on June 2, 2003 were reasonably based; and
>
> ii. The learned Trial Judge erred in fact by ignoring and failing to appreciate critical evidence based on a misapprehension of the legal test to be applied in determining whether or not it was reasonable for Mr. Evans to refuse to return to work on June 2, 2003.

Did Mr. Evans fail to mitigate his damages?

i) Did Mr. Evans make any meaningful effort to find employment?

[29] The first sub-issue dealt with by the judge was whether Mr. Evans engaged in a meaningful job search. The judge noted the answer given by Mr. Evans to the question of whether he used a resume in his job search. To this Mr. Evans replied, “What job search?” The judge noted that Mr. Evans “went up to the coffee shop” and let people know that he was available for “pilot car driving or whatever”, but that Mr. Evans testified that he was qualified only as a union business agent or as a truck driver. However, Mr. Evans said that he was not physically qualified as a truck driver and therefore, apart from a union job, the employment market in Whitehorse for him was, in Mr. Evans’ opinion, “zip.”

[30] The judge concluded this sub-issue with the following:

> [67] Like Locke J. in [*Bird v. Warnock Hersey Professional Services Ltd* (1983), 25 B.C.L.R. 95, [1980] B.C.J. No. 2057 (Q.L.) (S.C.)], I was not particularly impressed by the efforts of Mr. Evans to obtain alternate employment. However, I am also not satisfied that the Union has met the “relatively high standard of proof” that not only did Mr. Evans fail to make reasonable efforts to find work, but that had he done so, he likely would have found comparable alternative employment in the Yukon. I agree that he put minimal effort into the task, but there is little or no evidence that it would have made a difference if he had done more.

The factual findings by the judge – that Mr. Evans was not qualified for other jobs in Whitehorse and did not even attempt to look for one – is highly relevant to the legal question of whether Mr. Evans had a legal duty to mitigate his damages by accepting re-employment with the union.

ii) Was there a job offer made to Mr. Evans by the union?

[31] In the telephone conversation Mr. Evans asked Mr. Hennessy if he could be honest with him “off the record.” This, in spite of the fact that he was recording the conversation. When Mr. Hennessy agreed, Mr. Evans said, “If you guys keep me on to the end of the year … and put Barb on … then I wouldn’t have a problem.” He then added: “I’m reaching for gold here”. Mr. Evans was entitled to reach for gold, but this did not relieve him of his lawful duty to mitigate his damages. With no job prospects outside of the union, Mr. Evans knew that a return to his previous employer was the only way he had to fulfil this obligation.

[32] In the letter of 23 May 2003 Mr. McGrady wrote, in part, as follows:

> … My client is unable to agree to Ms. Evans’ demands, for reasons that are too extensive to enumerate. There appears to be no basis for further negotiations.
>
> On behalf of the Local, we request that Mr. Evans return to his employment no later than June 1, 2003, to serve out the balance of his notice period of 24 months. To be clear, the total notice period is the 24 months from January 1, 2003 until and including December 31, 2004.

[33] Mr. Macdonald replied saying that he and his client considered the union’s position to be “an attempt to accept the settlement proposal” earlier proposed by Mr. Evans. Mr. McGrady responded that the union was not prepared to accept the “special arrangements” proposed by Ms. Evans and again requested Mr. Evans to return to work for a period concluding on 31 December 2004. This was rejected and Mr. McGrady replied that the union “requires Mr. Evans to report for work” and work

"through the 24-month notice period" culminating on 31 December 2004. Mr. Macdonald responded that Mr. Evans had never "received 24 months notice of the termination of his employment" therefore he could not "rationally be expected to respond positively to your client's directive to return to work."

[34] In his reasons for judgment the judge said as follows:

> [81] The Union argued in its memorandum that it was "completely unreasonable" for Mr. Evans to refuse to return to work on June 2, 2003, regardless of whether the letter from its counsel of May 23, 2003 was characterized as a request by the Union for him to return to work or as an offer of re-employment for a period of 19 months. I find that the letter was neither.

The judge then replicated portions of the letter and added:

> Although the letter is framed as a request, it is really a demand which, if refused, would result in Mr Evans' termination; and it is entirely incapable of being interpreted as an offer of re-employment.

[35] The judge, in concentrating on whether the letter was a demand or request, focused on the characterization of the 23 May 2003 letter when the question that had to be answered was whether the letter made a position available to Mr. Evans.

[36] Furthermore, the finding of the judge that there was nothing but a demand is internally inconsistent with his own conclusions. He had earlier found as follows:

> [37] … it was not Mr. Hennessy's intention during the telephone conversation of January 2nd to discuss a period of working notice or pay in lieu of notice. Rather, Mr. Hennessy was of the view that Mr. Evans' term of employment had ceased as a result of the application of

> Bylaw 13 and <u>he was seeking to negotiate a renewed and fixed term of employment with Mr. Evans</u>.
>
> …
>
> [39] To summarize, <u>I conclude that what the Union did was terminate Mr. Evans and then attempt to re-hire him for an additional term</u>.
>
> …
>
> [58] … I have already found that <u>what Mr. Hennessy was doing was attempting to negotiate with Mr. Evans the length of a renewed period of employment.</u>
>
> [emphasis added]

[37] The letter of 23 May 2003 should not have been interpreted by the judge in isolation from the telephone calls, other letters and negotiations that had taken place. But even in isolation it was not open to conclude that the letter was "entirely incapable of being interpreted as an offer of re-employment." It must be read as saying that if Mr. Evans returns to the job he will have it subject to the 24 months notice from 1 January 2003 to 31 December 2004. The question is whether the letter, regardless of how it is defined, encompassed a job offer.

[38] When all of the evidence is considered, it is clear that there was a job open for Mr. Evans and that he would be paid for two years from 1 January 2003. It is equally clear that this was known to Mr. Evans. The job was available to Mr. Evans on essentially the same terms that he had held it before. Thus, the trial judge overlooked important relevant evidence and, as a result, reached an erroneous conclusion on this question that is "plainly seen": see ***Housen v. Nikolaisen*** (2002), [2002] 2 S.C.R. 235, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 286 N.R. 1, 2002 SCC 33, [2002] S.C.J. No. 31 (Q.L.) at paras. 6, 10.

[39] The key difference, of course, was that he would be working in a politically charged environment under the ticking clock of a two-year notice period. This raises the second part of the equation: namely**,** was it reasonable of Mr. Evans, in these circumstances, to refuse the job?

ii) Was Mr. Evans' failure to return to work on 2 June 2003 unreasonable?

[40] Mr. Justice Gower discussed, as a further sub-issue**,** the key issue on this appeal; namely, whether Mr. Evans' failure to return to work on 2 June 2003 was unreasonable**:**

> [82] The Union says that it does not matter whether it had a legal right to order Mr. Evans back to work on June 2, 2003. Rather, it argues that there was a *bona fide* opportunity for Mr. Evans to accept the position of business agent on June 2, 2003 in order to mitigate his damages. Once again, I disagree. Mr. Evans was prepared to return to work, providing the Union rescinded the termination letter and he returned to his previous status as an indefinite-term employee, as was the case with Mr. Owens. That was not an unreasonable expectation, nor was his decision not to return to work when the Union refused to meet this expectation.

[41] As I have already indicated, I agree with the union's position that "there was a *bona fide* opportunity for Mr. Evans to accept the position of business agent on June 2, 2003 in order to mitigate his damages." While the judge was clearly correct that "Mr. Evans was prepared to return to work, providing the Union rescinded the termination letter", I am of the opinion that this condition was, on the evidence, an "unreasonable expectation." Contrary to the finding of the judge, such a rescission would have opened up to Mr. Evans the opportunity, which he clearly had in mind, to

extend his “notice” to 29 months, an extension which Mr. Evans knew was unacceptable to the union.

[42] At paragraph 95 of his reasons the judge said that he failed to understand the logic of this submission. He said that Mr. Macdonald’s letter of 23 May 2003 “indicates that Mr. Evans viewed the employer’s offer to mitigate as one which involved a further period of 24 months employment beginning January 1, 2003 and not at any subsequent date.” The judge then reviewed how the union handled the case of a different business agent who had been terminated, but negotiated a period of working notice:

> [98] Surely if that was done for Mr. Owens, it could also have been done for Mr. Evans. In other words, it was also open to the Union to rescind Mr. Evans’ termination letter, restore him to his pre-termination status as an indefinite-term employee, and then attempt to come to a suitable arrangement regarding the cessation of his employment. Such discussions could easily have taken into account any concrete retirement plans by Mr. Evans, as well as the fact that he had already received five months pay in lieu of notice to that point. Indeed, had that been done, it seems highly unlikely that Mr. Evans would have been able to successfully argue for an additional period of 24 months notice, when he had already received five months pay in lieu of notice. That is especially so when both parties agree that 24 months notice, regardless of whether it is a combination of working notice or pay in lieu, is the probable maximum in these circumstances.

[43] These comments, particularly that the union could “attempt to come to a suitable arrangement regarding the cessation of his employment”, show that the judge was cognizant that Mr. Evans might have argued for 24 months notice in addition to the 5 months he’d already been paid while not working, in spite of the fact that the judge thought there was little hope of successfully doing so. The evidence

establishes that there was reason to find that Mr. Evans was trying to lengthen the notice period, that is, go for gold. Mr. Evans testified as follows on his examination for discovery that was read into evidence at the trial:

> Q. And so, was there any other reason for you not returning to work on June the 2nd?
>
> A. I was going. I would have gone back to work if you would have taken the restrictions off going back to work.
>
> Q. You wanted the old job back without any notice at all?
>
> A. Yeah, or start the notice from that day.

[44] The logic of the submission comes from the evidence of Mr. Evans. The judge speculated as to what might have happened had negotiations proceeded from a rescission of the termination, but given Mr. Evans' starting point for negotiations the conclusion of the judge that it "was not an unreasonable expectation" of Mr. Evans that the union would rescind the termination cannot be upheld.

[45] The judge went on to note other aspects of Mr. Evans' testimony that caused him concern:

> [83] The Union further argued extensively that there is a good deal of evidence to show that Mr. Evans had nothing to fear from a continued relationship with Mr. Hennessy and the new executive. However, there are also a number of reasons which provide support for Mr. Evans' apprehension about continuing that relationship:
>
> > 1. From Mr. Evans' subjective perspective, he had been "treated like a dog" by Mr. Hennessy when he was terminated without cause or notice on January 2nd.
> >
> > 2. Mr. Evans also knew, from the opportunity to review Mr. McGrady's legal opinion of December 31, 2002, that this was a planned and deliberate course of action by the Union.

3. When Mr. Hennessy called Mr. Evans on the telephone to discuss the matter, he made no mention whatsoever about working notice or pay in lieu of notice. Rather, as I have found, the only accommodation Mr. Hennessy was prepared to make, and even that was less than clear, was to mention the possibility of re-hiring Mr. Evans for a renewed fixed term of employment.

4. In March 2003, the Union sent in KPMG Chartered Accountants to perform an audit of the Whitehorse office without any prior notice whatsoever to Mr. Evans. … Understandably, Mr. Evans felt threatened and demeaned by the audit …

5. Mr. Evans' fellow business agent in Prince George, Jim Jeffery, who had also been terminated on January 2, 2003, was re-instated, … However, he was subsequently terminated for cause and he telephoned Mr. Evans to inform him of this turn of events.

6. On the other hand, another of Mr. Evans fellow business agents, Ron Owens, … had been re-instated … and his termination letter had been rescinded. … it is understandable that [Mr. Evans] would have assumed the worst about the Union's motives towards him.

7. There is evidence from Mr. Evans that it was well known in Whitehorse that he had been terminated by the Union. Consequently, Mr. Evans' belief that he would no longer have the respect of employers and would not be able to perform effectively as a business agent was not without foundation.

8. There was also evidence from Jim Fairbrother, the Union's dispatcher in the Vancouver office, that after the election of the new executive, he felt ostracized … . … it was not unreasonable for Mr. Evans to consider this information and rely upon it as part of his overall assessment of whether he could continue to work with the Union in all the circumstances.

9. Further, the outgoing president … testified that the campaign prior to the election in December 2002 had been hard fought and difficult. … Mr. Evans had been a supporter of Mr. Zimmerman … .

[46] It was suggested in oral argument that in referring to these concerns it is shown that the judge did not ignore the facts. With respect to those items that is so, but that is not the basis of the appeal. The appeal is based upon how those matters were used by the judge. That is, were they considered solely from Mr. Evans' perspective or were they considered objectively, i.e. did the judge consider them from the perspective of what a reasonable person in Mr. Evans' position would do.

[47] The judge said:

> [88] … [Mr. Evans] believed the working relationship had been poisoned by the circumstances that led up to and followed his termination on January 2, 2003. While some of Mr. Evans' fears in that regard may have been over-stated, they were not without foundation and were therefore not unreasonable.

From this Mr. Evans submits that the judge looked beyond the subjective and applied an objective approach to find that his position was not unreasonable. I fail to see how that conclusion can be drawn from that paragraph or, indeed, from any other passage in the reasons for judgment. Although the trial judge quoted passages from ***Cox v. Robertson*** (1999), 131 B.C.A.C. 257, 69 B.C.L.R. (3d) 65, 181 D.L.R. (4th) 214, 1999 BCCA 640, [1999] B.C.J. No. 2693 (Q.L.) (C.A.), and from ***Farquhar v. Butler Brothers Supplies Ltd.*** (1988), 23 B.C.L.R. (2d) 89, [1988] 3 W.W.R. 347, [1988] B.C.J. No. 191 (Q.L.) (C.A.) that refer to an objective test, he failed to apply that test and, to the contrary, found that from Mr. Evans' perspective the "fears" were not without foundation and were therefore not unreasonable. That was a purely subjective approach.

Case authorities

[48] At trial the union relied on cases which established that where a former employee fails to accept work with the employer who terminated him, even where the former employee has commenced a wrongful dismissal action, this may constitute a failure to mitigate. The judge said, at paragraph 84, that "most of those cases were constructive dismissal situations and are therefore distinguishable for that reason alone." In support he quoted the following from ***Mifsud v. MacMillan Bathurst Inc.*** (1989), 70 O.R. (2d) 701, 63 D.L.R. (4th) 714, [1989] O.J. No. 1967 (Q.L.) (C.A.), leave to appeal to S.C.C. refused (1990), 68 D.L.R. (4th) vii:

> The fact that the transfer to a new position may constitute in law a constructive dismissal does not eliminate the obligation of the employee to look at the new position offered and evaluate it as a means of mitigating damages (at 722 cited to D.L.R.).

[49] I find it instructive to consider a more extensive portion of the judgment delivered by the Court which includes the above quotation. At pages 722-23:

> There is no doubt that the duty of the plaintiff to take steps to mitigate his damages applies in all wrongful dismissal cases. The question is simply whether or not the steps taken by the plaintiff were reasonable.
>
> When an employer wishes to dismiss an employee (other than for cause) the employer may choose either to give the employee reasonable notice of his termination date and require that he work out the notice period, or he may require the employee to leave immediately, thus rendering the employer liable for damages equal to the employee's remuneration and benefits for the reasonable notice period. If the employee leaves immediately, he is required to take reasonable steps to mitigate his loss and, barring any agreement to the contrary between the parties, any moneys earned in mitigation must be credited against his damages.

> Is the situation substantially different when an employer does not wish to dismiss an employee but, being unsatisfied with his performance, or for some other valid reason, wishes to place him in a different position at the same salary? Why should it not be considered reasonable for the employee to mitigate his damages by working at the other position for the period of reasonable notice, or at least until he has found alternative employment which he accepts in mitigation?
>
> The fact that the transfer to a new position may constitute in law a constructive dismissal does not eliminate the obligation of the employee to look at the new position offered and evaluate it as a means of mitigating damages. In all cases, comparison should be made to the contractual entitlement of the employer to give reasonable notice and leave the employee in his current position while a search is made for alternative employment. Where the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal 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.
>
> It must be kept in mind, of course, that there are many situations where the facts would substantiate a constructive dismissal but where it would be patently unreasonable to expect an employee to accept continuing employment with the same employer in mitigation of his damages.
>
> In this case, Mr. Mifsud improperly rejected the opportunity to mitigate his damages by maintaining an employed status from which to seek a preferable position elsewhere.
>
> I would allow the appeal, replace the judgment of the trial judge with a judgment dismissing the plaintiff’s claim, and allow the appellant its costs here and below.
>
> [emphasis added]

[50] At paragraph 86 of his reasons Mr. Justice Gower quoted the following from ***Cox v. Robertson*** at 218, cited to D.L.R.:

> 11. Probably the leading case on mitigation by re-employment is the judgment of this court in *Farquhar v. Butler Brothers Supplies Ltd.*, *supra*, where the Court stated, at p.94 [cited to B.C.L.R.], that in

> mitigation of losses, an employee is only required to take such steps as a reasonable person would take. **Each case, of course, will be different, but it is clear that while an employee may be under a duty to accept re-employment on a temporary basis in some circumstances, such obligation will arise infrequently because "[v]ery often the relationship … will have become so frayed that a reasonable person would not expect both sides to work together again in harmony…**" (per Lambert J.A., writing for the Court, at 94 [cited to B.C.L.R.])."
>
> [emphasis added by Gower J.]

[51] On the basis of this quote, the judge in the case at bar held that "the circumstances in which a former employee may have a duty to accept employment with the former employer will be rare" (at para. 86). Mr. Justice Gower then reviewed other cases and concluded:

> [93] Reading all of these cases together, it appears that it is truly the rare case when wrongfully dismissed employees will be considered in breach of their duty to mitigate their damages by failing to return to the employment from which they had been dismissed. I find that, in all of the circumstances, Mr. Evans did not breach his duty to mitigate by failing to return to the Union's employment after he was terminated.

[52] I cannot find any support in the case law for the proposition that constructive dismissal cases are distinguishable from express dismissal cases *per se*. While it is a distinguishing factor, the principles are the same in both types of dismissal. Nor do I find support for the proposition that it will only be the "rare" case where a terminated employee is not obliged to return to his former employer in order to mitigate his damages. Where the facts of the case, viewed objectively, warrant it, mitigation requires just that.

CONCLUSION

[53] An employee is required to take such steps as a reasonable person would take in the circumstances. That is an objective test. Mr. Justice Burnyeat in ***Smith v. Aker Kvaerner Canada Inc.**,* (2005), 2005 BCSC 117, [2005] B.C.J. No. 150 (Q.L.), worded the issue in a manner that I find helpful:

> 31. In seeking and accepting alternative employment, the plaintiff has a duty to act reasonably and to take such steps as a reasonable person in the plaintiff's position would take in his own interest to maintain his income and his position in his industry, trade or profession. The duty involves a constant and assiduous application for alternative employment, an exploration of what is available through <u>all</u> means: *Forshaw v. Aluminex Extrusions Ltd.* (1989) 39 B.C.L.R. (2d) 140 (B.C.C.A.) and *Leawood v. Thunderbird Home Centres* (unreported) April 3, 1995 decision of Koenigsberg J. (Supreme Court of British Columbia Action No. C941213 – Vancouver Registry).
>
> [emphasis added]

[54] When Ms. Evans refused the job offer made to her the union wrote its letter of 23 May 2004 requesting Mr. Evans to return to work and to continue until 31 December 2004. On an objective test a reasonable person would view this as a *bona fide* employment opportunity. It was not for a different job; it was for the exact job that Mr. Evans had been doing and which he described as "the best job in the world." This fulfilled the 24 month notice period that Mr. Evans wanted.

[55] Mr. Evans' only condition was that Ms. Evans be guaranteed the same term. In cross-examination the following took place:

> Q. Do I understand you to be saying that you were prepared to accept 24 months from January 1, 2003, as long as your wife was guaranteed the same term?
>
> A. Yes.

This shows that Mr. Evans must have considered the 23 May letter to be a *bona fide* employment offer. It was not open to the judge to conclude otherwise nor was it open to him to find other than that it was unreasonable for Mr. Evans to refuse the offer. The judge, in my opinion, must have applied a purely subjective test. This was an error of law.

[56] However, even if it could be said that there was objectivity, and no error of law, the judgment in the case at bar falls, in my opinion, into the words of Chief Justice McEachern, for the Court, in ***Cox v. Robertson***:

> 12. … I do not agree that the conclusions of the trial judge are supported by the facts of this case. If necessary, I would find that the trial judge was clearly wrong in his conclusions having regard to the particular, personal circumstances of this employment that do not seem to have been given sufficient weight.

[57] The evidence does not support the conclusion that Mr. Evans' circumstances, viewed objectively, justified his refusal to resume employment with the union. The fact that Mr. Evans was prepared to resume his old job was never in doubt and it was never contended otherwise. His counsel as early as 3 January 2003 wrote that Mr. Evans "would be prepared to remain working as a Business Agent throughout 2003." This was consistently maintained throughout the negotiations which at no time explored the nine reasons for apprehension that subsequently emerged in the judge's reasons.

[58] The remedy in the case at bar is as stated by Mr. Justice Brenner in ***Carlysle-Smith v. Dennison Dodge Chrysler Ltd.*** (1997), 33 C.C.E.L. (2d) 280, [1997] B.C.J. No. 3075 (Q.L.) (S.C.):

> 40. … an inadequate mitigation effort coupled with a finding of the likelihood that comparable alternative employment could have been achieved had a reasonable effort been expended, requires the court to make an appropriate reduction to what would otherwise be an appropriate period of notice. Clearly the less the mitigation effort and the stronger the evidence of prospective alternative employment, the more heavily this factor will be weighted in determining the appropriate notice period.

[59] Mr. Evans failed to act reasonably with respect to the job offer made to him by the union. He should have returned to employment for the union shortly after his termination on 2 January 2003. However, in that there is no claim for reimbursement for the five months salary paid to him, the disentitlement commences as of 2 June 2003. The award made by the judge took into account only salary and allowances that would have been paid to Mr. Evans beginning on 2 June 2003.

[60] I would allow the appeal and set aside the award in its entirety.

"The Honourable Mr. Justice Thackray"

I Agree:

"The Honourable Madam Justice Saunders"

I Agree:

"The Honourable Mr. Justice Smith"