SMHI LEGAL NOTES
STEINBERG MORTON HOPE & ISRAEL LLP
BARRISTERS & SOLICITORS • TRADEMARK AGENTS
Volume 35 Fall 2013

Dismissed Employees: The Duty to Mitigate

Thus, for most people, work is one of the defining features of their lives. Accordingly, any change in a person's employment status is bound to have far-reaching repercussions.
Iacobucci J.
Wallace v. United Grain Growers Ltd.

The truth of this sentiment is underlined every time another employee is let go by an employer. Despite the emotional attachment people have to their work an employer has a right to dismiss employees. The employer's obligation is simply to provide the employee with sufficient notice of termination or payment in lieu of that notice. In fact, most wrongful dismissal cases come down to the issue of the sufficient notice in a particular set of circumstances.

Obligation to Mitigate
Although a dismissed employee may choose to commence litigation, he or she cannot simply sit around waiting for the court to make a decision about the legitimacy of the claim. Rather, as with any breach of contract, the employee is under an obligation to take all reasonable steps to mitigate his or her damages. In other words, he or she must attempt to minimize the losses by actively looking for an alternate source of income. This position is supported by the Supreme Court of Canada in the case of *Michaels* v. *Red Deer College.*

"...The parameters of loss are governed by legal principle. 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. The reference in the case law to a "duty" to mitigate should be understood in this sense."

In short, a wronged plaintiff is entitled to recover "damages for the losses he has suffered, but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation."

Returning to the Former Place of Employment
One question that sometimes arises with respect to an employee's duty to mitigate is whether an employee, as part of his or her mitigation efforts, must accept an offer from the former employer to take him or her back. The Supreme Court of Canada addressed this issue in 2008 in the case of *Evans* v. *Teamsters Local Union No. 31*. Writing for the majority, Bastarache J. stated: "in the absence of conditions rendering the return to work unreasonable, on an objective basis, an employee can be expected to mitigate damages by returning to work for the dismissing employer. Finding otherwise would create an artificial distinction between an employer who terminates and offers re-employment and one who gives notice of termination and offers working notice.

"I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-employment is significant."

The Court goes on to discuss the test that is to be considered in determining whether an employee must accept the employer's offer to rehire in order to fulfill his or her obligation to mitigate: would a reasonable person in the employee's position have accepted the employer's offer. The following factors should be considered when answering this question.

- The history and nature of the employment.
- Whether or not the employee has commenced litigation.
- Whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left.
- The reason that motivated the termination or change of

see **DISMISSED** on page **2**

In this issue

*The articles in **SMHI Legal Notes** are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.*

DISMISSED continued from page 1

employment, or for example, was it for legitimate business or concerns about performance).

- Whether the atmosphere the employee would be returning to would be one of hostility, embarrassment or humiliation.

It is this last factor that is the most critical, and if the atmosphere would be one of "hostility, embarrassment or humiliation" the employee would not be expected to accept an offer of re-employment.

*Chevalie*r v. *Active Tire & Auto Centre Inc.* is a recent Ontario case involving an employee that was constructively dismissed and whose employer offered to give him his job back after he began legal proceedings.

The Facts

Chevalier had worked for Speedy Muffler for more than 30 years, 18 as a manager of a service centre, when Active Tire & Auto acquired 28 Speedy Muffler Centres in March 2007. All of the employees were required to sign new employment agreements. The agreement included a requirement that all employees adopt the company's *Steps to Success* program.

Following the acquisition, Chevalier continued to manage the same Niagara Falls based location for several months. He was then transferred to the Welland location. When this location was franchised, Chevalier was offered an opportunity in Brampton. He ultimately chose not to make this move. He was then moved to one of the St. Catharines stores. Next he was asked to come to Toronto to act as a mystery shopper for a few weeks. In August 2008 he was sent back to the Niagara Falls location, which had since been repositioned as a wholesale business. Unfortunately, it became apparent that this location was not financially feasible and Chevalier was laid off.

Two weeks later, Chevalier commenced an action for wrongful dismissal. It was at this point that Active Tire realized it had not been legally entitled to lay off Chevalier. He was sent a letter of apology and offered his job back. Chevalier refused. It took him 17 months to find a new job.

The Trial

The parties were in a agreement that Chevalier had been constructively dismissed. They were essentially in agreement regarding the amount of notice to which Chevalier was entitled. What they could not agree to was whether Chevalier had been obliged to accept Active Tire's offer of re-employment.

Chevalier's position was that, while still an employee, everything Active Tire had done under the guise of coaching was in fact harassment. He claimed that the management personnel had engaged in conduct intended to make his life miserable with the goal of having him quit his job. Active Tire disagreed, arguing that everything it had done was simply to make Chevalier a more effective contributor as an employee for the company.

Although the trial judge found Chevalier to be an honest witness, he preferred the evidence of Active Tire, concluding that the conduct of Active Tire's management was properly directed to assisting Chevalier in meeting the terms of his employment agreement, not driving him from the company. Further, the trial judge believed that Chevalier had been let go for economic reasons and that he had not been treated to demeaning or humiliating conduct that would justify his refusing to return to Active Tire. He further found that Chevalier was bitter about what had happened, which led to the significance of various incidents becoming magnified and distorted in Chevalier's mind.

The result was that a reasonable person in the circumstances would have returned to work for Active Tire. Therefore, Chevalier had been obligated to accept Active Tire's offer, in order to mitigate his damages. The final result: Chevalier's damages in lieu of notice were nil. The judge did take into account that Chevalier had already left the company and had started a claim, but ultimately he did not find these factors to be determinative.

The decision was upheld by the Ontario Court of Appeal.

The Takeaway

Although the loss of a job is generally an emotional moment for an employee, the employee must realize that damages in a wrongful dismissal case are meant to compensate for lack of notice, and not to penalize the employer for the dismissal itself. Employees must also recognize that they have an obligation to attempt to lessen those damages by seeking new employment, and in some cases by accepting the former employer's offer of re-employment.

Whether you are an employee faced with a dismissal or an employer thinking of dismissing an employee, you would be well advised to seek legal advice.

To view past newsletters and to learn more about our lawyers visit us at www.smhilaw.com

Divorce and Parental Alienation

"…a healthy relationship with both parents is a health and safety issue that good parents ensure takes place."

Mossip J., Reeves v. Reeves

The breakdown of a marriage is generally a difficult time for all concerned, including any children of the marriage. When children are put at the centre of the dispute, this tends to up the ante. When one parent deliberately sets out to alienate the children from the other parent, irreparable damage may occur. While parental alienation is not the norm in custody cases, sadly it is not unheard of. When we think of parental alienation syndrome, we often think of one parent aggressively and persistently bad-mouthing the other parent and putting pressure on the children to have nothing to do with the other parent. However, a recent Ontario case casts the spotlight on a type of parental alienation which is less overt and more passive aggressive.

Decisions About Custody and Access

When making decisions about who should have custody and/or access to children, the *Divorce Act* mandates the court to consider the best interests of the children. In determining the best interests of the children, the court must consider the conditions, means, needs and other circumstances of a child. The court must also ensure that a child have as much contact with each parent as is consistent with the best interests of the child. Finally, the court is not to take into consideration the past conduct of the parents unless the conduct is relevant to the ability of that person to act as a parent of the child.

In addition to the criteria set out in the *Divorce Act* for determining what is in the best interests of the child, the court also has access to the factors listed in Ontario's *Children's Law Reform Act*. Those factors include the following:

- the love, affection and emotional ties between the child and each person entitled to or claiming custody of or access to the child,
- the child's views and preferences, if they can reasonably be ascertained;
- the length of time the child has lived in a stable home environment;
- the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;
- tthe ability of each person applying for custody of or access to the child to act as a parent.

The Facts

The parents were married for approximately five years when they separated. They had two children, who were 1 and 4 at the time of the separation. Initially, there was no order for custody and access and the children were primarily resident with the mother. The father exercised some mid-week overnight access, together with weekend access two to three times per month.

Problems began to arise a few years after the sepration, such that the Office of the Children's Lawyer and a parenting coordinator became involved. In addition, the father filed an application for a determination of custody and access. The application was brought pursuant to section 16 of the *Divorce Act*. (If the parents had not been legally married, the application would have been brought under the *Children's Law Reform Act*.)

In support of his application, the father alleged that the mother had proven herself to be unaccountable, ungovernable, and untrustworthy. He argued that she had demonstrated a conscious and deliberate pattern of attempting to alienate and disenfranchise him from their children. The following are just three of the examples, accepted by the court, of the mother's behaviour and attitude.

The "gum ball" incident The parties were at their daughter's hockey game. After the game, she asked her father for money to buy a gumball. When the mother saw this, she demanded that her daughter surrender the gumball. This was done in front of family, friends, and fellow hockey moms and dads. Rather than make the situation worse, the father assured his daughter that she could have a gumball the next time. The next time he saw her, he produced a gumball for her only to find that the mother had already given her one. The court found that this to be a deliberate attempt to alienate the father and diminish his role in the child's life.

The "McHappy Day" incident The mother had agreed in the parenting protocol not to make plans on the father's access days. When the father asked to pick up the children from school on his scheduled access day, he was told by the mother that the children were to be taken to McHappy Day. The father agreed however the mother decided to show up as well. The court found the mother had again diminished the role of the father by interfering with his parenting time.

The "skating" incident The parties' son was enrolled in skating lessons on Tuesday evenings. The mother, however, intentionally chose to switch to Wednesday nights, the father's access night. The court concluded that this demonstrated the mother's determination to control events at the expense of the father's parenting time.

see **ALIENATION** on page **4**

ALIENATION continued from page 3

The evidence also demonstrated that the mother would frustrate all attempts to resolve issues, particularly around scheduling, until the last minute. In addition, she was constantly claiming to be afraid that the father would harm her, a fear that she was making her children aware of. The court summed up the evidence as follows:

"Overall, the evidence in this case establishes a pattern of denied access, uncooperative behaviour, parental alienation, and disenfranchisement on the part of the mother. I find that this conduct has been flagrant, intentional, constant, and unwarranted. Furthermore, it has remained unaltered despite the commencement of this process, the involvement of the parenting co-ordinator, and the report of the Office of the Children's Lawyer."

The Decision

The court concluded that it would be in the best interests of the children for the father to have the rights and responsibilities of primary care of the children. This outcome was based largely on the finding that the father was the parent who was committed to the maximum contact principle and who would ensure that the children would enjoy the best possible relationship with each parent. Further, it was his parenting plan that had the best chance of achieving stability and predictability for the children, while at the same time maximizing the time spent with each parent in a workable and reliable manner.

On the other hand, the court found that the past conduct of the mother, denigrating, minimizing and alienating the father, which had continued up to the time of the trial, had to be taken into account. This was so because the court had no confidence that this pattern of conduct would cease.

The Takeaway

There are often a lot of hurt feelings following the breakdown of a marriage. One or both parties often want to get back at the other. One of the easiest ways to do this is through that other person's relationship with the parties' children. This tactic can have all kinds of unintended consequences, including loss of custody and even of access to the children. While some of the antics of the mother in this case can seem trivial or petty, it is the relentlessness of her actions and the combined effect of these actions on the children's relationship with their father that amounted to parental alienation. So before you want to get back at your ex in this manner, think long and hard about the damage you may be doing to your children as well as whether it may ultimately affect the amount of time you will be able to spend with your children.

There are better ways to handle divorce, custody and access. We have experienced family lawyers who would be pleased to assist you with this emotional process.

Case Update

In the Summer Issue of SMHI Legal Notes, we told you about the case of Mr. Beaton, who had decided to transfer his stock holdings from RBC to Scotia. Despite very explicit instructions about the timing, Scotia made a mistake which arguably cost Mr. Beaton thousands of dollars.

Despite this mistake, which Scotia admitted, Mr. Beaton did not commence a legal action until five years later. That action was dismissed as being outside the two year limitation period.

Mr. Beaton appealed to the Ontario Court of Appeal on the grounds that the motions judge erred in failing to conclude that the limitation period was extended by Scotia's fraudulent concealment of certain information.

The appeal was dismissed in September.

Steinberg Morton Hope & Israel LLP

5255 Yonge Street - Suite 1100
Toronto, Ontario M2N 6P4

T: 416 225-2777 F: 416 225-7112
www.smhilaw.com

LAWYERS

Irwin Steinberg
isteinberg@smhilaw.com

James C. Morton
jmorton@smhilaw.com

Jack W. Hope
jhope@smhilaw.com

David M. Israel
disrael@smhilaw.com

Michael E. Cass
mcass@smhilaw.com

M. Michael Title
mtitle@smhilaw.com

Michael Birley
mbirley@smhilaw.com

Shelley Brian Brown
sbrown@smhilaw.com

Derrick M. Fulton
dfulton@smhilaw.com

Taras Kulish
tkulish@smhilaw.com

David A. Brooker
dbrooker@smhilaw.com

Daria Krysik
dkrysik@smhilaw.com

PRACTICE AREAS

Corporate & Commercial
Commercial & Civil Litigation
Residential Real Estate
Commercial Real Estate
Condominium Law
Matrimonial & Family Law
Employment Law
Wills, Trusts & Estates
Personal Injury Law
Construction Law
Criminal Law
Trademark Law
Health Discipline Law
Administrative Law