

A digest of recruitment issues, plans and strategies

Does an employee have to accept a lower position?

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The reassignment of an employee to a new position within your company may amount to his or her wrongful dismissal and therefore to a successful lawsuit against your company. This will occur, for example, where the new position is at a lower salary, involves significantly less responsibility or opportunity for advancement, or appears significantly less secure.

The tremendous restructuring which many companies have been forced to undergo in response to the economic pressures of the last few years has forced courts to redefine the circumstances in which an employee may refuse relocation to a new position within his or her company. Recent court decisions in Ontario and other parts of the country suggest that there may now be some circumstances in which an employee must accept reassignment to a new position, even where that reassignment constitutes a demotion.

These court decisions have held that where the employee refuses the reassignment, in such circumstances, he or she may not sue the employer for damages arising from his or her wrongful dismissal.



One of the fundamental principals of contract law is that a party who sues another for breach of contract has a duty to mitigate, or lessen, his or her damages. Applying this principal to the workplace, this means that an employer who has wrongfully dismissed an employee may be sued for damages but that employee must establish that he attempted to off-set the loss of salary resulting from his dismissal by seeking alternative employment. As a result, the employee who is fired without just

cause will not fully recover his damages if he has unreasonably refused an offer of comparable employment made shortly after the firing.

Two recent decisions of the Ontario Court of Appeal, *Mifsud v. MacMillan Bathurst Inc.* (1989) and *Davidson v. Allelex* (1991), cumulatively suggest that in Ontario an employee who is demoted to a lesser position is obliged, in certain circumstances, to accept that position to mitigate his or her damages

while looking for satisfactory alternative employment. This obligation to accept the demotion arises in the following circumstances:

1. Where the employee was promoted within the ranks of the company to the position from which he or she was dismissed;
2. Where the salary and benefits of the new position are comparable to those of the former position;
3. Where the working conditions (hours and schedule) of the new position are not substantially different from that of the old position;
4. Where the tasks of the new position are not objectively demeaning;
5. Where the personal relations between employer and employee did not deteriorate into acrimony prior to the demotion.

As a result of these and other cases, it may be that the reassignment of an employee to a new position, which is significantly less secure, is at a lower point in the organization chart, involves a downward change in reporting functions or entails a significant decrease in responsibility, may amount to constructive dismissal and yet still be one which the employee is obliged to accept for the purpose of mitigating his or damages. The failure to accept the new position would limit the amount of damages which the employee can recover for wrongful dismissal.

Remembering this can potentially save an employer significant sums of money during reorganization. Instead of

providing hefty pay in lieu of notice, as generally required for highly specialized, long-term or older employees, employers can realize significant savings by demoting long-term employees or older employees to lower positions so long as the lower positions satisfy the five characteristics listed above. In such circumstances, the employee must either accept the less attractive offer, or by refusing such, forego his or her claim for damages for wrongful dismissal, due to his or her failure to mitigate.

The latter option may in fact be more theoretical than real. To the extent that the salary or benefits of the new, lower position, are inferior to those of the

former position, if the employee sues he or she, in most circumstances, will be limited to recovering the differential between the two salaries. Where this differential amounts to less than \$10,000.00, suing the employer will appear to many employees to be very unattractive, owing to the likely costs of protracted litigation. The truth is that it will not be economically practical, for the employee, to pursue what may, in theory, be a highly winnable case against your firm.

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