SUPREME COURT OF CANADA

CITATION: Evans *v*. Teamsters Local Union No. 31, 2008 SCC 20

DATE: 20080501
DOCKET: 31733

BETWEEN:

Donald Norman Evans
Appellant
v.
Teamsters Local Union No. 31
Respondent

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Abella and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 51) Bastarache J. (McLachlin C.J. and Binnie, LeBel, Deschamps and Rothstein JJ. concurring)

DISSENTING REASONS: (paras. 52 to 140) Abella J.

evans *v.* teamsters local union

Donald Norman Evans *Appellant*

v.

Teamsters Local Union No. 31 *Respondent*

Indexed as: Evans *v.* Teamsters Local Union No. 31

Neutral citation: 2008 SCC 20.

File No.: 31733.

2008: January 29; 2008: May 1.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Abella and Rothstein JJ.

on appeal from the court of appeal of the yukon

Employment law — Wrongful dismissal — Damages — Duty to mitigate — Union employee wrongfully dismissed after new union executive took office — Whether employee required to mitigate damages by returning to work for same employer.

E was employed for over 23 years as a business agent in the respondent union's Whitehorse office. He was dismissed on January 2, 2003 after the election of a new union executive. The incoming president faxed E a termination letter, and later that same day telephoned him to "commence discussions". E's legal counsel wrote a letter to the incoming president the following day submitting that E was entitled to reasonable notice of the termination of his employment. He said that E was prepared to accept 24 months' notice of termination 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. Subsequent to this proposal there was a continuing exchange of correspondence between the lawyers, but no resolution was reached. In the meantime, the union continued to pay E his salary and benefits. E stated during this period that he wanted a settlement which would see him retire and his wife replace him as the union's business agent. E also became aware that other union employees who had been fired on the same day and in the same way had been reinstated, either with working notice or unconditionally. On May 23, E received a letter from the union's legal counsel requesting that he "return to his employment . . . to serve out the balance of his notice period of 24 months" and stating that, if he refused to return, the union would "treat that refusal as just cause, and formally terminate him without notice". E indicated he would return to work provided the union immediately rescinded its termination letter of January 2003, but the union was not prepared to do so.

The trial judge found that E had been wrongfully dismissed and was entitled to 22 months' notice. He also found that the union had not shown that E had failed to mitigate his damages. E was awarded over $100,000 in damages, representing the salary

and allowances owed to him. The Court of Appeal set aside the damage award, holding that E had not acted reasonably with respect to the job offer made to him by the union, and that this constituted a failure to mitigate his damages.

Held (Abella J. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and **Bastarache**, Binnie, LeBel, Deschamps and Rothstein JJ.: Where the employer has ended the employment contract without notice, the employer is required to pay damages in lieu of notice, but that requirement is subject to the employee making a reasonable effort to mitigate the damages by seeking an alternate source of income. Given that both wrongful dismissal and constructive dismissal are characterized by employer-imposed termination of the employment contract (without cause), there is no principled reason to distinguish between them when evaluating the need to mitigate. Although in some instances the relationship between the employee and the employer will be less damaged where constructive rather than wrongful dismissal has occurred, this will not always be the case. Accordingly, this relationship is best considered on a case-by-case basis when the reasonableness of the employee's mitigation efforts is being evaluated. [26-27]

In some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to re-employment, requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and not to penalize the employer for the dismissal itself.

Not imposing such a requirement 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. [28-29]

The employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found. Where the employer offers the employee a chance to mitigate damages by returning to work for the employer, the central issue is whether a reasonable person would accept such an opportunity. A reasonable person should be expected to do so 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. Other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and 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 critical element is that an employee not be obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation. Although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer, it is extremely important that the non-tangible elements of the situation — including work atmosphere, stigma and loss of dignity — be included in the evaluation. [30]

Here, the evidence does not support the conclusion that E's circumstances, viewed objectively, justified his refusal to resume employment with the union. E's requests for rescission of the letter of termination and re-establishment as an indefinite term employee were unreasonable since their effect would simply have been to extend his notice period to 29 months. The requirement that E's wife be given a new contract

of employment was also unreasonable, as this had no relationship to the conditions under which E himself would be continuing his employment relationship with the union. Moreover, the particular aspects of E's testimony that were retained by the trial judge do not reflect an objective evaluation of the reasonableness of E's decision to refuse employment in order to mitigate his damages. The trial judge erred in law in applying a purely subjective test and failing to consider relevant evidence. As the Court of Appeal recognized, there was strong evidence that E was prepared to resume his old job and that he understood the May 23 letter to be an invitation to do so. Furthermore, his concerns about returning to work were never invoked in the various negotiations with the union. Although the fears expressed by E may have been subjectively justified, there was no evidence of acrimony between the incoming president and E, and no evidence that E would be unable to perform his duties in the future. The fact that E was at one time prepared to return to work if his wife was guaranteed the same term also demonstrates that the reasons given by the trial judge to justify the refusal found no support in the evidence. The relationship between E and the union was not seriously damaged. Given that the terms of employment were the same, it was not objectively unreasonable for E to return to work to mitigate his damages. [37-38] [47-48] [50]

Per **Abella** J. (dissenting): When an employee is fired without cause and without reasonable notice, the dismissal is, at law, "wrongful". The employee is immediately entitled to an action in damages. Such an employee should not be expected or required to mitigate any damages by remaining in the workplace from which he or she has been dismissed. To do so disregards the uniqueness of an employment contract as one of personal service. [106-108]

A purely objective test should not be applied to E's decision not to return to the workplace from which he had been fired. Both objective and subjective factors are relevant in evaluating what a reasonable person in the position of the employee would do and whether a particular dismissed employee should be obliged to mitigate any damages by working in an atmosphere of hostility, embarrassment or humiliation. Different employees will be differently affected by a dismissal, and are entitled to consideration being given to the reality of their own experience and reaction. [109] [113]

The trial judge rejected the union's argument that the purpose of the January 2 phone call was to negotiate a period of working notice. There is no reason to disturb this finding. The trial judge also construed the union's letter of May 23 as a demand that E return to work, not an offer. It is difficult to read it any other way, particularly since the letter said he would be dismissed for cause if he did not return on the specific date. The union could have told E on January 2 that his employment would end two years later, or that his employment would be terminated immediately with two years' pay in lieu of notice. What it could not do was fire him without notice on January 2, and then, when negotiations failed, fire him unlawfully again when he failed to accept the union's *ex post facto* acknowledgment that as of January 2, he was entitled to 24 months' notice, but had to spend it working for the union. [117] [119-121]

The trial judge's findings on the reasonableness of E's refusal to mitigate by returning to his former employer rested on nine factors, all of which were supported by the evidence. Likewise, there is no basis for overturning the trial judge's factual finding that E acted reasonably in his negotiations with the union. There can be no significance attached to the fact that E did not, during the negotiations, expressly articulate the nine

factors identified by the trial judge as justification for his refusal to return to work. Nor does the fact that E was prepared to return to work if his termination letter was rescinded constitute either an unreasonable expectation or an admission that his working relationships remained unaffected by the dismissal. [135-136]

The burden was on the employer to demonstrate that E had failed to make reasonable efforts to find work. The trial judge concluded that E had made sufficient effort but that, given the size of the community, his age, and the unique nature of his job as a business agent among other things, no alternative jobs were available. The fact that the wrongful dismissal resulted in a paucity of alternative employment opportunities did not entitle the employer, in its own financial interests, to direct E to mitigate his damages by serving out the notice period in the workplace from which he had been wrongfully dismissed. [126] [137]

The trial judge's reasons in this case reflect a thoughtful and thorough review of the evidence. He made no errors of law and his findings with respect to the reasonableness of E's decision not to accede to the union's demand that he mitigate his damages by returning to the workplace or face dismissal for cause, are amply supported in the evidence. Therefore, the trial judge's decision should be restored. [115-116]

Cases Cited

By Bastarache J.

Referred to: *Cox v. Robertson* (1999), 69 B.C.L.R. (3d) 65, 1999 BCCA 640; *Michaud v. RBC Dominion Securities Inc.*, [2003] C.L.L.C. ¶210-015, 2002 BCCA

630; *Christianson v. North Hill News Inc.* (1993), 106 DLR (4th) 747; *Farquhar v. Butler Bros. Supplies Ltd.* (1988), 23 B.C.L.R. (2d) 89; *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701; *Reibl v. Hughes*, [1980] 2 S.C.R. 880; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.

By Abella J. (dissenting)

Cox v. Robertson (1999), 69 B.C.L.R. (3d) 65, 1999 BCCA 640; *Farquhar v. Butler Bros. Supplies Ltd.* (1988), 23 B.C.L.R. (2d) 89; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *Darbishire v. Warran*, [1963] 1 W.L.R. 1067; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Cemco Electrical Manufacturing Co. v. Van Snellenberg*, [1947] S.C.R. 121; *Christianson v. North Hill News Inc.* (1993), 106 DLR (4th) 747; *Smith v. Aker Kvaerner Canada Inc.*, [2005] B.C.J. No. 150 (QL), 2005 BCSC 117; *De Francesco v. Barnum* (1890), 45 Ch. D. 430; *Reibl v. Hughes*, [1980] 2 S.C.R. 880; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *Forshaw v. Aluminex Extrusions Ltd.* (1989), 39 B.C.L.R. (2d) 140; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802.

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Continuing Tension Between the Rights Paradigm and the Efficiency Paradigm" (1994-95), 20 *Queen's L.J.* 557.

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APPEAL from a judgment of the Yukon Court of Appeal (Saunders, Smith and Thackray JJ.A.) (2006), 231 B.C.A.C. 19, 381 W.A.C. 19, 53 C.C.E.L. (3d) 177, [2006] C.L.L.C. ¶ 210-045, [2006] Y.J. No. 90 (QL), 2006 CarswellYukon 86, 2006 YKCA 14, reversing a decision of Gower J., [2005] Y.J. No. 106 (QL), 2005 YKSC 71. Appeal dismissed, Abella J. dissenting.

Eugene Meehan, *Q.C.*, and *Marie-France Major*, for the appellant.

Leo B. McGrady, *Q.C.*, and *Christopher J. Foy*, for the respondent.

The judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps and Rothstein JJ. was delivered by

[1] BASTARACHE J. — This appeal concerns an employee's duty to mitigate damages for wrongful dismissal. In particular, the Court is asked to determine whether an employee who has been wrongfully dismissed is required to mitigate damages by returning to work for the same employer who terminated the employment contract.

Facts

[2] The appellant, Donald Evans, was employed for over 23 years as a business agent in the respondent union's Whitehorse office. He was one of two employees in this office; the other was his wife, Ms. Barbara Evans. Mr. Evans was dismissed on January 2, 2003 after the election of a new union executive. During the election campaign, held in December 2002, Mr. Evans supported the incumbent president, who was defeated.

[3] Prior to taking office on January 1, 2003, the incoming president, Mr. Hennessy, asked the union's legal counsel, Mr. McGrady, for an opinion regarding the termination of six employees, including Mr. Evans and three other business agents located in other cities. In a letter dated December 31, 2002, counsel 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". He also suggested the wording of a letter to be sent to the four business agents.

[4] On January 2, 2003, Mr. Hennessy faxed a letter to Mr. Evans. This letter was almost entirely 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.

[5] 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.

[6] Mr. Evans' legal counsel, Mr. Macdonald, wrote a letter to Mr. Hennessy on January 3, 2003. He submitted that Mr. Evans was entitled to reasonable notice of the termination of his employment. He said that Mr. Evans was prepared to accept 24 months' notice of termination 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.

[7] Subsequent to this proposal there was a continuing exchange of correspondence between the lawyers, but no resolution was reached. Mr. McGrady insisted that the original letter of January 2, 2003 "was not intended as a 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, a fact which added a wrinkle to the ongoing discussions. Further, Mr. Evans stated during this period that he wanted a settlement which would see him retire and his wife replace him as the union's business agent.

[8] Mr. McGrady stated the following in a letter dated May 23, 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 formerly 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.

[9] Mr. Macdonald, in a letter also dated May 23, 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 a period of 24 months commencing January 1, 2003, one issue that must also be resolved is the continued status of Ms. Evans.

[10] Mr. McGrady replied on May 27, 2003 that the union had "no plans to suspend, discipline or lay off Ms. Evans", but that 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 June 1, 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".

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

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

Judicial History

Yukon Territory Supreme Court, [2005] Y.J. No. 106 (QL), 2005 YKSC 71

[13] Gower J. found that the termination letter of January 2, 2003 had the effect of repudiating the employment contract and putting it to an end. He also found that Mr. Evans was an indefinite term employee and that the union was obliged to provide him with reasonable notice or pay in lieu of notice.

[14] With respect to the telephone conversation between Mr. Hennessy and Mr. Evans on January 2, 2003, Gower J. found that Mr. Hennessy was attempting to negotiate a renewal of Mr. Evans' employment for a fixed term. He concluded that what the union had done was terminate Mr. Evans with the letter and then attempt to rehire him for an additional term with the phone call. However, the negotiations to enter into

the 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 constituted a wrongful dismissal.

[15] Gower J. found that the appropriate period of notice for Mr. Evans was 22 months. He was, however, unable to conclude that the union had acted in bad faith in the manner of its termination and, as a result of this finding, declined to extend the required notice period to account for the nature of the dismissal.

[16] Regarding whether Mr. Evans had failed to mitigate his damages, Gower J. stated the following (at para. 67):

> 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.

[17] Gower J. also noted, with respect to Mr. Evans' failure to return to work with the union on June 2, 2003, that Mr. Evans had been prepared to resume his employment, providing the union rescinded the termination letter and he was able to return to his previous status as an indefinite term employee, as was the case with Mr. Owens (another of the terminated business agents). In the view of Gower J., these were not unreasonable expectations, nor was Mr. Evans' decision not to return to work when the union refused to meet the requests. He further found that although the union had argued extensively that there was ample evidence showing that Mr. Evans had nothing to fear from a continued relationship with Mr. Hennessy and the new executive, there were in fact a

number of factors supporting the reasonableness of Mr. Evans' apprehensions.

[18] In his discussion of the mitigation issue, Gower J. acknowledged a number of cases that the union said indicated that a dismissed employee may have a duty to mitigate by returning to the same employer who dismissed him or her, even where a wrongful dismissal action has been commenced. He pointed out, however, that most of those cases were constructive dismissal situations and that they were therefore distinguishable for that reason alone. Further, in *Cox v. Robertson* (1999), 69 B.C.L.R. (3d) 65, 1999 BCCA 640, one of the few cases on this point that did not involve a constructive dismissal, it had been held that the duty to accept employment "will arise infrequently" (para. 11). Finally, *Michaud v. RBC Dominion Securities Inc.*, [2003] C.L.L.C. ¶ 210-015, 2002 BCCA 630, was also distinguishable since Mr. Evans believed the working relationship had been poisoned by the circumstances surrounding his termination, while in *Michaud* the relationship between employee and employer remained amicable. Gower J. stated that while some of Mr. Evans' fears about his relationship with the union may have been overstated in this case, they were not without foundation and were therefore not unreasonable. He concluded as follows (at para. 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.

[19] Gower J. ultimately found that the union had not satisfied the relatively high standard of proof required to show that Mr. Evans had failed to mitigate his damages.

[20] Thackray J.A., writing for a unanimous court, noted that the trial judge had found that Mr. Evans was not qualified for other jobs in Whitehorse and had not even attempted to seek alternate employment. In his view, these factual determinations were 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. Thackray J.A. stated the following (at paras. 38-39):

> 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 et al.*, [2002] 2 S.C.R. 235, . . . at paras. 6, 10.
>
> 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?

[21] Thackray J.A. agreed 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" (para. 41). He held that while the trial judge was correct in finding that Mr. Evans was prepared to return to work if the union rescinded the termination letter, this condition was, on the evidence, an unreasonable expectation.

[22] He also referenced the cases the union had relied on to show that a former employee may have a duty to mitigate by returning to work for the same employer, even where a wrongful dismissal action has been commenced. The trial judge had said that

most of those cases were constructive dismissal situations and were therefore distinguishable for that reason alone. Thackray J.A. rejected this conclusion, stating (at para. 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.

[23] Ultimately, Thackray J.A. held that the evidence did not support the conclusion that Mr. Evans' circumstances, viewed objectively, justified his refusal to resume employment with the union. He noted that the fact that Mr. Evans was prepared to resume his old job was never in doubt and it had never been contended otherwise. Mr. Evans had failed to act reasonably with respect to the job offer made to him by the union, and this constituted a failure to mitigate his damages.

Analysis

[24] On appeal to this Court, the appellant argues that cases requiring that an employee mitigate damages by returning to the same employer deal primarily with individuals who have been constructively dismissed. He says that the trial judge was correct in finding that those cases must be distinguished from others in which the employee has been wrongfully dismissed. In support of this position, the appellant cites a judgment by the Alberta Court of Appeal in which it was held that in wrongful dismissal cases "the plaintiff need not mitigate damages by . . . going back to the employer who fired him or her" (*Christianson v. North Hill News Inc.* (1993), 106

D.L.R. (4th) 747, at p. 750). The British Columbia Court of Appeal appeared to make a similar finding in *Farquhar v. Butler Brothers Supplies Ltd.* (1988), 23 B.C.L.R. (2d) 89, at p. 93, stating that although a constructively dismissed employee may at times be required to mitigate by returning to the same employer, there is "normally no question" that an employee will be required to do so where there has been a wrongful dismissal.

[25] Ten years after *Farquhar*, however, the British Columbia Court of Appeal accepted that even a wrongfully dismissed employee could be required to mitigate by accepting re-employment with his or her former employer on a temporary basis. While the court in *Cox* held that on the facts before it a dismissed dental assistant did not need to return to work for the same dentist, its decision clearly contemplated that such mitigation may in some circumstances be required of wrongfully dismissed employees. In that case, the court applied the same principles it articulated in *Farquhar*, notwithstanding the fact that the earlier case dealt with a constructive dismissal while the facts before it concerned a wrongful dismissal.

[26] In my view, the British Columbia Court of Appeal was correct to apply the same principles to both constructively dismissed and wrongfully dismissed employees. The key element is that in both situations the employer has ended the employment contract without notice. Indeed the very purpose behind recognizing constructive dismissal is to acknowledge that where an employer unilaterally imposes substantive changes to an employment contract, the employee has the right to treat the imposition of those changes as termination. This termination is every bit as "real" as if the employee were actually told of the dismissal and is, accordingly, accompanied by the same right to claim for damages in lieu of notice:

> Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.
>
> (*Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 24)

[27] Given that both wrongful dismissal and constructive dismissal are characterized by employer-imposed termination of the employment contract (without cause), there is no principled reason to distinguish between them when evaluating the need to mitigate. Although it may be true that in some instances the relationship between the employee and the employer will be less damaged where constructive rather than wrongful dismissal has occurred, it is impossible to say with certainty that this will always be the case. Accordingly, this relationship is best considered on a case-by-case basis when the reasonableness of the employee's mitigation efforts is being evaluated, and not as a basis for creating a different approach for each type of dismissal.

[28] In my view, the courts have correctly determined that in some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to re-employment (potential barriers to be discussed below), requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and *not* to penalize the employer for the dismissal itself. The notice period is meant to provide employees with sufficient opportunity to seek new employment and arrange their personal affairs, and employers

who provide sufficient working notice are not required to pay an employee just because they have chosen to terminate the contract. Where notice is not given, the employer is required to pay damages in lieu of notice, but that requirement is subject to the employee making a reasonable effort to mitigate the damages by seeking an alternate source of income.

[29] There appears to be very little practical difference between informing an employee that his or her contract will be terminated in 12 months' time (i.e. giving 12 months of working notice) and terminating the contract immediately but offering the employee a new employment opportunity for a period of up to 12 months. In both situations, it is expected that the employee will be aware that the employment relationship is finite, and that he or she will be seeking alternate work during the 12-month period. It can also be expected that in both situations the employee will find that continuing to work may be difficult. Nonetheless, it is an accepted principle of employment law that employers are entitled (indeed encouraged) to give employees working notice and that, absent bad faith or other extenuating circumstances, they are not required to financially compensate an employee simply because they have terminated the employment contract. It is likewise appropriate to assume that 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. In either case, the employee has an opportunity to continue working for the employer while he or she arranges other employment, and I believe it nonsensical to say that when this ongoing relationship is termed "working notice" it is acceptable but when it is termed "mitigation" it is not.

[30] 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. This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here 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" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701). In *Cox*, the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and 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 (paras. 12-18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (*Farquhar*, at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v. Hughes*, [1980] 2 S.C.R. 880), it is extremely important that the non-tangible elements of the situation — including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements — be included in the evaluation.

[31] I note that the nature of this inquiry increases the likelihood that individuals who are dismissed as a result of a change to their position (motivated, for example, by legitimate business needs rather than by concerns about performance) will be required to mitigate by returning to the same employer more often than those employees who are terminated for some other reason. This is not, however, because these individuals have been constructively dismissed rather than wrongfully dismissed, but rather because the circumstances surrounding the termination of their contract may be far less personal than when dismissal relates more directly to the individuals themselves. This point is illustrated by *Michaud* in which a bank executive was constructively dismissed as a result of an organizational restructuring. The evidence showed that the bank offered the employee another executive position and was anxious to have him continue working for them. Importantly, there was no evidence that the relationship between the employee and the bank was acrimonious or that he would suffer any humiliation or loss of dignity by returning to work while he looked for new employment. As a result, mitigation was required.

[32] I also note parenthetically that I do not believe that damages awarded by lengthening the notice period because of bad faith conduct in the manner of dismissal (*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701) should ever be subject to mitigation. These damages, though expressed in terms of an extension to the "notice period", are in fact awarded as a result of the manner in which the employee is terminated and not in recognition of the fact that he or she is entitled to an opportunity to arrange his or her affairs prior to losing all employment income. As a result, the employee's ability to replace the lost income through mitigation is irrelevant, as this does not alter the suffering caused by the means of dismissal. In my view, *Wallace* damages ought therefore to be completely exempt from the need to mitigate.

[33] In sum, I believe that although both constructively dismissed and wrongfully dismissed employees may be required to mitigate their damages by returning to work for the dismissing employer, they are only required to do so where the conditions discussed in para. 30 above are met and the factors mentioned in *Cox* are considered. This kind of mitigation requires "a situation of mutual understanding and respect, and a situation where neither the employer nor the employee is likely to put the other's interests in jeopardy" (*Farquhar*, at p. 95). Further, the reasonableness of an employee's decision not to mitigate will be assessed on an objective standard.

[34] In this case, the trial judge cited case law referring to the requisite objective standard, a fact acknowledged by the Court of Appeal, at para. 47. Gower J. then analysed whether or not Mr. Evans' fears about the acrimonious work environment were "without foundation" and "unreasonable". He concluded that they were not. In reaching this conclusion, the judge considered a large number of factors which, in his view, indicated that Mr. Evans could reasonably consider the relationship with the employer to be damaged. These included the fact that Mr. Evans had a copy of the leaked letter from the union's legal counsel, the fact that he was not informed of an audit conducted by KPMG, and the fact that he was aware of the uneven treatment of several of his colleagues after the change in union leadership. I note also that the trial judge took into account the adversarial nature of the political process within the union more generally, and cited the incoming and outgoing presidents as saying that the election was "hard worked" and "contentious", and ultimately resulted in the candidates not even speaking to each other.

[35] It is the union that bears the onus of proving that a reasonable person in the place of Mr. Evans would have returned to work, and the trial judge determined that the

union had not discharged its burden. This was a finding of mixed fact and law and is therefore only subject to appellate intervention if there is a palpable and overriding error:

> Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule . . . is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.
>
> (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at para. 36)

[36] In overturning the trial judge, the Court of Appeal placed significant weight on the fact that the appellant had agreed to return to work if certain conditions were met (these included, at various times, a renegotiation of the terms of his wife's employment contract and a rescission of his letter of termination). The fact that an employee may be willing to return to work if certain terms are met does not, however, automatically lead to the conclusion that the employment relationship has not been severely harmed. Indeed, just because a wrongfully dismissed employee is *willing* to return to work notwithstanding a damaged relationship does not mean that the law ought to *require* him to do so. The question is one of reasonableness in all of the circumstances (*Christianson v. North Hill News*, at p. 750). One important issue, of course, is the nature of the terms of re-employment that the employee wishes to put in place. The question here is whether these conditions are designed to mitigate some of the humiliation and embarrassment which would otherwise result from returning to work.

[37] I agree with the Court of Appeal that Mr. Evans' requests for rescission of the letter of termination and re-establishment as an indefinite term employee were unreasonable since their effect would simply have been to extend his notice period to 29 months (see para. 41). Mr. Evans himself recognized this (reasons of the Court of

Appeal, at para. 43), as did the trial judge, who discussed at para. 98 of his reasons the consequences of a return to work on the length of the notice period. The requirement that Mr. Evans' wife would be given a new contract of employment was also unreasonable, as this had no relationship to the conditions under which he himself would be continuing his employment relationship with the union.

[38] The main issue is therefore whether, notwithstanding these unreasonable conditions, the particular aspects of Mr. Evans' testimony that were retained by the trial judge reflect an objective evaluation of the reasonableness of his decision to refuse employment in order to mitigate his damages. I will not discuss here the failure to take an alternative position in Prince George, accepting the finding that this did not constitute a serious offer by the union (see para. 74). The trial judge said, with regard to re-employment in the same position in Whitehorse (at para. 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.

[39] The Court of Appeal commented as follows (at para. 47):

> 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* . . . and from *Farquhar v. Butler Brothers Supplies Ltd.* . . . 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.

[40] Accepting that it is for the union to prove that Mr. Evans has failed in his duty to mitigate his damages (*Red Deer College*, at p. 332), it is instructive, I believe, to consider the reasons the appellant says the prospect of returning to work for the union made him apprehensive. He mentions in his factum:

> a) he was terminated without cause
>
> b) the termination was planned and deliberate
>
> c) he was "treated like a dog" in the telephone conversation of January 2
>
> d) no mention was made of working notice or payment in lieu of notice in the telephone conversation with Mr. Hennessy
>
> e) an audit of the Whitehorse office was commissioned in March 2003 under the guise of assessing property management issues
>
> f) he was being treated differently than other business agents who were terminated on the same day
>
> g) he had lost the respect of employers as the termination by the union was well known in Whitehorse
>
> h) he felt ostracized because he had supported the outgoing president

And later adds the fact of pending litigation and apprehended difficulty in working with the new executive.

[41] The first two of these reasons are, in my view, entirely irrelevant. The trial judge concluded that there was no bad faith in the termination, and that finding is not under appeal — the issue is solely that of mitigation. In evaluating the mitigation requirement, the trial judge had to consider the other reasons listed above by taking into account all of the evidence and the entire context in which the termination occurred. It

is therefore important to note that the written notice of termination was followed immediately by a telephone call whose object was to engage Mr. Evans in negotiations about a possible rehiring.

[42] The trial judge did not find that there was any acrimony between Mr. Hennessy and Mr. Evans, or, for that matter, between Mr. Evans and anyone else at the union. On the contrary, he said there was no bad faith on the part of the union in the negotiations. The evidence was that the tone of the conversation of January 2, 2003 was respectful and friendly (A.R, at p. 401). There is certainly no support for the allegation that Mr. Evans was "treated like a dog". This claim had to be addressed on an objective basis.

[43] With regard to the KPMG audit, the union states that Mr. Evans was not notified of this event simply because he was not attending work at that time. There is nothing in the record to substantiate the reason why Mr. Evans felt threatened by the holding of the audit, and the cross-examination of Mr. Hennessy on this point is totally inconclusive (A.R., at pp. 337-338). Moreover, the legal director of the union explained the reason for the audit, and his evidence was not challenged (R.R., at p. 78). With regard to the other dismissed employees, there was evidence of legitimate reasons for them being treated differently from Mr. Evans and, in any event, the union had every right to negotiate with each employee individually. As for the apprehended difficulty in working with the new executive, there was also strong evidence showing that this was not founded, as discussed hereafter.

[44] Other evidence of the work situation also had to be considered — Mr. Evans affirmed in his examination for discovery of June 2, 2005, for example, that his work

environment had not changed in May of 2003 (R.R., at p. 103). This is relevant to the reasonableness of his feelings of ostracization and claims that he would find it difficult to work with the new executive. It appears that the feelings of ostracization related more to the fact that Mr. Evans had spoken to other dismissed employees who felt ostracized than to his own experiences with the union. Mr. Evans refers specifically, in this regard, to Mr. Fairbrother (A.R., at pp. 107-109), a union dispatcher of the Vancouver office who told Mr. Evans that he was being ostracized. The trial judge, however, does not seem to have given any attention to the fact that Mr. Fairbrother had had a poor relationship with support staff in Vancouver prior to 2003 and that he worked in a separate dispatch building, not in the general Vancouver office. Further, the value of that evidence and its relevance to the Whitehorse state of affairs is not apparent. The trial judge apparently ignored the fact that there seemed to be no difficulty in the relationship of other dismissed employees with the new union executive, such as Mr. Owens, Mr. Ellis, Mr. Kelava and Mr. Cooper (R.R., at pp. 41-43, 80-81, 83-85 and 95 and 98).

[45] Mr. Evans' belief that he would no longer have the respect of employers and would be unable to perform effectively as a business agent in Whitehorse would also seem to be an entirely subjective concern since there is no evidence in the record to demonstrate that there was a reasonable basis for this belief. Furthermore, Mr. Evans operated in a highly independent way and offered to go back to work without mentioning this difficulty, under conditions he had set himself.

[46] With regard to the fact that Mr. Evans had started legal proceedings, I would note that this course of action can have an effect on the relationship between the parties and that this should be taken into account in each case, but that starting an action does

not by itself relieve the employee from the duty to mitigate his or her damages. Again, I reiterate that it is the entirety of the situation that must be evaluated in every case (see *Cox*, at paras. 13-18).

[47] I recognize that it is not for the Court of Appeal to substitute its opinion for that of the trial judge on findings of fact. In this case, however, the Court of Appeal found that the trial judge applied a purely subjective test (at paras. 47, 54-55) and that he failed to consider relevant evidence (at para. 56), both of which are errors of law. I agree with those conclusions.

[48] In my view, the most significant aspect of the Court of Appeal's decision is however its recognition that there was strong evidence that Mr. Evans was prepared to resume his old job, that he understood the May 23 letter to be an invitation to do so, and that the concerns discussed above were never invoked in the various negotiations with the union. The court writes (at para. 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.

[49] I agree with the Court of Appeal that on an objective test, a reasonable person would have viewed the union's May 23, 2003 letter as a *bona fide* employment opportunity. Although the request to return to work should have been drafted differently, Mr. Evans clearly understood that this was a unique position and that he had no work

alternative if he were to remain in Whitehorse. The request fulfilled the 24 months' notice that Mr. Evans had offered on January 3, 2003. He had been paid full salary and benefits for 5 months and the duration of his employment with the union would be for an additional 19 months. The trial judge had found that during the January 2, 2003 telephone conversation, Mr. Hennessy was attempting to negotiate an alternative to the immediate cessation of employment. The union had then and there demonstrated that it wanted Mr. Evans to continue his work with the organization.

[50] Although the fears expressed by Mr. Evans may have been subjectively justified, there was no evidence of acrimony between Mr. Hennessy and Mr. Evans, and no evidence that Mr. Evans would be unable to perform his duties in the future. In fact, Mr. Evans had himself suggested that he could continue to perform his work. I do not accept that the withdrawal of the January 2, 2003 termination letter, requested by Mr. Evans as a condition of returning to work, had anything to do with reestablishing his dignity — on his own admission, this request was meant to obtain an extension of the notice period. The fact that Mr. Evans was at one time prepared to return to work if his wife was guaranteed the same term also demonstrates that the reasons given by the trial judge to justify the refusal found no support in the evidence. This is all the more obvious when one considers the examination for discovery of June 2, 2005 where Mr. Evans was asked whether he wanted the old job back without any notice at all and answered: "Yeah, or start the notice from that day" (R.R., at p. 104). In my view, this evidence makes it clear that the relationship between Mr. Evans and the union was not seriously damaged and, given that the terms of employment were the same, it was not objectively unreasonable for him to return to work to mitigate his damages.

Conclusion

[51] For the above reasons, I would dismiss the appeal with costs.

The following are the reasons delivered by

[52] ABELLA J. — After 23 ½ years of service as a business agent and at the age of 58, Donald Evans was fired without notice by Teamsters Local No. 31 immediately following the bitterly fought election of a new executive whose candidacy he had opposed.

[53] Mr. Evans commenced a wrongful dismissal action against the Teamsters. After five months of negotiations, the Teamsters sent him a letter telling him that if he refused to come back to work for the balance of a 24-month work period, he would be fired. Again. At no time before sending this letter did the Teamsters ever indicate to Mr. Evans that he was entitled to 24 months' notice, in the form of either working notice or pay in lieu of notice.

[54] The trial judge found that Mr. Evans' decision not to return to his former workplace to mitigate his damages was a reasonable one. Based on the evidence, I see no error in this conclusion.

[55] I have had the benefit of reading the reasons of the majority. With respect, I do not share the view that the Court of Appeal was correct in concluding that the trial

judge made a legal error. Nor do I think the Court of Appeal was justified in reinterpreting the evidence and reversing the trial judge's factual findings, all of which were manifestly supported by the record.

Background

[56] Mr. Evans had been a member of the Teamsters since 1969 when he moved to Whitehorse and took a job as a truck driver. In 1979, he was appointed as a business agent for Teamsters Local No. 31 in the Yukon region. He remained in that position until he was fired on January 2, 2003.

[57] Mr. Evans' responsibilities as a business agent included organizing workers, negotiating and drafting collective agreements, handling grievances, attending arbitrations, and assisting Teamsters members with other matters. He became well known as the "Teamsters rep" in the Whitehorse community where he lived and worked. His wife, Barb Evans, worked as a secretary in the Whitehorse office with him. They were the only employees in that office.

[58] In December 2002, Teamsters Local No. 31 held an election to elect a new executive. During the campaign, Mr. Evans had supported the incumbent, Garnet Zimmerman, and actively campaigned on his behalf. The election was hard fought. Ultimately, the former executive was ousted and replaced by a new slate led by Stan Hennessy. Mr. Hennessy was elected president on December 16 and formally took office on January 2, 2003.

[59] On December 23, 2002, Mr. Hennessy met with a lawyer, Leo McGrady Q.C., to discuss the possible application of s. 13 of the union's Bylaws to six employees of the Teamsters, all of whom had supported the incumbent president in the election. Section 13, passed in March 2000, links the term of appointment of the business agents to the term of the executive which had appointed them and states, in part:

> "Business Agents and Assistant Business Agents shall be appointed and may be removed at will only by the appointing authority. ..." Appointed Business Agents cannot be appointed for a period beyond the term of office of the appointing authority.

Four of the six employees Mr. Hennessy asked about were business agents outside Vancouver (Mr. Evans, Ron Owens, John Ellis and Jim Jeffery). Two others who worked in the Vancouver offices (Jim Fairbrother and Jure Kelava) were not business agents.

[60] Mr. McGrady, in a letter dated December 31, 2002, cautioned Mr. Hennessy about the application of s. 13 of the Bylaws to Mr. Evans who, given his length of service, was more likely to be found to be an indefinite term employee. His advice to Mr. Hennessy was as follows:

> While the Local may legally be entitled to take the [position that s. 13 applied to the business agents and ended their appointment], I have serious reservations about whether they would be successful at trial, if the business representatives chose to sue. There are a number of reasons for that opinion.

While the language of Section 13 ties the duration of the business agents' appointment to the duration of the term of office of the appointing authority, that language appears for the first time in the March 17, 2000 revision of the Bylaws. I have examined the relevant provisions in prior version[s] of the Bylaws, dated July 22, 1993, June 9, 1978, November 21, 1972, and January 11, 1967. There is no corresponding language.

There is provision in the current Bylaws, Section 14 which limits the authority of the Local executive board to bind the Local Union with respect to personal service contracts only for the term of their office. Similar language is found in the 1993 version. However, the language is at best ambiguous. The courts have consistently held that it takes express and clear language to deprive an employee of the protection of the common law regarding reasonable notice of termination.

In addition, I understand that there has been no formal termination and renewal of these employees over the elections during which they have been employed. This could be considered as a waiver of any fixed term to the contract of employment.

In conclusion on this point, while it is open to the Local to take the position that they are on fixed term contracts, I do not recommend that course. That is particularly so with respect to Messrs Evans and Owens. Both of these individuals are long term employees (27 years [*sic*] and 26 years respectively). Both are either at or very close to retirement age. These two factors would carry a great deal of weight in a court's determination of

whether these were fixed term employees or indefinite term employees.

...

You may wish to place reliance on Section 13 as an initial position, but abandon that position in the course of negotiations should either of these two individuals make a sustained claim to indefinite term status. [Emphasis added.]

[61] Mr. McGrady also addressed the option of providing the business agents with working notice or pay in lieu of notice, suggesting that working notice would be the more economical option. He recommended to Mr. Hennessy that the employees be given a simple termination letter, designed to "maximize the Local's options and to minimize its exposure to liability", and proposed the following language:

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.

[62] He advised that if the Teamsters chose to provide the employees with working notice, the following specific language be included:

> 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.

[63] The letter containing this legal advice was leaked to Mr. Evans and the other targeted employees on the morning of January 2. Later that same day, Mr. Evans received a letter from Mr. Hennessy advising him that "[p]ursuant to Section 13 of the Bylaws", his employment was terminated. Despite Mr. McGrady's advice, there was no mention of a notice period in the termination letter. Three of the four business agents from outside Vancouver were fired by Mr. Hennessy in the same manner.

[64] Shortly after receiving the termination letter, Mr. Evans was told to stand by for a phone call from Mr. Hennessy. The two spoke by phone that afternoon. Mr. Hennessy confirmed the termination, making no mention of a notice period.

[65] Mr. Evans immediately retained counsel, Grant Macdonald, Q.C. The next day, January 3, Mr. Macdonald wrote to Mr. Hennessy, informing him that Mr. Evans was prepared to accept 24 months' notice of termination:

> In our opinion, separate and apart from the severance payment, Mr. Evans is entitled to reasonable notice of termination of his employment.
>
> ... As you know, Mr. Evans has served Teamsters Local Union No. 31 loyally and professionally for the past 23½ years. Separate and apart from legal principles, he deserves more than termination without notice.
>
> Mr. Evans is prepared to accept 24 months notice of termination of his employment. He remains loyal to the union and desirous of representing union members in the Yukon and, for this reason, is quite prepared to accept a combination of working notice and/or pay in lieu of notice.

[66] Mr. McGrady responded on behalf of the Teamsters by letter on January 13, stating that Mr. Hennessy's letter of January 2 "was not intended as a termination without notice. Rather, it was the notice the newly-installed Executive of the Local is obliged to provide pursuant to Section 13 of the Bylaws. No notice period is stipulated in s. 13.

[67] Mr. McGrady confirmed that Mr. Evans would continue to be paid while the Teamsters considered its position. Mr. Macdonald, in a letter to Mr. McGrady dated January 14, responded that the January 2 letter could only be seen as terminating Mr. Evans' employment without notice. The same day, he indicated that no legal action would be taken before January 20, in order to give the Teamsters time "to consider Mr. Evans' proposal" that he would accept 24 months' notice.

[68] Mr. Evans subsequently learned that on January 16, the Teamsters had rescinded the letter of termination for the business agent for Vancouver Island, Mr. Owens. He also learned that Mr. Jeffrey, the business agent in Prince George, was reinstated with seven months' working notice.

[69] On January 27, 2003, Mr. Evans commenced this action for wrongful dismissal.

[70] In March, the Teamsters directed KPMG Chartered Accountants to perform an audit of the Whitehorse office. Mr. Evans and his wife, the only employees in that office, were given no notice of this audit. The trial judge found that Mr. Evans felt "threatened and demeaned" by the experience, especially since the auditors acted like a "forensic team" in their search ([2005] Y.J. No. 106 (QL), 2005 YKSC 71, at para. 83).

[71] A settlement meeting was held with Mr. Hennessy, Mr. Evans and their respective counsel on April 3. It was unsuccessful. On Mr. Evans' behalf, Mr. Macdonald strongly maintained that Mr. Evans was entitled to 24 months' notice. In response, Mr. McGrady replied:

> I am instructed to say, at the outset with respect to your comments about the strength of Mr. Evans' case, that my client respectfully but emphatically disagrees both with the assessment of the case as a strong one, and with the suggestion that somehow Mr. Evans is entitled to 24 months' salary. In the event of the parties being unable to reach agreement, the Local will vigorously pursue its defence that Mr. Evans abandoned his position without notice and has left the members, for which he was responsible, unrepresented and unserviced. We will also vigorously advance the other breaches of his employment contract as set out in the balance of paragraph 8 of the Statement of Defence.

Mr. Evans raised the possibility that his wife be appointed business agent in his stead, in return for which he would not pursue his lawsuit. The Teamsters, in turn, proposed a draft contract of employment for her. The parties were unable to agree on its terms.

[72] On May 23, Mr. McGrady wrote a letter to Mr. Macdonald saying there was no basis for future negotiations and that Mr. Evans was expected to return to work for an additional 19 months:

> On behalf of the Local, we request that Mr. Evans return to his employment no later than June 1, 2003 [this was later changed to June 2], 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. [Emphasis added.]

[73] This was the first time that the Teamsters acknowledged that Mr. Evans was entitled to a 24-month notice period, causing Mr. Macdonald to respond on behalf of Mr. Evans, asking:

> ... would you be so kind as to immediately provide any documentation in the possession or control of Teamsters Local Union No. 31 evidencing that Mr. Evans was ever given 24 months notice of termination of his employment. We are unaware of such notice being given to Mr. Evans so we are somewhat taken aback by your letter.

[74] On May 30, Mr. Macdonald wrote to Mr. McGrady:

> Would you be so kind as to advise Teamsters Local Union No. 31 that if Teamsters Local Union No. 31 immediately rescinds and withdraws the termination letter dated January 2, 2003, Mr. Evans will return to his position effective June 2, 2003.

This request was denied in a letter from Mr. McGrady on the same day:

> Local 31 is not prepared to accept the conditions or the proposal that you make in your letter. My client requires Mr. Evans to report for work on Monday, June 2, 2003. He will be working through the 24-month notice period from January 1, 2003 through to December 31, 2004. [Emphasis added.]

[75] In reply, Mr. Macdonald reiterated his position that Mr. Evans had never been given 24 months' notice and that, in the circumstances, "he cannot rationally be expected to respond positively to your client's directive to return to work".

[76] When Mr. Evans failed to come to work on June 2, 2003, the Teamsters sent Mr. Macdonald a letter the same day, purporting to terminate Mr. Evans for cause. The letter stated: "The immediate cause [for dismissal] is the fact that he is AWOL, and guilty of insubordination."

[77] On June 3, the Teamsters posted a notice to its members that it was accepting applications for the position of business representative in the Yukon Territory.

Prior Proceedings

[78] On March 11, 2004, Veale J. made a pre-trial order declaring that Mr. Evans' employment was terminated by the Teamsters on January 2, 2003.

[79] The trial took place before Gower J. of the Yukon Territory Supreme Court. He found that Mr. Evans was dismissed without notice, and, therefore, wrongfully, on January 2, 2003.

[80] At trial, the Teamsters argued that the purpose of Mr. Hennessy's phone call to Mr. Evans on January 2 was to negotiate a period of working notice. That argument was firmly rejected by Gower J., who concluded that Mr. Hennessy's intention during that call was to continue to rely on s. 13 of the Bylaws as authority for terminating Mr. Evans that day without notice.

[81] The Teamsters also argued that Mr. Evans had received 24 months' working notice, including the 5 months of pay in lieu of notice while the parties were negotiating, and 19 months' working notice commencing June 2. They also submitted that it was "completely unreasonable" for Mr. Evans to refuse the offer made in the letter of May 23. In so doing, he failed to take reasonable steps to mitigate his damages.

[82] Gower J. also categorically rejected this submission. He found that the letter of May 23 was "entirely incapable of being interpreted as an offer of re-employment". Rather, he found it to be a "demand which, if refused, would result in Mr. Evans' termination" (para. 81). He held that it was not an unreasonable position for Mr. Evans to return to work if his termination letter was rescinded, based on Mr. Evans' knowledge that the termination letter of Mr. Owens was rescinded.

[83] He also found that it was reasonable for Mr. Evans to refuse the Teamsters' demand to return to work on June 2. He gave nine reasons for this conclusion:

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. Although the Union's evidence was that this was done strictly for the purpose of assessing property management issues relating to the Union's office building, it appears as though the auditors acted more like a forensic team in their comprehensive search and seizure of documents. Understandably, Mr. Evans felt threatened and demeaned by the audit and his concerns in that regard were no doubt exacerbated by the fact that Mr. McGrady's letters of April 3rd, May 5th and May 23rd, 2003 were all prefaced as regarding the "KPMG Report".

5. Mr. Evans' fellow business agent in Prince George, Jim Jeffery, who had also been terminated on January 2, 2003, was re-instated effective January 15th with seven months working notice. 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, who was also terminated on January 2, 2003, had been re-instated effective January 16th and his termination letter had been rescinded. Mr. Evans could not fathom why he was being treated differently from Mr. Owens. Thus, it is understandable that he 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 because he had previously supported the outgoing president, Mr. Zimmerman. He felt the conditions in the Vancouver officer were "quite bad" and that he found it difficult to work under those conditions. Further, Mr. Fairbrother was of the view that Mr.

> Hennessy and Mr. Peterson, the newly elected secretary treasurer, both had "an absolute hatred" towards the appointed business agents. Finally, after Mr. Fairbrother learned that Mr. Evans had been terminated, he telephoned him and talked to him about what was happening in the Vancouver office. The Union's counsel argued that, viewed objectively, Mr. Fairbrother's complaints about being treated badly in the Vancouver office were over-stated and without foundation. While that may be, there is no reason that Mr. Evans should have known that at the time he received this information from Mr. Fairbrother. Therefore, 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 of the circumstances.
>
> 9. Further, the outgoing president, Garnet Zimmerman, testified that the campaign prior to the election in December 2002 had been hard fought and difficult. In direct examination he said:
>
> > " … Teamster politics are tough at the best of times, but this was a fairly contentious - - I think it was nasty election. It certainly wasn't run on the cleanest fronts, I will say, with our opposition. I think that they used every trick in the book that they could and ultimately were successful in it".
>
> Mr. Hennessy was asked in cross-examination whether the election was "bitterly contested". He replied, "It was a hard worked election, yes", and that he and Mr. Zimmerman were not really on speaking terms afterwards. Mr. Evans had been a supporter of Mr. Zimmerman during the campaign and the two spoke over the telephone about the issue of Mr. Evans' termination. Mr. Evans was aware of the contentious nature of the election and it was not unreasonable for him to factor this into his consideration of whether to return to the Union's employment. [para. 83]

[84] Gower J. concluded that in these circumstances, the Teamsters had not satisfied their burden of showing that Mr. Evans acted unreasonably in refusing to come back to his former workplace. He distinguished those cases relied on by the Teamsters — holding that an employee's failure to accept work with the employer who terminated him may constitute a failure to mitigate — on the basis that they were constructive dismissals. Citing *Cox v. Robertson* (1999), 69 B.C.L.R. (3d) 65, 1999 BCCA 640, he concluded that in cases of wrongful dismissal, it would be rare to find that the duty to mitigate requires a return to the former workplace. In most cases, he observed, the relationship is so frayed that no reasonable person would expect the parties to work

together again harmoniously. Employees cannot be required to return to "an atmosphere of hostility, embarrassment or humiliation" (*Farquhar v. Butler Brothers Supplies Ltd.* (1988), 23 B.C.L.R. (2d) 89 (C.A.), at p. 94).

[85] Gower J. also rejected the Teamsters' argument that by demanding reinstatement, Mr. Evans was attempting to obtain 29 months' notice; that is, that he was requesting reinstatement in order to get 24 months' notice of termination in addition to the months he was paid while the negotiations were taking place. He found that Mr. Evans' true motivation was not "a desire for a longer notice period" (para. 99), but to be treated the same way as his fellow business agent, Ron Owens, whose letter of termination had been rescinded in January. In any event, he found it "highly unlikely that Mr. Evans would have been able to successfully argue for an *additional* period of notice ... 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" (para. 98 (emphasis in original)).

[86] Gower J., while not "particularly impressed" with Mr. Evans' efforts to get alternate employment, found that the Teamsters had not discharged their burden of showing 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 alternate employment in the Yukon" (para. 67). As a result, he held that Mr. Evans was entitled to 22 months' notice, and awarded him $100,008.79 in damages, representing the salary and allowances owed to him.

[87] This decision was overturned on appeal by the Yukon Court of Appeal ((2006), 231 B.C.A.C. 19, 2006 YKCA 14). Emphasizing Gower J.'s factual findings

that Mr. Evans was not qualified for other jobs in Whitehorse and that his efforts to find alternative employment were less than impressive, the Court of Appeal drew the inference that "Mr. Evans knew that a return to his previous employer was the only way he had to fulfill this obligation [to mitigate his damages]" (para. 31). It concluded that the letter of May 23 made it clear to Mr. Evans, and Mr. Evans understood, that there was a job open to him, and that he would be paid for two years from January 2, 2003. In those circumstances, the Court of Appeal found Gower J.'s finding that there was no genuine offer of re-employment to be "clearly wrong".

[88] The Court of Appeal found that Gower J. had also erred in applying a "purely subjective" test when he concluded that Mr. Evans' "fears" were not without foundation (para. 47). In its view, Mr. Evans' refusal to return to work was objectively unreasonable:

> The evidence does not support the conclusion that Mr. Evans' circumstances, viewed objectively, justified his refusal to resume employment with the union. [para. 57]

[89] Nor did the Court of Appeal agree with Gower J.'s conclusion that there was a distinction between wrongful and constructive dismissals in assessing the duty to mitigate. In particular, it disagreed with the conclusion that in the case of wrongful dismissals, employees will rarely be required to return to their former employers to mitigate damages, concluding instead: "Where the facts of the case, viewed objectively, warrant it, mitigation requires just that" (para. 52).

[90] Notwithstanding the trial judge's express findings to the contrary, the Court of Appeal also concluded that Mr. Evans' demand that he be reinstated as an indefinite term employee was an unreasonable expectation designed to give Mr. Evans the

opportunity to extend his notice period to 29 months. Stating that it was not open to the trial judge "to find other than that it was unreasonable for Mr. Evans to refuse the offer", the Court of Appeal concluded that Mr. Evans "should have returned to employment for the union shortly after his termination on 2 January 2003" (paras. 55 and 59). Because "Mr. Evans failed to act reasonably with respect to the job offer made to him by the union" , the damages award was set aside in its entirety (para. 59).

Analysis

[91] The issue in this appeal centres on the trial judge's conclusion that it was not unreasonable for Mr. Evans to refuse to return to work on June 2. In particular, the issue is whether the decision not to return to work constitutes a failure by Mr. Evans to take reasonable steps to mitigate his damages.

[92] In my view, the result of the Court of Appeal's decision is that the Teamsters have been permitted to unilaterally transform their unlawful treatment of Mr. Evans on January 2, which had entitled him to a considerable period of notice, into a lawful dismissal on June 2 which entitled him to no notice. With respect, this flies in the face not only of the law of wrongful dismissal, but also of the trial judge's factual findings.

[93] This Court has recognized employment contracts as a unique subset of contracts marked by an inherent imbalance of bargaining power, making the wholesale, uncritical acceptance of principles from contract law inappropriate (*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986). The uniqueness of employment contracts was well explained by Professor Judy Fudge as follows:

> Both the nature of the employment relationship, that is, the rights and duties that define it, and the nature of the commodity sold, which is the human capacity to work, create pressures that are hard to contain within the conceptual boundaries of contract. Historically, the employment contract emerged out of, and was infused with, master and servant law. Employment is an asymmetrical relationship in which the employee implicitly cedes authority to the employer. Inequality is not just a question of bargaining power; it is an essential institutional feature of employment that the employer has a unilateral and residual right of control and the employee has an open-ended duty of obedience. Moreover, concepts of contract law must accommodate the distinctive object of the exchange in employment — the capacity of human beings to labour. In a liberal society, human beings are to be treated with dignity and respect. The employee is both the subject and object of the employment contract, with the result that the employment relationship helps to define an individual employee's self-worth.
>
> (Judy Fudge, "The Limits of Good Faith in the Contract of Employment: From *Addis* to *Vorvis* to *Wallace* and Back Again?" (2007), 32 *Queen's L.J.* 529, at p. 530)

[94] Because of the inherent imbalance in bargaining power, the central role that work plays in the individual's sense of identity, and the recognition that "the point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection", this Court has sought to "encourage conduct that minimizes the damage and dislocation (both economic and personal)" inherent in the termination of employment (*Wallace*, *per* Iacobucci J., at para. 95).

[95] The law has, accordingly, imposed "an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal" (*Wallace*, *per* McLachlin J., at para. 115). This period of reasonable notice aims to "cushion the blow of unemployment" (G. England, "Recent Developments in the Law of the Employment Contract: Continuing Tension Between the Rights Paradigm and the Efficiency Paradigm" (1994-95), 20 *Queen's L.J.* 557, p. 599).

[96] The majority's reasons in this Court suggest that there is "little practical difference" between terminating an employee by giving notice and dismissing an employee without notice but later offering re-employment for a period of time that would have constituted reasonable notice (para. 29). In suggesting that it is "nonsensical to say that when this ongoing relationship is termed 'working notice' it is acceptable but when it is termed 'mitigation' it is not", the majority, with respect, fundamentally changes the obligations of an employer upon termination and appears to remove critical protection from an employee at a time when, as this Court observed in *Wallace*, "the employee is most vulnerable" (para. 95).

[97] Mitigation is a limiting principle in damages, imported into the employment context from contract law (*Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 65). Professor Waddams explored the basis of the rule of mitigation in his work on *The Law of Damages* (loose-leaf ed.):

> A plaintiff is not entitled to recover compensation for loss that could, by taking reasonable action, have been avoided. This rule rests partly on the principle of causation: losses that could reasonably have been avoided are caused by the plaintiff's inaction rather than by the defendants' wrong and partly on a policy of avoiding economic waste. (¶15.70)

In *Darbishire v. Warran*, [1963] 1 W.L.R. 1067 (C.A.), Pearson L.J. explained:

> ... it is important to appreciate the true nature of the so-called "duty to mitigate the loss" or "duty to minimise the damage." The plaintiff is not under any actual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. <u>The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss.</u> [Emphasis added; p. 1075.]

[98] The leading judgment from this Court explaining how the principle of mitigation is to be applied in the employment context is *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, at pp. 329-30, where Laskin C.J. (writing for the majority) approved the following statement from Rand J., dissenting, in *Cemco Electrical Manufacturing Co. v. Van Snellenberg*,[1947] S.C.R. 121:

> The principle of mitigation is a necessary corollary of the basis of damages, namely, that they have arisen in a legal sense from a violation of a right. Underlying this is the assumption that a person must concern himself with his own interest if he would seek from the law the vindication of his civil engagements. In a contract of employment, the remuneration is either for work done or for the commitment to work. Upon a dismissal which is a repudiation of the obligation to accept the one or the other, as the remedy of specific performance is not available, the employee's capacity to work is now released to him to be used as he sees fit. He may decide to waste it or he may demand that the employer make good its full utility. In any event, he must act reasonably in seeking to employ it as he would or might have had the particular engagement not been made. It is the loss of earnings resulting from a denial of a right to use or commit his working capacity profitably that is the substance of his claim, and as he must prove his damages, it must appear that they arose from the breach of contract. [Emphasis added; p. 128.]

Laskin C.J. framed the "duty" to mitigate as a qualification of 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". The duty underscores the notion 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" (p. 330).

[99] In *Red Deer College v. Michaels*, at p. 322, the Court held that the burden of proving that an employee has failed to mitigate his or her damages lies with the employer. Laskin C.J. cited Cheshire and Fifoot's *Law of Contract (*8th ed. 1972), to explain the nature of the burden:

> ... the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame. [p. 599]

As this passage suggests, the burden of proof is onerous. This is consistent with the approach to mitigation as a principle in damages more generally. As Waddams observed: "In case of doubt, the plaintiff will usually receive the benefit, because it does not lie in the mouth of the defendant to be over-critical of good faith attempts by the plaintiff to avoid difficulty caused by the defendant's wrong" (¶15.140).

[100] An employer alleging a failure to mitigate must prove two things: that the employee did not make a reasonable effort to find new work and that had the employee done so, he or she would likely have been able to obtain comparable alternative employment. In other words: that the loss was avoidable.

[101] The question has occasionally arisen whether employees are required to mitigate their losses by accepting re-employment with the same employer who fired them. Beginning in the 1980s, some courts came to accept that in cases of constructive dismissal in which the employment relationship remained one of "mutual understanding and respect", an employee may be expected to accept alternative employment with the employer to mitigate his or her losses (*Farquhar*, at p. 95).

[102] Counsel for the Teamsters conceded before us, graciously, that he knew of no case where this principle has been applied when an employee has been wrongfully dismissed. This is not surprising, given that courts have consistently acknowledged the conceptual difference between the two forms of dismissal.

[103] As the Alberta Court of Appeal said in *Christianson v. North Hill News Inc.* (1993), 106 D.L.R. (4th) 747:

> In wrongful dismissal cases, ... the plaintiff need not mitigate damages by taking a significant demotion, or by going back to the employer who fired him or her. All that is trite law. [p. 750]

The same principle was expressed in *Farquhar* by Lambert J.A.:

> If the employer orders the dismissal, then there is normally no question of the employee mitigating his loss by continuing to work for the employer. But if the dismissal is a constructive one, ... then a question may arise about whether the employee should remain in the work force of the employer, on new terms and under a new arrangement, while he is seeking work elsewhere. [p. 93]

(See also *Smith v. Aker Kvaerner Canada Inc.*, [2005] B.C.J. No. 150 (QL), 2005 BCSC 117, at para. 41.)

[104] It is true, however, that the court in *Cox v. Robertson* appeared to accept the possibility that wrongfully dismissed employees might be expected to mitigate their damages at a former workplace. But, significantly, it concluded that the dismissed employee in that case was not required to return to work, noting that it was "almost amusing, and highly artificial" to suggest that employee and employer could work closely together while the employee was pursuing an action for wrongful dismissal (para. 16).

[105] In my view, the distinction between constructive and wrongful dismissal is an important one. Constructive dismissal occurs when an employer breaks or repudiates a fundamental term of the contract. The employee is then given the option of either accepting the new terms, or treating the contract as at an end and suing for damages. In such circumstances, it may, infrequently, be possible for an employee comfortably to

stay on while looking for work elsewhere.

[106] On the other hand, when an employee is fired without cause and without reasonable notice, the dismissal is, at law, "wrongful". The employee is immediately entitled to an action in damages. He or she has lost the job, period. That means, to use the language of Professor Fudge, that the employer has lost the "right of control" and the employee has lost the "open-ended duty of obedience" (p. 530).

[107] But even if one can assert that a wrongfully dismissed employee's duty to mitigate may include returning to the workplace, I agree with Gower J. (and the existing jurisprudence) that it would only be in "the rare case" that such an expectation would be reasonable (para. 93). The rarity of expecting a dismissed employee to mitigate damages in the same workplace is already well recognized in the case of constructive dismissals. The reason such an expectation should remain a remote and exceptional possibility is explained by David Harris in his text *Wrongful Dismissal* (loose-leaf ed.), vol. 2:

> Surely the employee should not be kept on the employer's strings, having to respond at the slightest whim of the same company that deliberately rejected him by the act of dismissal. [p. 4-292.3]

[108] The raw application of the remedial principle of mitigation in the way the Court of Appeal proposes, has the danger of making routine the requirement to accept re-employment with an employer who acted wrongfully. This, in my view, is particularly troubling because it disregards the uniqueness of an employment contract as one of personal service. An employee cannot be forced to work against his or her will. This is reflected in the legal principle that an employer will never be entitled to an order of specific performance. Fry L.J. captured this concept in *De Francesco v. Barnum*, (1890), 45 Ch. D. 430, where he said:

> For my own part, I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases. I think the Courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery ... [Emphasis added; p. 438.]

[109] This is a principle that should be most jealously guarded in the case of an employee who has been wrongfully dismissed. It is for that reason that I also have difficulty accepting the Court of Appeal's application of a purely objective test to Mr. Evans' decision not to return to the workplace from which he had been fired. An objective test makes little sense when applied to an analysis that turns on whether a particular dismissed employee should be "obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (*Farquhar*, at p. 94).

[110] The majority in this Court has accepted the Teamsters' argument that *Reibl v. Hughes,* [1980] 2 S.C.R. 880, sets out an objective test. In my view, *Reibl v. Hughes* has no application to this case. It involved a consideration of causation in connection with a physician's duty of disclosure to a patient. The Court's reasoning in support of a "modified" objective standard was particular to that specific context and has been found not to apply in other circumstances. In *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, for example, the Court applied a subjective test to determine whether a manufacturer's failure to warn of risks associated with its product caused the harm complained of.

[111] The Court of Appeal, at para. 50, relied on the following passage from *Cox v. Robertson* to justify the application of an objective standard:

> 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, 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… ." [Emphasis added; para. 11.]

The Teamsters also cited the following passage from *Forshaw v. Aluminex Extrusions Ltd.* (1989), 39 B.C.L.R. (2d) 140 (C.A.), in support of an "objective" standard:

> The duty to "act reasonably", in seeking and accepting alternate employment, cannot be a duty to take such steps as will reduce the claim against the defaulting former employer, but must be a duty to take such steps as a reasonable person in the dismissed employee's position would take in his own interests — to maintain his income and his position in his industry, trade or profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the employer who has wrongfully dismissed him. The former employer cannot have any right to expect that the former employee will accept lower paying alternate employment with doubtful prospects, and then sue for the difference between what he makes in that work and what he would have made had he received the notice to which he was entitled. [Emphasis added; emphasis in original deleted; p. 144.]

[112] I do not see support for a "purely objective" test in these passages, but I do see support for two other propositions. The first is confirmation in *Farquhar* that re-employment will be a rare circumstance for a dismissed employee. The second is the direction in *Forshaw* that the duty to "act reasonably" in mitigating must be seen not just from the perspective of a reasonable person, but from the perspective of a "reasonable person in the dismissed employee's position".

[113] This latter observation in particular acknowledges that different employees will be differently affected by a dismissal, and are entitled to consideration being given to the reality of their own experience and reaction. A court clearly cannot ignore the

objective reality, but neither can it disregard the employee's subjective perceptions in assessing the reasonableness of the decision not to return to a workplace from which he or she has been unlawfully dismissed. Both objective and subjective factors are relevant in evaluating what a reasonable person *in the position of the employee* would do.

[114] A review of Gower J.'s nine reasons for accepting the reasonableness of Mr. Evans' decision not to return to work shows, in any event, that far from being "purely subjective", as suggested by the Court of Appeal, they reflect both subjective *and* objective considerations. Since both are relevant, Gower J. made no error in identifying and applying the correct legal test.

[115] The conclusion that the trial judge made no error in law brings me to what I see as the most problematic aspect of the decision of the Court of Appeal. Appellate courts are expected to be respectful of the determinations trial judges make in assessing facts and credibility, and to decline to interfere unless the error was manifest, palpable and overriding, or was a mischaracterization or misappreciation of the evidence. This is some of the language used to signal the high threshold of error required before the findings can be displaced (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802). None applies in this case.

[116] The trial judge's reasons in this case reflect a thoughtful and thorough review of the evidence, which he was best placed to conduct. He made no errors of law and his conclusions with respect to the reasonableness of Mr. Evans' decision not to accede to the Teamsters' demand that he return to the workplace or face dismissal for cause, are

amply supported in the evidence. The following are examples of those substantiated findings which were nonetheless reinterpreted or overturned by the Court of Appeal or by the majority in this Court.

[117] The Court of Appeal and the majority in this Court interpreted the purpose of the January 2 phone call differently from the trial judge. At trial, the Teamsters had argued that Mr. Hennessy's intention during this conversation was to negotiate a period of working notice. Gower J. rejected this submission. While Mr. Hennessy referred to giving Mr. Evans some "clean up time", he never mentioned a notice period. After listening to the conversation recorded by Mr. Evans at the time, Gower J. concluded that it was "less than clear" that Mr. Hennessy was attempting to negotiate a term of re-employment and found instead that his intention was to continue to rely on s. 13 of the Bylaws as authority for terminating Mr. Evans without notice on January 2.

[118] In his reasons, Gower J. set out the relevant portions of that conversation, along with his impressions of the evidence. The emphases and commentary below are from those reasons:

> Page 2:
>
> "[Hennessy] 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.**
>
> [Evans] Right.
>
> [Hennessy] Um, and I wanted to know, basically, I guess, because I was under the understanding earlier that you were going to retire. The call today was to find out how much time you needed …"
>
> Note: Mr. Hennessy did not refer to leaving the office "as is" with ***Mr. Evans*** continuing his employment.
>
> Page 3:

"[Hennessy] The problems that we have, of course, with the new administration and executive board is **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**."

Page 4:

"[Evans] … **I know that I have to be terminated as of today** …

[Hennessy] **That's what the letter says** …

…

[Evans] Okay, so am I still on the payroll as of five o'clock or am I off the payroll?

[Hennessy] No, no, **your appointment has been terminated**, …"

Page 5

"[Evans] … **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.** …

[Hennessy] **That's fine** …"

Note: Why would Mr. Evans be considering legal action for "unfair dismissal" if he was still employed? And yet, Mr. Hennessy does not attempt to correct him on this point.

Pages 5 and 6:

"[Hennessy] **These are new bylaws**, Don; that was changed in the last couple of years.

[Evans] Well, **it doesn't say we will be terminated on that date,** though.

[Hennessy] **Oh, yes it does**. Well, you know, my advice is that if **we're going to sever employment** we are going to have to make that decision."

Page 6 and 7

"[Evans] … you're telling me because you guys take over January second, **you're terminating my service as of today**, and you guys take office. You're not saying,

> ‘Don, we’ll keep you on another year to try to figure out what’s going on …
>
> [There is further discussion regarding Bylaw 13]
>
> [Evans] … **So you’re saying, effective today, I am terminated** because the other authority is gone?
>
> [Hennessy] **That’s right**.
>
> [Evans] Okay. **It does not say you cannot keep me on for another year, another four years, or another six months**. …
>
> [Hennessy] What is says, is, **if in fact we were to renew the employment**, **we can renew** and it’s under our mandate …”
>
> Page 7
>
> “[Evans] … You guys take over power today, **I could be terminated today. But there is nothing in there says I can’t be held on, then let go a year down the road, is there?**
>
> [Hennessy] 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 made 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. [para. 25.]

[119] Notwithstanding the trial judge’s findings and the supporting evidence, the majority has characterized the objective of this conversation as being “to engage Mr. Evans in negotiations about a possible rehiring” (para. 41). While this was a finding the trial judge might potentially have made, he drew a different, but entirely reasonable, inference that the Teamsters purported to rely on s. 13 of the Bylaws —which they had been advised by their own lawyer most likely did not apply to Mr. Evans — to support his termination without any notice. I see no reason to disturb it.

[120] As for the Teamsters' letter of May 23 to Mr. Evans, the trial judge construed it as a *demand* that Mr. Evans return to work, not an offer. It is difficult to read it any other way. The words in the letter were "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." This was followed on May 30 by a letter from Mr. McGrady stating: "My client requires Mr. Evans to report for work on Monday, June 2, 2003." This is a direction, not an offer.

[121] What followed were five years of litigation resulting from the Teamsters' failure to give Mr. Evans notice when he was fired on January 2, 2003. They could have told him then that his employment would end two years later, or that his employment would be terminated immediately with two years' pay in lieu of notice. What they could not do was fire him without notice on January 2, and then, when negotiations failed, fire him unlawfully again when he failed to accept their *ex post facto* acknowledgment that as of January 2, he was entitled to 24 months' notice, but had to spend it working for them. As Gower J. noted:

> The Union's approach here seems particularly perplexing since an employer can always terminate an employee upon reasonable notice. Therefore, even if Mr. Evans assumed that he had been re-appointed to another five-year term on January 1, 2003, as the Union feared he might, it could still have given him reasonable notice of termination. Therefore, the Union did not gain any advantage by purporting to terminate Mr. Evans immediately and then attempting to engage him in negotiations on rehiring him for a fixed term. Conversely, there was no prejudice to the Union to wait until after the commencement of the new five-year term and then provide Mr. Evans with reasonable notice of his termination. After all, I understood the Union and its counsel to concede that, as Mr. Evans was likely an indefinite-term employee, he would have been entitled to reasonable notice of termination in any event. [para. 34]

[122] When, on January 3, Mr. Evans' lawyer offered to accept 24 months' notice, including through a combination of working notice and pay in lieu of notice, the matter

could again have been easily resolved. Instead, five months of negotiations ensued, at the end of which time the Teamsters took the position, unsustainable on the evidence, that the dismissal had been with 24 months' notice all along.

[123] During those months, Mr. Evans became aware that other Teamsters employees, who had been fired on the same day and in the same way, had been reinstated, either with working notice or unconditionally. He therefore took the position, reasonably in the trial judge's view, that he was entitled to similar treatment and continued the negotiations on that basis.

[124] The majority in this Court concludes that the trial judge committed an error of law by overlooking relevant evidence of Mr. Evans' work environment, including evidence that "his work environment had not changed in May of 2003", a factor "relevant to the reasonableness of his feelings of ostracization" (para. 44). This reference is to an answer given by Mr. Evans in his examination for discovery:

> Q: So the situation in the office, the local office here in May of 2003, hadn't changed, had it, from what it was the previous year? There had been no significant change in your working environment, had there?
>
> A: No.

That is all of the evidence on this point. I can see no error in the trial judge's decision not to mention this single answer from Mr. Evans' examination for discovery. He was entitled to prefer other evidence of Mr. Evans' working conditions.

[125] It is true that the office remained physically located in the same place and that the only other employee in the office remained Mr. Evans' wife. But the suggestion that his "work environment" was limited to his office and his wife, fails to take into account the nature of Mr. Evans' work, which was to work within the community, organizing workers, negotiating with management and representing members. The evidence was that news of Mr. Evans' dismissal was well known in Whitehorse. This was recognized by the trial judge, who accepted that there was some evidence to support Mr. Evans' view that working conditions had been damaged by his dismissal:

> 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. [para. 83]

[126] The majority in this Court is of the view that this finding was not supported by any evidence in the record and, as a purely subjective belief, was therefore irrelevant to the inquiry into whether Mr. Evans behaved reasonably (para. 45). I have earlier expressed my inability to understand how subjective factors can be irrelevant in assessing the reasonableness of a particular employee's decision whether to return to a workplace from which he or she has been fired. But there is an additional problem with this analysis, namely that it ignores the burden of proof, which is on the employer. Mr. Evans' testimony was that news of his dismissal appeared in the local newspapers and that his reputation was destroyed. This was uncontradicted and was, therefore, evidence the trial judge was entitled to accept.

[127] The majority also finds that the trial judge erred in relying on the fact that Mr. Evans' sense of ostracization arose, in part, from his conversations with other dismissed employees, stating:

> The trial judge, however, does not seem to have given any attention to the fact that Mr. Fairbrother had had a poor relationship with support staff in Vancouver prior to 2003 and that he worked in a separate dispatch building, not in the general Vancouver office. Further, the value of that evidence and its relevance to the Whitehorse state of affairs is not apparent. [para. 44]

This is the argument the Teamsters made at trial about Mr. Fairbrother, namely, that his ostracization did not arise from his termination but rather from unrelated events and was, as a result, irrelevant to Mr. Evans' perceived working conditions in Whitehorse.

[128] The trial judge addressed — and rejected — this argument as follows:

> 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 because he had previously supported the outgoing president, Mr. Zimmerman. He felt the conditions in the Vancouver officer were "quite bad" and that he found it difficult to work under those conditions. Further, Mr. Fairbrother was of the view that Mr. Hennessy and Mr. Peterson, the newly elected secretary treasurer, both had "an absolute hatred" towards the appointed business agents. Finally, after Mr. Fairbrother learned that Mr. Evans had been terminated, he telephoned him and talked to him about what was happening in the Vancouver office. The Union's counsel argued that,

> viewed objectively, Mr. Fairbrother's complaints about being treated badly in the Vancouver office were over-stated and without foundation. While that may be, there is no reason that Mr. Evans should have known that at the time he received this information from Mr. Fairbrother. Therefore, 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 of the circumstances. [Emphasis added; para 83.]

Again, I can see no reason for interfering with this conclusion.

[129] The majority also relies, as did the Court of Appeal, on the trial judge's finding that no *Wallace* damages were warranted, as evidence that there was no acrimony in Mr. Evans' working relationships. The test for additional *Wallace* damages is a high one. The trial judge, applying this test, was unable to conclude that "Mr. Hennessy was intentionally being untruthful, misleading or unduly insensitive in relying upon [his lawyer's] advice" (para. 58). This does not mean that the trial judge concluded that the absence of this degree of bad faith following Mr. Evans' wrongful dismissal had left intact a relationship of mutual understanding and respect. *Wallace* damages are an extraordinary remedy. The fact that there is an insufficient basis for *Wallace* damages does not lead invariably to the conclusion that the former workplace is a sufficiently comfortable one that a fired employee should be expected to continue to work there throughout his or her notice period.

[130] As for the KPMG audit, Mr. Evans testified in some detail about this event and the trial judge was entitled to accept his evidence. Gower J. found that it was understandable that Mr. Evans felt "threatened and demeaned" by it (para. 83). It was

conducted without any notice and in a fashion more akin to a "forensic team" than that of an audit designed to assess property management issues. The majority points to the Teamsters' explanation of the reason behind the audit and suggests that "[t]here is nothing in the record to substantiate the reason why Mr. Evans felt threatened by the holding of the audit" (para. 43).

[131] On the contrary, it is my respectful view that the trial judge's conclusions about the nature of the audit find ample support in the record. The true motives for the audit are irrelevant if they were not known to Mr. Evans at the time it was conducted, and the evidence is that they were not. Rather, the significance of the audit, and the reason it was mentioned by the trial judge, is that the manner in which it was carried out led Mr. Evans to suspect that the Teamsters were looking for something in the Whitehorse records to justify his dismissal, and possibly that of his wife, since they were the only two employees who had been working in that office prior to the audit.

[132] The audit took place during Mr. Evans' negotiations with the Teamsters. The auditors arrived without any prior notice either to him or to his wife. Mr. Evans testified that he first heard about the audit when he received a call from his wife, who was at the office and in tears. He went down to the office, which he described as follows:

> It was chaos. I walked into my old office. I got a woman going through the drawers looking for stuff. I said, "Anything you need, I'm here. You ask me; I will get it for you." She wouldn't talk to me.

[133] Mr. Evans' fears about the Teamsters' motives for ordering the audit were exacerbated by the fact that numerous subsequent letters from Mr. McGrady concerning the negotiations for his reinstatement, were labelled as being in connection with the "KPMG Report". While that reference was termed a clerical error at trial, the fact that this was an error was not known to Mr. Evans at the time, who was of the view that the auditors intended to "tear the office apart looking for anything to have an excuse to make my dismissal retro back to [January 2]" .

[134] The trial judge also rejected the Teamsters' submission that Mr. Evans was seeking to obtain 29 months' notice instead of 24, concluding instead that Mr. Evans' intention was simply to be treated the same as Ron Owens, whose termination letter was rescinded. The Court of Appeal overturned this finding, basing its opinion that Mr. Evans was seeking 29 months' notice on a single passage from Mr. Evans' cross-examination in his examination for discovery:

> 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.

In my view, this evidence can hardly be said to be sufficiently compelling to justify overturning the trial judge's conclusion as to Mr. Evans' intention.

[135] Likewise, there is no basis for overturning the trial judge's factual finding that Mr. Evans acted reasonably in his negotiations with the Teamsters. There can be no significance attached to the fact that Mr. Evans did not, during the negotiations, expressly articulate the nine factors identified by the trial judge as justification for his refusal to return to work. The negotiations were taking place between an ex-employee and his former employer through their respective counsel. There was no onus on Mr. Evans to tell Mr. Hennessy that he felt he was being "treated like a dog", that he was aware of his termination being planned and deliberate, that he felt threatened by the KPMG audit, that he wanted to be treated in the same fashion as other business agents, that he feared he would no longer have the respect of employers in Whitehorse, or that he suspected his negative treatment was based on his support for the former president of the local. He was entitled to attempt to reach a negotiated solution in the most effective way possible. Mentioning these reasons would hardly have enhanced his bargaining position. More importantly, however, the fact that Mr. Evans does not mention them does not deprive them of their legitimacy. Each one, as found by the trial judge, had a sound evidentiary foundation.

[136] Nor, contrary to the view of the majority, does the fact that Mr. Evans was prepared to return to work if his termination letter was rescinded, constitute either an "unreasonable expectation" or an admission that his working relationships remained unaffected by the dismissal. The fact that an employee is prepared to negotiate a return to work following his or her dismissal is not evidence that the working relationship is one of "mutual understanding and respect", free of hostility, acrimony or humiliation.

This penalizes employees for attempting to negotiate mutually satisfactory remedies for a wrongful dismissal.

[137] Finally, I have concerns about the Court of Appeal's and the majority's reliance on the fact that Mr. Evans had little or no alternate job prospects in Whitehorse as a basis for requiring him to return to his employer. The fact that employment opportunities for a 58-year-old former union business agent are limited in a small community is not Mr. Evans' doing. He found himself in this difficult position because of his unlawful dismissal. The paucity of alternate jobs does not entitle the Teamsters to dictate to Mr. Evans how to mitigate his damages. It may well be that an employee will be found not to have taken sufficient mitigating steps. But that is different from creating a presumption that if an employee like Mr. Evans has difficulty finding alternate employment, he will be obliged to work out his notice period with the employer who fired him. Firing an employee without notice, then requiring him or her to return temporarily to work at his former workplace because the unlawful dismissal resulted in bleak employment prospects, has the perverse effect of requiring a wronged employee to ameliorate the *wrongdoer's* damages, rather than the other way around. As the British Columbia Court of Appeal said in *Forshaw*:

> The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the employer who has wrongfully dismissed him. [p. 144]

[138] At law, Mr. Evans was found to be entitled to 22 months' notice as of January 2, 2003. The burden was on the Teamsters to show that Mr. Evans failed to mitigate his damages. The trial judge concluded that this burden was not met.

[139] It was certainly open to the Teamsters to try to prove that Mr. Evans had made insufficient attempts to mitigate the damages they caused. What they were *not* entitled to do, however, was dictate how he should mitigate them by ordering him back to the workplace from which he was fired. The consequence of a refusal to comply with this demand, according to the letter of May 23, was to be a new firing, this time for cause and therefore without notice. This would — and did — have the bizarre consequence of transforming a wrongful dismissal attracting a substantial notice period to a lawful one attracting none. This result is, in my view, as unpalatable as it is legally and factually unsustainable.

[140] I would allow the appeal and restore the trial judge's decision.

Appeal dismissed with costs, ABELLA J. *dissenting.*

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