

***Evans* Revisited: The Potential for Mischief Where Constructive Dismissal Meets the Duty to Mitigate Damages with the Dismissing Employer**

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Abstract

In early 2008 the Supreme Court of Canada released its judgment in Evans SCC, a case of wrongful dismissal. In the 6-1 decision, the majority held that Mr. Evans had failed to mitigate his damages by rejecting an offer of re-employment made by the dismissing employer shortly after it had terminated the employment contract. As a result, the award of the trial judge for damages in lieu of 22-months reasonable notice at common law was set aside in its entirety. The thesis of this paper is that the majority reasons in Evans opens the door for mischief by employers who may unilaterally make fundamental or substantial changes to an employee's contract of employment with little risk of being liable to pay damages in lieu of reasonable notice so long as the circumstances surrounding the termination of the employment contract are framed so as to avoid the appearance of serious damage to the employer-employee relationship.

A constructive dismissal occurs “where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment—a change that violates the contract's terms—the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed. The employee can then claim damages from the employer in lieu of reasonable notice.” Part II of this paper discusses constructive dismissal. Part III of this paper discusses the circumstances when a constructively dismissed employee has a duty to mitigate his or her damages by accepting re-employment with his or her former employer on a temporary basis according to the majority in Evans.

Part IV of this paper discusses the potential for mischief by employers taking advantage of the interplay between the principle of constructive dismissal and the employee's duty to mitigate damages as elucidated in Evans. Part V sets out post-Evans jurisprudence in an attempt to glean whether Courts and tribunals will embrace Evans or limit its impact. Part VI concludes the paper by pointing out that the majority ratio in Evans can result in the “bizarre consequence of transforming a wrongful dismissal attracting a substantial notice period to a lawful one attracting none.” Evans arguably creates a legal oxymoron, in that situations where (1) “an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment” (a constructive dismissal), and (2) “[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” are mutually exclusive. Perhaps the law ought not to require (on pain of forfeiting pay in lieu of reasonable notice for the employer's fundamental breach of the employment contract) an employee to return to work for the dismissing employer at all considering that it is the rare employee who does not subjectively experience embarrassment, humiliation and loss of dignity when his or her employer unilaterally and fundamentally alters the employment contract (a unique subset of contracts marked by an inherent imbalance of bargaining power) disturbing the central role that work plays in the individual's sense of identity and dignity at the time of dismissal when the employee is most vulnerable and hence, most in need of protection from the Courts.

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I. Introduction

In early 2008 the Supreme Court of Canada released its judgment in *Evans* SCC,¹ a case of wrongful dismissal. In the 6-1 decision, the majority held that Mr. Evans had failed to mitigate his damages by rejecting an offer of re-employment made by the dismissing employer shortly after it had terminated the employment contract. As a result, the award of the trial judge for damages in lieu of 22-months reasonable notice at common law was set aside in its entirety.² The thesis of this paper is that the majority reasons in *Evans* opens the door for mischief and abuse by employers who may unilaterally make fundamental or substantial changes to an employee's contract of employment with little risk of being liable to pay damages in lieu of reasonable notice so long as the circumstances surrounding the termination of the employment contract are framed so as to avoid the appearance of serious damage to the employer-employee relationship.

A constructive dismissal occurs “where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment—a change that violates the contract's terms—the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed. The employee can then claim damages from the employer in lieu of reasonable notice.”³ Part II of this paper discusses constructive dismissal.

In *Evans*, the majority of the Court wrote that it is “correct to apply the same principles [that “a wrongfully dismissed employee could be required to mitigate by accepting re-employment with his or her former employer on a temporary basis”⁴] to both constructively dismissed and wrongfully dismissed employees.”⁵ The majority continued: “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

¹ *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] S.C.J. No. 20 (QL) [“*Evans* SCC”].

² *Evans v. Teamsters Local Union No. 31*, 2006 YKCA 14, [2006] Y.J. No. 90 at para. 60 (QL), aff'd 2008 SCC 20, [2008] S.C.J. No. 20 (QL) [“*Evans* YKCA”].

³ *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, [1996] S.C.J. No. 118 at para. 33 (QL).

⁴ *Evans* SCC, *supra* note 1 at para. 25.

⁵ *Ibid.* at para. 26.

need to mitigate.”⁶ Part III of this paper discusses the circumstances when a constructively dismissed employee has a duty to mitigate his or her damages by accepting re-employment with his or her former employer on a temporary basis according to the majority in *Evans*.

Part IV of this paper discusses the potential for mischief by employers taking advantage of the interplay between the principle of constructive dismissal and the employee’s duty to mitigate damages as elucidated in *Evans*. Part V sets out post-*Evans* jurisprudence in an attempt to glean whether Courts and tribunals will embrace *Evans* or limit its impact. Part VI concludes the paper by pointing out that the majority ratio in *Evans* can result in the “bizarre consequence of transforming a wrongful dismissal attracting a substantial notice period to a lawful one attracting none.” *Evans* arguably creates a legal oxymoron, in that situations where (1) “an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment” (a constructive dismissal), and (2) “[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” are mutually exclusive. Perhaps the law ought not to *require* (on pain of forfeiting pay in lieu of reasonable notice for the employer’s fundamental breach of the employment contract) an employee to return to work for the dismissing employer at all considering that it is the rare employee who does not subjectively experience embarrassment, humiliation and loss of dignity when his or her employer unilaterally and fundamentally alters the employment contract (a unique subset of contracts marked by an inherent imbalance of bargaining power) disturbing the central role that work plays in the individual’s sense of identity and dignity at the time of dismissal when the employee is most vulnerable and hence, most in need of protection from the Courts.

II. Constructive Dismissal

In the 1997 decision *Farber*,⁷ the unanimous Supreme Court of Canada held that in both civil and common law Canadian jurisdictions a constructive dismissal occurs “where an employer unilaterally makes a fundamental or substantial change to an employee's

⁶ *Ibid.* at para. 27.

⁷ *Farber*, *supra* note 3.

contract of employment—a change that violates the contract's terms—the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed. The employee can then claim damages from the employer in lieu of reasonable notice.”⁸ The Court noted “it has been held that a demotion, which generally means less prestige and status, is a substantial change to the essential terms of an employment contract that warrants a finding that the employee has been constructively dismissed. In some decisions, it has been held that a unilateral change to the method of calculating an employee's remuneration justifies the same finding. Other decisions have found that a significant reduction in an employee's income by an employer amounts to constructive dismissal.”⁹

In the case *Mr. Farber*, regional manager for Western Quebec, was informed by his immediate supervisor that as part of a major restructuring, the company had decided to eliminate his position. The employer offered Mr. Farber financial compensation and the manager's position at a branch.¹⁰ Mr. Farber quit and sued to recover damages for constructive dismissal. Although it turned out that between the date of the dismissal and the date of trial, it was shown that Mr. Farber would have made more money had he accepted the offered position at a branch than he had made as regional manager for Western Quebec, the Court held: “what is relevant is what was known by the appellant at the time of the offer and what ought to have been foreseen by a reasonable person in the same situation. Evidence of events that occurred *ex post facto* is not relevant unless the sales figures achieved subsequent to the offer could reasonably have been foreseen at the time of the offer.”¹¹ “The mere fact that an event occurs does not mean that it was foreseeable.”¹² Mr. Farber's action was successful and the Court ordered the employer to pay him \$150,000 with interest from the date of service, the additional indemnity and costs throughout.¹³

⁸ *Ibid.* at para. 33.

⁹ *Ibid.* at para. 36.

¹⁰ *Ibid.* at paras. 2, 4.

¹¹ *Ibid.* at para. 42.

¹² *Ibid.* at para. 44.

¹³ *Ibid.* at para. 53.

While Mr. Farber subjectively considered the employer's offer unacceptable because the position was one he had held eight years earlier and from which he had been promoted, he was insulted by the fact that he was being asked to manage a branch experiencing problems, and he estimated that his income would be cut in half if he accepted the offer, there is no evidence in the reported decision that the employer-employee relationship had been seriously damaged, yet the Court found no reason to alter the trial judge's conclusion that Mr. Farber had fulfilled his duty to mitigate his damages. The trial judge wrote:

After the manager of one of the branches in which the plaintiff was interested died in September of the same year, [the appellant] took steps to obtain the position. Since he was no longer an employee and in reliance, *inter alia*, on its practice of appointing managers from within its ranks, Royal Trust denied him the requested position. Subsequently, after being unemployed for a time, the plaintiff opened his own business, which had a slow, difficult start. The evidence did not show how it was doing at the time of trial. In any event, that is not relevant. It is sufficient to note that in the year after he left Royal Trust, the plaintiff's income was minimal despite his attempts to find employment that in some way corresponded to his experience and talent.¹⁴

However, the Court also noted:

At the hearing, counsel for the respondent argued, without notice, that assuming that the appellant had in fact been constructively dismissed, he should have accepted the June 1984 offer in order to mitigate his damages. According to that argument, his refusal to accept the offer justifies reducing his damages by the amount he would have earned as manager of the Dollard branch. The argument was not made in either the Superior Court or the Court of Appeal and was not even discussed by the respondent in the factum it filed with this Court. The appellant was therefore not able to respond to it adequately. This Court did not have to consider it.

The Supreme Court of Canada found its opportunity to consider a similar argument in *Evans*.

III. Duty to Mitigate by Returning to Work for the Dismissing Employer

In early 2008 the Supreme Court of Canada released its judgment in *Evans* SCC,¹⁵ a case of wrongful dismissal. In the 6-1 decision, the majority held that Mr. Evans had failed to mitigate his damages by rejecting an offer of re-employment made by the dismissing employer shortly after it had terminated the employment contract. As a result, the award

¹⁴ *Ibid.* at para. 51; emphasis added.

¹⁵ *Evans* SCC, *supra* note 1.

of the trial judge for damages in lieu of 22-months reasonable notice at common law was set aside in its entirety.¹⁶

Mr. Evans had been employed as a Business Agent of the Teamsters for 23 ½ years, was 58 years old, and there was no availability of similar employment in Whitehorse, having regard to his experience, training and qualifications when he was wrongfully dismissed on January 2, 2003.¹⁷ The Teamsters continued to pay Mr. Evans' salary while settlement negotiations were ongoing, and on May 23, 2003 it offered Mr. Evans his old job back for the remainder of an offered 24-month working notice period. Mr. Evans rejected the offered re-employment, the Teamsters ceased the salary continuance payments, and Mr. Evans sued for wrongful dismissal. Mr. Evans won his case at the Yukon Supreme Court,¹⁸ but lost at the Yukon Court of Appeal on the issue of failure to mitigate.¹⁹ The Supreme Court was “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.”²⁰ The majority wrote:

28 ... 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. ... 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. ... 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. ...

¹⁶ *Evans YKCA*, *supra* note 2.

¹⁷ See *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140, [1960] O.J. No. 149 (QL) (H.C.J.); cited and relied on in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41 (QL) and subsequent Supreme Court of Canada decisions.

¹⁸ *Evans v. Teamsters Local Union No. 31*, 2005 YKSC 71, [2005] Y.J. No. 106 (QL) [*“Evans YKSC”*].

¹⁹ *Evans YKCA*, *supra* note 2.

²⁰ *Evans SCC*, *supra* note 1 at para. 1.

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 ...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. ...because the circumstances surrounding the termination of their contract may be far less personal than when dismissal relates more directly to the individuals themselves. ...

33 ...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....

36 ...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. ...

On the facts of the *Evans* case:

48 ... 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. ...

50 ... 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.

[Emphasis added].

In short, the ratio of *Evans* then, is that in some circumstances—in the absence of conditions rendering the return to work unreasonable objectively—it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. An employee should be required to return to work for the dismissing employer only where there are no barriers to re-employment—where the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious. Employees are only required to mitigate their damages by returning to work for the dismissing employer where those conditions are met, after the following relevant factors have been considered by the Court in its multi-factored and contextual analysis: the history and nature of the employment; whether or not the employee has commenced litigation; whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left; that an employee not be obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation (a critical factor at the forefront of the inquiry); and non-tangible elements of the situation including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment (extremely important).

On a strict reading of the majority reasons in *Evans* an employee should be required to return to work for the dismissing employer only in fairly limited

circumstances. But query whether the law ought to *require* him or her to do so at all—on pain of forfeiting pay in lieu of reasonable notice for the employer’s fundamental breach of the employment contract—given the recognized uniqueness of employment contracts, and especially given the potential for mischief by employers taking advantage of the interplay between the principle of constructive dismissal and the employee’s duty to mitigate damages by returning to work for the dismissing employer as elucidated in *Evans*.

IV. Potential for Mischief

Imagine an employer (sophisticated or with legal advice) who has an employment contract with an employee. The employer wants to abolish the employee’s job A and simultaneously create another job B but does not want to give working notice or pay in lieu of notice to the employee even though it knows that a fundamental or substantial change to the employee’s contract of employment would amount to a wrongful constructive dismissal. If the employer knows about, and understands, the principles of constructive dismissal and the employee’s duty to mitigate damages by returning to work for the dismissing employer as elucidated in *Evans* it may attempt the following tactic. The employer, in a friendly manner so as to avoid the appearance of creating acrimonious personal relationships, informs the employee that his or her job A is no longer required but the employer is very happy with the employee and looks forward to continuing the relationship with the employee performing Job B.

The employee seeks legal advice and is given the opinion that he or she has been constructively dismissed as the employer made a fundamental or substantial change to the employee’s contract of employment. The lawyer calculates that on the *Bardal*²¹ factors the employee would be entitled to 24 months pay in lieu of reasonable notice at common law if he or she were to quit and sue for wrongful constructive dismissal. However, the lawyer continues, since the salary offered is the same, the working conditions are not substantially different or the work demeaning, and the personal relationships involved are not acrimonious, if the employee were to quit and sue for wrongful constructive dismissal she or he would risk a finding that he or she failed to mitigate by not returning to work

²¹ *Bardal supra* note 17.

for the dismissing employer. Likely, the employee reluctantly returns to work performing Job B believing he or she has no practical choice, and the employer has successfully avoided giving working notice or pay in lieu of notice (even if the employee subsequently quits after finding alternative employment).

Madam Justice Abella, the sole Justice in dissent in *Evans*, recognized the potential for mischief in the majority decision. She wrote: “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.”²² “[W]hen 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.”²³ “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.”²⁴ Abella J. concluded:

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.²⁵

Has the danger of making routine the requirement to accept re-employment with an employer who acted wrongfully that Abella J. forewarned about come to pass post-*Evans*? Reported decisions shed no light on the number of times actual situations have

²² *Evans* SCC, *supra* note 1 at para. 92.

²³ *Ibid.* at para. 106.

²⁴ *Ibid.* at para. 108.

²⁵ *Ibid.* at para. 139.

arisen post-*Evans* as is described in the fictitious situation set out above because, of course, those situations would never be litigated. However, post-*Evans* jurisprudence can shed light on how adjudicators and judges have applied *Evans*, and whether it can be predicted whether *Evans* will be narrowly applied and factually distinguished, or its principles broadened to allow employer “flexibility” in tough economic times at the cost of employee rights.

V. Post-*Evans* Jurisprudence

Following are excerpts from post-*Evans* jurisprudence in chronological order.

*i. 6 June 2008: Borsato*²⁶

Fenlen J. wrote:

53 Counsel for the defendant in this case conceded, quite properly, that a 20% reduction in an employee's salary amounts to a fundamental change to the employment contract. ...

63 The defendant relies on *Evans* ... as support for its argument that Ms. Borsato should have mitigated her losses by continuing to work at the Agency until she found another job. ...

66 The plaintiff counters by arguing that *Evans* does not require Ms. Borsato to continue working for her employer when the salary for her position has been significantly reduced. ...

67 In my view it was not reasonable to expect Ms. Borsato in these circumstances to mitigate her damages by returning to work at a salary that was 20% lower than her previous compensation. In addition, the Supreme Court of Canada identified as relevant factors whether the employee was still working for the employer when the offer of re-employment was made or whether she had already left, as in the case at bar; and whether or not the employee has commenced litigation, as Ms. Borsato had by December 21, 2006.

Query why according to *Evans*, an employee should be required to return to work for the dismissing employer only where the salary offered is the same, when alternative employment with a different employer has been held to be reasonable for the purpose of mitigation at less salary than the lost job paid.

²⁶ *Borsato v. Atwater Insurance Agency Ltd.*, 2008 BCSC 724, [2008] B.C.J. No. 1039 (QL).

ii. 12 June 2008: Loehle²⁷

Mr. Loehle was manager, Internal Audit, Operations whose job ended. Gordon J. wrote:

17 In August 2006, Mr. Hill also encouraged Mr. Loehle to apply for a position as unit manager. Mr. Loehle refused, indicating he was not prepared to accept a demotion to his former position. ...

19 Mr. Loehle and Mr. Deegan met again on 29 November 2006. Mr. Deegan reported the existing salary would continue if Mr. Loehle accepted assignment as a unit manager. ...

20 ... Mr. Loehle returned the offer of employment after endorsing it "I respectfully decline".

25 Over the four month period following the 8 December 2006 meeting, Mr. Loehle applied for 280 positions with other companies. As time progressed, he expanded the geographic area of his search and applied for lesser positions. His family financial situation was in jeopardy. On 9 April 2007, Mr. Loehle accepted the position of operations manager at the London facility...

40 A demotion is a fundamental change to the terms of employment. ...

49 ... In attempting to compel the acceptance of a demotion, Purolator made unilateral and significant changes to the terms of Mr. Loehle's employment contract. ... Despite continuing the same salary level, a concession for management's negligence, the demotion to unit manager involved dramatic changes in responsibility, status and working conditions. ...

50 The offer of employment presented to Mr. Loehle ... and the circumstances created by management, constituted constructive dismissal. ...

51 Having been constructively dismissed, Mr. Loehle is entitled to compensation, in lieu of notice, subject to his duty to mitigate.

52 The efforts of Mr. Loehle's search for alternate employment are not challenged. Indeed, he acted diligently and reasonably in this regard. The mitigation issue is whether Mr. Loehle ought to have accepted the demotion during an otherwise appropriate notice period. ...

59 In *Evans*, the plaintiff was actually dismissed without cause and the employment offer was for the same position. Here, Mr. Loehle was offered a demotion in circumstances that could not be justified by the defendant. In this respect, *Mifsud* is instructive as the demotion was the result of dissatisfaction with the plaintiff's job performance. The principles advanced in *Mifsud* and *Evans*, in my view, apply regardless of the nature of the employment offer. It is the surrounding

²⁷ *Loehle v. Purolator Courier Ltd.*, [2008] O.J. No. 2462 (QL) (S.C.J.).

circumstances that require consideration. In particular, the conduct of management and the environment surrounding the demoted position require scrutiny.

63 Mr. Loehle was a valued employee of Purolator. His job performance had never been in question. The company wanted him to stay and, but for the negligence of management, Mr. Loehle would have continued as an employee in a higher position. The offer of employment to a demoted position was an obvious attempt to retain Mr. Loehle as an employee and, at the same time, relieve the company from liability for its negligence.

64 ... Mr. Loehle was respected for his ability and his experience. As well, the salary would have remained at the higher level. ...

65 ...objectively, I am not satisfied the working environment would have been one of "hostility, embarrassment or humiliation". ...

67 Mr. Loehle's ... subjective assessment of the situation is not unreasonable. An objective consideration results in a different conclusion. In my view, a reasonable person would have accepted the position offered, notwithstanding the demotion, until alternate employment elsewhere was obtained. Searching for a comparable position with another company while working should be less difficult than during a period of unemployment.

68 In this result, Mr. Loehle has not met the mitigation test as established by the case law.

[Emphasis added].

iii. 4 July 2008: Johnston²⁸

MacDonald J.:

28 I find there was a termination of the employee, employer relationship between Mr. Johnston and Clearwater upon the new system being implemented ... I find there was a change in the terms of employment at that point in time which was unilaterally done by Clearwater. Mr. Johnston as an employee for an indefinite term could not therefore be terminated without reasonable notice.

29 In *Henley v. St. John's (City)*, [1981] N.J. No. 184 (Nfld. T.D.), Goodrich, J. said as follows at para. 3:

3. "The law on the matter is quite clear. Where there is a change in the terms of the employment, the employee may either accept it and continue employment or reject it and refuse to report for work. Condonation of the change constitutes acceptance. In *Harris, Wrongful Dismissal*, the author at

²⁸ *Johnston v. Clearwater Seafoods Ltd.*, 2008 NSSC 126, 2008 CarswellNS 769 (WeC).

pages 29 and 30, referring to the case of *Lindsay v. Canadian Chamber of Commerce* [1977] 2 A.C.W.S. 367, said:

It is most significant to note that in all cases of constructive dismissal, the servant must quickly elect to consider the conduct of the Master as an act of dismissal by refusing to offer his services. Should he elect to continue in the employ, he will be said to have condoned the amended job description and hence will be estopped from relying upon the unilateral amendment as an act of constructive dismissal.

See also *Perry v. Ontario Die Co.*, 1986 CarswellOnt 2477 (Ont. Dist. Ct.). ...

33 I find on the whole of the evidence in the present case Mr. Johnston accepted the changes made by Clearwater in their employment contract when he applied for the new position and subsequently went to work for them. ...

35 Should I be in error on this point I find the plaintiff's continuation of working for Clearwater under the new system until finally terminated in early 2005 amounted to a condonation of the change in his employment contract.

36 Thus, I find on the facts of this case Mr. Johnston is estopped from including any of his years prior to the year 2000 of indefinite employment to count towards any notice time for any act of constructive or outright dismissal in this action. ...

75 The Court has been referred to case authorities which state an employee who has been wrongfully dismissed has a duty to return to work in different positions with the same employer in reasonable situations to mitigate damages. [*Evans*]...

76 I am not satisfied there was any concrete proposal put to Mr. Johnston, nor did he refuse any employment position offered to him by Clearwater. ...

[Emphasis added].

Query whether Mr. Johnston was “damned if he did, damned if he didn’t” in that had he refused the “new position” it might have been held that he had failed to mitigate his damages on *Evans*, but having accepted the “new position” he was held to have condoned the change in his employment contract and was thus estopped from including any of his 10 years prior to the year 2000 of indefinite employment to count towards his reasonable notice period at common law when he was ultimately dismissed in 2004

iv. 18 July 2008: Davies²⁹

On 25 September 2006 Davies was told by his employer that due to a “reduction in business” he would be placed on “temporarily lay-off”. Humphries J.:

10 Mr. McCann recalled the plaintiff to work on November 20, 2006. The plaintiff would have returned at the same salary and status. The plaintiff ignored the offer. The plaintiff deposes that he did not want to be in a situation where he could be laid off again. He says he felt humiliated by the way he had been treated on September 25, 2006. ...

37 Mr. Davies argues that his refusal to respond to the recall notice was not unreasonable. He says if he returned, he would have been accepting the defendant's position that it was entitled to lay him off, and could be subject to further lay-offs in the future without recourse.

38 As for the non-competition clause, Mr. Davies says that until there has been a determination that his employment was terminated, he could not take the chance of breaching the agreement. Although employers who have breached contracts of employment have not been allowed to rely on non-competition clauses because the contract, once terminated, is at an end for all purposes (see, for example, *General Billposting Co. Ltd. v. Atkinson*, [1908-10] All E.R. Rep. 619) the employee should be entitled to await a determination by a court that the contract is at an end, rather than provoke action on the non-competition clause by the employer.

39 According to the Supreme Court of Canada in *Evans*, [i]n 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. ...

43 On the evidence before me, I am satisfied that there were no conditions arising out of factors such as humiliation, embarrassment, or hostility in the workplace that would render the return to work unreasonable, despite Mr. Davies' statement to the contrary. ...Mr. Davies was being asked to return at the same salary, at the same status and with the same benefits, which had never been cut off. I note the comments in *Evans, supra*, at para. 31 that individuals who are dismissed as a result of legitimate business needs will be required to mitigate by returning to the same employer more often than those employees who are terminated for some other reason. ...

45 ...what he did: refuse to return to work, treat the contract as terminated, sue his employer, and purport to rely on the non-competition clause while making attempts to mitigate his damages. ...

²⁹ *Davies v. Fraser Collection Services Ltd.*, 2008 BCSC 942, [2008] B.C.J. No. 1368 (QL).

47 ...once Mr. Davies unequivocally accepted the termination of his contract of employment, he should have offered to work out his notice period with the defendant. ...

48 It is not reasonable for an employee to refuse to communicate with an employer who is trying to rehire him, refuse to respond to an offer of further employment, treat the contract as unequivocally terminated, sue the employer for having wrongfully terminated the contract, and then purport to rely on the contractual non-competition clause to deliberately reduce his ability to mitigate his damages. ...

49 ...Mr. Davies has failed to mitigate his damages by failing to offer to return to employment with the defendant in order to work out the remainder of the notice period after the recall.

v. 5 August 2008: Thornton³⁰

Adjudicator Luborsky:

2 The Complainant alleges he was constructively dismissed as a result of a pattern of conduct culminating in an e-mail communication from his manager ...after approximately 10 years of service and was not obliged to accept the Bank's subsequent offers of continued or re-employment reporting to the same and/or another manager. ...

5 For the reasons that follow I conclude that the Complainant was unjustly dismissed and was not obliged to accept the Bank's subsequent offers of continued or reemployment. ...

129 ...If a constructive dismissal has occurred, the Complainant may be obligated to accept offers of continued or re-employment with the same or another manager to mitigate his damages in proper circumstances, even if the terms of employment have fundamentally changed: see...*Evans* ... at paras. 28 - 33. However, the Bank has the burden of showing that the Complainant's mitigation efforts were objectively unreasonable for refusing its offers: see *Evans* ..., at para. 35.

130 The case before me like many of its genre is fact specific...

138 The notion of constructive dismissal has traditionally been recognized in two situations. There is the clear unilateral breach of a fundamental term of the employment contract said to reveal the repudiation of the employment contract. But more subtly are those situations where the employee is isolated or marginalized in an effort to make the employment so disagreeable as to encourage the employee's

³⁰ *Thornton v. Toronto Dominion Bank*, 70 C.C.E.L. (3d) 235, 2008 CarswellNat 4519 (WeC) (Can. Arb. Brd.).

(sought after) resignation, where it arises in circumstances indicating the employer no longer intends to be bound by fundamental terms of the employment contract. ...

152 It is a reasonable inference from the evidence that Ms. Pratten, who only became involved in this matter as a result of the Complainant's commencement of unjust dismissal proceedings under the *Code*, realized the inherent difficulties with the Bank's case and sought to fix the problem with an offer of continued employment reporting to a different manager. As a tactical matter, the offer would also support the Bank's mitigation defence. ...

154 ...the Bank was in fact taking a hard line, using its belated offer as a tactic in an attempt to force the Complainant back to work on its terms, hoping to limit its liability and/or set up more fully its mitigation defence.

155 The foregoing factual context is readily distinguishable from those considered by the Supreme Court of Canada in *Evans*...

159 On the evidence before me it is clear that the relationship between the Complainant and Mr. Johnson was strained if not acrimonious by the time the "status quo" offer of January 16, 2006 making the prospects of a harmonious working relationship between them unlikely, particularly given the embarrassment the Complainant would naturally feel from the dissemination of Mr. Johnson's October 24 e- mail to the District Manager and Human Resources officials. ... It was not objectively reasonable for the Complainant to accept that offer...

vi. 30 September 2008: Coquitlam School District³¹

Member Beharrell:

526 In *Evans* ... the Supreme Court of Canada considered the issue of mitigation in circumstances where an employer offered an employee a chance to mitigate damages by returning to work for that employer. In such cases, the central issue is whether a reasonable person would accept such an opportunity.

527 In the circumstances before me, at the time the District offered to hire J.J., she was actively seeking re-employment with the District. Further, the terms of employment were the same as those she had previously operated under. On all of the circumstances, I find that J.J.'s decision to reject the District's offer was not reasonable, and that she failed in her duty to mitigate her losses in rejecting that offer.

³¹ *J. (J.) v. Coquitlam School District No. 43*, 2008 BCHRT 360, [2009] B.C.W.L.D. 6493, [2009] B.C.W.L.D. 6496, 2008 CarswellBC 3093 (WeC).

528 Thus, I find that the District's responsibility for J.J.'s wage loss ended on April 26, 2006, the date that they offered her employment as a temporary casual employee.

vii. 16 October 2008: Magnan³²

The Court:

31 Brandt submits that Magnan did not take reasonable steps to avoid his losses. It says that the duty to mitigate includes an obligation to return to the employment of the former employer where it is reasonable to do so. It relies upon *Evans*...

32 Here, the trial judge concluded that in the circumstances of Magnan's constructive dismissal, it was not reasonable to expect him to accept Brandt's offer to allow him to return to work. We can ascertain no palpable or overriding error on the part of the trial judge in making this determination. In fact, having regard to Brandt's unwithdrawn allegation of dishonesty on the part of Magnan, as set out on Brandt's solicitor's letter ... we are of the view that the finding of the trial judge is merited.

viii. 15 December 2008: Colwell³³

Little J.:

34 Such actions and justifications poisoned the workplace as Mrs. Colwell stated in her September 17, 2004 e-mail (Exhibit 1, Tab 9).

35 Not only had her privacy been violated, but so had her contract of employment in that all trust had evaporated.

36 On the facts of this case, the court finds that Mrs. Colwell's contract of employment contained an implied term at the time the contract was entered into, that each party would treat the other in good faith and fairly, throughout the existence of the contract, as well as during termination.

37 I find Mrs. Colwell was justified in leaving this poisoned atmosphere and was, in fact, constructively dismissed. ...

41 In *Evans* ..., the Supreme Court of Canada imposed the duty upon the employee to accept re-employment offered by the original employer after wrongful dismissal. This is qualified, however, by the fact that no employee is obliged to continue or return to a working atmosphere of hostility, embarrassment or humiliation. In Mrs. Colwell's case, I find that she was absolutely correct in stating that she could not continue her employment with Cornerstone in the presence of Mr. Krauel as she was left "to question that such invasive actions could be repeated at any time without my knowledge".

³² *Magnan v. Brandt Tractor Ltd.*, 2008 ABCA 345, [2008] A.J. No. 1109 (QL).

³³ *Colwell v. Cornerstone Properties Inc.*, [2008] O.J. No. 5092 (QL) (S.C.J.).

42 Under the circumstances, Mrs. Colwell was not obligated to return to Cornerstone in order to mitigate her damages.

ix. 6 January 2009: Iliescu³⁴

Echlin J.:

45 Mr. Iliescu was not constructively dismissed. At law, it was he who ended the relationship. Alternatively, even if it were determined that Mr. Iliescu had been dismissed, the result would be no different. As indicated by the Supreme Court of Canada in *Evans* ..., an employee has a duty to mitigate by returning to work for the dismissing employer absent an atmosphere of hostility, embarrassment or humiliation. In this instance, no such atmosphere existed. Even if a constructive dismissal had occurred, any damages sought would be completely offset by deductions for the amounts Mr. Iliescu would have earned during the same time period.

x. 20 February 2009: Dawydiuk³⁵

Masuhara J. (in Chambers) dismissing an application to strike out a jury notice:

14 Further, in regard to intricacy and to complexity, the defence argues that the issues are more legal than factual, and thus warrants the case to be heard by a judge alone. Moreover, the defendant argued that, where the facts are in dispute, the interplay between the facts and law makes the determination unwieldy. The specifics include the following. ...

18 Four, that there are difficulties with respect to the mitigation issues, particularly in light of the decision in *Evans* ... It is argued that the fact that the plaintiff was offered a comparable position which she rejected leads to some complexity, in light of that case. ...

20 I do not find that these factors overcome the heavy onus on the applicant.

xi. 16 April 2009: Panimondo³⁶

Strathy J.:

64 In *Evans* ..., the Supreme Court of Canada reiterated that the employer bears the onus of proving not only that the employee failed to make reasonable efforts to find employment, but also that the employee would in fact have found employment had reasonable efforts been made. ...

65 I find that Mr. Panimondo did not make reasonable efforts to find employment. I accept that he was entitled to a period of two or three months to get

³⁴ *Iliescu v. Voicegenie Technologies Inc.*, [2009] O.J. No. 85 (QL (SCJ)).

³⁵ *Dawydiuk v. Insurance Corp. of British Columbia*, 2009 BCSC 518, [2009] B.C.J. No. 761 (QL).

³⁶ *Panimondo v. Shorewood Packaging Corp.*, 73 C.C.E.L. (3d) 99, [2009] O.J. No. 1519 (QL) (S.C.J.).

over the initial shock, collect himself, develop a job search plan and make the necessary preparations: see *Pauloski v. Nascor Inc.*, [2002] 5 W.W.R. 114, 16 C.C.E.L. (3d) 202 (Alta. Q.B.) at para 93. ...

66 ...I am unable to find that the employer has discharged the burden of proving that reasonable efforts during the notice period would have resulted in a reduction of his damages. I therefore make no reduction.

xii. 21 April 2009: Alberta Permit Pro³⁷

The Court:

38 A failure to consider relevant evidence, or the consideration of irrelevant evidence, can result in an extricable error of law reviewable on the correctness standard: ... *Evans* ... at para. 47. ...

51 In the result, the trial judge's finding that, in light of all of the circumstances viewed objectively, the May 1st email "could be construed as written notice of termination" is amply supported by the evidence and not contrary to the terms of Article 4.5. Moreover, the appellants' argument, if accepted, would allow them to terminate the consulting services agreement and avoid paying the termination amount in Article 4.5 by crafting a document that artfully avoids specific mention of termination and then contending that termination was not intended. A reasonable interpretation of the commercial relationship between the parties cannot support that result.

[Emphasis added].

xiii. 27 April 2009: Walsten³⁸

Greenberg J.:

29 The measure of damages payable to an employee who is wrongfully dismissed from a fixed term contract is the amount she would have been paid had she completed the contract term. ...there should be deducted from these amounts any earnings they made from employment during those periods. ...

32 The Band argues that any damages awarded to the plaintiffs should be reduced because the plaintiffs failed to mitigate their damages by refusing the Band's offer of re-instatement and by not actively pursuing alternate employment. ...

35 Looking at the various factors referred to in *Evans*, the plaintiffs here were wrongfully dismissed, not constructively dismissed. The offer was made a few months after they were dismissed and Ms Kruk had already started school and a part-time job. But, as stated in *Evans*, the most significant factor in considering whether it was reasonable for the plaintiffs to refuse the offer is the relationship

³⁷ *Alberta Permit Pro v. Booth*, 2009 ABCA 146, [2009] A.J. No. 406 (QL).

³⁸ *Walsten v. Kinonjeoshtegon First Nation*, 2009 MBQB 106, [2009] M.J. No. 148 (QL).

between Ms Kruk and Mr. Bailey. Their relationship had ended on bad terms. I accept the explanation of the plaintiffs that it would have been very awkward for them to be working in the same small community as he did. While the Band's offer of reinstatement stated that Ms Kruk would not be reporting to Mr. Bailey, it would be inevitable that the plaintiffs would encounter him. The community was remote and small, only 350 residents, and, as the Band comptroller, Mr. Bailey would likely have been connected to everything that was going on. ...

36 In my view, it would not be reasonable to expect the plaintiffs to return to these jobs to mitigate their damages.

xiv. 10 June 2009: Drew³⁹

Adjudicator Laura Trachuk:

1 ...Drew ... alleges that the Canadian National Railway Company ... has constructively dismissed her. ...

3 ... she was verbally harassed by her supervisors. The verbal abuse was significant enough to create an intolerable working environment and resulted in her constructive dismissal. ...

188 ...the jurisprudence conceptualizes claims to constructive dismissal in the circumstances of a toxic work environment in two different ways. The first approach is to find an implied fundamental term in the contract of employment that an employee will be treated with "civility, decency, respect and dignity"... If that fundamental term is breached, the employee can claim that she or he has been constructively dismissed.

189 The second approach does not require the implication of a fundamental term but requires a determination as to whether the conduct of the employer is so intolerable that a reasonable person should not be expected to persevere in the employment. ...

224 These facts are very different from those before the Supreme Court in *Evans*...

225 ... It is a reasonable conclusion that Ms. Drew would be stigmatized if she returned and that she would face hostility. She had been humiliated by Mr. Orr in the past and would still have some contact with him. Furthermore, Mr. Gallagher continued in Human Resources and he had concluded as far back as December 2004 that he believed Mr. Carroll and Mr. Orr and that Ms. Drew was only seeking attention. Ms. Drew could, therefore, hardly count on an objective response from

³⁹ *Drew v. Canadian National Railway*, [2009] L.V.I. 3853-2, 2009 CarswellNat 2256 (WeC) (Can. Arb. Brd).

Human Resources if she had problems. Finally, Ms. Drew had been advised by her doctor that her mental health would suffer if she returned to CN, at least while the conflict was unresolved. I therefore find that it was objectively reasonable for Ms. Drew to reject the offer of the position at GO and that the company has therefore failed to meet the onus of proving that she failed to mitigate her damages.

xv. 9 July 2009: *McBrearty*⁴⁰

Guthrie J.:

67 Cerescorp's attorneys argued that Mr McBrearty could have mitigated his damages by remaining with Cerescorp during the 24-month notice period. The Court disagrees. Mr McBrearty no longer believed the word of Mr Simmers, CTI's CEO, did not trust the financial figures emanating from Mr Rutolo, CTI's CFO, had no information concerning the criteria that Mr Simmers, in his sole discretion, would use to calculate his bonus (if any), and was suddenly in the position where his annual remuneration had been substantially reduced retroactively. This kind of mitigation requires a situation of mutual understanding and respect which is absent in this case. It is Cerescorp that bears the onus of proving that a reasonable person in the place of Mr McBrearty would have returned to work, and in the Court's opinion [citing *Evans*] Cerescorp has not discharged its burden.

xvi. 8 September 2009: *MacKinnon*⁴¹

Warner J.:

60 In this case, whether the Plaintiff had good reason depends on whether the unilateral decision of the President to take personal responsibility and oversight for enrollment was a fundamental change to the Plaintiff's contract. The factual matrix involves no other changes to her employment. Her position, title, other duties, responsibilities, role, salaries and benefits, and place of work all remained the same.

61 The test is an objective test and, essentially, a question of fact. ...

63 First, as noted in *Quitting for Good Reason*, at pp. 20 to 33, the general approach of courts to the determination of when a change is fundamental, has swung like a pendulum in concert with the economy between (a) a "subjective test" (Echlin/Fantini's term) that was protective of employee's expectations that prevailed during the good economic times of the 1960s and 1970s, and (b) the "objective approach" (again Echlin/Fantini's term) beginning with *Canadian Bechtel v. Mollenkopf*, [1978] O.J. No. 1200 (Ont. C.A.) and persisting throughout most of the 1980s and early 1990s, that recognized an employer's legitimate business interests, or at least business necessity, and a broad entitlement to implement job reassignments in good faith. Since *Farber v. Royal Trust*, [1997] 1 S.C.R. 846, the

⁴⁰ *McBrearty c. Cerescorp Company*, 2009 QCCS 3134, [2009] Q.J. No. 6954 (QL).

⁴¹ *MacKinnon v. Acadia University*, 2009 NSSC 269, [2009] N.S.J. No. 411 (QL).

pendulum has swung back slightly to what Echlin and Fantini call the current test. Legitimate business interests can justify a degree of change in the employee's duties, provided the degree of change is not fundamental to the employment contract.

64 The economic times in which the decisions cited by counsel were made is a contextual factor that affects the application of those decisions to this matrix. ...

107 While I find that the removal of enrollment and admissions from the Plaintiff's portfolio was a change in her job, it was not a fundamental change to an essential term of her employment contract. ...

108 If I am wrong, the plaintiff is entitled to damages in lieu of notice, subject to reasonable mitigation. ...

115 But for the issue of mitigation dealt with separately below, I find that the reasonable period of notice for someone in the plaintiff's position, in these circumstances, would be sixteen months...

125 The obligation to mitigate by working with the employer while looking for alternative work has been a contentious principle. The Ontario Court of Appeal decision in *Mifsud* has been much maligned and seldom applied. Recently the Supreme Court of Canada in *Evans* endorsed the *Mifsud* principles.

126 According to the Supreme Court in *Evans*, absent bad faith or other extenuating circumstances, which in para. 30 were described as an atmosphere of hostility, embarrassment or humiliation, there is no juridical reason why an employee should not be expected to work out the notice while looking for other work. The Court suggests that this is an analysis that should be made on a case by case basis, but it does not start with the assumption, either in cases of constructive dismissal or wrongful dismissal, that an employee should not consider working the notice period. The Court emphasized that the critical element is whether there was an atmosphere of hostility, embarrassment or humiliation.

127 Applying that to the case at bar, I am satisfied that this one of those cases, whether rare or not, where Ms. Cook MacKinnon should have worked out her notice.

Query whether the *Evans* decision is also indicative of the common law having “swung like a pendulum in concert with the economy” following the global economic meltdown beginning in late 2007 - early 2008 recognizing an “employer's legitimate business interests, or at least business necessity, and a broad entitlement to implement job reassignments in good faith.”

xvii. 25 September 2009: Besse⁴²

Slade J.:

78 There can be no question but that the imposition of a temporary lay-off constitutes, in the absence of a contractual provision permitting the same, a fundamental breach of contract. ...

81 In conclusion, the plaintiff has established that the imposition by the defendant of a temporary lay-off, while not intended as a termination of the plaintiff's employment, constituted a repudiation of an essential term of the employment contract. The plaintiff was entitled to treat it as a constructive dismissal.

82 In *Evans* ... the Yukon Court of Appeal and the Supreme Court of Canada set out the law on an employee's duty to mitigate his or her damages by returning to work with his or her former employer. ...

92 Even if Dr. Machner, had, in the several weeks between taking over the dental practice and Mrs. Besse's departure on medical leave, inquired of her intentions by reference to her age, and any obligation that may exist to make a severance payment, his actions between mid-December and February 14th, viewed objectively, reveal no good reason why a reasonable person in Mrs. Besse's specific circumstances would have experienced stigma or loss of dignity, or have valid concerns for the workplace atmosphere on a return to her previous employment.

93 I find the defendant has established that Mrs. Besse failed to mitigate her loss by declining to accept the defendant's offer of a return to her previous employment. Her recovery in damages is therefore limited to the period from January 14 to February 19, 2007.

VI. Conclusion

In the words of Abella J. dissenting in *Evans*, the majority ratio can result in the “bizarre consequence of transforming a wrongful dismissal attracting a substantial notice period to a lawful one attracting none.”⁴³

Further, try to imagine circumstances where “an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment” (a constructive dismissal) in a situation “[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.” Viewed thus, *Evans* arguably

⁴² *Besse v. Dr. A.S. Machner Inc.*, 2009 BCSC 1316, [2009] B.C.J. No. 1912 (QL).

⁴³ *Evans* SCC, *supra* note 1 at para. 139.

creates a legal oxymoron. Another inconsistency between *Evans* and general principles of mitigation in the employment context, as pointed out above,⁴⁴ is that according to *Evans*, an employee should be required to return to work for the dismissing employer only where the salary offered is the same, but the law has long required dismissed employees to accept reasonable alternative employment with non-dismissing employers at lower salary than the lost job paid.

Having a requirement as a matter of law 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” has the effect of encouraging employer and employee mischief to avoid or attach liability respectively. When contemplating a heavily multi-factored and factually contextual analysis to overcome: (1) employers may be motivated to paint a factual picture wherein “objectively”, conditions rendering the return to work unreasonable to the employee are absent even though the employer knows it has fundamentally breached the employment contract and the employee “subjectively” perceives hostility, embarrassment, stigma and/or loss of dignity; (2) employees may be motivated to paint a factual picture wherein “objectively”, a reasonable person in the employee’s position would be experiencing hostility, embarrassment, stigma and/or loss of dignity, when “subjectively” conditions rendering the return to work unreasonable to the employee are absent. The *Evans* analysis also leaves adjudicators widely free to arrive at “outcome oriented” decisions by “finding” the facts and “applying” the multiple factors so that the outcome results in damages paid, or not paid, to plaintiffs in similar situations depending on whether the adjudicator feels it was objectively reasonable for the employee to reject the offered re-employment, or not.

Perhaps the law ought not to *require* (on pain of forfeiting pay in lieu of reasonable notice for the employer’s fundamental breach of the employment contract) an employee to return to work for the dismissing employer at all considering that it is the rare employee who does not subjectively experience embarrassment, humiliation and loss of dignity when his or her employer unilaterally and fundamentally alters the employment contract (a unique subset of contracts marked by an inherent imbalance of bargaining power) disturbing the central role that work plays in the individual’s sense of

⁴⁴ See *Borsato*, *supra* note 26.

identity and dignity at the time of dismissal when the employee is most vulnerable and hence, most in need of protection from the Courts.⁴⁵ Only time will tell whether the common law pendulum will swing back to favor wrongfully dismissed employees.

⁴⁵ *Evans* SCC, *supra* note 1 at paras. 94-4.

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