Constructive dismissal and mitigation of damages: Is there an obligation to accept another position offered by the employer?

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The Supreme Court of Canada has previously addressed this issue in Evans v. Teamsters Local Union No. 31[1] and concluded that, in certain circumstances, when an employer offers a new position to a dismissed employee, the latter may have to accept it in order to mitigate their losses.

A few years later, in 2108805 Ontario inc. c. Boulad,[2] the Court of Appeal stated that such acceptance is not automatically required because an employee cannot be forced to accept a position offered without mutual understanding and respect between the parties.

More recently, the courts have indicated that acceptance of a position with a former employer is indeed not automatically required and emphasized the importance of analyzing the totality of the circumstances when determining whether an employee must accept an offer from their former employer.

In short, the issue is whether a reasonable person in the same situation would accept the employer's offer. Both the tangible aspects, such as the nature and conditions of employment, as well as the intangible aspects, such as work climate and the preservation of the employee's dignity, are essential and must be considered.

Mitigation of damages

In determining whether an employee has been constructively dismissed, the question is whether a reasonable person in the same circumstances would have considered there to be a substantial change to the essential conditions of their employment contract.

In *St-Laurent* c. *Cosmétiques Baronesse inc.*,[3] the Administrative Labour Tribunal («ALT») responded to this question by confirming that each situation is unique.

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In this case, the ALT concluded, on the basis of all the facts and the relationship between the parties, that the plaintiff was not required to mitigate her damages by agreeing to a change of territory, given that such a change was not compatible with her family obligations.

The employer, a distributor of cosmetic products for beauty salon and spa professionals, had offered the plaintiff, a resident of Chambly, the position of sales representative for the South Shore. The territory for which she would have been responsible stretched from Boucherville to Drummondville, and from Brossard to Sherbrooke. It also included Vaudreuil.

When a portion of Montréal's downtown and the West Island was added to her territory, the plaintiff, who had joint custody of her children and had them in her care every other week, was given flexibility in her schedule to care for her children.

After an absence due to disability, the plaintiff was informed of the need to adhere to a strict schedule and that, because of client complaints, she would instead be assigned to the territory of the North Shore (Laval, Laurentides, Ottawa and Gatineau), with the obligation to work more than 40 hours per week, despite her attending physician's advice to the contrary.

The ALT first pointed out that the undisputed evidence showed that the plaintiff had initially accepted the representative position because the employer offered her the opportunity to work on the South Shore and a flexible schedule.

The ALT added that the employer had not established policies or practices whereby territorial changes could be made on a regular basis or in certain circumstances.

Finally, the ALT noted the employer's failure to attempt to adjust the schedule or sales territory, even though it had hired two representatives to replace the plaintiff and reorganized the territory for them.

Placed in this situation without further modification, the plaintiff had no choice but to refuse the changes. The ALT confirmed the absence of a resignation and upheld the complaint for constructive dismissal.

Notice of termination

Dismissed employees have a duty to mitigate their damages, meaning that they must make reasonable efforts to find employment in their field or a related field, and they must not refuse offers of employment that are deemed to be reasonable in the circumstances.

The assessment of a reasonable notice period is a question of fact that must take into consideration the specifics of the entire situation. The question of whether the notice period should be reduced due to the employees' failure to fulfil their obligation to mitigate their damages—which is an obligation of means—is also essentially a question of fact.[4]

This is another example of something which requires a case-by-case assessment.

What to look for when assessing the terms offered to a person facing a termination of employment

In short, although it may be reasonable for an employee whose position has been eliminated to accept a job offered by their employer to mitigate their damages, it is not a given. All facts and circumstances must be considered.

In assessing the position and terms offered to such an employee, and in order to validly claim that the employee is required to mitigate their damages, a prudent manager should determine whether there are barriers to continued employment under these conditions. In particular, this manager

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should consider whether a reasonable person placed in the same situation would accept the position, notably because the employee would not suffer embarrassment, humiliation, hostility or loss of dignity in doing so.

Our Labour and Employment Law team is available to advise you and answer your questions.

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1. 2008 SCC 20.
2. 2016 QCCA 75.
3. 2021 QCTAT 3732.
4. *CISSS des Laurentides* c. *St-Arnaud*, 2021 QCSC 2071.

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