MITIGATION: DUTIES AND DEDUCTIONS

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Mitigation is on the tip of the tongues of employment lawyers right now, perhaps more than ever before as a result of: the emerging case law; the evolving principals; and, the new recession. Mitigation is resoundingly relevant.

There are two "mitigation" issues which will be addressed in this paper, the first is the implied obligation to mitigate damages with respect to express termination provisions in employment contracts and the second, is the recent treatment of the duty to mitigate at common law by acceptance of employment with the current employer.

PART I – DEDUCTIONS FROM CONTRACTUAL PAYMENTS

Whether or not termination provisions in employment contracts are subject to mitigation remains unsettled. The issue has not been dealt with the Court of Appeal in Ontario and the trial level decisions in the province are in direct conflict with the decision of the Alberta Court of Appeal on the subject. The current divergence stems from the application of two very different approaches to the determination of the issue. The first approach relies upon the finding that the termination provision is an express agreement as to what payment would be made to the employee in the event of termination. The second approach relies upon the finding that the termination provision is an express agreement as to what the period of reasonable notice of termination will be in the event of termination.

At present in Ontario, written termination provisions are presumed to include as an implied term, the duty to mitigate in the absence of evidence of a contrary intention.

The Courts however are frequently inclined to find that the duty to mitigate does not to reduce the amounts the employer has contracted to provide in a termination provision of an employment agreement.

A. Review of the Basics

In the absence of an employment contract, whether or not the employment was for a fixed or indefinite term[1], when terminated, an employee is required to take all reasonable steps to mitigate his/her damages by locating alternate employment. While the burden is upon the employer to prove that the employee has failed to mitigate his/her damages, the employee must seek to mitigate his/her loss by seeking out alternate employment.[2]

However, when the employee and employer have agreed, by virtue of a written employment agreement, a period of notice, or payment in lieu thereof, upon termination, the question becomes whether the employee still has a duty to mitigate his/her damages to reduce the amounts the employer has contracted to provide?

The approaches taken by the Courts in Alberta, B.C. and Ontario are not consistent. The Alberta Court of Appeal has found that Courts there will not impose a duty to mitigate the notice provided for in any termination provision. In British Columbia the caselaw from the Court of Appeal and its treatment thereafter is divided. In Ontario a contextual approach is taken as was established by the Honourable Mr. Justice Nordheimer in early 2000, albeit in *obiter*, in *Graham v. Marleau, Lemire Securities Inc.*[3], holding that a duty to mitigate is presumed unless a contrary intention is expressed.

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[1] See *Canadian Ice Machine Company v. Sinclair*, [1955] 5 D.L.R. 1 (S.C.C), *Neilson v. Vancouver Hockey Club et al*, [1988] B.C.J. No. 584 (B.C.C.A.). In cases of fixed term employment, employees can seek damages up to the end of his/her fixed term but cannot let that period run out without seeking to mitigate those damages: *Prozak et al v. Bell Telephone Company of Canada*, [1984] O.J. No. 3217 (O.C.A.)

[2] *Michaels v. Red Deer College*, [1975] S.C.J. No. 81(S.C.C).

[3] *Graham v. Marleau, Lemire Securities Inc.*, [2000] O.J. No. 383. (SCJ) (hereinafter "*Graham*")

B. Ontario Caselaw – Pre-2000

Prior to the decision in 2000 in *Graham*, the caselaw favoured the approach still in place in Alberta established in *Mills v. Alberta*[4] and in B.C. in *Philp v. Expo 88 Corp*.,[5] that there is no duty to mitigate whenever an employment agreement provides for specific payments upon termination.

In *Rossi v. York Condominium Corporation No. 123*[6] the employee was employed under a fixed term contract of employment which provided a specific termination provision which read as follows:

> "Upon the termination of the said employment of the Superintendent, any and all monies owing to the superintendent by the corporation shall be prorated to the date of such termination and shall be paid to the superintendent within seven calendar days of such termination."[7]

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[4] *Mills v. Alberta*, [1986] A.J. No. 605 (Albt. C.A.). In *Mills* the Plaintiff was employed by the government of Alberta under a contract of indefinite duration. The termination provision provided that the Defendant could terminate the Plaintiff's employment by giving six months notice or salary in lieu thereof.[4] The Court held that the termination provision was a contractual right to salary and not damages and therefore not subject to mitigation. This decision, and the principle that mitigation does not apply to termination provisions in employment contracts remains the authority in Alberta: *Paquin v. Gainers Inc*., [1991] A.J. No. 484 (ALTA C. A.), *Grant v. ISM Information Systems Management (Alberta) Corp.*, [1998] A.J. No. 573 (ALB. Q.B.) and *Nystoruk v. Provision Diversified Services Limited*, [2003] A.J. No. 332 (ALB. Q.B.).

[5] *Philp r. Expo 8 Corp*, [1987] B.C.J. No. 2127 (B.C.C.A). In *Philp*, the B.C. Court of Appeal held that if Mr. Philp had been properly dismissed he would not have had an opportunity to mitigate his loss and was entitled to the contractual payment without any offset for the contingency of obtaining work in the future. The Court held that Mr. Philp was permitted to enforce the fulfillment of his contractual entitlements and not for damages for breach of the entitlement. The Court cited the decision in *Mills* for the proposition that no mitigation was required with respect to a termination provision in a written employment agreement. While thought to have been implicitly overruled by the B.C. Court of Appeal decision in *Neilson v. Vancouver Hockey Club et al*, [1988] B.C.J. No. 584, *Philp* has still been cited as an authority for the no mitigation principle in B.C.: *Schwartz v. Selkirk Financial Technologies Inc*, [2004] B.C.J. No. 1142 (B.C.S.C.) at para. 56.

[6] *Rossi v. York Condominium Corporation No. 123*, (1989), 31 CCEL 265 (Ont. H.C.).

[7] *Rossi*, supra at p. 3 (QL).

The Court of Appeal upheld the trial judge's conclusion, that having regard to the wording of the termination provision and the fact that it would be paid within 7 days, the clause was a contractual pre-estimate of damages and therefore mitigation was inapplicable.[8]

Later, in *Emery v. Royal Oak Mines Inc.*,[9] the Honourable Madam Justice Chapnik dealt with a situation where the contract provided the employer's formula for notice in lieu of termination to be that the Plaintiff would receive 12 weeks' salary, plus 4 weeks per year of service, with a minimum of 39 weeks and no maximum.[10] Chapnik J. cited *Mills* and *Philp* for the proposition that where an employment contract provides for a specified period of notice upon termination, the employee is contractually entitled to the salary component without obligation to mitigate his/her losses.[11] Chapnik J. specifically found that:

> "It is therefore open for the parties to provide for a severance payment in which the principles of mitigation do not apply. Mr. Emery's severance package contained a formula triggered by the termination which is easily ascertainable, that is, it was a matter of mere arithmetic. In a document outlining the specific benefit entitlements for the four senior executives, no mention was made of potential deductions or a duty to mitigate losses."[12]

The Courts in those decisions took the approach that, unless the employment contract specifically provides for deductions as a result of mitigation, then no duty to mitigate would be imposed upon the terminated employee.

In *Jardine v. Gloucester (City)*[13] the Court followed Chapnik J.'s reasoning in *Emery* and held that unless the employment agreement specifically imposed an obligation to mitigate the employer's losses, then no such duty to mitigate would be imposed. Bell

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[8] *Ross v. York Condominium Corporation No. 123*, [1991] O.J. No. 3174 (O.C.A.) at para. 1 (QL).
[9] *Emery v. Royal Oak Mines Inc.*, [1995] O.J. No. 1708 (S.C.J.).
[10] *Emery*, supra at para 22. Note: It does not seem that there was a specific employment agreement in this case, yet Justice Chapnik found that the employer's procedure upon terminations was to pay severance according to a specific formula.
[11] *Emery*, supra at para 32.
[12] *Emery*, supra at para 33.
[13] *Jardine v. Gloucester (City)*, [1999] O.J. No. 424 (SCJ).

J. in this decision specifically found that the policy and practice of the employer was that employees had no obligation to mitigate their losses upon termination, and therefore that the termination provisions did not impose an implied obligation on the employees to do so.[14]

Prior to 2000, the Ontario caselaw consistently found that termination provisions are to be enforced upon termination without a corresponding duty to mitigate unless one is explicitly provided, following the *Mills* and *Philp* line of cases.

C. 2000 and *Graham*

Thereafter, in February 2000, Nordheimer J. rendered his decision in *Graham*[15]. While his decision relating to mitigation was in fact *obiter*, as he found that the criteria for the payments at issue were not met, Nordheimer J. summarized the principles from the existing caselaw as follows:

> "I confess that I do not find it easy to reconcile all of these cases however, I feel that the following general conclusions can be drawn from them:
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> (a) When a contract is a fixed term contract or a contract of indefinite duration, the principle of mitigation applies to a claim arising from any breach of that contract; and
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> (b) In cases where there is an agreed upon severance provision, the principle of mitigation also applies to that provision but;
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> (c) There is an exception to that second conclusion in cases where the contract of employment can be interpreted as having exempted, either expressly or by implication, the employee from the duty to mitigate. Examples of such exemptions are:
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> (i) An express waiver of the duty to mitigate as in *Neilson*;

[14] *Jardine*, supra at paras. 212-214.
[15] *Graham*, supra.

> (ii) An express obligation to continue to make the payments under the employment contract as in *Paquin*;
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> (iii) Where the contractual provision provides that the severance amount is payable immediately at or, very shortly after, the time of the termination as in *Borkavitch* and *Rossi*. In such cases the fact that the payment is to be made prior to the time when either the employer or the employee could know whether mitigation could occur implicitly suggests a waiver of that obligation."[16]

After his summary, Nordheimer J. conceded that his conclusions were inconsistent with the decisions in *Mills* and *Philp*, previously relied upon as the authorities in this issue, but never-the-less held that a duty to mitigate should be presumed unless explicitly or implicitly waived.

In reaching his conclusions Nordheimer J. commented as follows:

> "I agree with the thrust of the cases that hold that the principle of mitigation ought to apply to a contract of employment that contains a provision that stipulates what notice is to be given, or what payment to be made in lieu of notice, if the termination of the contract occurs. Such a stipulation is nothing more than an agreement between the parties as to the length of the reasonable notice to terminate the contract. I see no reason why there should be any distinction drawn between contracts of employment where the notice period is not stipulated and those where it is with the result that there would be a duty to mitigate in the former but not in the latter. If that were the case, it would seem to be an unfair result for the employer simply because the parties tried to agree in advance on the proper notice and thereby eliminate that as an issue in the event of a dismissal - subject of course to the Court's overriding right to determine the reasonableness of such an agreement in any given case."[17]

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[16] *Graham*, supra at para 50.
[17] *Graham*, supra at para 53.

Nordheimer J.'s final comment, that the Court retains an overriding right to determine the reasonableness of a termination provision, is troubling as it seems to undermine the value of employment agreements altogether.

In any event, *Graham* concluded that there is a *prima facia* presumption of a duty to mitigate, which would have to be rebutted explicitly or implicitly in the circumstances.[18] Based on the reasoning in *Graham*, an inquiry into the language of the termination provision, method of payment, and policies and procedures of the employer are necessary before making a determination of whether the employee is required to mitigate.

The exceptions from that general rule that Nordheimer J. lists are examples of cases of what he found to be an express or implied rebuttal of the mitigation presumption by the parties. The following discussion will assess how the *Graham* decision has been recently treated in Ontario.

D. Post-Graham

The Court's road map in *Graham* for a determination as to whether the duty to mitigate applies has been considered and applied in a number of cases in Ontario and elsewhere, and therefore seems to be the authority despite the fact that his discussion was in fact *obiter*.[19]

In *Sures v. Calian Technology Limited,* the Honourable Mr. Justice Charbonneau cited *Graham* as the prevailing authority with respect to the duty to mitigate. In that case the termination provision provided as follows:

> "2.4 The employment of the Employee may be terminated at any time:
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> …(b) by the Corporation, by providing to the Employee the greater of (i) a lump sum amount equal to twelve month's Annual Base Salary in effect at the time of

[18] This approach is consistent with the B.C. Court of Appeal approach in *Neilson,* supra.
[19] *Sures v. Calian Technology Limited,* [2003].

> termination, and (ii) those amounts required to be paid pursuant to the *Employment Standards Act* (Ontario)."[20]

Charbonneau J. held that there was insufficient evidence for an application of one of the exceptions listed in *Graham* and held that the duty to mitigate did apply[21]. This finding was despite the fact that the termination provision called for a lump sum payment to the employee, which no doubt would have been paid well in advance of when either party could know when mitigation could occur.

In *Wells v. Conestoga Meat Packers*[22] the termination provision in a fixed term employment agreement provided that employment could be terminated without cause "immediately upon paying to the Employee the Termination Amount" which was defined as "the sum equivalent to the Employee's Base Salary for the remainder of the Term".[23] In determining that the employee was not required to mitigate, the Court cited *Graham* for the proposition that when an agreement provides for payment of the severance amount immediately upon termination, it can be interpreted as waiving the duty to mitigate. Specifically, Taylor J. in writing the decision held:

> "By providing for the payment to be made prior to the time when either the employer or the employee could know whether mitigation might occur implicitly suggests a waiver of that obligation."[24]

Later, in *Orr v. Magna Entertainment Corp.*[25], the Court held that a waiver of the duty to mitigate could be implied as a result of the "design" of the contract and the payment of the severance amount within 30 days of termination.[26] The termination provision in that case read:

> "Otherwise, you or the Corporation may, at any time in the first three years of this agreement, terminate your employment and this agreement by providing the other party with twenty-four (24) months prior written notice of intention of termination and, at any time, in any year after

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[20] *Sures*, supra at para 14.
[21] *Sures*, supra at para 51.
[22] *Wells v. Conestoga Meat Packers Limited*, [2007] O.J. No. 4335 (S.C.J.) per G.E. Taylor J.
[23] *Wells*, supra at para 56.
[24] *Wells*, supra at para 58.
[25] *Orr v. Magna Entertainment Corp.*, [2008] O.J. No. 116 (S.C.J.) per G. R. Klowak J.
[26] *Orr*, supra at para 205.

> the third year of this agreement, by providing the other party with twelve (12) months prior written notice of intention to terminate. In addition the Corporation may elect to terminate your employment immediately by paying you a retiring allowance. Such retiring allowance shall be equal to your salary and Annual Bonus for the two years preceding termination, in the case of termination in the first three years of this agreement, and equal to your salary and Annual Bonus for the one year preceding termination, in the case of termination after the third year of this agreement. Any such aforesaid payment of a retiring allowance will be made in a lump sum within thirty days of the day of termination. If your employment is terminated pursuant to this paragraph, the Corporation shall maintain on your behalf the benefits referred to in paragraph 4(a) for a period of two years, in the case of termination in the first three years of this agreement, and thereafter one year from the day of termination."[27]

While the termination provision clearly provides the employer with the option of providing advance notice of termination, Klowak J. found that, as the employer failed to do so, its only option was to pay the lump sum within 30 days. That, along with the "design" of the parties, led Klowak J. to find that the duty to mitigate was inapplicable.

In *Eady v TrekLogic Technologies Inc.*[28] the Court dealt with the following termination provision:

> "9. Termination without Cause
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> The TrekLogic Group may terminate this Agreement at any time and for any reason by providing Consultant with: (i) written notice of termination; (ii) payment equal to one (1) year of consulting fees and benefits, to be paid, at the option of the TrekLogic Group, in a lump sum or in accordance with normal pay periods; and iii) vesting of options per Schedule "C". The preceding payments in lieu of notice shall satisfy TrekLogic Group's obligations to pay termination penalties."[29]

The Honourable Mr. Justice Herman asked the question as to whether a waiver of mitigation can be implied in the circumstances. Herman J. found that the employer's

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[27] *Orr*, supra at para 183.
[28] *Eady v TrekLogic Technologies Inc.*, [2008] O.J. No. 1693 (O.S.C.J.).
[29] *Eady*, *supra* at para 122.

option to make payments at the regular pay periods did not fall within the third exception listed in *Graham*. However, Herman J. distinguished *Graham* on the facts, and indeed found that the termination provision was intended to provide the employee with a minimum entitlement in the event of a breakdown of the employment relationship, thereby implicitly waiving the duty to mitigate.[30]

Earlier this year (2009), the Court of Appeal in *Soye v Corinthian Colleges Inc.*[31] briefly dealt with the issue of mitigation and employment contracts. In that case, there was an issue as to what agreement in fact governed the parties. It is not clear from either the Court of Appeal or the trial decision[32] what the specific terms/language of the termination provision were, nor did either decision refer to the reasoning in *Graham*. Of particular interest is that the Court of Appeal overruled the trial judge's ruling which permitted reimbursement to the employee for mitigation expenses incurred by stating that "[t]he agreement provided for payment in lieu of notice regardless of whether the respondent mitigated."[33] It is unclear what approach the Court of Appeal took to render its decision in this case, but it is clear that the Court of Appeal determined that there was no implied duty to mitigate in that case.

Leaving *Soye* aside, what seems to be the determining factor for the Courts post-*Graham* is the manner in which the termination payments are to be made, focusing on the timing of the payments – Nordheimer J.'s third exception in *Graham*. The focus seems to be on whether the parties agreed to payments that they knew would not be subject to mitigation if the payments were to be made prior to both parties having the ability to determine if/when mitigation could in fact take place. This suggests that, absent an express waiver, the manner and timing of the payments will be the focal point of any inquiry into this issue.

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[30] *Eady*, *supra* at para 131-133
[31] *Soye v Corinthian Colleges Inc.*, [2009] O.J. No. 1451 (O.C.A.).
[32] *Soye v Corinthian Colleges Inc.*, [2008] O.J. No. 876 (S.C.J.) per K.A. Hoilett J.
[33] *Soye v Corinthian Colleges Inc.*, [2009] O.J. No. 1451 (O.C.A.) at para 9.

E. Deductions in Summary

In cases without written employment agreements, there is an implied agreement to provide reasonable notice of termination and the damages for failure to provide such reasonable notice are subject to a duty upon the employee to mitigate. In Ontario, in cases where there is a written employment agreement, an implied duty to mitigate will be presumed unless a contrary intention is found in the circumstances, which determination will be made on a case-by case basis. Some indicators from the caselaw which suggest that a duty to mitigate will not be imposed on benefits provided in termination provisions of written employment agreements are:

(a) An express waiver of the duty to mitigate;[34]

(b) An express obligation to continue to make the payments under the employment contract;[35]

(c) Payments are required shortly after the termination occurs;[36]

(d) Where advance notice is not provided in cases where the termination provision provides a choice between advance notice or a lump sum payment in lieu notice;[37]

(e) Where the termination provision was intended to be an employee's minimum entitlement upon termination;[38]

(f) A lump sum payment was required on termination;[39] and

(g) The policy and procedure of the employer is that employees had no obligation to mitigate their losses upon termination.[40]

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[34] *Neilson*, supra as noted by Justice Nordheimer in *Graham*, supra.
[35] *Paquin*, supra, as noted by Justice Nordheimer in *Graham*, supra.
[36] *Rossi*, supra as noted by Justice Nordheimer in *Graham*, supra, *Wells*, supra.
[37] *Philp*, supra, and *Orr*, supra.
[38] *Eady*, supra.
[39] *Wells*, supra, and *Neilson*, supra.
[40] *Jardine*, supra.

PART II – DUTIES AND ACCEPTANCE OF POSITIONS WITH THE TERMINATING EMPLOYER

A. *Evans v. Teamsters Local Union No.31*

In the decision released on May 1, 2008 of *Evans v. Teamsters Local Union No. 31*[41], the Supreme Court of Canada adopted a conservative approach to assessing an employee's efforts to mitigate his damages, finding an employee had completely failed to mitigate his damages by refusing to return to work for the balance of the notice period.

Evans was employed as a business agent for Teamsters Local Union No. 31 in its Whitehorse, Yukon office for over 23 years. His employment was terminated after the newly elected Union Executive took office in January 2003. Following his notice of dismissal, Evans advised the Union that he was prepared to accept 24 months' notice of termination of his employment, offering to continue his employment for 12 months followed by a payment of 12 months' salary in lieu of notice. The Union rejected Evans' offer but did respond by requesting that Evans return to his employment to serve out the balance of his 24 month notice period. Evans refused to return to work and sued for wrongful dismissal, seeking 22 months' termination pay.

The Court was asked to consider *inter alia* whether Evans failed to mitigate his damages by refusing to return to his prior position and to work out the notice period.

At trial, the Judge applied a purely subjective test when assessing the reasonableness of Evan's refusal to return to work for the Union for the remainder of his notice period. The Trial Judge only gave consideration to what Evans himself thought was reasonable in the circumstances. In doing so, the Trial Judge concluded that Evans had been wrongfully dismissed by the Union and that in the circumstances; he was entitled to refuse the Union's offer to attend work for the balance of his notice period. As a result, the Trial Judge awarded Evans 22 months' salary in lieu of notice.

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[41] [2008] 1 S.C.J. No. 20.

The Yukon Court of Appeal allowed the Union's appeal, finding that the Trial Judge had erred in law by applying a purely subjective test when assessing whether Evans' refusal to return to work for the Union for the balance of his notice period was reasonable. The Court of Appeal held that an objective standard of reasonableness was the proper test to be applied to the facts of the case, meaning that the test was not what Evans would do in the circumstances, but rather what a "reasonable person in similar circumstances" would do. In doing so, the Court of Appeal set aside the Trial Judge's award of damages equivalent to 22 months' compensation in its entirety, and held that Evans' refusal to return to work for the Union was unreasonable and constituted a complete failure to mitigate his damages.

The majority of the Supreme Court dismissed Evans' appeal and upheld the decision of the Yukon Court of Appeal. The Court concluded that the objective standard was the correct one. The majority of the Supreme Court also concluded that Evan's refusal to return to work for the balance of his notice period was not objectively reasonable. Being requested to return to work for the notice period is akin to working notice.

Abella J. was the lone dissenting Supreme Court Judge. In her dissenting reasons, Abella J. held that an employee should not be expected or required to mitigate damages by remaining in the workplace from which he or she has been dismissed. To do so, according to Abella J., disregards the uniqueness of an employment contract as one of personal service. Abella J. also found that objective and subjective factors ought to be taken into consideration when assessing the reasonableness of an employee's refusal to return to a workplace that he or she has been dismissed. She held 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. The fact that Evans had few alternative employment opportunities in Whitehorse, other than the Union's offer to return to the workplace, did not entitle the Union to direct Evans to mitigate his damages by working through the notice period in the workplace from which he had been wrongfully dismissed.

B. The *Evans* Aftermath and Recessionary Tactics

Following its release, there was debate as to whether the *Evans* decision was fact specific or whether it would be applied in a more broad fashion and have the effect of increasing obligations of employees in the area of mitigation. There have been several cases which have dealt with the mitigation doctrine in *Evans* since the date of its release of interest.

The first opines on what has become a common business practise at present, the move to the four day work week. In *Borsato v. Atwater Insurance Agency*[42], the Plaintiff alleged constructive dismissal when she was moved to a four day work week and her remuneration reduced by a corresponding twenty percent.

The Court held that the change was a unilateral and fundamental change to a material term of the employment contract such as to amount to constructive dismissal. The Defendant argued that the Plaintiff had failed to mitigate her damages by continuing to work for the Defendant until she found another position. The Court held that it was not reasonable to require the Plaintiff to mitigate her damages by returning to a salary 20% lower than her previous compensation. The Court relied upon the statements by the Supreme Court of Canada in *Evans* that the requirement to return to work was not absolute, but "should only occur where there are no barriers to re-employment" and "the central issue is whether a reasonable person would accept such an opportunity". Citing the factors in *Red Deer College v. Michaels*[43], 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".

The Court also took notice of the fact that the Plaintiff had left on stress leave after a dispute arose from the change being made and that the Plaintiff was out of the workplace and would have had to return. Perhaps this will distinguish it from events transpiring at present; perhaps it will be the fact that there does not appear to have been

[42] [2008] B.C.J. No. 1039 (B.C.S.C.).
[43] [1976] 2 S.C.R. 324.

any across the board cut to all staff in the *Borsato* case, or perhaps it may be the economic situation at the present timing making the anticipated action of the reasonable person perhaps somewhat different than it was in early 2008 when this case was tried.

In the Ontario decision of *Lochle v. Purolator Courier Ltd.*[44], the Court held that an employee failed to mitigate his damages by accepting the offer of a demotion within the company. This too is an important decision in light of all the restructuring at present.

The Plaintiff had held a series of management positions with the Defendant. At the end of a fixed term assignment, the Plaintiff was told to find his own position in the company and placed on a short-term project while he did so. During that time, he applied for six management positions, but was unsuccessful in his internal job search. He was thereafter told to apply for a position outside of management which would have been a demotion; he refused. Many months later he was offered the non-management position and told he would be taken to have resigned if he failed to report to work. He refused the position and did not report to work.

The Court concluded that the actions of the Defendant amounted to constructive dismissal. However, it went on to conclude that the Plaintiff did not meet the objective standard of a reasonable person in refusing to accept the demotion to mitigate his damages. It held:

> "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 [in planning]…."
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> "Clearly [the Plaintiff] was respected for his ability and his experience. As well, the salary would have remained at the higher level…"
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> "Considering the totality of the evidence objectively, I am not satisfied the working environment would have been one of 'hostility, embarrassment or humiliation.' The working relationships were not 'acrimonious' and the work would not have been 'demeaning'. Indeed, the situation was quite

[44] [2008] O.J. No. 2462 per D.J. Gordon J.

> the opposite. [The Plaintiff], subjectively, may have felt embarrassed to return to a lower level but there was no evidence tendered to support an objective finding in this regard. It is unknown how other employees would have viewed [the Plaintiff's] return as unit manager and how they would have reacted to his presence in this position."
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> "The conduct of management… was inappropriate in presenting the offer of employment for a lesser position. Their actions, however, did not create an unworkable environment and can be viewed as an attempt to retain a valued employee and, in effect, mitigate their liability."[45]

The compensation was the same and nothing had transpired between the parties to create "bad blood". This case illustrates that restructuring of the workforce may place employees in difficult positions and damage to the resume may not be enough to remove the obligation to mitigate damages by accepting the position offered.

Another "recession" relevant case emerged from BC in which an employee placed on temporary lay-off refused to return to work. In *Davies v. Fraser Collection Services Ltd.*[46], the Plaintiff was placed on a temporary lay-off. The employer had no contractual right of lay-off nor other basis providing it the right to temporarily lay-off the Plaintiff. When the Plaintiff's lawyer sent a demand letter, the Defendant recalled the Plaintiff to work. The issue was whether the Plaintiff failed to mitigate his damages by returning. The Court held that he did.

The Court concluded that there were no factors which rendered the Plaintiff's return to work as unreasonable, and that in view of the fact that he was offered the same position, at the same compensation, he had an obligation to return to work and to work out at least what he believed to be the reasonable notice period in order to mitigate his damages. The Court held that this obligation was not obliterated by the Plaintiff's concern that he would be agreeing to further lay-offs.

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[45] See par. 63-66.
[46] [2008] B.C.J. No. 1368.

C. The Breakdown of the Relationship

The Court has however continued to apply the traditional considerations with respect to the obligation to mitigate damages by accepting the changes presented by the employer of whether there has been a breakdown in the relationship rendering the return to work to be humiliating, hostile or embarrassing.

In the decision of the Alberta Court of Appeal in *Magnan v. Brandt Tractor Ltd.*[47], the Court refused to find that the Plaintiff failed to appropriately mitigate his damages by returning to work where there existed allegations of dishonesty by the Defendant employer.

The Plaintiff had taken a voluntary retirement package and had then been told to return to work and give back retirement gifts bestowed upon him amidst allegations of improper acceptance. The Court distinguished this situation from that in *Evans*, in which the Plaintiff employee had expressed a willingness to return to work, and had in fact offered to return to work for at least part of the notice period, which evidence there was no impediment to his return.

The Court also found there had not been any failure to mitigate in a situation in which an employer had installed a camera in the employee's office without her knowledge.[48] When the employee confronted the employer she was told that there had been thefts and the president suspected the perpetrators may go into her office to review the loot. The employee refused to continue to report to work. She expressed that "she felt violated and could not continue to work so long as [the president] was present as she felt he was no longer trustworthy."[49] The Court held:

> "A secret camera being installed in a trusted manager's office without her knowledge, although perhaps acceptable employer conduct in itself, coupled with a totally

[47] [2008] A.J. No. 1109.
[48] Coldwell v. Cornerstone Properties Inc. [2008] O.J. No. 5092 (Ont. S.C.J.) per. T.D. Little J.
[49] Ibid at par. 15.

> implausible explanation, renders the actions unacceptable."[50]

The Court held that the employer created a poisoned work environment such that she was constructively dismissed. The Court went on to state that *Evans* does not require an employee to return to a work environment that is humiliating, hostile or embarrassing, and therefore, she was not required to return to work to mitigate her damages.

This same principle was applied with the opposite finding by the Honourable Mr. Justice Echlin in *Illiescu v. Voicegenie Technologies Inc.*[51] In that case it was stated in *obiter* that if the employee had been constructively dismissed, which he was not, he would have been obligated to return to work as no atmosphere of hostility, embarrassment or humiliation existed.[52] The employee had been placed on a performance improvement plan following which he ceased reporting to work. Echlin J. held that the performance improvement plan was not a repudiation of the employment relationship evidencing an intention to end the relationship, and in fact it contained comments to the contrary.[53] The employee's actions were therefore held to constitute a resignation.

PART III CONCLUSION

Mitigation is a paramount concern whenever the opportunity exists to continue in the workplace and must not be overlooked. It is also important when reviewing and drafting employment contracts and hence is relevant to every employment lawyer. The principles of mitigation will undoubtedly receive much further consideration in the year ahead. Perhaps we will see the Court of Appeal seize the opportunity to comment on the post-*Graham* cases and add some clarity for lawyers in Ontario on the subject of mitigation obligations and termination provisions.

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[50] Ibid at par. 30.
[51] [2009] O.M. No. 85 (Ont. S.C.J.).
[52] Ibid at par. 45.
[53] Ibid at par 39.