# Refusal to accept new employment offer not a failure to mitigate

*Timing of new offer of employment can determine whether acceptance would be required to mitigate damages*

BY RONALD MINKEN

**FOR MOST** employees, the elimination of their position by their employer results in the termination of their employment and a severing of the employment relationship. But in some instances, employees are presented with two options — termination of employment or a new offer of employment in a different position. Sometimes the terms of the new offer of employment are similar to their current terms; other times the new offer is a demotion to a lesser position with reduced compensation. In such a scenario, what is the obligation of the employee? Is the employee obligated to accept the lesser terms and does the refusal to accept those new terms equivalent to the employee failing to mitigate her damages?

In the recent case of *Fillmore v. Hercules SLR Inc.*, the Ontario Superior Court dealt with this issue. After more than 19 years of employment, Roy Fillmore, a 51-year-old director of purchasing, was informed by Hercules SLR that his position was being eliminated. Fillmore was provided with two letters at once — one outlining his termination package and the other offering continued employment in the new position of supervisor, service. The new position came with a 20-per-cent reduction in compensation from his director job, but the employer offered to guarantee his previous salary for six months before implementing the reduced compensation package.

Hercules SLR provided Fillmore with a deadline to accept either option. When he failed to make a decision by the deadline, the company proceeded with the termination.

Fillmore brought an action for wrongful dismissal against Hercules SLR seeking notice. At a summary judgment motion, the judge determined that the employee was entitled to 17 months' notice and that Fillmore had not failed to mitigate his damages by refusing the new offer of employment.

The judge looked at the timing and substance of the new offer of employment and determined that the new offer was not an offer to work through the notice period as discussed by the Supreme Court of Canada in *Evans v. Teamsters, Local 31*, but was really an offer of a new, full-time, demoted position. In *Evans*, a terminated employee was asked to continue to work throughout the notice period and the

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# Promotion didn't start until new contract was signed

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"merely an inquiry by the manager as to whether (Gibbons) would be interested in a new position which had been created by the (company) and not an acceptance of the employment contract." Once Gibbons indicated his interest, the company gave him a job description so he would know exactly what the position would entail, said the court.

When BB Blanc provided a job description, it also told Gibbons he would be getting an employment contract with all the details including the promotion, salary increase, start date, and termination clause. Then, when the company gave Gibbons the employment contract, he took five days until he signed it. Given that Gibbons had the contract for this amount of time before he signed it — and the fact that he was university-educated — the court found he was sophisticated enough and had enough time to understand what he was signing. In addition, there was ample opportunity for him to ask questions about it and seek legal advice.

> The court found everything indicated the new job duties and salary all started on the start date in the contract and not before.

The court found everything indicated that Gibbons' new job duties and salary all started on the start date shown in the employment contract and not before, as Gibbons claimed. As a result, the promotion and new salary constituted consideration for signing the new employment contract and no other consideration was necessary to make it valid, said the court.

"I conclude that both the contract and the termination clause are enforceable and the notice given to (Gibbons) on termination is in accordance with the termination clause," said the court. "Consequently, (Gibbons) is not entitled to any further notice or payment in lieu of notice as a result of the termination of his employment by (BB Blanc)."

The court noted that had the termination clause not been valid, Gibbons would have been entitled to between two and three months' notice, due to the fact he worked for BB Blanc for 22 months, was relatively young, and was able to secure other employment fairly easily — Gibbons found another job on the last day of his two-week notice period from BB Blanc.

Gibbons' claim for wrongful dismissal damages was dismissed. See *Gibbons v. BB Blanc Inc.*, 2016 CarswellOnt 11390 (Ont. S.C.J.).

# Demotion and pay cut not a reasonable offer

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Supreme Court determined that the employee's refusal to do so resulted in the employee failing to mitigate his damages. In *Fillmore*, the court also determined that the employer's new offer was not a reasonable offer of employment due to the demoted position and reduced earnings. As a result, the employee was not obligated to accept the new terms of employment as a means of mitigation.

> If the new terms of employment are not comparable, the offer may not be reasonable and the employee will have no obligation to accept.

**Lessons for employees**

When presented with the option of termination or a new position, it is important to look closely at the new terms of employment that are being presented. If the new terms of employment are not comparable, the offer may not be reasonable from a legal standpoint and there will be no legal obligation on that employee to accept the revised terms. However, if the new terms are comparable, it may be reasonable for the employee to accept those terms. The timing of an employer's request that an employee continue to work in these situations is also very important to determine that employee's mitigation obligations. An employer's request that an employee work through the notice period after the employee refuses to accept the new position is more likely to trigger an employee's mitigation obligation than a scenario where the employee is presented with a new, lesser position as an alternative to termination.

**Lessons for employers**

The decision on whether to terminate employees or provide the option of a revised position as an alternative to termination is a delicate one. To trigger the employee's duty to mitigate, it may be prudent to offer a comparable position rather than a lesser position, consider whether it is appropriate to offer the employee a longer guarantee of remuneration, or whether to also offer working notice.

The employee's duty to mitigate is also more likely to be triggered when the employer requests that the employee work through the notice period after an employee refuses to accept a revised position.

**For more information see:**

- *Fillmore v. Hercules SLR Inc.*, 2016 Carswell Ont 11560 (Ont. S.C.).
- *Evans v. Teamsters, Local 31*, 2008 Carswell Yukon 22 (S.C.C.).

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