

**Part I – Forced to Return to Work after being Wrongfully Dismissed: Evans v. Teamsters Local Union 31**

By Kenneth Krupat

2008 was not a banner year for employee rights in Canada. The Supreme Court of Canada issued four employment law decisions all of which sided in favour of employers. Viewed collectively, the decisions show a pendulum shift by Canada's highest Court away from protecting the rights of "vulnerable employees" and towards providing employers with greater freedom to manage and protect their workplaces.

The decisions are likely to generate a high volume of litigation as employees and their former employers struggle to demarcate the new boundaries over some significant issues. The challenge for dismissed employees will be to find creative ways of getting around some of the implications of these decisions, while ensuring that their own conduct does not run afoul of the technical requirements of some of these cases.

This four part series of articles reviews and comments on these decisions.

**Evans v. Teamsters Local Union No. 31 – Forced to Return to Work after being Wrongfully Dismissed**

The Supreme Court's 6-1 decision in *Evans v. Teamsters* is one of the harshest, pro-employer decisions issued by this Court in quite some time. Although the particular facts in this case probably narrow the implications of the decision, the Supreme Court nevertheless provides some comments which will concern many dismissed employees.

Evans had worked for the Teamsters for more than 23 years as a business agent in Whitehorse. He was dismissed following the election of a new union executive, which he had opposed during the union's election process. The union terminated Evans' employment and then asked to open negotiations. When the parties could not come to a deal, the union insisted that Evans return to work for 24 months of "working notice." Evans refused to return to work. The union took the position that he had failed to "mitigate his damages" by refusing to return to work for the notice period.

The majority of the Supreme Court indicated that the appropriate question in this circumstance is whether a reasonable person would agree that the dismissed employee should be expected to return to work for his or her employer in all of the circumstances after being dismissed. The Court cited the requirement to consider work atmosphere, stigma and loss of dignity as well as nature and

conditions of employment. However, the Court held that these questions should all be resolved by looking at an “objective” standard rather than a “subjective one.”

In this particular case, Evans had a number of concerns that would seem to have justified his concerns about returning to the workplace. After all, he had been dismissed by a newly elected union executive after siding with the losing side in a hotly contested election. He had what appeared to have been genuine concerns that the workplace would have been poisoned for him. These issues were all reflected in findings by the Trial Court.

Instead of accepting the Trial Court’s findings, the Supreme Court and the Court of Appeal overturned these factual findings even though that is generally not the focus of an Appellate Court. In particular, the Supreme Court focused on a letter that Evans had written in which he had said that he was willing to return to work if certain preconditions were met. Ultimately, the Supreme Court made a factual finding that “the relationship between 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.”

Justice Abella was the lone dissenting judge – and the lone glimmer of hope for dismissed employees facing this type of situation. She highlighted the fact that the Trial Court Judge had found nine reasons why it would be unreasonable for Evans to return to work and that generally it is not an appellate court’s role to overturn these types of facts.

For Justice Abella, the major issue here was whether or not it would be reasonable for Evans to be required to return to work. Justice Abella noted that employees cannot be forced to work against their will – and to continue to be required to work in an atmosphere not conducive to appropriate “personal relations” would be inconsistent with the law as it currently stands.

The end result as summarized by Justice Abella was that Evans was in effect fired twice. First he was fired without cause, which should have meant providing him with a reasonable notice period. Then he was dismissed *with cause* and not paid anything for refusing to return to work for the employer that had chosen to dismiss him. The conclusion is that a 22 year employee is left with no compensation because of the way he was dismissed and manipulated by his former employer.

As a practical matter, it may well be true that few employers will want to have their dismissed employees return to work for a lengthy notice period – especially where they have already chosen to issue a notice of dismissal instead of providing the employee with a period of working notice. However, employers may be able to use the *Evans* decision as a bargaining lever by threatening to recall employees to work out a notice period if they refuse to accept severance

arrangements. Dismissed employees will have the obligation of showing why it would be objectively unreasonable to have to return to work for the employer that has just dismissed them.

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