



Posted on: February 17, 2016

WHAT'S TRUST GOT TO DO WITH IT? THE BC COURT OF APPEAL FINDS NO FAILURE TO MITIGATE WITH A FORMER EMPLOYER.

Richards Buell Sutton Employment Newsletter

In the recent British Columbia Court of Appeal decision of *Fredrickson v. Newtech Dental Laboratory Inc.*, 2015 BCCA 357, the Court overturned a trial judge's finding that an employee had failed to mitigate her damages by declining to accept an offer of re-employment from her former employer.

In this case, the Court of Appeal took a closer look at the "non-tangible" aspects of the employment relationship in considering whether an employee acted unreasonably, and failed to mitigate her damages, by refusing to accept multiple offers of re-employment by her former employer.

The Facts

The plaintiff ("Fredrickson") had been an employee of the defendant ("Newtech") for nearly 9 years. Both Fredrickson and the owner of Newtech, Mr. Ferbey ("Ferbey"), had a good working relationship over the years. In 2010 and 2011, Fredrickson came under significant stress resulting from her husband's illness and a serious injury to her son. On April 28, 2011, she took a medical leave of absence. On July 11, 2011, Fredrickson's doctor advised her she would be fit to return to work on July 20, 2011, and provided a note to that effect. On July 20, 2011, Fredrickson reported for work at her usual time but was told by Ferbey that she was laid off due to insufficient work.

Fredrickson engaged counsel and a demand letter was sent to Newtech on September 9, 2011. On September 23, 2011, Newtech, through its lawyer, directed Fredrickson to resume work effective September 26, 2011, and advised her that if she was dismissed, she was obliged to mitigate her damages by accepting the offer of re-employment.

On October 19, 2011, Newtech offered to re-employ Fredrickson with an offer to pay her unpaid wages from July 20, 2011 until the date she was invited to return to work, September 26, 2011.

On October 25 and November 4, 2011, Newtech again offered to re-employ Fredrickson at her same position, salary and benefits, and to pay her lost wages to the date of the first offer of re-employment, this



being September 23, 2011. Yet again on April 19, 2012, Newtech offered to re-employ Fredrickson at her identical position, salary and benefits, and to pay her lost wages to the date of the initial offer.

In total, Newtech offered to re-employ Fredrickson 5 times, and each time, Fredrickson declined the offer on the basis that Ferbey's behavior since the time he purported to lay her off had broken the employment relationship such that it was reasonable for her to decline to return to work.

The Trial Decision

The trial judge concluded that there were no barriers to Fredrickson accepting the offers of re-employment and that her acceptance of that offer would have been the reasonable thing to do in the circumstances. Ultimately, the court found that she had failed to mitigate her damages and limited the award of damages for wrongful dismissal to the period from July 20, 2011, when she was laid off, to September 23, 2011, the date she was first offered employment.

The Court of Appeal Decision

On appeal, Fredrickson argued that the trial judge erred in law by finding that a reasonable person would have returned to her job after having been dismissed from it.

Mitigation

The Honourable Madam Justice Saunders (at para. 23) held that the trial judge erred in respect to the mitigation issue in two ways:

1. failing to accord significance to the incomplete nature of the offer; and
2. failing to reflect the intangible element of mutual trust, commensurate with the nature of the employment, that flows like a current in the employment relationship.

With respect to the incomplete nature of the offer, the offer in September 2011 was taken by the trial judge to be a "make whole offer". Neither the September 23 nor the September 26 offer dealt with Fredrickson's lost income from July through to the date she was directed to return to work; in that sense, the September offers were not "make whole" offers.

Regarding the intangible element of mutual trust, the Court of Appeal concluded that the trial judge was wrong in failing to reflect the mutuality of trust, in the context of this employment, inherent in the relationship between employer and employee.

The Court espoused the following (at para. 29):



The pertinent question when mitigation is in issue was described by Justice Bastarache as whether “a reasonable person in the employee’s position would have accepted the employer’s offer. To determine whether this is so, in my view requires a judge to consider the full nature of the employment relationship. This includes the obligations of good faith or fidelity on the part of both the employer and employee, consistent with the nature of the work and the workplace. Most frequently questions of good faith, fidelity and fair dealing are questions that arise in the context of allegations of cause for the employee’s dismissal. The integrity of the employment relationship goes further, however. Just as trust of an employee, in the circumstances of the employment, is an important aspect for the employer, so too trust of the employer is important.

In *Fredrickson’s* case, the Court held that her trust in her employer was eroded by at least two aspects of Ferbey’s actions. The first was his recording on two occasions of private conversations between them, and the subsequent use made of those conversations. The second aspect concerned Ferbey’s engagement in conversation with another employee regarding *Fredrickson* in which Ferbey acknowledged that *Fredrickson* would be too embarrassed to return to work. The Court noted that Ferbey’s conduct breached the confidence one would expect of the “boss”. In those circumstances, knowing these facts, *Fredrickson* did not act unreasonably in refusing to return to that workplace.

Key Takeaways

The message from *Fredrickson* is clear: the salient question to be considered is not whether some person in that circumstance would have returned to the position but whether the *dismissed employee* acted unreasonably in rejecting the offer from her former employer. The non-tangible but very real elements of the workplace bear upon the question. A contract of employment is more personal in nature than most contracts, and invites greater mutual dependence and trust.

While *Fredrickson* concerned a unique set of facts, the case highlights the importance for employers, where an employee has been dismissed, to refrain from discussing (at all costs) with other employees the individual circumstances of a dismissed employee.