



## Court finds a failure to mitigate by employee refusing an offer of employment on the same terms from new owners of a purchased business

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In the recent Court of Appeal for British Columbia (BCCA) case of [Silva v. Leippi](#), the Court upheld the [trial decision](#) that a wrongfully dismissed employee was not entitled to damages. The BCCA held that the employee failed to mitigate when he refused a reasonable offer of employment on the same terms from the new owners of the business, notwithstanding the loss of his competing sideline business.

The appellant, Shawn Silva, worked for four years as one of two employees of a small vehicle repair and salvage business owned by Edmund and Diane Leippi. As the Lieppi's were nearing retirement age, they sold the assets of the business to Randy Oben and Erin Young.

While owned by the Lieppi's, Mr. Silva was permitted to run a sideline business buying, storing, repairing and selling vehicles in direct competition with the salvage business, utilizing the same workspace and sale yard.

The new owners intended to retain Mr. Silva as an employee; however, they did not want him to continue his sideline activities, which they viewed as taking away profits of the salvage business. A series of letters and other communications were exchanged regarding Mr. Silva's continued employment. In one of these letters, Mr. Silva asked for a 33% wage increase, and viewing this request as unreasonable, the new owners decided they no longer required his services.

About a week later, Mr. Silva was terminated without any notice or pay in lieu of notice, although Mr. Lieppi did pay out his accrued wages and holiday pay. He subsequently brought a wrongful dismissal action.

The Court's Decision:

At trial, the judge determined that four months was Mr. Silva's entitlement to reasonable notice. However, the judge dismissed Mr. Silva's action on the basis that Mr. Silva had failed to act reasonably in attempting to mitigate any damages resulting from the dismissal. That finding was based on the judge's view that Mr. Silva had failed unreasonably to accept an offer of employment from the purchasers of his employer's business. Therefore, no damages were awarded for wrongful dismissal.

The issues on appeal included whether Mr. Silva received an offer of employment and whether he acted unreasonably in refusing the offer of employment. In dismissing the appeal, the BCCA concurred with the trial judge's decision that notwithstanding Mr. Silva's wrongful dismissal, he would have suffered no damages had he accepted continued employment with the new owners.

In arriving at its conclusion the BCCA considered the following:

First, the Court rejected the Mr. Silva's argument that the offer was "too vague to be capable of acceptance." The Court applied the test in [Palmer v. Clemco Industries Inc.](#) in which the terms of the employment must be "complete and clear" to both parties. The Court held that the standard was met in this instance because it was clear that Mr. Silva was offered work in the same capacity as before, with the same pay, with the exception of the sideline business. The level of detail for the offer did not need to rise to the level of an employment contract as the key terms of the employment were at minimum implied based on the content and tone of communications between the parties.

Second, the Court refused to interfere with the trial judge's finding of fact that Mr. Silva had rejected this offer of employment. The trial judge had found that Mr. Silva's letter asking for an increased salary was a counteroffer and therefore a rejection of the offer of continued employment.

Third, the Court applied the standard set down in [Evans v. Teamsters Local Union No. 31](#) in which "the Supreme Court held that a reasonable person is expected to accept an offer where the salary is no less than at the former job, the working conditions are not significantly different, and relations would not be acrimonious." The Court declined to disturb the trial judge's finding that Mr. Silva would have been working "the same job, with the same or similar working conditions, at the same salary with no acrimonious relationships with Ms. Young or Mr. Oben."

Invoking the law of constructive dismissal, the Court examined whether Mr. Silva's working arrangement would have been so impaired by the loss of his sideline business that a reasonable person in his position would be justified in refusing the offer.

The Court held that the sideline business was "not a fundamental part of his former job" as it would have been grounds for dismissal had it not been condoned by his former employer. It was also not an implied term of Mr. Silva's original employment contract. As such, acceptance of an otherwise identical job offer from the new owners would have afforded Mr. Silva "complete mitigation of his loss."

Therefore, Mr. Silva failed to mitigate his damages when he refused an offer of continued employment for essentially the same job, and no damages were awarded for the termination of his employment.

Mr. Silva argued for additional damages due to the improper manner in which he was dismissed. Looking at the relevant case law, including the Supreme Court's decision in [Honda Canada Inc. v. Keays](#), the Court held that while the manner of Mr. Silva's termination may have been improper, Mr. Leippi's actions were not of the kind or quality to warrant aggravated damages. The Court noted that employment in the vehicle scrap yard resulted in "robust and direct" communication, and the manner of termination of employment should be "judged in that context, not as if the work place were a more refined, caring, and sensitive environment."

Our Views:

This decision may appear surprising in the result as the court held the employee was in a situation where if he continued to work, he would only be mitigating his damages and if he quit working, he would have no entitlement due to failure to mitigate his damages. However, the situation is akin to being provided working notice by the employer – when given such notice, an employee is obliged to continue to work until the date set out in the notice, and if the employee chooses to breach that obligation (e.g. by quitting or being negligent in their duties) they would not have any further entitlement at law.

However, the case does raise the question of what leeway an employee has to negotiate the terms and conditions of their employment with the purchaser following the sale of their employer – if any counter offer is equal to a refusal of the offer of employment and constitutes a failure to mitigate if negotiations break down, this case could have a significant impact on such negotiations.

Finally, one wonders why Mr. Silva was not entitled to statutory notice of termination at the very least, since statutory notice is not subject to the duty to mitigate. While this case is unlikely to be appealed to the Supreme Court, the decision does not entirely clarify the muddy waters around this aspect of the duty to mitigate damages. We will continue to monitor this complicated area of the law for any developments.

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