

# FOCUS

## ON LABOUR & EMPLOYMENT



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## THE DUTY TO MITIGATE: moving to find work after dismissal

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As the recession reduces employment opportunities, the question of whether dismissed employees must relocate to fulfill their duty to mitigate becomes more significant.

Following termination, an

employee has a duty to mitigate his losses by searching for new employment. In *Smith v. Aker Kvaerner Canada Inc. and Kvaerner Power Inc.*, [2005] B.C.J. No. 150, Justice Grant Burnyeat stated that an employee has “a duty to act reasonably and to take such steps as a reasonable person in [his] position would take in his own interest to main-

tain his income and his position in his industry, trade or profession. The duty involves a constant and assiduous application for alternative employment, an exploration of what is available through all means.”

The good news for employees is that the law does not strictly require them to move in order to

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## Is a Charter-protected right to strike sneaking in?

The process of collective bargaining now enjoys constitutional status. Will substantive outcomes gain constitutional purchase too? Isn't it just a matter of time before the right to strike gets the ultimate nod — or has it already got it by stealth?

In *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, the Supreme Court of Canada famously — and to most, surprisingly — reversed 20 years of consistent jurisprudence that had excluded the institution of collective bargaining from the protective embrace of the Charter's s. 2(d) guarantee of freedom of association. It's now in.

This was a tectonic shift in the court's appreciation of collective bargaining, its role in our polity and in our civic culture. The court expressed not just a *mea culpa* for its earlier hardline jurisprudence on the issue, but a *mea maxima culpa*.

In the now demolished 1987 labour trilogy (*Reference re Public*



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*Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460), collective bargaining was said to be ephemeral — here today, gone tomorrow. It was seen as a mere economic institution, much too recent and transitory to merit Charter protection.

In *Health Services*, the Supreme Court came a long way from that dismissive characterization to an open acknowledgement of “Canada's historic recognition of the importance of collective bargaining to freedom of association.” So important, in fact, that legislatures interfere with it at some peril. They can make substantial changes to any existing legislative frame-

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## LABOUR &amp; EMPLOYMENT

# Courts accept many factors when considering duty to relocate

## Moving

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mitigate their damages. Rather, as author David Harris states in his employment law text *Wrongful Dismissal*, “the obligation of the employee to relocate to seek employment is tempered by the individual fact situation confronted by him or her.”

Whether an unemployed worker must move to fulfill his duty to mitigate depends on the facts of the particular case. Specific factors courts have considered in the relocation context include the employee’s age, health, family circumstances, community attachment and “norms” within a given industry.

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Whether an unemployed worker must move to fulfill his duty to mitigate depends on the facts of the particular case.

In *Kozak v. Hallmark Engineering Ltd.*, [1983] B.C.J. No. 1781, Justice Thomas Berger, as he then was, concluded that Rene Kozak’s refusal to move from Vancouver to Calgary to accept a job offer made to him at the time of his dismissal meant that he had failed to take reasonable steps to mitigate. Key to Justice Berger’s decision was the evidence before him “that it is customary for engineers to be prepared to relocate,” as well as the fact that there was “no reasonable prospect of employment in Vancouver” (or Calgary) if Kozak did not accept the offer. The job offer was made by the company that had purchased the shares of Kozak’s former employer.

Justice Berger was not moved by the fact that Kozak, his wife and his children all wished to remain in Vancouver.

In another decision involving a dismissed engineer, the Ontario Court of Appeal came to the opposite conclusion. In *Peet v. Babcock & Wilcox Industries Ltd.*, [2001] O.J. No. 1129, the court affirmed that Peet’s refusal to move to Ohio to join another division of the defendant employer was reasonable, based on his age (54), long association with his hometown of Cambridge and his decision to start his own business as a consultant.

For the Saskatchewan Court of Queen’s Bench, the factors of

age and attachment to community were similarly important, as was the employee’s length of service to her former employer. In *Curry v. Lakeland Library Region*, [1980] S.J. No. 308, the court ruled in favour of the plaintiff, a dismissed librarian, stating “it would be most unreasonable for the defendant to suggest that she should have scoured the library systems of Saskatchewan or western Canada to determine if similar employment was available when she is

55 years of age, has rendered 30 years of service to that library, and has established a family home in North Battleford.”

In spite of *Kozak*, employees in B.C. shouldn’t consider that losing their jobs will necessarily result in the need to relocate. The B.C. courts have concluded on a number of occasions that it was not unreasonable for a dismissed employee to refuse to move to find a new job. Familial responsibilities (*Litster v. British Columbia Ferry Corp.*, [2003]

B.C.J. No. 817), cultural ties (*Brougham v. Carrier-Sekani Tribal Council*, [1998] B.C.J. No. 2319 (BCSC)), health concerns (*Dunbar v. Port Coquitlam (City)* 1992 CarswellBC 890 (BCSC)) and financial considerations (*Tennant v. Greyhound Lines of Canada Ltd.*, [1988] B.C.J. No. 1573 (BCSC)) have all factored into the courts’ decisions not to impose a duty to relocate.

Given the wide range of factors the courts have accepted in refusing to impose a duty to

relocate, it appears that employees will generally be expected to mitigate only within their own backyards.

However, a prolonged economic crisis may cause more courts to follow Justice Berger’s lead as “reasonable employment prospects” dwindle. ■

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