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THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE  
BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

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## Speedy Judicial Determination Where Notice Period is the Only Issue in Dispute

Summary judgment may be available for actions in which the sole issue is the length of notice, according to a recent decision of the Honourable Mr. Justice Perell.

The action was commenced under the Simplified Rules (for claims less than \$50,000 in value or with the consent of the parties). The Employee moved for summary judgment. The issues to be determined were the appropriate notice period (requiring assessment of the nature of her employment), appropriateness of mitigation and whether the calculation of damages should be at the rate of a salary increase which the Employee would have received but for her termination.

Perell J. held that the Employee met the test under the Simplified Rules for summary judgment and further stated that he believed the test would have been met under the ordinary procedure. He concluded that he would accept the Employer's position on the nature of the Employee's employment. He indicated that the mitigation evidence was overwhelming and while she had not yet mitigated her damages, it was not because she had not made reasonable efforts to do so. The Employer did not require cross-examination on those efforts because "mitigation need not be perfect, it need only be reasonable". Further, it was clear in his view that the salary increase would have been received but for the termination and therefore this was the rate at which damages would be calculated.

A 16 month notice period was assessed and damages awarded. Amazingly, the judgment was delivered a mere 6 months following the employee's termination. Perell J. accordingly imposed a trust requiring the Plaintiff to account for any mitigation earnings during the balance of the notice period. He did not impose a requirement to continue to account for her mitigation efforts however.

*Adjemian v. Brook Crompton North America* [2008] O.J. No. 2238 (S.C.J.)

## **Supreme Court of Canada Permits Differential Treatment on the Basis of Age**

On July 18, 2008, the Supreme Court of Canada released its decision in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.* This decision serves to allow New Brunswick pension plans to dictate the retirement age of employees despite the existence of legislative safeguards to protect employees from discrimination on the basis of age. Although this decision arises out of an interpretation of New Brunswick human rights legislation, the exemption of pension plans from age discrimination complaints exists in many provinces, including Ontario.

The Supreme Court's decision in *Potash* arose out of a 2004 human rights complaint filed by Melrose Scott, a miner who was forced to retire at age 65 because of a mandatory retirement age provision in his employer's pension plan. Scott argued that the mandatory retirement age in his employer's pension plan constituted discrimination on the basis of age contrary to New Brunswick's *Human Rights Act* (the "*New Brunswick Act*").

Justice Abella, writing for the majority of the Supreme Court of Canada, upheld the decision of the New Brunswick Court of Appeal. Relying on section 3 (6) of the *New Brunswick Act* which expressly permits an employer to terminate an employee because of the terms or conditions of any *bona fide* pension plan, Justice Abella held that an employer need only establish that a pension plan, as a whole, is *bona fides* (legitimately adopted in good faith). In her reasons, Justice Abella, stated:

It is the plan itself that is evaluated, not the actuarial details or mechanics of the terms and conditions of the plan. The piecemeal examination of particular terms is exactly what the legislature intended to avoid by explicitly separating pension plan assessments from occupational qualifications or requirements. This is not to say that the *bona fides* of a plan cannot be assessed in relation to terms which, by their nature, raise questions about the plan's legitimacy. But the inquiry is into the overall *bona fides* of the plan, not of its constituent components.

Although the *New Brunswick Act* contains unique language that does not exist in the Ontario *Human Rights Code*, the *Potash* decision is still relevant to employers in Ontario. The Ontario *Human Rights Code* contains provisions which permit employers to devise pension plans that treat employees differently on an actuarial basis because of their age. The Supreme Court's decision in *Potash* suggests that this type of differential treatment on the basis of age will likely be upheld should it ever be challenged.

It is important to note however that the Supreme Court's decision in *Potash* did not consider whether the provisions of the *New Brunswick Act*, which permit differential treatment on the basis of age, violates Canada's *Charter of Rights and Freedoms*. In the circumstances, the *Potash* decision will likely not be the last word from the Supreme Court of the Canada on the lawfulness of a pension plan's differential treatment of employees on the basis of age or on the lawfulness of human rights legislation that permits such differential treatment. Over the next few years, a *Charter* challenge seeking answers to these questions will surely make its way up to the Supreme Court of Canada before this human rights debate comes to an end.

*New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, [2008] S.C.J. No. 46

## Interim Reinstatement Of A Dismissed Employee Is Available in “Special Circumstances”

As discussed in our last edition, the Supreme Court of Canada in the case of *Evans v. Teamsters Local Union No. 31*, held that a wrongfully dismissed employee failed to mitigate his damages by refusing to return to work for the employer that had dismissed him.<sup>1</sup> The corollary to the *Evans* case is the question, under what circumstances then will a wrongfully dismissed employee be granted interim reinstatement pending the outcome of his wrongful dismissal suit?

Reinstatement of terminated employees is a remedy that is commonly available to unionized workers; for employees who work for employers engaged in federal works, undertakings and businesses; under human rights legislation; and public and private office holders. Despite the availability of reinstatement in numerous employment and near-employment relationships, Courts have been reluctant to provide interim reinstatement to a wrongfully dismissed employee. Yet it falls within the inherent jurisdiction of the Court to grant the remedy of reinstatement. It is a remedy that is used sparingly, and will only be granted in “special circumstances”.<sup>2</sup>

What constitutes “special circumstances” involves an assessment of a number of factors specific to the circumstances of each case. The main issue is whether the employee can demonstrate that he or she would suffer irreparable harm if the application for interim reinstatement is refused, and then an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.<sup>3</sup>

The following are a non-exhaustive list of factors for the Court to consider in deciding whether the balance of convenience favours the employee: irreparable harm, uniqueness of the job, risk of undercompensation, risk of overcompensation, employee performance record, and mutual trust & confidence.<sup>4</sup>

Irreparable harm requires an analysis framed on the presumption that a job is more than just a paycheque. The loss of one’s livelihood and pleasure from work, the psychological impact on employees and their families could establish irreparable harm.<sup>5</sup> The uniqueness of the job including the opportunity for a comparable substitute will weigh in favour of granting an employee interim reinstatement.<sup>6</sup> The risks of undercompensation can be met through reinstatement and any fears of overcompensation may be dealt with through an order which is limited in time.<sup>7</sup>

The mutual trust and confidence between the employee and employer must be viewed in a multi-factored contextual analysis requiring the past performance record of the employee and relationship with the employer be considered, as well as the independence of the employee. The parties are expected to work through some tensions and an employee’s wrongful dismissal action is not a bar to the continuation of a professional relationship.<sup>8</sup>

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<sup>1</sup> See: Koskie Minsky Employment Newsletter, Summer 2008

<sup>2</sup> *Clitheroe v. Hydro One Inc.* [2002] O.J. No. 4383 (S.C.J.) at paras. 18; *Philip v. Expo 86 Corp.* [1987] B.C.J. No. 2127 (C.A.) at p. 3; *Red Deer College v. Michaels* (1975) 57 D.L.R. (3d) 386 (S.C.C.) (QL) at p. 11 per Laskin C.J.C commenting on *Hill v. C.A. Parsons & Co. Ltd.*, [1972] Ch. 305; *National Ballet of Canada v. Glasco* [2000] O.J. No. 2083 at para. 50; *Sharma v. London Life Insurance Co.* [2005] O.J. No. 3266 at para. 22.

<sup>3</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

<sup>4</sup> *Injunctions and Specific Performance* looseleaf, Canada Law Book Inc., at pp. 2-28; cited with approval in *Struik v. Dixie Lee Food Systems Ltd.* [2006] O.J. No. 3269 at para. 32; *Sharma v. London Life Insurance Co.* [2005] O.J. No. 3266 at para. 29; *National Ballet of Canada v. Glasco* [2000] O.J. No. 2083 (S.C.J.) at paras. 50-51; *Philip v. Expo 86 Corp.* [1987] B.C.J. No. 2127 (C.A.) at p. 4

<sup>5</sup> *Sharma v. London Life Insurance Co.* [2005] O.J. No. 3266 at para. 29; *Re United Parcel Service and Teamsters, Loc. 938 (Barrant)* (2002) 109 L.A.C. (4<sup>th</sup>) 312 (Canada) (P.Knopf) at pp. 9, 12

<sup>6</sup> *National Ballet of Canada v. Glasco* [2000] O.J. No. 2083 (S.C.J.) at para. 50

<sup>7</sup> *Philip v. Expo 86 Corp.* [1987] B.C.J. No. 2127 (C.A.) at p. 4; *British Columbia (Telecommunications Workers Union) v. Stang* [2006] B.C.J. No. 2980 (S.C.) at para. 8

<sup>8</sup> *National Ballet of Canada v. Glasco* [2000] O.J. No. 2083 at para. 52

Recent changes to the Ontario Human Rights Code<sup>9</sup> (“Code”) empower the Court within a civilaction to grant relief for an infringement of the Code. The Code provides for a wide range of relief including restitution other than monetary awards; which has been applied in the past to equate to reinstatement. Accordingly, this may now become a more commonly encountered claim for relief in many wrongful dismissal and constructive dismissal cases.

Although interim reinstatement of a dismissed employee is an unusual occurrence, the Court does have jurisdiction to grant that remedy. However, in light of the *Evans* decision and the recent changes to the Code, Courts will likely have to deal more frequently with the issue of interim reinstatement.

### **Ontario Court Rewrites Contract of Employment**

The Ontario Superior Court of Justice relied on the doctrine of rectification, estoppel, and trust principles in order to ensure an executive received an additional 36 months of service credit towards his supplementary employment retirement plan (“SERP”), even though this benefit was not permitted according to the strict language in the executive’s employment contract. Vic Hepburn negotiated a “golden parachute” agreement which stated that he would receive the 36 month accrual only “In the event of a sale of the business, and you do not accept employment with the purchaser... and your employment is terminated...”. However, the Court held that it was clear from the facts and circumstances surrounding the execution of the agreement that the parties intended Hepburn would receive the 36 months of credited service even if he obtained employment with the purchaser.

The equitable doctrine of rectification operated to restore the original intention of the parties, by essentially re-writing the agreement. The court summarized the “hurdles” that must be overcome before a party can benefit from the doctrine of rectification. Specifically, the plaintiff must show: i) the existence and content of an inconsistent prior oral agreement; ii) the written document does not correspond with the prior oral agreement; iii) a precise form in which the written instrument can be made to express the prior intention; and iv) the foregoing must be established by convincing proof.

*Hepburn v. Jannock Ltd.* [2008] O.J. No. 62 (S.C.J.)

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<sup>9</sup> R.S.O. 1990, c. H19, s. 46.1