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

FALL 2003

EDITORS:

Larry Banack, lbmack@koskieminsky.com

Phone: (416) 595-2070

Nancy Shapiro, nshapiro@koskieminsky.com

Phone: (416) 595-2108

REQUIREMENT THAT EMPLOYEE BE 'ON-CALL' ON WEEKEND IS MATERIAL CHANGE IN CONTRACT OF EMPLOYMENT

In a recent decision, the Ontario Court of Appeal held that to suddenly require an employee to be on-call every sixth weekend, without additional pay, amounted to a material change in his contract of employment.

After the Plaintiff was told he would then be required to be on-call every sixth weekend, he advised the employer verbally and in writing that he was unable to accommodate the request as a result of his child care responsibilities. To be on-call would require the employee to, on average, receive two or three calls and attend at the premises for three hours. When the employee refused to change the requirement, his employment was terminated.

In *Hilton v. Norampack Inc.*, the Honourable Mr. Justice Laskin writing on behalf of the Court stated: "It seems to me that a trier of fact could reasonably find that the unilateral imposition of additional hours of weekend work without pay materially changed the terms of [the employee's] employment."

The Court went on to consider whether the Plaintiff, faced with the material change, had an obligation to mitigate his damages by accepting the on-call requirement during the notice period or until he found another job. Laskin J. wrote:

"[The employee] did not have a similar obligation to accept the on-call requirement. As McKinlay J.A. pointed out at 710 [in *Mifsud v. MacMillan Bathurst Inc.*] 'there are many situations where the facts would substantiate a constructive dismissal but where it would be patently unreasonable to expect an employee to accept continuing employment with the same employer in mitigation of his damages.' This is one of those situations. The trial judge implicitly found that it would not have been reasonable to expect [the employee] to comply with the on-call requirement. I therefore would not give effect to [the employer's] argument on mitigation."

Accordingly, the Court of Appeal upheld the finding of the trial judge of wrongful dismissal.

WHERE TRIAL IS HELD DURING THE NOTICE PERIOD – MAY BE NO REDUCTION FOR ANTICIPATORY MITIGATION

The Supreme Court of British Columbia found it was inappropriate to make any reduction in the damages awarded to the Plaintiff for wrongful dismissal, in anticipation that the Plaintiff may ultimately earn some income during the notice period, still running at the conclusion of trial.

The trial judge awarded 21 months pay in lieu of notice to the plaintiff, a procurement manager who had been employed by the employer for 37 years, was 60 years of age and who had earned an annual income of roughly \$100,000.

The judge declined to reduce the amount of notice on the theory that the Plaintiff may find other employment prior to the conclusion of the notice period. Based upon the fact that the Plaintiff had diligently been seeking out new employment for over one year without success, and considering his age, specialization and the lack of availability of alternative employment, the judge held it was inappropriate to make such deduction. The onus of illustrating that such mitigation was likely to occur lies on the employer. The employer having failed to meet the onus, no deduction was made.

COURT MAY HAVE JURISDICTION TO EXTEND TIME FOR WITHDRAWAL OF ESA COMPLAINT

The Honourable Madam Justice Sachs was recently required to determine whether the Plaintiff, having filed an Employment Standards Act ("ESA") complaint, was barred from continuing with her civil action with respect to an alleged termination without cause.

The ESA provides that where a complaint is filed under the Act, it may be withdrawn within two weeks of filing if the complainant instead wishes to file a civil claim.

The complainant filed a complaint and did not withdraw it within the two week period. The complainant was advised of a date for a meeting with the ESA officer and failed to attend due to illness. In her absence, and unbeknownst to her, a decision was rendered finding that she was guilty of misconduct and there was cause for her dismissal. Her claim for benefits under the ESA was dismissed. The employee, under the impression that her complaint was adjourned, retained legal counsel and commenced civil proceedings for wrongful dismissal. She took no steps to appeal the findings of the ESA officer.

Sachs J. held that there may be inherent jurisdiction in the court to extend the two week period for the withdrawal of a complaint where special circumstances warrant such extension, as held by Pepall J. earlier this year in *Scarlett v. Wolfe Transmission Limited*. However, Sacks J. held that even if such discretion exists, it would not be appropriate to exercise it in this case. She found that based upon the fact that the employer had attended the hearing before the ESA officer, the employer had suffered 'prejudice'. Further, there was no evidence upon which to conclude that the employee had formed an intention to sue civilly within the two week time period, as had the employee in *Scarlett v. Wolfe Transmission Limited*, rather the Court found that the Plaintiff did not form that intention until consulting with a lawyer some six months after the filing of the complaint.

Accordingly, while Sachs J. urged legislative reform to take into account the inequities of such circumstances, she granted the employer's motion for a dismissal of the civil action.

This edition of Employment News has been sent to you either via ordinary mail or email. Should you at any time wish to change your preferred method of receipt of this Newsletter, please take the time to either reply to this email or return this page to us indicating your selected method of delivery.

Further please note, past issues of Employment News, as well as our other firm newsletters, including Commercial Counsel, Legal Foundations, Practice Tips, Labour Board Briefs and Talking Union may be viewed on our website at www.koskieminsky.com. You may reach the editors at (416) 977-8353 or by email at: lbانack@koskieminsky.com

I prefer to receive Employment News by mail

I prefer to receive Employment News by email at: _____

Name: _____

Firm/Company: _____

Please return to Larry Banack by fax: (416) 204-2824, or mail to Koskie Minsky, 20 Queen St. W., Box 52, Suite 900, Toronto, Ontario, M5H 3R3