

 **Employment News**

This is a summary of employment matters of interest to the business community, from a litigator's point of view.

We welcome your questions and comments.

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MANDATORY RETIREMENT POLICY STRUCK DOWN

A recent decision of the British Columbia Court of Appeal has held that mandatory retirement policies of public bodies require justification on a case-by-case basis.

A waste plant operator challenged the policy of the City/employer which mandated retirement at age 65.

The employer argued first that the policy did not contravene Human Rights legislation which provides protection only up to age 65. Further, the employer relied upon the decision of the Supreme Court of Canada in *McKinney v. University of Guelph* which found such policies to be a justifiable infringement of rights under the Charter.

The Court held that the *McKinney* case was distinguishable in that it applied to private sector retirement policies and that mandatory retirement policies must be examined on a case-by-case basis.

The Court wrote:

"I am not persuaded that *McKinney* and its companion decisions decide that all mandatory retirement policies in the public sector are saved by s. 1 of the Charter simply because they do not contravene relevant provincial human rights legislation..... Nor am I persuaded that the reason the court engaged in the extensive s. 1 analysis of the university policies in *McKinney* was simply for illustrative purposes to support a conclusion that mandatory retirement policies, at large, were constitutional.... Further, if the majority in *McKinney* had intended to resolve the issue of the constitutionality of mandatory retirement policies in the public sector for all employment of every kind, one would have expected them to say so in no uncertain terms. They did not.."

The Honourable Madam Justice Prowse further urged a reconsideration of the matter of mandatory retirement policies generally, suggesting that they were outdated in today's society. She remarked poignantly that at least two other countries had abolished

mandatory retirement.

Accordingly, we can likely expect this issue to receive further judicial consideration in the not too distant future as this decision may open the floodgates for reconsideration of this issue.

SERIES OF ONE YEAR CONTRACTS DEEMED CONTRACT OF INDEFINITE TERM

The Ontario Court of Appeal has held that a series of one-year employment contracts may be interpreted as a contract of employment for an indefinite term.

The common law has provided that the ordinary requirement of reasonable notice of termination does not apply to fixed term contracts. In the case of fixed-term contracts, employment ceases in accordance with the terms of the contract. Accordingly, it was possible for an employee to finish 20 separate one-year contracts with one employer and then be terminated without any notice.

In the case before the Ontario Court of Appeal, the employee had a 16-year employment relationship consisting of 16 individual one year contracts in a senior management capacity. The relationship was terminated without cause.

The Court stated that an employer should not be entitled to evade traditional employee protection mechanisms by resorting to the label "fixed term contract" when the underlying reality of the employment relationship is something quite different.

Accordingly, the Court held that the contract lacked the "unequivocal and express language" necessary to establish a fixed term contract, in fact all evidence was to the contrary; the employment relationship was one of an indefinite term.

Accordingly, the employer was required to provide notice as was justified by the common law under the circumstances having regard for the fact that the employment had continued for sixteen years.

NOT ALL DISHONEST CONDUCT JUSTIFICATION FOR DISMISSAL

The Supreme Court of Canada has held that not all dishonest conduct by an employee will constitute just cause of dismissal.

Dishonesty will only constitute just cause for dismissal in circumstances where "such termination is otherwise reasonable and just, taking into consideration the nature and degree of the dishonesty, and whether it can be said to give rise to a breakdown in the employment relationship."

While this decision likely does not change what was generally understood to be the considerations in any event, it does operate to set forth a test which can be cited in the future in order to dismiss for

dishonesty or to oppose such a dismissal as wrongful.

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