Summary Judgment - The Speedier Solution in Ontario Wrongful Dismissal Claims

Ontario wrongful dismissal cases can now be resolved by summary judgment under the Superior Court's simplified procedures, according to a 2008 Ontario Superior Court ruling in*Adjemian v. Brook Crompton North America*, which has now beenaffirmed by the province's Court of Appeal.

The plaintiff, Dolores Adjemian, had worked more than 22 years for Toronto-based electric motor manufacturer Brook Crompton. She was an IT Administrator, Accounts Payable Clerk, and Inventory Receiving Clerk, with a base annual salary of just under $50,000, plus benefits. Unfortunately, economic difficulties led to downsizing at the company, and she was let go. She was given very favourable letters of reference, and four month's pay in lieu of notice.

She felt she deserved at least 16 month's notice, and commenced legal action.

In a May 22, 2009 article in *The Lawyers Weekly*, her counsel, Daniel Lublin said his client "couldn't afford to wait" for her lawsuit to meander through the court system. Her claim seemed "open and shut," so she moved for summary judgment under simplified procedure. She succeded.

In deciding in favour of the plaintiff, Justice Paul Perell confirmed that wrongful dismissal claims can indeed be resolved by summary judgment under simplified procedure. This is true, Justice Perell explained, even though the test for summary judgment under Rule 76.07(9) is less stringent – it is not necessary to show there is "no genuine issue for trial," whereas for regular Rule 20 summary judgment, there is that requirement.

In fact, in simplified procedure, summary judgment is essentially mandatory under Rule 76.07(9): "The presiding judge shall grant judgment on the motion unless, (a) he or she is unable to decide the issues in the action without cross-examination; or (b) it would be otherwise unjust to decide the issues on the motion."

There is also jurisprudence, Justice Perell pointed out, saying that the summary judgment test under simplified procedure "does not preclude the judge hearing the motion from making findings of fact including credibility findings if that can be done fairly and justly."

Having said that, Justice Perell ruled that in this case the plaintiff not only met the relaxed summary judgment test under simplified procedure, she actually met the stricter test under regular Rule 20 – there was no genuine issue for trial here. True, the employer argued that there were three triable issues: 1.whether the plaintiff's efforts to mitigate her damages by finding another

job were adequate; 2. the nature of her employment; and 3. the assessment of her damages. Justice Perell found no substance to any of these.

On the mitigation issue, there was “overwhelming evidence” that the plaintiff had made and continues to make reasonable efforts to mitigate her loss, ruled Justice Perell. (As of the hearing date, she had applied for 120 positions in various industries and job types and had attended 9 job interviews.) The employer, noted the judge, wished to cross-examine her to establish that she could have done more, “but that is not a genuine issue for trial because mitigation need not be perfect, it need only be reasonable,” and the employer “has not remotely shown” that the plaintiff’s efforts were lacking.

Regarding the nature of the plaintiff’s employment, Justice Perell simply accepted the employer’s own characterization of it, and found that this had no negative effect on the claim. As for damages, Justice Perell found no problem with determining a fair notice period without a trial.

The judge went on to consider the jurisprudence as to the appropriate notice period for comparable situations, and was satisfied that the plaintiff’s claim of 16 months was fair. He also awarded just over $14,000 in costs, and pre-judgment interest.

This was a very speedy resolution – the plaintiff was dismissed on Jan. 24, 2008 and won summary judgment less than six months later, on June 6, 2008.

Interestingly, the fact that the case resolved so speedily also presented a problem – what if the plaintiff got a new job before the 16-month notice period was up? How were such mitigation earnings to be accounted for?

Justice Perell followed established precedent to address this issue:

> Although Ms. Adjemian is entitled to judgment, her judgment has come so quickly that it comes during the period in which she continues to have an obligation to mitigate. In these circumstances, the court can impose a trust requiring her to account for any mitigatory earnings. This approach was used in Bullen v. Proctor & Redfern Ltd., supra and Correa v. Dow Markets Canada 1997 CanLII 12268 (ON S.C.), (1997), 35 O.R. (3d) 126 (Gen. Div.) and should be employed for this case.

- Bill Rogers, Student-at-Law, Toronto

Addendum on the "Migation Trust"

In *Adjemian*, the court did not detail how the parties were to address the "mitigation trust" applicable to the portion of the judgment sum relating to the notice period still ahead on the Judgment date.

Presumably, any earnings by the Plaintiff during the remaining notice period were to be credited against this trust. The Court, however, was silent as to the mechanics and administration of the trust fund itself.

This left considerable uncertainty, notwithstanding the favourable outcome for the Plaintiffs.

Mr. Lublin notes that in a subsequent 2009 Ontario Superior Court ruling in *Cardenas v. Kohler Canada Co.*, the Court provided greater clarification as to the management of this "mitigation trust."

In *Cardenas*, Madame Justice Thea Herman ordered that settlement funds applicable to the balance of the notice period remaining as at the date of her order be paid into an interest bearing trust account, to be administered by the employer's counsel:

> Damages that are attributable to the remaining portion of the notice period will be paid forthwith into an interest-bearing trust account held by Canac's counsel. I ask counsel to work out the terms, including the terms of the payments to the plaintiffs. Failing agreement on these terms, the parties may make submissions to me.

In these circumstances, therefore, it appears that employers' counsel may find themselves acting in the dual roles of advocate and payroll administrator.

Garry J. Wise, Toronto