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## In This Issue



Tom Hakemi takes a look at a recent application of the U.S. *Sarbanes-Oxley Act* and shows how these whistleblower provisions may, under certain circumstances, also protect employees working outside the U.S.

Meanwhile, Katherine Reilly looks at a recent B.C. Supreme Court decision, *Monjushko* v. *Century College Ltd.*, which examined the reasonable notice rights of employees working on fixed-term contracts.

In "Grounds for Dismissal: Employees Can't Just Deny Insubordination," Gary Fraser delves into *McGachie* v. *Victoria Immigrant and Refugee Centre Society* and shows how an employee's refusal to formally acknowledge her mistakes was enough insubordination to lead to her just cause dismissal.

Michael Weiler summarizes recent notice awards in B.C.

Matthew Dewar looks at the changes to the *Ontario Human Rights Code* made in 2006 and how these will impact on employers and employees in Ontario.

Finally, In "New Statutory Holiday for Ontario; New Costs for Employers" George Waggott explains how important it is for employers to regularly review their employee holiday policies.

## Cross-Border Whistleblower Protection

Tom Hakemi

The fraud scandals that rocked the U.S. economy at the beginning of this decade have led governments to re-examine legislation to protect whistleblowers. In the last issue of this newsletter, Karl Gustafson discussed Canada's amendments to the *Criminal Code*. In this issue, we look at a recent New York District Court decision that arguably extends whistleblower protection to employees working outside the U.S.

In 2002, the U.S. enacted the *Sarbanes-Oxley Act*, commonly referred to as SOX. Among other things, the intent was:

> To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.

To further this goal, the Act provides a private right of action to any employee of a publicly traded company who suffers retaliation for reporting fraud. If successful, the employee may be entitled to relief that includes back pay, reinstatement and compensatory damages.

To succeed in a whistleblower claim under SOX, the following must be shown:

- the employee engaged in "protected activity," (reporting to the U.S. government or a supervisor at their place of employment information that the employee reasonably believes relates to fraud);
- the employer knew of the protected activity;
- the employee suffered an "unfavourable personnel action," including termination, demotion or any other negative treatment that would reasonably be likely to deter other whistleblowers; and
- it can be seen that the protected activity was a contributing factor to the unfavourable action.

### SOX Stays Local

Since enactment, U.S. courts have declined to apply the SOX whistleblower provisions to employees working outside the U.S. For example, in 2006, a federal appeals court held in *Carnero* v. *Boston Scientific Corp.* that the SOX whistleblower provisions: "do not reflect the necessary clear

expression of congressional intent to extend its reach beyond our nation's borders."[1]

In *Carnero*, an Argentinean citizen, residing in Brazil, sued Boston Scientific, the U.S. parent of his former Latin American employer. Carnero alleged that Boston Scientific had terminated him in retaliation for informing it about fraud occurring at two Latin American subsidiaries. The Court decided that "a foreign employee complaining of misconduct abroad could not bring a claim under [the SOX whistleblower provisions] against the United States parent company," and also noted the potential problems that would ensue if U.S. courts were to "delve into the employment relationship between foreign employers and their foreign employees."[2]

## SOX Goes Global

On February 5, 2008, however, the U.S. District Court for the Southern District of New York issued a decision to the effect that the SOX whistleblower provisions may indeed, under certain circumstances, apply to employees working outside the U.S.

In *O'Mahoney* v. *Accenture LLP*,[3] an employee of Accenture's French subsidiary, who was working and living in France, claimed that she had suffered retaliation in violation of the SOX whistleblower provisions for reporting fraud relating to certain social security (or pension) payments that Accenture was obligated to make to the French government. Accenture relied on *Carnero*, and sought to have O'Mahoney's complaint dismissed on the grounds that she was employed outside the U.S. and that SOX had no extra-territorial application.

In refusing to dismiss the complaint, the Court distinguished *Carnero* on three grounds:

- O'Mahoney worked in the U.S. for Accenture for eight years before being transferred to France, and even after her transfer, she was compensated by the U.S. entity for another 12 years. As a result, the Court put little weight on the fact that, for the two years before her complaint, O'Mahoney was an employee of Accenture's French subsidiary. In contrast, Carnero was a foreign employee, employed and compensated exclusively by overseas subsidiaries of a U.S. company.
- Secondly, the fraud in *O'Mahoney* allegedly occurred in the U.S., when Accenture executives in New York and California decided not to pay contributions owing under the Franco-American Social Security Agreement, and then demoted O'Mahoney for saying she would not be a "party to tax fraud." In *Carnero*, the wrongful conduct giving rise to the claim occurred in Latin America.
- Finally, O'Mahoney brought her action against a foreign (Bermuda) parent and its U.S. subsidiary for the alleged misconduct of the U.S. subsidiary in the U.S. The Carnero complaint was against a U.S. parent company for the alleged misconduct abroad of its Latin American subsidiary.

*O'Mahoney teaches that the SOX whistleblower provisions may apply to employees working in Canada for a company publicly listed in the U.S. under certain conditions.*

## Canadian Impact

For Canadians, *O'Mahoney* teaches that the SOX whistleblower provisions may apply to employees working in Canada for a company publicly listed in the U.S. if:

- the employee has some history of working for a U.S. entity related to the employer (even if at the time of the complaint, the employee happens to be working for a foreign entity); and
- the decisions to engage in fraud and to retaliate were made within the U.S.

Companies with publicly traded securities in the U.S. would be well advised to consider adopting effective whistleblower policies in their efforts to comply with the SOX provisions. See the Winter 2007/2008 issue of this newsletter for Karl Gustafson's discussion of the characteristics and need for such a policy.[4]

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1 *Carnero* v. *Boston Scientific Corp*, 433 F.3d 1, 18 (1st Cir. 2006).

2 *Id.* at 15.

3 07 Civ. 7916 (VM) (S.D.N.Y. Feb. 5, 2008).

4 Karl Gustafson's article is available at: http://www.langmichener.ca/uploads/content/LM-E&LBriefWinter2007-2008.pdf.

# Court Finds Fixed-Term Contract No Excuse for Not Giving Reasonable Notice


Katherine Reilly

In a recent B.C. Supreme Court decision, the issue of whether an employee with a fixed-term contract is continuously employed – and therefore entitled to reasonable notice – is clarified. In *Monjushko* v. *Century College Ltd.,* 2008 BCSC 86, the plaintiff argued that he was entitled to damages in lieu of reasonable notice for the nine years he was employed by the defendant. The defendant claimed that the plaintiff was hired on a fixed-term contract and was therefore not entitled to any reasonable notice.

## The Facts

The plaintiff, Dr. Monjushko, was a Ukrainian mechanical engineer who worked as an instructor and associate professor before he immigrated to Canada in 1995. In 1996, Monjushko began working for the defendant, Century College Ltd. ("Century"), as an instructor for Century's math and computer science–related distance education courses, provided under contract with Athabasca University.

Century gave Monjushko an appointment letter at the start of each academic term; the first one in January 1996. Each of these appointment letters stated that the plaintiff's appointment as instructor had been approved for the upcoming semester, and noted which courses the plaintiff would be teaching that term as well as the exact start and end dates of the semester. From 1996 to 2004, Century issued a total of 40 appointment letters to Monjushko. The form of the appointment letters for each semester were nearly identical to each other, with only the semester start and end dates and the particular course names changing. In return, Monjushko issued invoices to Century under the name of AVM Computing, a business name he used. All invoices listed AVM Computing's address as Monjushko's home address.

The issue of whether Monjushko was an independent contractor or an employee was considered by the Canada Customs and Revenue Agency ("CCRA") in 2004 and a letter was sent by CCRA to Century, which stated:

> We have determined that Vladimir Monjushko was an employee under a contract of service…for the following reasons:
>
> - You controlled his hours of work.
> - He had to perform the services personally.
> - He had to take direction about the work to accomplish as well as the method to use to complete it.
> - You determined the course content.
> - You provided any equipment necessary to complete the work.
> - The terms of his employment did not allow him to profit or expose him to a risk of loss.

*Madam Justice Loo considered the facts of this case to "fly in the face" of the defendant's assertion that each of the 40 appointments was a separate fixed-term contract that did not require any termination notice.*

Century did not appeal the CCRA ruling. Rather, Century issued T4 statements to Monjushko for each year that he worked.

Around the end of October 2004, Century learned that Athabasca University, the source of approximately 70% of its students and revenue, did not intend to renew its partnership agreement after the current agreement expired in June 2005. After learning this, and prior to the sale of the company some months later, Century issued one last appointment letter to Monjushko in December 2004. That letter covered the spring 2005 semester, which ran from January 10, 2005 to April 22, 2005.

Sometime in April 2005, Monjushko was informed without warning that his employment would be terminated at the end of the semester. On April 28, 2005, Century issued a Record of Employment (ROE) to Monjushko, which noted the first day worked as January 2, 1996 and the last day paid as April 22, 2005. This was the one and only ROE that Century issued to Monjushko.

## The Law

In determining whether Monjushko was employed under a contract of fixed term or indefinite term, Madam Justice Loo referred to two applicable appellate level cases. In *Marbry*

*Distributors Ltd.* v. *Avrecan International Inc.,* 1999 BCCA 172, Justice Braidwood considered the intermediate category of employment relationships between those that are clearly employment and those that are clearly independent contracts. In determining "where on the continuum a relationship of this [intermediate] nature resides," Braidwood referred to a non-exhaustive list of three factors to consider:

1. Duration/permanency of the relationship: the longer or more permanent the relationship, the more likely it is that it is an employment relationship and a reasonable notice requirement exists;
2. Degree of reliance/closeness of the relationship: the higher the degree of reliance between the parties, the more likely it is that the relationship falls on the employer/employee side of the continuum; and
3. Degree of exclusivity: an exclusive relationship favours the master/servant classification.

Madam Justice Loo also looked at the Ontario Court of Appeal case, *Ceccol* v. *Ontario Gymnastic Federation*, 204 D.L.R. (4th) 688 ("*Ceccol*"). The facts of *Ceccol* closely mirrored those of the case at bar. There, the parties had entered into a series of 15 annual contracts, each of which contained a specified end date. In finding that the plaintiff was not a fixed-term employee, Justice MacPherson emphasized the importance of the parties' reasonable expectations in situations such as these. This direction clearly resonated with Madam Justice Loo, who made particular note of the fact that: "Century was Monjushko's sole source of income. He worked for no other employer. He expected his employment to continue indefinitely."

*Based on the result of this case, employers should be warned that the courts will not hesitate to search below the surface of an employment contract, and the "fixed-term" label, to determine whether an employee is entitled to and has received reasonable notice.*

## The Case at Bar

Madam Justice Loo considered the facts of this case to "fly in the face" of the defendant's assertion that each of the 40 appointments was a separate fixed-term contract that did not require any termination notice. In particular, she made note of the start and end dates quoted on the ROE issued to Monjushko, as well as the fact that there was only one ROE, instead of a ROE being issued at the end of each semester.

These facts, combined with the fact that Century never appealed the CCRA ruling that Monjushko was an employee and not an independent contractor, led the judge to conclude that Monjushko was considered by both parties to be continuously employed from January 2, 1996 to April 22, 2005. In light of this conclusion, the judge held that the plaintiff was entitled to reasonable notice of the termination of his employment.

Madam Justice Loo's decision in this case appears to have been strongly influenced by Justice MacPherson's reasoning in the *Ceccol* decision:

> It seems to me that a court should be particularly vigilant when an employee works for several years under a series of allegedly fixed-term contracts. Employers should not be able to evade the traditional protections of the ESA and the common law by resorting to the label of "fixed-term contract" when the underlying reality of the employment relationship is something quite different, namely, continuous service by the employee for many years coupled with verbal representations and conduct on the part of the employer that clearly signal an indefinite term relationship.

Applying this reasoning to Monjushko's case appears to be at the heart of the court's decision. A party's reasonable expectations must be considered and employers cannot be allowed to evade traditional legal protections by merely applying the "fixed-term" label to the employment relationship.

Interestingly, while Madam Justice Loo found that there were insufficient facts to support a finding for *Wallace* damages (aggravated damages awarded against an employer for their bad-faith conduct in the manner in which the employee was dismissed), she found another way to penalize Century for its behaviour. The judge states that:

> Century knew at the end of October 2004 that it would no longer have work for Dr. Monjushko after its partnership agreement with AU [Athabasca University] ended in June 2005, or even sooner, when the semester ended in April 2005. However, it did not make that fact known to

> Dr. Monjushko when it ought to have. That is a factor that in my view ought to lengthen the notice period.

Judge Loo does not indicate the precise extent to which this factor increased the damages award she made; however, it was held that 15 months was the appropriate notice period in this case.

Based on the result of this case, employers should be warned that the courts will not hesitate to search below the surface of an employment contract, and the "fixed-term" label, to determine whether an employee is entitled to and has received reasonable notice.

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## Grounds for Dismissal: Employees Can't Just Deny Insubordination


**Gary Fraser**

Employee insubordination is generally recognized as a cause for dismissal when an employee refuses to submit to the lawful instructions of an employer in performing a task or job. Even a single act of insubordination will justify termination if the refusal is found to be so serious that it affects the fundamental nature of the employment relationship. But what about a situation where the employee's insubordination takes the form of refusing to formally acknowledge a mistake made? This issue was central to the determination of *McGachie* v. *Victoria Immigrant & Refugee Centre Society* [2007] B.C.J. No. 180 (S.C.).

In *McGachie*, the plaintiff had been employed as an employment counsellor by the Victoria Immigrant and Refugee Centre Society for five years. During the course of her employment she had been warned, on several occasions, that her job performance was unsatisfactory. Her supervisor had recommended more than once that she be terminated for incompetence. When the plaintiff made two errors regarding one file, she was given a written warning stating that "any more serious mistakes like this will certainly lead to the termination of your employment in the future." Following a subsequent error she was warned in writing that "this e-mail will be kept on your personnel file for the appraisal."

Several months later, the plaintiff made another mistake at work. Even though the employer's policy was that certain documents sent to Human Resources and Social Development Canada (HRSDC) be approved first by the plaintiff's supervisor; the plaintiff, with full knowledge of the policy, sent the documents to HRSDC without obtaining the supervisor's prior approval.

Following this latest mistake, the plaintiff was asked to meet with her supervisor to discuss what she had done. At that time, the employer asked the plaintiff to acknowledge her mistake in writing. The plaintiff failed to do so but instead indicated that she would, in the words of the Court, "pursue her own approach to serving clients."

At trial, the Court found that the plaintiff's mistake, with respect to sending documents to HRSDC was not inconsequential; however, it was not so serious as to warrant summary dismissal. Neither could it be construed as the culminating event in a series of earlier mistakes for which she had received warning.

The Court did find, however, that the mistake was serious enough to warrant discipline in the form of requiring the plaintiff to acknowledge her mistake in writing. The Court further held that in light of the plaintiff's previous infractions, the discipline imposed was reasonable and that the refusal to comply with the direction to acknowledge her mistake in writing constituted insubordination, which justified dismissal for cause. The Court noted that the plaintiff's response to the employer's direction was "an indication [that the plaintiff] did not feel bound to follow directions from her superiors."

> *The Court further held that the refusal to comply with the direction to acknowledge her mistake in writing constituted insubordination, which justified dismissal for cause.*

While *McGachie* does not create any new law regarding the effect of insubordination on the employment relationship, it does serve to illustrate that insubordination justifying dismissal for cause is not limited to the refusal to perform one's job duties. In *McGachie*, the Court found that the plaintiff's refusal to acknowledge her mistake in writing, together with her indication that she would continue to approach her job duties as she saw fit, constituted a repudiation of the employment agreement which justified her summary dismissal.

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# Recent Notice Awards

**Michael J. Weiler**

Wrongful dismissal law suits are most commonly caused by an employer having failed to provide proper written notice. When this happens, the courts will determine what would have been a reasonable notice period. The four key factors considered by the courts in determining the reasonable notice period are the employee's age, length of service, position with the employer and the availability of similar, alternate employment, keeping in mind the particular skills, training and experience of the employee.

There are no specific rules to define the notice period. For example, courts do not follow a rule of one month for each year of service. Rather, the court will determine each case on its own facts, taking into account the above-noted factors as well as looking at other similar cases that have been settled.

The following selected cases from 2007 and 2008 show the wide range of notice awarded in cases in B.C.

| Name | Position | Salary | Age | Length of Service (years) | Notice (months) | *Wallace* Damages (months) |
|---|---|---|---|---|---|---|
| *Strauss* v. *Albrico Services* 2007 BCSC 197 | journeyman insulator and metaller | $68,400 | 43 | 16 | 16 | – |
| *Stuart* v. *Navigata Communications* 2007 BCSC 463 | account manager | $136,000 | 46 | 24 | 18 | 2 |
| *Solomon* v. *Alexis Creek Indian Band* 2007 BCSC 459 | band councillor | $36,480 | 32 | 1.5 | 5 | 3 |
| *Earl* v. *Canada Bread Co.* 2007 BCSC 1574 | territory manager, north Vancouver Island | $60,000 plus bonus | 49 | 19 | 17 (less 2 months mitigation) | – |
| *Monjushko* v. *Century College Ltd.* 2008 BCSC 86 | college instructor | $57,000 | 63 | 9 | 15 | – |
| *Fasslane Delivery* v. *Purolator* 2007 BCSC 1879 | delivery driver | – | – | 5 | 6 | – |
| *Lewis* v. *Lehigh* 2008 BCSC | cement plant engineer/manager | $116,000 | 59 | 26 | 22 | – |
| *Taner* v. *Great Canadian Gaming* 2008 BCSC 129 | vice-president marketing | $130,000 | 36 | 0.5 | 10 | – |
| *Fisher* v. *Lakeland Mills* 2008 BCSC 129 | switchboard operator/ receptionist | – | 65 | 18 | 10 | – |
| *Johnson* v. *Global TV* 2008 BCCA 33 | manager of on-air operations | $91,000 | 65 | 39 | 8 (as per contract – the trial judge awarded 24 months) | – |

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# Ontario's *Human Rights Code* Amendment Means New Challenges for Employers

**Matthew L. Dewar**

On December 20, 2006, the Ontario *Human Rights Code Amendment Act, 2006*, better known as Bill 107, received Royal Assent after the Act was passed on December 5, 2006. The McGuinty Government's stated goal for Bill 107 has been to "modernize the human rights system and shorten the pipeline from complaint to resolution." The bill had a rocky road in 2006, with most stakeholders being opposed to it. Now that it has passed, employers need to understand what the new system will mean for them.

## The Old System

Under the Ontario *Human Rights Code*, employees are assured of equality and employment without discrimination because of a range of prohibited grounds, including race, ancestry, colour, creed, sex, sexual orientation, marital status, family status and disability. Employees who feel that they have been subjected to discrimination could previously file a complaint with the Ontario Human Rights Commission. That agency was empowered to investigate the complaint and endeavour to have it resolved.

Typically, the Commission would attempt to mediate the differences between the parties. If a settlement was not reached, investigators were then assigned the task of collecting evidence relating to the allegations of discrimination. They, in turn, made recommendations to the commissioners as to whether the complaint should be referred to the Ontario Human Rights Tribunal for further prosecution. If the commissioners believed that a complaint had merit, the complaint was referred to the Tribunal where the Commission would prosecute the complaint.

### Post Bill 107

The passage of Bill 107 eliminated the Commission's investigative role. Now, an employee will have to file their own complaint directly to the Human Rights Tribunal and investigate their own case. While the government has made some funding available for access to legal services, it is not clear whether every claimant will have access or will need to pay their own legal fees in addition to a Tribunal user fee. While it could be seen as a more open system, with complainants enjoying direct access to the tribunal, the burden of assembling a case will now be on the individual employee, not the Commission.

For employers, the process will be judicialized: the Commission will no longer be conducting investigations. Employers will be charged with marshalling all of their evidence in defence of their position. Because of the Complainant's automatic access to the Tribunal, most cases will be referred there for adjudication.

The employer's exposure to damages for violations of the Code will now be significantly increased. For example:

- the cap of $10,000 in compensation for damages for mental distress will be revoked;
- willful or reckless conduct will no longer be required to be proven to obtain such damages;
- the limitation period for claims will double from six months to one year after the alleged infringement;
- the Tribunal will have the authority to impose fines of up to $25,000 for violating human rights; and
- employees will now be able to sue an employer and claim damages for a breach of the *Human Rights Code* as a cause of action.

Ontario's Attorney General stated that it took an average of five years to resolve a human rights complaint using the Commission. But while the government has assured Ontario of a more streamlined process to deal with a backlog of human rights complaints, in reality, the volume of complaints will simply shift from the Commission to the Tribunal. It remains to be seen how the Tribunal will establish practices and procedures to ensure an expeditious processing of complaints and the screening out frivolous proceedings.

Employers now face the prospect of more regular litigation on human rights complaints either through the Ontario Human Rights Tribunal or through the court system. The cost of doing business in Ontario will rise significantly.

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## New Statutory Holiday for Ontario; New Costs for Employers


George Waggott

One of the first acts of Ontario's newly re-elected McGuinty government last fall was to add Family Day as a new statutory holiday under the *Employment Standards Act*. As a result, some – but not all – workers in Ontario will have an additional day off with pay on the third Monday of each February, starting with February 18, 2008.

While the government's purpose in making this change was to give people more time with their families, the move represents a significant expense to many employers, with some estimating Ontario's aggregate business costs to range from $500 million to $2 billion. The City of Toronto has reportedly increased payroll by $2.3 million as a result. And while this follows through on the Liberal Party's election platform, some feel the proposal did not receive significant discussion at the election campaign or public consultation levels.

Employers will need to examine this regulatory change and how it relates to their holiday policy and/or their collective agreements for unionized groups, because providing this day as a paid holiday is not an automatic requirement. For instance, where the employer already provides employees with a greater right or benefit, they are not required to give employees Family Day off. While there are now nine public holidays in Ontario, some employees may already be receiving additional holidays not listed in the *Employment Standards Act*, such as Easter Monday and Civic Holiday in August.

Each time a new statutory holiday is added (such as with Boxing Day in 1989), employers need to review their package of holidays for employees. Essentially, an employer and employ-

ee can contract out of the *Employment Standards Act* holidays as long as employees receive an equal or greater number of days off. For instance, an employer could provide 10 paid days off at dates other than the statutory holiday dates and that would exceed the current requirement of nine days off.

Employers will also need to consider the costs involved. If an employee is required to work on a holiday and there isn't a written policy or agreement providing for a substitute holiday, work on that day is payable at time-and-a-half.

The addition of Family Day to Ontario's statutory holidays reinforces the importance of regularly reviewing the provisions in applicable company policies, employment contracts, handbooks or collective agreements in order to focus on the whole holiday package being offered to employees.

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## Announcement

### Canadian Snowboard Team Sponsorship

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## Events

### Employment Law Conference 2008

Continuing Legal Education Society of British Columbia
Pan Pacific Vancouver, 300 – 999 Canada Place
April 24 & 25, 2008

Lang Michener Speaker: **Michael Weiler**
"Punitive and Aggravated Damages"

The eighth annual employment law conference covering two days full of current and emerging issues, case law updates, and valuable practice points.

### Center for Labour Management Development Seminar

Fairmont Hotel Vancouver
900 West Georgia Street, Vancouver, BC
May 6 & 7, 2008

Lang Michener Speaker: **Michael Weiler**
"Question and Answer Session"

This two-day event will cover how to tackle today's most challenging accommodation cases with skill and confidence



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