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SUMMARY JUDGMENT APPLICATIONS

IN WRONGFUL DISMISSAL CASES

by

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Background

On January 1, 2010, the Ontario rule concerning summary judgment underwent a significant change. Up to that time, a judge could only grant summary judgment upon a finding that there was "no genuine issue for trial". The caselaw interpreted this to mean that the motions judge was not permitted to weigh evidence, evaluate credibility, or draw inferences from the evidence.

The new wording required judgment to be granted provided there was "no genuine issue requiring a trial". New powers were expressly given in Rule 20.04(2.1) to permit the weighing of evidence, evaluation of credibility and drawing of inferences from the evidence, as well as the ability to order oral evidence at the hearing.

Interpretation of the new wording went to the Court of Appeal in 2011 when five appeals were heard together. (*Combined Air Mechanical Services Inc. v. Flesch*, 2011 CarswellOnt 13515) In reasons released on December 5, 2011, the court made the following observation:

> 37 As we shall go on to explain, the amended rule permits the motion judge to decide the action where he or she is satisfied that by exercising the powers that are now available on a motion for summary judgment, there is no factual or legal issue raised by the parties that requires a trial for its fair and just resolution.
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> 38 However, we emphasize that the purpose of the new rule is to eliminate *unnecessary* trials, not to eliminate all trials. The guiding consideration is whether the summary judgment process, in the circumstances of a given case, will provide an appropriate means for effecting a fair and just resolution of

the dispute before the court.

39 Although both the summary judgment motion and a full trial are processes by which actions may be adjudicated in the "interest of justice", the procedural fairness of each of these two processes depends on the nature of the issues posed and the evidence led by the parties. In some cases, it is safe to determine the matter on a motion for summary judgment because the motion record is sufficient to ensure that a just result can be achieved without the need for a full trial. In other cases, the record will not be adequate for this purpose, nor can it be made so regardless of the specific tools that are now available to the motion judge. In such cases, a just result can only be achieved through the trial process. This pivotal determination must be made on a case-by-case basis.

It therefore seems apparent that summary judgment is a tool to be considered carefully by every litigant.

Application of Rule 20 to Employment Law

Many wrongful dismissal cases lend themselves to summary judgment proceedings. This is because the relevant facts are often not in dispute. The parties will usually agree how long the employee has worked, and the quantum of the salary and benefits. Unless the employer is alleging cause, or the employee is alleging bad conduct in the manner of firing, the actual conduct of the parties is largely irrelevant to a calculation of damages. Summary judgment will be appropriate when the areas of dispute can be “fully appreciated” and evaluated from affidavit evidence. A limited amount of oral evidence is permitted, without turning the motion into what amounts to a trial.

The following cases provide useful examples.

Case	Court	Date	Brought by	Result
Bomhof v. Eunoia Inc.	OSCJ	May 30, 2012	Plaintiff	Refused
Pegus v. Ecorite Distributors Ltd	OSCJ	Apr 25, 2012	Plaintiff	Granted
Olivares v. Canac Kitchens	OSCJ	Jan 18, 2012	P and D	Granted
Hussain v. Suzuki Canada Ltd.	OSCJ	Nov 4, 2011	P and D	Granted
Thorne v. Hudson's Bay Co.	OSCJ	Oct 12, 2011	Plaintiff	Refused
Di Tomaso v. Crown Metal Packaging	OCA	June 22, 2011	Plaintiff	Granted
Harvey v. Shoeless Joe's Ltd.	OSCJ	May 26, 2011	P and D	Granted
Cockshutt v. Computer Facility Services	OSCJ	Mar 25, 2010	Plaintiff	Refused
Poliquin v. Devon Canada Corp.	ABCA	June 17, 2009	Defendant	Granted
Adjemian v. Brook Crompton	OCA	Dec 22, 2008	Plaintiff	Granted

Bomhof v. Eunoia Inc. 2012 CarswellOnt 6896 ONSC

A 64 year old nurse, with 8 years of employment at a medical corporation, brought a motion for summary judgment to determine the reasonable notice period. The central issue of the case was whether the plaintiff had made reasonable efforts to mitigate her damages. The motions judge held that this question could not be decided on a motion, but required oral evidence. Declining

to order oral evidence under Rule 20.04(2.2), the judge cited *Combined Air* in finding that the better course of action was simply to proceed to a speedy trial.

Pegus v. Ecorite Distributors Ltd. 2012 CarswellOnt 5026 ONSC

After only 2 months employment, the plaintiff was fired without notice from his marketing job. He alleged he had been enticed to leave secure employment in order to accept the job, but had only worked for the previous employer for 5 months. The defendant hired a non-lawyer, Brij Kapur, to draft a defence. Kapur's motion for permission to represent the defendant was denied and the defendant was ordered to retain a lawyer. The plaintiff served a Request to Admit. The defendant did not respond within the time frame under the Rules, thus the plaintiff brought a motion for summary judgment on the basis of the deemed admissions. The defendant then retained counsel, who brought a cross motion to with draw the admissions.

The motions judge permitted the deemed admissions to be withdrawn, finding the failure to respond was inadvertent and resulted in no non-compensable prejudice to the plaintiff. However, the judge also granted summary judgment in favour of the plaintiff, having enough evidence to evaluate all the relevant factors. The plaintiff, despite only 2 months of employment, was awarded 3 months notice.

Olivares v. Canac Kitchens, 2012 CarswellOnt 582 ONSC

A 48 year old employee was terminated by a kitchen manufacturer after 24 years of service. Classifying him as a non-managerial employee, the defendant paid him only 32 weeks' pay, the ESA maximum. The plaintiff brought an action seeking 24 months. The parties agreed to have the damages determined on a summary judgment motion. In the final result, the plaintiff was awarded 20 months. The salary figure used was based on the average of his total compensation over the previous 3 years, and thus included overtime. He was also compensated for loss of benefits. The defendant was unsuccessful in deducting any amounts the plaintiff earned during the period of the ESA entitlements. Relying on *Boland v. APV Canada Inc*, 2005 CarswellOnt 532 (Ont. Div. Ct), the judge held that ESA entitlements are not damages, but are payable even if the employee finds a new job the day after termination.

Hussain v. Suzuki Canada Ltd. 2011 CarswellOnt 12251 ONSC

A 65 year old warehouse supervisor was fired from Suzuki after 36 years. He sought 30 months' notice. The parties agree there were no genuine issues requiring a trial, and submitted an agreed statement of facts. The judge found that 26 months was the appropriate period. While the defendant argued bonuses were discretionary and not always paid, the judge included an amount for this, finding that the plaintiff had received bonuses in 30 out of 36 years, and in particular, 5 of the last 7. The judge also awarded an amount for the cost to replace lost disability benefits even though the plaintiff had paid for them during employment. The judge held that there was

only a 1% chance of reemployment for the plaintiff, and thus reduced the notice period by 2 weeks to 25.5 months.

Thorne v. Hudson's Bay Co. 2011 CarswellOnt 11419 ONSC

A 59 year old employee of the Hudson's Bay Company was dismissed after 37 ½ years. She was given 8 weeks working notice and 26 weeks of severance. She sued for approximately 24 to 30 months salary and brought a motion for summary judgment. The motions judge refused to grant judgment. He noted that the question of the summary judgment standard was before the Court of Appeal at that time, but declined to wait for that decision. Instead he held that there were issues that could only be determined at a trial. There was conflicting evidence about the exact nature of the plaintiff's job. There was also significant disagreement about the availability of comparable jobs, and the plaintiff's job search efforts. He found that the evidence before him made it difficult to draw any fair conclusions.

Di Tomaso v. Crown Metal Packaging 2011 CarswellOnt 5356 ONCA

A 62 year old mechanic was fired after 33 years. He was given working notice, but this was extended several times. His motion for summary judgment was granted and he was awarded 22 months' severance. The employer appealed, but the appeal was dismissed.

The employer had delivered a total of 5 termination letters, each giving a termination date that was less than 13 weeks ahead. After the final termination, the employer took the position that the

first notice of termination was valid and each period of temporary employment after that was working notice. However, the motions judge agreed with the plaintiff. Since the final termination date was more than 13 weeks from the original termination notice, only the final notice was valid. She pointed out that the ESA is a remedial minimum standard statute and should be interpreted to the benefit of the employee. She also rejected the employer's submission that there is a cap of 12 months on notice for unskilled workers in non-managerial positions, and awarded 22 months. The Court of Appeal upheld the motions judge's decision.

Harvey v. Shoeless Joe's Ltd. 2011 CarswellOnt 3713 ONSC

This employer recruited a 41 year old V.P. of operations, requiring him to move from Quebec to Ontario to take up the job. He was fired after only 5 ½ months. He brought an action, claiming 6 months' severance, and moved for summary judgment. He was awarded 11 weeks. The employer alleged that the employee's refusal to accept consulting work from it after termination was a failure to mitigate. However, since this offer was made only after the notice period had expired, the judge held it to be irrelevant.

Cockshutt v. Computer Facility Services 2010 CarswellOnt 1768 ONSC

The CFO of a computer company was fired at age 47 after 24 years of employment. He sought partial summary judgment on the length of the appropriate notice period. The parties agreed that the issues of aggravated damages and bonuses required a trial.

The motion was filed before the Rule 20 changes, but heard afterwards. The judge held that the new rule applied. However, there were several areas in dispute which the judge found required a trial. The questions involved the exact nature of the plaintiff's job, the enforceability of an employment contract signed 24 years before, the entitlement to a fixed monthly expense amount, and the plaintiff's mitigation efforts.

Poliquin v. Devon Canada Corp. 2009 CarswellAlta 903 ABCA

This case from the Alberta Court of Appeal involves a summary judgment motion brought by an employer seeking to dismiss a wrongful dismissal action. A 50 year old production foreman was fired for cause after 26 years of employment. He was alleged to have received free services from suppliers and accessed pornography and racist material on the internet at work. He brought an action for wrongful dismissal. His employer brought a motion for summary judgment which was dismissed by the motions judge on the grounds that a trial was required. The Alberta Court of Appeal reversed the motions court judge, finding that on the uncontroverted evidence, it was plain and obvious the action could not succeed.

Adjemian v. Brook Crompton 2008 CarswellOnt 7813 ONCA

A 47 year old employee was fired after 22 ½ years of service. Her employer paid her 4 months' severance, and continued benefits for that period. She sued and brought a motion for summary judgment. The motions judge awarded her 12 months of salary and benefits (in addition to the 4 already received), plus pension contributions and bonuses. The court also imposed a trust on any

amounts she earned during the notice period. The employer appealed. The Court of Appeal upheld the motion decision, holding that the judge could fairly asses the employee's mitigation efforts without cross-examination.

Conclusions from the Case Law

It is clear from the cases that summary judgment is available even if there are facts in dispute. The issue to be resolved is whether those factual questions can be fairly evaluated by the motions judge on the basis of affidavit evidence. If affidavits alone are insufficient, the question then becomes whether a limited amount of oral evidence will be enough.

The 3 cases listed above where judgment was been refused involved the following factual disputes:

Bomhof	Mitigation efforts
Thorne	Mitigation efforts, responsibilities of job
Cockshutt	Mitigation efforts, responsibilities of job, contract, expense allowance.

Reviewing these decisions, it is hard to see why these issues were so intractable, when other cases dealt with very similar issues without needing a trial.

Every wrongful dismissal action must address the *Bardal* factors when asking a judge to assess damages. These factors were listed in the *Bardal* case as follows:

(a) the character of the employment in issue;

(b) the length of service;

(c) the age of the employee; and

(d) the availability of similar employment having regard to the experience, qualification s and training of the employee.

Bardal v. Globe & Mail Ltd. (1960), 24 D.L.R. (2d) 140 (Ont. H.C.)

It is useful in any litigation to prepare a chart of all the relevant facts and list in two columns the evidence supporting or contradicting the plaintiff's position. This should help with the drafting of clear and solid affidavits.

Mitigation efforts are often a contentious issue. When acting for a plaintiff, it is very important to advise the client to keep meticulous records of the job search, including all phone calls and emails. When acting for an employer, you will want to document suitable job openings posted in newspapers and on-line.

If the plaintiff and defendant are diametrically opposed on a key issue, the scope of the job for example, and cross-examination on the affidavits does not resolve it, then consider whether oral evidence from the plaintiff and/or the employer is probably sufficient.

To sum up, I believe that summary judgment motions are an area where clear and logical writing go a long way towards a winning result.