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

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Systemic Discrimination – Open for Consideration

In a ground breaking decision released by the Ontario Court of Appeal considered, allegations of systemic discrimination advanced in support of an individual's claim for constructive dismissal.

The Court held that while the law is clear that no common law cause of action exists for a breach of the *Ontario Human Rights Code*, and while there can be no right of action on behalf of non-parties, the allegations should be permitted to stand.

The Plaintiff alleged it was an implied term of her contract of employment that she would be employed without discrimination on the basis of race. She asserted that there were three internal opportunities for promotion which were not given to her, systemic slow-tracking of minorities for promotion, denial of equal access to seminars and conferences and payment of a comparably lower salary to minorities.

The Honourable Mr. Justice MacFarland writing for the Court stated:

"For the purposes of pleading discriminatory conduct as a basis for a wrongful dismissal claim, I see no principled basis for distinguishing between allegations of direct discrimination aimed at the Plaintiff and allegations of systemic racism which target a class or group of which the Plaintiff is a member. In either case the allegation is one of discrimination against the Plaintiff offered to support the wrongful dismissal claim".

The rationale given for permitting the allegations to stand is the challenging for any employee to adduce direct evidence of the purposive practise of discrimination by an employer.

This may be the beginning of the ability to actually litigate issues of systemic discrimination in the workplace.

Standard Imposed For Mitigation – Employee's Best Interests

In a decision released in Spring, the British Columbia Court of Appeal held a wrongfully dismissed employee failed to mitigate his damages when he failed to diligently pursue other possible employment and instead unrealistically focused on one potential opportunity which never came to fruition.

The Court held that the duty to act reasonably in attempting to mitigate damages is not a duty to reduce the claim against the former employer but a duty to take steps in his or her own interests to maintain income and a position in the industry trade or profession. The former employer cannot expect the employee to accept lower paying employment with doubtful prospects.

However, the Court held this principle is not decisive; an employee's conduct still will be assessed on the basis of reasonableness. Here the employee, a luxury car sales representative failed to follow through with potential employment opportunities with two other dealerships waiting for a new Ferrari dealership to open nine months later. The Court held this to be unreasonable and constituted a breach of the duty to mitigate. The notice period was reduced by slightly more than a month as a result.

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