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

SUMMER 2004

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DISMISSAL WAS JUSTIFIED – BUT CONSIDERING LENGTH OF SERVICE– NOTICE REQUIRED

The Honourable Mr. Justice Pitt found that while the employee's conduct justified dismissal, the dismissal was wrongful and notice was required.

The plaintiff had been employed by the defendant for approximately 13 years as a chemical analyst. The defendant dismissed the employee on the basis of incompetence and negligence in the failure or refusal to conduct the chemical testing of products. Pitt J. found that at the time of dismissal, the employer genuinely believed that the plaintiff may have fabricated test results, thereby exposing it to the risk of losing its license for manufacturing and testing of products. He concluded that "[s]uch a belief, reasonably grounded, as was the case here, in my view, justifies a dismissal."

However, the balance of the decision goes on to consider whether the conduct could support the dismissal of a thirteen year employee without notice. He concluded it could not, suggesting that the threshold test in his view is higher for employees with longer periods of service.

Pitt J. went on to state:

"The authorities to date have determined that there are no half measures in wrongful dismissal. The dismissal is either wrongful or it is not.... I do not wish to disturb what appears to be a well-established principle. Accordingly, on the view that I take of the facts of this case, I must find that the dismissal was legally wrongful."

The employee was awarded eight months' salary in lieu of notice.

ONTARIO JUDGES HAVE OPPOSING VIEWS ON CONCURRENT *HUMAN RIGHTS CODE* COMPLAINTS AND CIVIL ACTIONS

On October 20, 2003, the decision of the Honourable Mr. Justice Echlin was released in *McKelvey v. D'Ercole*. On March 24, 2004 the decision of the Honourable Mr. Justice Lederman was released in *Farris v. Staubach Ontario Inc.*. The decisions reach opposite conclusions as to whether one proceeding must be stayed where the plaintiff in a civil employment action has also filed a complaint under the *Human Rights Code*.

Ms. McKelvey filed a complaint with the Human Rights Commission and the next day commenced civil proceedings. Both the complaint and the action were "virtually identical in their wording". Echlin J. held it was inappropriate to have two concurrent claims in different forums and stayed the civil action pending determination of the complaint.

In coming to this conclusion Echlin J. considered which proceeding had been commenced first and the fact that the *Human Rights Code* complaint may offer remedies not available in a civil action including reinstatement with back pay. He also weighed the fact that the complaint would not be stayed by the Commission and the plaintiff had not requested that he consider granting a stay of the complaint pending a determination of the civil action. Therefore it was preferable to proceed first with the complaint.

In the *Farris v. Staubach Ontario Inc.* case, the civil action was commenced a few days prior to the filing of the complaint. The civil action was at the settlement conference stage whereas the commission had not yet commenced its investigation. The Ontario Human Rights Commission intervened and submitted that the complainant who files a complaint should not be deprived of access to the court with respect to claims not founded upon an infringement of the Code, even if the complaint and the action were based upon the same facts, since the basis of liability differs as between the two proceedings.

Lederman J. concluded that there was no need to stay either proceeding. He stated: "[a]ny concern about 'double recovery' can be obviated by arguing before the Tribunal or court (whichever proceeds second), that recovery in any particular area of the claim has already been achieved in whole or in part by an order in a previous proceeding, if there is such an order." Lederman J. did not find that forcing the Plaintiff to elect and proceed, potentially through all levels of appeal, should be necessary prior to proceeding with the other process. "Employment issues, by their nature, should be dealt with expeditiously."

In respect of the *McKelvey v. D'Ercole* case Lederman J. stated:

"Insofar as the decision of Justice Echlin in *McKelvey v. D'Ercole*, supra stands for the proposition that an employee cannot simultaneously pursue a civil action for damages for wrongful dismissal and tortious conduct and a Human Rights complaint, I respectfully disagree."

The Court concluded that the employer had failed to demonstrate that continuing the action would work an injustice because it would be oppressive or vexatious, nor did it show that a stay would not cause an injustice to the plaintiff, and therefore the test for the granting of a stay had not been met.

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