This is a summary of employment matters of interest to the business community, from a litigator's point of view.

We welcome your questions and comments.

Editors
Larry Banack Nancy Shapiro
Telephone TeleFax
416-977-8353 416-977-3316

Winter 2002

EMPLOYEE DEEMED TO HAVE ABANDONED JOB FOLLOWING LEAVE OF ABSENCE

An employee dissatisfied with a position offered upon return from an unpaid leave of absence, refused to accept it. He was found to have abandoned his position, notwithstanding the employee's express, contemporaneous statement that he was not resigning.

The Plaintiff employee, an assistant vice president in product management, requested a leave of absence in order to permit him to build a house. While his employment contract did not contain any provision permitting such a leave, the employer agreed.

The employer wrote to the plaintiff confirming the duration of the leave, and the agreed upon return date. Further, the letter set out the following: "Should you not return to work on the mutually agreed upon return date, you will be considered to have abandoned your position and have, therefore, voluntarily terminated your employment with [the employer]". The Plaintiff accepted those terms. Further, the leave policy in place in the company provided that no employee was guaranteed any specific position upon their return from leave.

Combined with accrued vacation time, the Plaintiff was absent from work for 6 months.

During the course of the leave, the Plaintiff's position was eliminated. The Plaintiff was advised, in writing, over five months prior to his scheduled return date, of this fact and was offered a different position upon his return.

The Plaintiff repeatedly advised his employer that he was not interested in the position which was proposed. No other position was offered.

The Plaintiff did not return to work on the scheduled return date; however, he telephoned Human Resources that morning at 9:15 a.m.

and advised that he was not resigning. He stated that he had expected that the company would provide him with another position.

The Court held that the Plaintiff in failing to return to the new position on his scheduled return date had abandoned his position. The leave of absence was granted on specific terms which were agreed to and accepted. The conditions were clearly communicated and did not vary throughout the leave.

STARTING A NEW BUSINESS NOT A FAILURE TO MITIGATE DAMAGES

In a judgment released by the Court of Appeal on October 11, 2002 the Court reaffirmed the concept that an employee will not be deemed to have failed to mitigate his or her damages simply because the employee starts a business rather than seeking out salaried employment.

The Plaintiff was a vice president with a background in engineering. He had been employed by the Defendant corporation in various capacities for 12 years prior to termination.

The employer did not allege cause for the dismissal at trial; therefore, the only issues were the appropriate notice period and mitigation.

At trial, Dyson J. held that 16 months represented a reasonable notice period taking into account all relevant circumstances.

Further, it was held that the Plaintiff had not failed to mitigate his damages. For 11 months the Plaintiff actively searched for work. The Plaintiff then incorporated a company which enabled the Plaintiff to first pay himself a salary 7 months later.

The Court deducted from the 16 month notice period a portion of the amount the Plaintiff took from his company a few months after the notice period ended, finding some of the income was attributable to income generated during the 16 month notice period.

On appeal, Doherty J.A. stated, while upholding the trial judgment, that self employment is not a "last resort" in the mitigation context. It is the reasonableness of the Plaintiff's conduct which is the determining factor.

While this decision does not expound any new legal theory, it does provide affirmation of the Courts' view. Further, it reflects the economic reality that a growing percentage of the population are self-employed and accepts that reasonably pursuing this option will not be a bar to recovery.

DISCRIMINATION MAY BE BASED ON INDIVIDUAL CHARACTERISTICS

The Supreme Court of Canada has held that in determining whether there has been discrimination on the basis of "marital status" or "family status" it is not necessary that the person discriminated against share characteristics with the group which the *Human Rights Code* was aiming to protect.

The Court upheld the finding of the Human Rights Commission Board of Inquiry that an employer had discriminated on the basis of "marital status" or "family status" when he dismissed an employee whose daughter had made allegations of sexual abuse against him.

The Court adopted a "broad" interpretation to the protected grounds. It held that the statute is aimed at protecting individuals as opposed to groups; therefore, the discrimination does not need to be against a protected group in order to attract protection. Iaccobucci J. and Bastarache J. for the majority wrote:

> "It is sufficient that the individual experience differential treatment on the basis of an irrelevant personal characteristic that is enumerated in the grounds provided in the Code. It is not necessary to embark on the artificial exercise of constructing a disadvantaged sub-group to which the complainant belongs in order to bring one's self within the ambit of marital or family status within the meaning of the code."

However, as the Court pointed out, this is not to say that "nepotism" is extinguished. Section 24(1)(d) of the Code provides that "the right to equal treatment is not infringed where an employer grants or withholds employment or advancement in employment to a person who is the spouse, child or parent of the employer or an employee."

The finding of the Court in this case is an important consideration to employers and employees alike who are engaged in businesses where "worlds collide". It is reasonable to anticipate that this finding may give rise to further Human Rights Complaints which may not previously have been filed.

Commencing Spring 2003 Employment News will be sent to you via email. Should you prefer to be sent hard copies please contact us. Further, past issues of Employment News may be viewed on our website. We look forward to your comments. You may reach the editors at (416) 977-8353 or by email at: nshapiro@koskieminsky .com