CHARACTER MATTERS: DON'T BE SO QUICK TO (SUMMARY) JUDGE

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A recent decision of the Ontario Superior Court of Justice is bucking the summary judgment trend in wrongful dismissal cases. In *Skov v. G & K Services Canada Inc.*,[1] the motion judge held that the appropriate length of reasonable notice owed to a dismissed employee could not be determined by way of summary judgment. Instead, the motion judge held that a mini-trial was necessary to determine a legal issue that was thought to be of declining significance: the character of the dismissed employee's employment.

Background

Mr. Skov was employed by G & K Services Canada Inc. for nearly 21 years before his employment was terminated without cause in 2016. At the time of his dismissal, he held the position of Customer Development Manager and earned approximately $120,000 in salary. Absent a signed employment agreement, Mr. Skov's position was that he should receive 24 months' reasonable notice at common law. In response, G & K argued that 15 months of reasonable notice was appropriate. G & K also argued that the amount should be reduced to 10 months because Mr. Skov failed to mitigate his damages by searching for comparable alternative employment. Mr. Skov sought to have his action for wrongful dismissal decided by way of summary judgment.

Decision

Ontario's *Rules of Civil Procedure* require a court to grant summary judgment if there is no genuine issue requiring a trial. Summary judgment is appropriate if there is sufficient evidence to justly and fairly adjudicate the dispute, and if summary judgment would be an affordable, timely and proportionate procedure. Because this method produces quick results for employees and reduces the strain on judicial resources, summary judgment motions have become an increasingly popular means of adjudicating wrongful dismissal actions in Ontario.[2]

In the present case, however, the evidence regarding Mr. Skov's character of employment was less than straightforward. In argument, Mr. Skov pointed to his title and salary as evidence that he held a management position with G & K. In response, G & K produced evidence that Mr. Skov was never a member of senior management, did not act as a mentor or supervisor, and held a management title "in name only".

Further, Mr. Skov's "updated resume" on LinkedIn stated that his position with G & K was "Director of Process Improvement and Customer Development" – a title that he admittedly never held. G & K made much of the fact that Mr. Skov's purported attempts to mitigate the loss of his employment aligned with his enhanced LinkedIn title, having applied for such positions as Director and Vice-President with prospective employers. G & K argued that Mr. Skov's mitigation efforts fell short because these positions were "out of [his] league".

In his decision, the motion judge recognized the Court of Appeal's oft-cited reasons in Di *Tomaso v. Crown Metal Packaging Canada LP*,[3] which suggest that the character of an employee's employment – e.g., low-level, unskilled positions versus senior-level, highly skilled positions – is a factor of declining relative importance. However, the motion judge also acknowledged that character of employment still remains an influential factor in determining the appropriate period of notice. Given the conflicting evidence in the present case, the motion judge held that he could not determine the appropriate reasonable notice period, nor the extent to which Mr. Skov had mitigated his damages, without resolving the character of employment question first. Therefore, a mini-trial of the character of employment issue was ordered for a later date.

What Employers Should Know

This decision has two notable impacts for employers. First, it represents a possible shift away from the recent proliferation of summary judgment decisions in reasonable notice cases. Second, it provides some clarity to the Court of Appeal's decision in *Di Tomaso* regarding the significance of character of employment.

Delaying the Decision

Successful summary judgment motions require employers to pay out reasonable notice faster, resulting in an obvious negative impact on the employer's position vis-à-vis settlement. However, where the factors that contribute to a reasonable notice award are genuinely contested, the courts may be less inclined to proceed by summary judgment. The motion judge's decision in the present case sends a message that the courts are willing to delay this form of rapid relief where employers can demonstrate that a *Bardal* factor is legitimately in dispute.[4]

Character Makes a Comeback

The *Di Tomaso* decision is often cited by employees for the principle that character of employment is a factor of declining relative importance, particularly in cases where the employer uses it to say that low-level, unskilled employees deserve less notice. In the present case, Mr. Skov argued that this "declining importance" should allow him to obtain summary judgment without having to resolve the issue first. The fact that this argument was rejected is good news for employers, as this case confirms that character of employment clearly retains some relevance in reasonable notice cases.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

[1] 2017 ONSC 4284.
[2] For example, see *Adjemian v Brook Crompton North America*, (2008) 2008 CarswellOnt 3304 (SC) and *Beatty v Best*, 2017 ONSC 3376.
[3] 2011 ONCA 469.
[4] The *Bardal* factors include: the dismissed employee's age, length of service, character of employment and availability of similar employment, with regard to the dismissed employee's training, experience and qualifications.