Employment lawyers big on summary judgment

BY MICHAEL McKIERNAN
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Wrongful dismissal cases are particularly appropriate for the summary judgment process, says Matthew Sammon.

Employment lawyers have renewed their love affair with summary judgment since the Supreme Court of Canada eased restrictions on its use in the landmark judgment of *Hryniak v. Mauldin*, according to practitioners in the field.

In January, the country's top court rejected the Ontario Court of Appeal's narrow "full appreciation" test, concluding that "summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely, and just adjudication of claims."

"I think the Supreme Court's interpretation has essentially opened the floodgates to employment matters being disposed of in this way," says Arthur Zeilikman of employment law firm Zeilikman Law PC in Richmond Hill, Ont.

Matthew Sammon, a partner in the employment law group at Lenczner Slaght Royce Smith Griffin LLP in Toronto, says he welcomes the increased enthusiasm for summary judgment motions he has seen since the decision.

"In my own practice, if I'm on for a plaintiff, I'm much more open now to bringing such a motion early," says Sammon.

"In the classic dismissal-without-notice cases, I've seen more and more going for summary judgment. What it does is where there is a lack of agreement, it drives agreement because it gets you to court much quicker. There are no discoveries, you just start the action, and pretty soon you can bring the motion. You're not waiting around for a year or more for a trial."

He says the effect *Hryniak* has had is no surprise since wrongful dismissal cases, the mainstay of an employment law practice, are particularly appropriate for the summary judgment process.

"In the employment context, usually you only have a few discrete issues to settle," he says. "Typically, they are discrete enough to be settled on a paper record, maybe with a small amount of *viva voce* evidence if it's required. Those are exactly the sort of cases where summary judgment should be used, so I think the impact is going to be significant."

Ottawa lawyer Sean Bawden says summary judgment works so well for wrongful dismissal cases that many lawyers have been using it for years. He says colleagues in Ottawa were already such heavy users of Rule 20 of the Rules of Civil Procedure that he's not so sure *Hryniak* marks much of a turning point there.

"It might be more of a watershed for personal injury cases or others, but the reality is that in the employment world, not a whole lot has changed," says Bawden, an employment lawyer at Kelly Santini LLP.

"It's more a reinforcing of the way we've been working. We're a rather courteous, civil bar that has long taken the view that we don't need trials to get matters done. Everyone knows the law, and it's not been my experience to have these long, drawn-out 10-year cases."

A recent decision by Ontario Superior Court Justice Charles Hackland signals the bench, as well as the bar, is ready to embrace the full range of powers bestowed by Rule 20. In *Beatty v. Best Theratronics Ltd.*, a wrongful dismissal claim brought by a 16-year employee of a medical product manufacturer, Hackland decided he could dispose of two issues raised by the action summarily: the period of reasonable notice and the alleged failure to mitigate.

Two further issues, the plaintiff's entitlement to aggravated and punitive damages as well as his claim for special damages, "do require *viva voce* evidence and I will deal with these subsequently by way of a summary trial of these issues as contemplated by Rule 20.05 (2)," wrote Hackland in his June 24 decision that ordered a two-day mini-trial before him.

"I think this approach is consistent with the directions of the Supreme Court of Canada in the recent case of *Hryniak v. Mauldin*," wrote Hackland.

"The Supreme Court is clear in rejecting the traditional trial as the measure of when a judge may obtain a 'full appreciation' of a case necessary to grant judgment. Obviously, greater procedural rigour should bring with it a greater immersion in a case, and consequently a more profound understanding of it. But the test is now whether the court's appreciation of the case is sufficient to rule on the merits fairly and justly without a trial, rather than the formal trial being the yardstick by which the requirements of fairness and justice are measured."

Zeilikman says that in the past, complicating factors such as the issue of punitive damages and even the alleged failure to mitigate could easily have resulted in the failure of a summary judgment motion. However, he says there are still cases where a Rule 20 motion may not be the best option open to a plaintiff.

"Where you have to resolve matters of credibility or questions regarding discrimination or punitive damages, summary judgment may not always be suitable," he says.

"Any extra issues you add to a straightforward case increase the chances the judge will dismiss the motion or direct you to trial having disposed of only part of the claim summarily."

Zeilikman also cautions against regarding summary judgment as a panacea for cost savings in employment law disputes.

"It's not always as cheap as you might think. To produce all those affidavits, attend cross-examinations, order transcripts, and appear before a judge, it can get pretty expensive." LT