LANCASTER'S
EMPLOYMENT STANDARDS LAW REPORTER

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Ontario amends employment standards legislation

Ontario's Employment Standards Act, 2000 has been amended by omnibus Bill 179, the Government Efficiency Act. The provisions amending the Ontario ESA came into force by royal assent on November 26, 2002.

Vacation time and pay provisions revised

Under Ontario's amended employment standards legislation, employers may utilize a "standard vacation entitlement year" for the purposes of administering vacation time and pay. The standard year is defined (in s.1(1)) as a 12-month period that commences on the employee's first day of work. Alternatively, under new provisions (sections 1(1), 12, 15, Part XI, 51 and 111) setting out a modified scheme for determining employees' entitlement to vacation time and pay, employers may establish an "alternative vacation entitlement year" (s.1(1)), which is defined as a recurring 12-month period that begins on a date chosen by the employer, other than the first day of the employee's employment (such as the start of the fiscal or calendar year). Where the employer establishes an alternative year, the amended Act further provides that the period between the employee's first day and the start of the alternative year is defined as the "stub period."

Vacation pay reporting requirement eased

Under the pre-2000 *Employment Standards Act*, employees were required to take vacation time in blocks of one or two weeks. When, in 2001, the *ESA 2000* came into force, employees became able, by written agreement with the employer, to take vacation time in increments of less than one week. However, the new Act required employers to prepare a vacation pay statement every time vacation time was taken. In some cases, this requirement led to onerous reporting requirements for employers.

The latest amendments ease the vacation pay reporting requirements (set out in s.15.1) for employers. Under the amendments, employees are entitled to request, in writing, a statement outlining their vacation entitlement and pay at the end of a "vacation entitlement" year

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PUBLICATIONS MAIL AGREEMENT NUMBER: 40009978

(s.41.1(1)). The employer may choose to base the vacation entitlement year on either the employee's date of hire or any alternative 12-month period. If the employer chooses the latter option, it must follow the rules set out in respect of the stub period (in s.15(3)).

In addition, s.111 extends the recovery period in respect of which employees may recover unpaid vacation pay.

Overtime pay averaging provisions clarified

Section 22 of the *ESA* allows employers and employees to agree, in writing, that an employee's hours may be averaged over a period of not more than four weeks for the purpose of determining his/her overtime. An amendment to s.22(2) clarifies that the hours of work may be averaged only over "separate, non-overlapping, contiguous periods of not more than four consecutive weeks."

Minimum period off work refined

Section 18(1), which grants employees a right to a period of 11 hours free from work each day, has been amended to clarify that the 11 hours must be consecutive.

Definition of "regular rate of pay" amended

The *ESA*, in s.1(1), defined an employee's "regular rate" of pay as the amount paid for an hour of work or the amount paid in a given work week. Under this definition, problems arose when overtime was calculated by multiplying the employee's regular rate by 1.5 times, because in some cases, while pay had been earned in a week, it had not yet actually been *paid*. The phrase "the amount paid" has been changed to "the amount earned" to address this problem.

Termination and severance pay rules added

Part XV of the Act, which sets out rules for determining whether termination has occurred and whether severance pay is due, has been amended to add rules for determining what constitutes a week of lay off for employees who do not have a regular work week. Previously, the Act did not distinguish, for the purpose of determining when termination and severance entitlement commenced, between employees who work a regular work week and those who do not. In some cases, this led to the situation that employees without a regular work week were not deemed by the Act to be terminated or severed despite the fact that they were not working or receiving pay.

With respect to termination, section 56(3.3) addresses this situation, providing that "an employee who does not have a regular work week is laid off for a period longer than the period of a temporary lay-off," and is thereby deemed to be terminated, "if for more than 13 weeks in any period of 20 consecutive weeks he or she earns less than one-half the average amount he or she earned per week in the period of 12 consecutive weeks that preceded the 20-week period."

Section 56(3.5) alternatively provides, "an employee who does not have a regular work week is laid off for a period longer than the period of a temporary lay-off," is thereby terminated, "if for 35 or more weeks in any period of 52 consecutive weeks he or she earns less than one-half the average amount he or she earned per week in the period of 12 consecutive weeks that preceded the 52-week period."

Section 63(2.3) similarly amends the Act with respect to severance, providing rules for determining when an employee without a regular work week is deemed to have his or her employment severed. The section states that "an employee who does not have a regular work week is laid off for 35 or more weeks in any period of 52 consecutive weeks if for 35 or more weeks in any period of 52 consecutive weeks he or she earns less than one-quarter the average amount he or she earned per week in the period of 12 consecutive weeks that preceded the 52-week period."

In addition, the amendments set out rules for determining how weeks in which an employee is unable to work will be taken into account when determining the employee's lay off status.

As well, s.63(1)(a), which states that an employer "severs" an employee's employment when it dismisses or refuses to continue to employ the employee, is amended by adding that severance also occurs where the employer is "unable to continue employing the employee." The new language brings the provision into harmony with the wording of the notice of termination provisions.

Regulations on employer's termination obligations authorized

Section 141(1) is amended to provide that the government may issue regulations setting out whether certain payments to an employee, such as workers' compensation, supplementary unemployment benefits, and pensions, may be taken into account in determining an employer's obligations to an employee in the event of termination or severance.

Public holiday provisions revised

Amendments have also been made to refine the Act's provisions governing an employee's entitlement to holiday pay. Under the Act, an employee working on a public holiday is entitled, where agreed by the employer and employee, to receive a substitute day off, with holiday pay, or to receive premium pay plus holiday pay for the holiday worked. Previously, to be eligible for this benefit, the employee was required to have worked his/her scheduled work days immediately preceding and following the holiday. If, without reasonable cause, the employee did not work the scheduled days, but with reasonable cause did not work on the holiday, entitlement to

the substitute holiday or premium/holiday pay was lost. In addition, where the employee worked some, but not all, of the scheduled hours on a public holiday, the employee was entitled to premium pay for the hours worked, but no other entitlement. The Act did not, however, address what happened when the employee performed all the work required or agreed to on the holiday, but not on the preceding and following scheduled work days.

Sections 27, 28, and 30 are now amended to clarify that employees who perform the work they are required or agreed to do on a public holiday, but who fail without reasonable cause to work their regularly scheduled shift immediately before or after the public holiday, are entitled to receive premium pay only for the hours worked on the public holiday, and receive no other entitlement.

In addition, s.29, which requires employers to substitute an alternative paid day off work where a public holiday falls on a day that is not an ordinary working day, is also amended to clarify that employees on pregnancy or parental leave, or who have been laid off, are not entitled to a substitute day off in this circumstance, but rather are entitled only to public holiday pay.

ONTARIO GOVERNMENT EFFICIENCY ACT (BILL 179)
Ontario Legislative Assembly
First Reading: September 25, 2002
Second Reading: November 7, 2002
Third Reading: November 21, 2002
Royal Assent: November 26, 2002

LEGISLATIVE UPDATE

Changes to B.C.'s *ESA* take effect

In May 2002, the B.C. legislature passed the Employment Standards Amendment Act, 2002. Most amendments came into force at that time; the remaining amendments came into force on November 30. Major changes are reviewed below.

ESA's scope of application reduced

Section 3 of B.C.'s *ESA*, which formerly provided, "this Act applies to all employees, other than those excluded by regulation, regardless of the number of hours worked," is repealed and replaced with language which reins in the *ESA*'s scope of application. The new s.3 provides that, where a collective agreement contains provisions dealing with hours of work or overtime, statutory holidays, annual vacation or vacation pay, or seniority retention, recall, termination, or layoff, the provisions of the *ESA* corresponding to those subjects are deemed not to apply in respect of employees covered by the agreement.

Director's liability reduced

Section 96(2) of the *ESA*, governing director/officer liability, is repealed and replaced. The new section reduces the liability of employers. In particular, an employee may now recover wages only for the 6 months preceding a complaint or investigation, whereas the Act previously provided for recovery of up to 24 months' wages.

Flexible work schedule provision repealed

Section 37, which allowed for the creation of flexible work schedules, has been repealed and replaced by a provision under which employers and employees may agree to average an employee's hours of work over a period of up to four weeks for the purpose of determining an employee's entitlement to overtime pay. Flexible work schedules are no longer provided for anywhere in the Act. At the same time, ss.40 and 42 are amended to provide that overtime is payable at double time after an employee works 12 hours in one day (previously 11 hours). However, under the amended provisions, employers are no longer required to pay double time for an employee's work in excess of 48 hours per week, as was previous required by s.40(2)(b).

Mandatory monetary penalties introduced

Section 98, which formerly provided that the Director of Employment Standards "may impose" monetary penalties where he or she determines that a requirement of the Act has been contravened, now provides for the mandatory imposition of mandatory monetary penalties.

In addition, the amended Act strengthens the enforcement of employer/employee-negotiated "settlement agreements." Under ss.76 and 78, the Director may assist in the settlement of complaints and, where a party to a settlement agreement fails to comply with its terms, the Director may file the agreement in the Supreme Court for enforcement.

Minimum hours requirement reduced

Section 34, which governs the minimum hours for which employees must be paid where an employer requires them to attend at work, has also been amended. Under the new provision, employers are required to pay employees for at least two hours at regular pay where they are required to attend, regardless of whether the employee starts work. This change will, in some cases, lead to a reduction in the hours paid to employees under the previous Act, which required that employees be paid for four hours of work where they attended, and actually commenced, work.

Public holiday pay revised

As well, amendments to ss.44-47 affect the amount of pay due to employees on statutory holidays. The amended Act now provides that employees required to work on statutory holidays must receive pay at time and a half for the time worked up to 12 hours and double time thereafter, whereas previously time and a half applied to time worked up to 11 hours, with double time applicable thereafter.

Posting requirement repealed

Finally, s.6 of the *ESA*, which required employers to post a statement of employees' rights under the *ESA* at the workplace, in a form approved by the Director, has been repealed.

EMPLOYMENT STANDARDS AMENDMENT ACT, 2002 (BILL 48)
First Reading: May 13, 2002
Second Reading: May 27, 2002
Third Reading: May 30, 2002
Royal Assent: May 30, 2002

DEDUCTIONS FROM WAGES

Can an employer impose a health care plan on its employees?

The New Brunswick Labour and Employment Board has held that the institution of a mandatory health care plan and the imposition of mandatory deductions were both reasonable and lawful.

On June 1, 1999, Connors Bros. Ltd., the operator of a fish plant on Grand Manan Island in New Brunswick, announced that it was introducing a mandatory Blue Cross medical plan for non-unionized employees, having negotiated such a plan for bargaining unit employees. As a result of the plan, Robin Wilcox, who had been employed seasonally by the plant for over 23 years as a non-unionized worker, was told that the sum of $8.89 would be deducted per pay cheque. Connors explained to the employees that the plan was mandatory because everyone's money was required to make the plan viable.

Wilcox was required to sign a consent to the deduction, but he did not want to participate in the plan, signed the agreement under protest, and filed a complaint with the Director of Employment Standards. On May 31, 2002, the Director ordered Connors to refrain from making the deductions from Wilcox's pay cheque and to return the monies already deducted. Connors requested that the decision be referred to the New Brunswick Labour and Employment Board. The Board found the actions of Connors to be lawful and vacated the Director's order.

First, the Board held that it was reasonable for Connors to impose participation in the plan as a condition of employment. It accepted that, based on past experience with its insurance carrier, the plan had to be mandatory in order to be financially feasible. Moreover, it noted that medical plans were commonplace in the industrial world and were therefore not unreasonable, unexpected, or unusual.

Second, the Board ruled that Connors could deduct premiums from Wilcox's pay without his consent. In arriving at this conclusion, the Board relied on *Hutchins v. Atlantic Provincial Security Guard Service Ltd.,* [1995] N.B.L.E.B.D. No. 24, where the Board had ruled that deductions that were not statutory and were made without the permission of the employee were permissible where a demonstrable economic benefit accrued to the employee. In this case, the Board found that a clear economic benefit had accrued to Wilcox and the other employees. In the words of the Board: "By means of the Blue Cross insurance plan, Mr. Wilcox, as have his fellow employees, had the benefit of the coverage, whether or not he has chosen to take advantage of it. In the Board's opinion, that coverage is in every sense an economic benefit. The underlying principle of a successful insurance plan is that the number of persons who pay premiums is larger than the number of persons who make claims."

RE CONNORS BROS. LTD.
New Brunwick Labour and Employment Board
Eugene McGinley, Chairperson
Drew Simpson, Counsel for the Director
James LeMesurier, Counsel for Connors Bros. Ltd.
November 15, 2002 (6 pages)

EXEMPTION FROM MINIMUM WAGE

Taxi company ordered to comply with minimum wage requirements

The New Brunswick Labour and Employment Board refused to exempt the owner of an internet-based taxi company from the requirement to pay his drivers minimum wages. The owner failed to demonstrate sufficient hardship to fall within an exemption under the provincial <u>*Employment Standards Act*</u>*.*

Tom MacLean's dream was to start up an internet-based taxicab and delivery service in New Brunswick. His

dream did not include guaranteeing minimum wages to his drivers. Instead, he planned to take 35 percent of the revenue generated in each shift. The income-splitting scheme rarely generated hourly pay equal to minimum wages for the drivers.

When MacLean learned that the minimum wage requirements in the *ESA* applied to taxi drivers, he applied to the Director of Employment Standards for an exemption. His application was denied, but MacLean requested that the matter be referred to the New Brunswick Labour and Employment Board, arguing that he would be unable to get his venture off the ground if he was required to pay minimum wages. The industry standard was the income-splitting method of revenue, he asserted, and he would be at a competitive disadvantage if he were forced to incur higher operating costs than other owners.

In considering its decision, the Board referred to the provisions of the New Brunswick *Employment Standards Act*. Under s.8(1) of the Act, MacLean could apply to the Director to be exempted from the minimum wage requirements if he met two conditions: "An employer may apply to the Director …to be exempted from any provision of this Act, and the Director may grant an exemption if the employer can show to his satisfaction that, in addition to any other requirement that may be established in this Act, … the employer suffers a special hardship in complying with the provision that is not suffered by other employers; and the employee receives other benefits or advantages that can be viewed as reasonable compensation for the sacrifice of the benefit, advantage, privilege or protection offered by the provision in respect of which the exemption is sought."

The Board came to the same conclusion as the Director. It did not accept that MacLean would suffer a special hardship from the minimum wage requirement because of the extraordinary startup costs of an internet-based taxi service. It also did not accept MacLean's argument that he should not be required to pay minimum wages because most other taxi companies did not do so. In the Board's view, the primary purpose of the legislation was to ensure minimum wage standards in almost all situations. Exemptions were to be granted only where there were extenuating circumstances.

The Board was also not satisfied that MacLean's drivers would derive tangible economic benefits that would compensate them for the loss of minimum wages, such as the opportunity to develop job skills and gain job experience which they otherwise could not. MacLean asserted that the drivers would have a) increased mobility; b) increased computer skills; c) new work contracts; d) improved social skills; e) the feeling of being useful and productive; f) an opportunity to generate more income; g) more opportunity to work; and h) new skills and training. However, the Board categorized these benefits as intangible.

In the end, MacLean failed to meet both tests as set out by s.8(3) of the *Employment Standards Act*. He had to pay minimum wages if he was going to run his dream taxi business.

RE MACLEAN
New Brunswick Labour and Employment Board
J. Paul Dubé, Alternate Chairperson
Tom MacLean, Applicant
Drew Simpson, Counsel for the Director
July 24, 2002 (5 pages)

OVERTIME PAY

Director's order to pay overtime vacated

How can an employer determine whether overtime is to be paid to live-in workers? In the case of a campsite caretaker, the fact that she could, and did do, work for herself meant that it was practically impossible to determine the actual number of hours she devoted to the employer.

Portage Lakes is a remote and lonely place. Thus, when the Portage Lakes Club advertised for new caretakers in 1998, it specified that it was seeking a couple to live and work at the campsite, during the May-October season, concluding that it would be easier to keep an employee there if the worker had some companionship.

Bruno Frenette responded to the ad. He and his wife, Noella Hamilton, relocated to the camp and closed their winter residence. Although both Frenette and Hamilton worked for the employer, only Frenette was paid for his services in the summers of 1998 and 1999. Only Hamilton was paid for the summer of 2000.

Hamilton testified that the work relationship ended when she and her husband were instructed not to leave the campsite during the summer of 2000. The couple did leave the property for a drive, and as a result, their contract was not renewed for 2001.

Hamilton claimed that, because she was not allowed to leave the workplace, she was entitled to overtime, vacation pay, and statutory holiday pay. The parties agreed that Hamilton was paid $540.80 gross per week, from which $100 was deducted for lodging.

The duties of the caretakers included, but were not limited to, the following tasks: greeting guests, distributing bedding, maintaining generators, performing general carpentry, plumbing and electrical work, mowing grass, maintaining boats, operating the canteen and gas bar

from 9:00 a.m. to 9:00 p.m., shopping for supplies, cleaning cottages, restocking cottage kitchens, and taking inventories.

Hamilton's claim was heard by the Director of the New Brunswick Labour and Employment Board, and an order was issued directing the employer to pay outstanding wages of $20,945.31. The employer appealed the order.

Vice-Chair Sylvia Mendes-Roux allowed the appeal. Citing several cases, the Board found Hamilton's case to be similar to *Piskahegan River Co.,* [2001] N.B.L.E.B.D. No. 11. In that case, a young man worked as a river guide with a friend. It was seasonal work, and at the end of the season the man claimed for unpaid wages. The Board was of the opinion that, by the very nature of the work involved, the working hours of the employee were "unverifiable." Furthermore, "the division of hours between work, rest, recreation was obviously extremely flexible, and in fact, there appeared to be a good deal of overlap."

Here, too, was a seasonal job that made it difficult to determine the number of hours worked. During her day, Hamilton had to keep the canteen open, but she had the use of the canteen to prepare and sell her own products for her own benefit. She could take breaks as necessary. Although she had to check on the generators, she could have found a club member to assist, as the former caretaker had routinely done when he was employed there.

Because of the nature of the work and the amount of overlap between personal and professional duties, the Board determined that the evidence did not support Hamilton's claim of working 24 hours a day: "It is virtually impossible to determine hours of employment when the employee had the option of doing errands for herself, preparing food for herself and food to sell in the canteen, doing her daily chores of cooking, washing clothes, cleaning her own camp, along with enjoying camp life. Evidence clearly showed that there were various times during the day where Mrs. Hamilton was not carrying out duties for the Club," said Mendes-Roux.

As the hours or work were unverifiable, Regulation 99-69 applied. It provided that $253 per week was the minimum weekly wage payable to employees in activities where the actual number of hours worked was unverifiable. However, the employer actually paid Hamilton $540.80 minus room and board, an amount which exceeded that prescribed by the Regulations. Therefore, the Board found that the employer had not violated the Act or the Regulations. The Director's order was vacated.

HAMILTON AND FRENETTE v. PORTAGE LAKES CLUB INC.
New Brunswick Labour and Employment Board
Sylvia Mendes-Roux, Vice-Chairperson

Drew Simpson, Counsel for the Director
Nicole Poirier, Counsel for the Employer

October 11, 2002 (9 pages)

PAY IN LIEU OF NOTICE

Business bought as going concern, employee credited with past service

An Alberta Court judge has awarded an employee with 25 years of service 20 months' pay in lieu of notice after his employment was terminated by a company which took over the business from a trustee in bankruptcy. The Court ruled that, where a business is bought as a "going concern," it is an implied term of employment that employees will be credited for their service with the predecessor employer.

When he was dismissed in February 2000, Hassan Radwan had worked for 25 years as a punch press operator for Arteif Furniture Manufacturing Inc. and its predecessor companies. Arteif, the current employer, purchased the furniture company in 1995 from a trustee in bankruptcy. In calculating the pay due to Radwan in lieu of notice, Arteif concluded that two weeks was appropriate, since Radwan had worked for the company for less than four years. Radwan commenced a wrongful dismissal action, arguing that, at common law and under the Alberta *Employment Standards Code*, his employment should be deemed to be continuous for the entire 25 years, since Arteif had taken over the business without any major interruption in work or change in operations.

Arteif countered that the 1995 bankruptcy had severed Radwan's employment and that, as a result, his previous employment should not be considered in calculating the notice period. Arteif further asserted that its purchase of the business was not a purchase of a "going concern," since it did not assume the previous owner's liabilities and obligations and had not agreed to retain employees. Even if it was a successor employer, Arteif contended, Radwan was not an employee at the time of the bankruptcy because he had stopped working briefly as a result of illness.

Bankrupt company a "going concern"

Judge Donald Lee of the Alberta Court of Queen's Bench considered two main issues in allowing the claim: first, whether the business was sold as a "going concern;" second, whether Radwan had adequately mitigated his damages.

Judge Lee fixed 20 months as a reasonable notice period. He cited with approval the British Columbia

Court of Appeal's ruling in *Sorel v. Tomenson Saunders Whitehead Ltd.* (1987), 39 D.L.R. (4th) 460, that credit for past service may be given if a new employer buys a business as a going concern. In such cases, Lee observed, there is an implied term in the contract of employment between the purchaser and the employees it retains that the employees will be given credit for past service with the vendor for the purposes of salaries, bonuses, and notice of termination. In Lee's view, it was not relevant that the previous employment relationship had been terminated, nor that the employee may have been paid vacation pay and other entitlements at the time of the takeover of the business.

In this case, Judge Lee was satisfied that Arteif had purchased a going concern because there was continuity of the business, the trustee operated the business from the date of the bankruptcy until the day before the date of the sale, and Arteif began operating the business from the day of the purchase. It was therefore up to the new employer to expressly inform employees that they would not be credited for past service and to give them the opportunity to take or leave their jobs on that basis. Here, since Arteif had not addressed the matter of notice or continuation of employment with the employees it kept on, it could not contest the implied agreement to credit employees for their previous service.

Employment continuous under Code

Judge Lee observed that the purpose of the *Employment Standards Code* is to protect employees' interests, and it should therefore be interpreted broadly. Accordingly, Lee deemed Radwan's employment continuous for the purposes of the *Code*. In doing so, the judge rejected the employer's argument that Radwan ceased to be an employee of the predecessor when he stopped working due to illness. At a minimum, he ruled, Radwan was entitled to termination pay appropriate to a person employed for 25 years. Given Radwan's age, lengthy service, minimal formal education, limited English, narrow skills set, and physical disabilities, Lee set 20 months as a reasonable notice period.

As for efforts to mitigate his damages, Judge Lee concluded that Radwan had not been very persistent. However, Arteif had not proved that there were other jobs which Radwan could have obtained. Accordingly, the 20-month notice period should not be reduced, Lee concluded.

RADWAN v. ARTEIF FURNITURE MANUFACTURING INC.
Alberta Court of Queen's Bench
Judge Donald Lee

Dennis Groh, Employee Counsel
Norma Mitchell, Employer Counsel

August 16, 2002 (17 pages)

LITIGATION OR ADJUDICATION

Choosing between a lawsuit and an *ESA* claim: how is it done?

In what circumstances should a court permit a wrongful dismissal action to continue when the employee has also filed an employment standards complaint? Several factors can be considered when a court exercises its inherent jurisdiction to effectively extend the time to withdraw the complaint.

A month after he filed a complaint with the Ministry of Labour over his dismissal from Wolfe Transmission Limited, Delroy Scarlett commenced an action for wrongful dismissal in the courts, even though he had not withdrawn his initial complaint.

According to s.97(4) of the Ontario *Employment Standards Act,* an employee who has filed a complaint under the Act can begin civil proceedings for wrongful dismissal if he or she withdraws the complaint within two weeks of its filing. The employer objected that Scarlett had not withdrawn the ESA complaint, and it was now too late to do so.

On November 5, 2001, an employment standards officer held a fact-finding session with Scarlett and Wolfe Transmission. However, noting that civil proceedings had been commenced, the officer adjourned the meeting to obtain legal advice as to whether she had authority to investigate. She directed Scarlett to seek legal counsel to determine which avenue he wanted to pursue and informed him that, if she proceeded to investigate and adjudicate the claim, Wolfe Transmission could go to court and have the civil claim struck out. If Scarlett withdrew his complaint, his employer could still go to court to have the civil claim struck because he had not withdrawn the complaint within the two-week period. The plaintiff was in danger of losing both avenues of recovery. She advised Scarlett that, in order to continue with the employment standards claim, she would require his written instructions, or he would have to withdraw his *ESA* claim by November 26, 2001.

On November 26, Scarlett withdrew his *ESA* claim. He stated that he thought there was no problem with this course of proceeding as "he had been given a further extension of time by the Ministry."

Wolfe Transmission brought a motion to stay or dismiss the civil action under Ontario's *Rules of Civil*

Procedure, on the ground that it was statute-barred. The employer argued that, under s.97(4) of the *ESA*, Scarlett should be barred from proceeding with a civil action for wrongful dismissal because he did not withdraw his complaint within two weeks of its having been made.

Scarlett countered that, if the motion were granted, he would have no remedy at all against the employer, even though he had a work history spanning some 20 years with the company.

Judge Sarah Pepall of the Ontario Superior Court of Justice denied the employer's motion. In her opinion, s.97(4) was designed to avoid parallel legal proceedings. She noted that the provision requires that an employee elect which route he or she wishes to use to obtain a remedy, and there is nothing in the statute that permits an extension of the two-week period.

However, in *Ordon Estate* v. *Grail* (1996), 30 O.R. (3d) 643, the Ontario Court of Appeal ruled that a court could invoke its inherent jurisdiction to extend a limitation period where special circumstances warranted such an extension. The question here was whether there were special circumstances that merited an extension of the two-week period.

"The plaintiff was unrepresented by legal counsel when he commenced his *Employment Standards Act* complaint. Even though he did have counsel for his wrongful dismissal claim, it would appear that he continued to be unrepresented with respect to the *Employment Standards Act* matter when he attended the aborted meeting of November 15, and when he withdrew the complaint," said Judge Pepall.

In addition to his lack of representation, Judge Pepall said Scarlett appeared to have an arguable case of wrongful dismissal. She considered the lack of prejudice to the employer to be persuasive as well.

"There has been no bad faith on the part of the plaintiff and the defendants have not been misled or taken by surprise in any way. There is no suggestion of any prejudice to the defendants if the relief requested by them is refused and indeed, I am unable to conceive of any such prejudice. The prejudice to the plaintiff on the other hand is significant. To me it would be a gross miscarriage of justice if the plaintiff were deprived of the opportunity to pursue his rights in court," Pepall said.

Given that the stay or dismissal could result in a complete loss of remedy to the employee, Judge Pepall refused to grant the motion. The employer would still be in a position to defend the action on the merits. The motion to grant a stay or dismissal was denied.

SCARLETT v. WOLFE TRANSMISSION LTD.
Ontario Superior Court of Justice
Judge Sarah Pepall

Clinton Ellis, Employee Counsel
Raymond Raphael, Employer Counsel

November 1, 2002 (5 pages)

HOURS OF WORK

Can an employee leave work after working maximum *ESA* hours?

Where an employee shut down the boilers and left work part way through a shift because it exceeded the Employment Standards maximum, was discipline warranted? An arbitrator recently held that, while the employee could not be disciplined for leaving work, a six-month suspension was justified for shutting down the boilers.

In early February 2001, Guy Rocheleau was asked to complete a 12-hour overnight shift, instead of the usual 8-hour shift, because the operations were short-staffed. As Rocheleau believed that this request breached the Ontario *Employment Standards Act*, he advised that he would leave the workplace at 7 a.m. (after eight hours) and that, if there were no stationary engineer present to replace him, he would shut down the boilers. At 6 a.m., the chief operating engineer, Alvin Gauthier, arrived and directed Rocheleau to work the full shift because Gauthier could not fill in for him due to conflicting commitments. Rocheleau was also warned that he would be dismissed if he left the workplace and shut down the boilers.

At 7 a.m., Rocheleau left the workplace after doing a "cold shut-down" of the boilers. Shortly thereafter, Gauthier, who had not left the building, restarted the boilers and reopened the gas valves. He estimated that the employer lost approximately 45-60 minutes of production time because of the method chosen to shut down the boilers.

Article 16 of the collective agreement stated that the normal hours of work were eight and a half hours per day. Sections 17 and 18 of the *Employment Standards Act* provided that, with the exception of an "emergency" situation, the "hours of work of an employee shall not exceed eight in a day" unless the employer obtained "the approval of the Director." According to the *Ontario Operating Engineers Act,* an engineer could leave the boilers running in his absence provided it was safe to do so and there was an engineer on site.

When Rocheleau's employment was terminated, the United Food and Commercial Workers' Union filed a grievance, alleging that the employer did not have the lawful authority to direct Rocheleau to work in breach of the Act and that Rocheleau acted reasonably in shutting down the boilers. The employer argued that the "work now, grieve later" principle applied, and Rocheleau could

have obtained adequate redress through the grievance procedure. Further, the employer contended that Rocheleau was not only insubordinate and careless in using the "cold shut-down" method to shut down the boilers, but he had also breached the Act as the shut-down was completed despite the fact that there was a chief operating engineer on the premises.

Arbitrator Michael Lynk substituted a suspension for discharge. He held that, while the employer was not justified in disciplining the grievor for refusing to obey an unlawful directive, a six-month suspension was appropriate for the grievor's conduct in shutting down the boilers.

The arbitrator found that the employer did not have the requisite permit to allow a 12-hour shift, and the operations did not fall within the emergency exception under the Act. Moreover, the breach of the Act was not technical in nature, as the shift was wrongfully extended by a lengthy period of time, i.e., four hours.

On the other hand, Lynk held, Rocheleau's conduct in shutting down the boilers was insubordinate. He should have kept the boilers running, in accordance with Gauthier's direction and the Act. Further, the use of the "cold shut-down" method was careless and risky. However, while this conduct constituted a serious workplace infraction, termination was excessive due to a number of mitigating factors, including its timing (immediately following the employer's unlawful order).

The arbitrator substituted a six-month suspension for discharge on a last chance basis, directing Rocheleau to write a letter to the company admitting his wrongdoing and undertaking to obey all lawful instructions in the future.

UNITED FOOD AND COMMERCIAL WORKERS' UNION, LOCAL 278W v. CANADIAN BLENDING & PROCESSING INC.
Ontario Grievance Arbitration
Michael Lynk, Sole Arbitrator
Kelvin Kucey, Counsel for the Union
Michael Duben, Counsel for the Employer
September 6, 2002 (23 pages)

REASONABLE NOTICE AND THE ESA

Requirement of reasonable notice rebutted by *ESA* provision in contract

A superior court judge has limited the damages of a wrongfully dismissed employee to the minimum notice required under the Employment Standards Act, since that is what his contract of employment clearly provided for.

On May 29, 2000, Ramin Mesgarlou was hired by 3XS Enterprises to manage the company's sales staff and sales program. An Ottawa-based franchise of the United Consumers' Club, 3XS sold club memberships to consumers, entitling them to the privilege of purchasing a wide range of household products at discounted prices. The company's profits were derived entirely from the revenue generated by the sale of memberships.

Mesgarlou's contract of employment provided for an annual salary of $42,000, plus bonuses. The parties also agreed that the contract could be terminated after the first three months of employment subject to notice in accordance with the Ontario *Employment Standards Act*.

Mesgarlou was successful at his job, and sales increased under his leadership. In August 2000, Mesgarlou approached the company's owner and requested a more lucrative remunerative package. He indicated that, if he was not offered more money, he might seek employment elsewhere. Reluctant to lose Mesgarlou, the company agreed to significant increases in Mesgarlou's salary and bonuses.

By the spring of 2001, however, the company had decided that Mesgarlou's remunerative package was too great a drain on the resources. The company was seeking to find a way to revisit the issue with Mesgarlou when the owner and Mesgarlou became embroiled in an argument over staff. After a heated exchange, Mesgarlou's employment was terminated.

Mesgarlou commenced an action in Ontario's Superior Court of Justice, seeking damages for wrongful dismissal. By the time the matter went to trial, the company conceded that Mesgarlou had been fired but insisted that he was limited by his contract of employment to the notice of termination provided in Ontario's *Employment Standards Act*. Citing *Ceccol v. Ontario Gymnastic*

Federation (2001), 55 O.R. (3d) 614 (C.A.), Mesgarlou argued that the contract provision was too vague to displace the presumption that he was entitled to a reasonable period of notice of termination.

Judge Douglas Rutherford disagreed. In his view, the contract provisions dealing with termination in *Ceccol* were very different and more complex than the contract language at issue in the present case. "I think the simple language of [the termination clause] is a sufficiently clear and unambiguous provision as to rebut the common law presumption that reasonable notice is required to terminate the employment," Rutherford declared. "It means, in my view, that any termination by either party would require notice in accordance with the Ontario statute." Nor was the judge persuaded that Mesgarlou had been in a vulnerable bargaining position when the contract was formed. "[F]rom his testimony before me, [Mesgarlou] is a competent and sophisticated businessman, well used to looking out for his interests," Rutherford observed. "He showed that by negotiating such significant increases in his production bonuses."

In the circumstances, the judge declared, Mesgarlou was entitled to only one week's notice of termination as provided under the *Employment Standards Act*. However, had he found that Mesgarlou was entitled to reasonable notice at common law, Rutherford added, "in light of … the plaintiff's age, experience, training and qualifications, the nature of the employment, and the circumstances surrounding the termination, I would have held that a reasonable period of notice … was three months."

MESGARLOU v. 3XS ENTERPRISES INC.
Ontario Superior Court of Justice
Judge Douglas Rutherford

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September 9, 2002 (4 pages)

EMPLOYMENT STANDARDS LAW REPORTER

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Published 6 times per year.
Annual subscription rate: $275 +GST

ISSN 1499-2507

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