

Summary judgment motion in actions for wrongful dismissal started under the Simplified Procedure rule: A new way forward

Litigation | Litigation & Dispute Resolution | Rules of Civil Procedure | Summary Judgment | Wrongful Dismissal

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Following a long line of cases, it has become standard practice in wrongful dismissal actions, even where the potential damages may exceed the prescribed monetary limit, to commence a claim under the Simplified Procedure rule (Rule 76 of the *Rules of Civil Procedure*) and then proceed with a summary judgment motion under Rule 20, to try and have the matter dealt with quickly and efficiently.

Indeed, this approach has been affirmed by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 1 SCR 87, ("*Hryniak*") and other decisions which have encouraged utilizing summary judgment motions as a means to obtain timely and just adjudication of claims such as these.

However recently, in *Singh v. Concept Plastics Limited*, 2016 ONCA 815, ("*Singh*"), the Ontario Court of Appeal (the "ONCA") appeared to deal, what some commentators consider, a serious death blow to the use of the Simplified Procedure in this manner and essentially indicated that the Simplified Procedure might not be the appropriate procedure for any matters where issues of credibility arise.

In *Singh*, two employees issued a wrongful dismissal action under the Simplified Procedure rule and then moved for summary judgment. While summary judgment was granted, the employer successfully appealed the decision.

On appeal, the employer argued that significant procedural constraints under the Simplified Procedure rule, particularly the prohibition against cross-examination of an affiant on their affidavit, rendered the process unfair and not conducive to summary judgment.

The ONCA agreed that the granting of summary judgment was inappropriate in *Singh* because the employer was unable to cross-examine the employees on their affidavits on contentious issues regarding lack of mitigation and evidence related to the notice period, particularly where the employer had provided evidence calling into question the evidence put forward by the employees.

But while the ONCA has raised important considerations as it relates to the use of the Simplified Procedure rule where credibility issues arise on motions for summary judgment, in our view, it has not dealt a death blow to summary judgment motions under the rule.

Rather the decision merely provides direction (i.e. a new way forward) to judges and lawyers that in wrongful dismissal cases commenced under the Simplified Procedure rule it is important for the court to specifically address issues of credibility and draw inferences as required pursuant to Rule 20.04 (2.1) and, where necessary in exercising these powers, obtain oral evidence further to Rule 20.04(2.2) by way of a Mini-Trial.

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In some cases, no issues of credibility will arise in connection with mitigation because actual evidence of a failure to mitigate may not exist and thus further oral evidence through a Mini-Trial will be unnecessary.

Singh also reinforces the need for judges hearing summary judgment motions, particularly under the Simplified Procedure, to clearly set out in their reasons how the powers available to them pursuant to Rule 20.04 (2.1) were exercised.

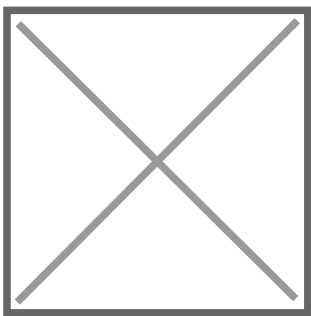
But despite the foregoing view, the decision in *Singh* is concerning because the ONCA did not address the procedure that the motions Judge should have employed to deal with issues of credibility in the absence of cross-examination. The ONCA also did not make reference to the decision in *Hryniak* and the specific obligation on the motion judge as set out therein or in the line of cases following *Hryniak* in Ontario, such as *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC, *Beatty v. Best Theratronics Ltd.*, 2014 ONSC 3376, and *Arnane v. Best Theratronics Ltd.*, 2015 ONCA 63, all of which require the judge hearing the motion to weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence pursuant to Rule 20.04 (2.1).

The ONCA also did not address Rule 20.04 (2.2) which further provides that a judge may, for the purposes of exercising any of the powers set out in sub-rule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

These issues should be clarified.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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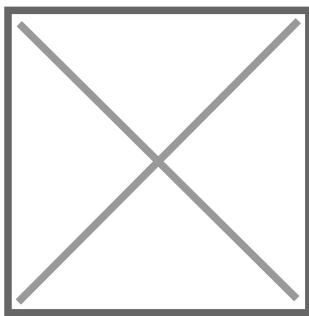


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