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Mandatory Retirement and Wrongful Dismissal: An Age Old Question of Compensation for Discrimination

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Cases Considered:

Magnan v. Brandt Tractor Ltd., 2008 ABCA 345

It has long been a legal principle in Canada that there is no recognized tort of discrimination; people should be pursuing remedies for discrimination from human rights tribunals: *Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181. This basic principle is supported by another principle: there is no recognized cause of action for breach of a statute, especially in negligence: *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. These principles were considered earlier this year in *Honda Canada Inc. v. Keays*, 2008 SCC 39, where the Supreme Court held that breach of a human rights code does not amount to an independent actionable wrong. However, a recent decision of the Alberta Court of Appeal confirms that these legal principles can be blurred when it comes to remedying wrongful dismissal that contains an element of discrimination.

Wrongful dismissal claims arise in contract, and are based on the idea that employment contracts contain an implied obligation on employers to provide reasonable notice of their intention to terminate the employment relationship where they do not have just cause for dismissing the employee. If an employer does not give reasonable notice of termination, the employee can sue for breach of this implied term. If successful, the employee's damages will be based upon the losses suffered as a result of the employer's failure to give proper notice (*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para 115). As noted in *Honda*, "[t]he normal distress and hurt feelings resulting from dismissal are not compensable" (at para. 56).

Under s. 7(1) of the *Human Rights Citizenship and Multiculturalism Act* (*HRCMA*), R.S.A. 2000, c. H-14, discrimination on the basis of age is protected in the employment context. If an employee alleges that they were dismissed under a mandatory retirement policy, they may have a prima facie case of discrimination (*Dickason v. Governors of University of Alberta and the Alberta Human Rights Commission*, [1992] 2 S.C.R. 1103 at para. 59). Once a *prima facie* case of discrimination is made out, then in order to defend its policy, the respondent can either establish that age is a *bona fide* occupational requirement (*HRCMA* s. 7(3)) or that the policy is reasonable and justifiable (*HRCMA* s. 11) (see Linda's earlier post on mandatory retirement). If

the respondent cannot prove one of these defences, discrimination is made out and remedies under the *HRCMA* will be available.

Generally speaking, employees who are dismissed in circumstances involving mandatory retirement policies may choose whether to pursue remedies in contract for wrongful dismissal, or under human rights legislation for discrimination on the basis of age. Human rights remedies have the advantage of being somewhat quicker, easier, and less expensive to obtain (as compared to a trial before the courts), but the level of monetary compensation available in the human rights realm is typically lower than that available in an action for wrongful dismissal. This is particularly so since the advent of "*Wallace* damages", which are available over and above damages for failure to give reasonable notice, and compensate employees where the manner of dismissal involved conduct that was unfair or in bad faith (*Wallace v. United Grain Growers Ltd.*, supra at para. 98). Until *Honda*, *Wallace* damages operated by extending the reasonable notice period. After Honda, it appears that damages for the manner of dismissal are to be calculated "not through an arbitrary extension of the notice period, but through an award that reflects the actual damages" (at para. 59). Such damages may be awarded where the employer's conduct damages the employee's reputation, misrepresents the reasons for dismissal, or where the employer meant to deprive the employee of certain rights or benefits (including the right not to be discriminated against). It is in the context of such damages that the line between wrongful dismissal and discrimination in employment may become blurred.

How were these principles applied in the case at hand? Mr. Magnan was employed by Brandt Tractors Ltd. (or its predecessor companies) for 38 years (from 1966 to 2004). For the last 11 years of his employment, Magnan was employed as a Customer Support Advisor. Brandt had an unwritten mandatory retirement policy which provided that employees were required to retire at age 65 or shortly after they reached that age. Magnan inquired in September 2003 as to whether Brandt offered a retirement package and was advised that there was no such package but that eligible employees would receive a pension upon retiring. In July 2004, Magnan was advised by Brandt's president that he could continue working until the "year end" following his 65th birthday (November 3, 2004). Magnan thought "year end" meant the company's year end-March 31, 2005- but Brandt's president meant December 31, 2004. At a meeting in October 2004, Magnan made it clear that he did not agree with Brandt's mandatory retirement policy. Although he was advised that a new customer support advisor had been hired to replace him after December 31, 2004, Magnan provided Brandt with a note advising that he would not be resigning. In December, 2004 after he was given a retirement gift, Magnan advised Brandt via a letter from his solicitors that he did not wish to retire, that he could not be forced to retire under Alberta law, and that he had a "significant wrongful dismissal claim against Brandt" (*Magnan v. Brandt Tractor Ltd.*, 2008 ABCA 345 at para. 12).

In a letter dated December 29, 2004, Brandt's solicitors advised Magnan's solicitors that they were making an exception to the mandatory retirement policy and that Magnan could continue in Brandt's employ and return to work on January 3, 2005. The letter also noted that "Brandt is both shocked and disappointed that Mr. Magnan misrepresented his intentions….allowed a replacement employee to be hired, and accepted retirement gifts from Brandt under what were

obviously false pretences" (at para. 14). Magnan did not report to work on January 3, 2005 and commenced his wrongful dismissal action on February 1, 2005.

At trial, Mr. Justice D.A. Sirrs of the Alberta Court of Queen's Bench held that Magnan was constructively dismissed on November 26, 2004 and awarded him damages equal to 3 months' wages and benefits. The damage award was based on the trial judge's finding that Magnan intended to retire on March 31, 2005.

On appeal, Magnan argued that there was no evidentiary basis for the finding that he intended to retire on March 31, 2005. Justices Ronald Berger, Clifton O'Brien and Doreen Sulyma agreed, and allowed the appeal on this basis. Magnan was awarded damages equivalent to a further 7 months of wages and benefits based on a longer period of reasonable notice (18 months, less working notice and vacation time given to Magnan).

Less successful for Magnan was his argument that he should be entitled to *Wallace* damages. This argument was not considered at trial, although the trial judge did make the finding that "Brandt had terminated the employment as a result of its mistaken belief that it was entitled to do so when an employee reached 65 years" (at para. 19). Apparently Brandt, being based in Saskatchewan, was not aware of the state of mandatory retirement law in Alberta. Magnan argued that Brandt's ignorance of the law should not be excused, and that its discriminatory dismissal of him should result in *Wallace* damages. In response, Brandt contended that while ignorance of the law would not excuse a human rights claim, *Wallace* damages required intentional wrongdoing, and should not be awarded in the circumstances.

The Court of Appeal agreed with Brandt on this point, citing the following passage from the Ontario Court of Appeal's ruling in *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688 (at para. 32):

> Returning to the question of bad faith or unfair dealing, it seems to me what is common in all of the examples provided in *Wallace* and other cases…is the presence of something akin to intent, malice or blatant disregard for the employee. It is conduct that could be characterized as "callous and insensitive treatment"…or… "playing hardball"…

While the Court was clear that "we do not condone Brandt's ignorance of the law", it nevertheless held that breach of the *HRCMA* was not in itself a sufficient basis for awarding *Wallace* damages (at para. 29).

Although the line may be blurred between wrongful dismissal and discriminatory termination of employment in some cases, the Court's ruling in *Magnan* suggests that *Wallace* damages may only be available where the employer's discrimination is shown to be intentional. This is not a requirement of a successful human rights claim, where discrimination may be found to have occurred even in the absence of intent. Intent does appear to maintain a bright line between the remedies available in wrongful dismissal and human rights cases in this sense.

Would Magnan have been better off pursuing his case under the *HRCMA*? Under s. 32 of that Act, the general remedial principle is to put the complainant back in the position they would have been in but for the contravention of the Act. Cases such as *Berry v. Farm Meats Canada Ltd.*, 2000 ABQB 682 have said that awards of general damages for pain and suffering can be made under the *HRCMA* in addition to compensation for lost wages. While general damage awards are typically small under human rights legislation (e.g. $7500 for discriminatory dismissal from employment in *Berry*), these awards may supplement damages for lost wages even in the absence of intentional behaviour by the employer. Section 34 of the *HRCMA* allows compensation for lost wages incurred within 2 years of the date of the human rights complaint. Reinstatement is also available as a human rights remedy in appropriate circumstances, and not in wrongful dismissal cases. If a human rights complaint had been filed by Magnan right after his dismissal, he may have been entitled to the full amount of damages in lieu of reasonable notice, and perhaps to general damages for the discriminatory dismissal as well, or alternatively, to reinstatement.

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