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**Employment Law for the General Practitioner:
Using Changes to the *Rules of Civil Procedure* Strategically**

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Employment Law for General Practitioners: Using the Changes to the *Rules of Civil Procedure* Strategically

Introduction

On January 2010, significant amendments to the *Rules of Civil Procedure* will come into effect. This paper will highlight the strategic considerations that lawyers should have when litigating employment law matters and how to use the new amendments to their strategic advantage. In particular, this paper will address the amendments to rules for Discovery, changes to the rules for Summary Judgment, important changes to the Simplified Procedure, the increased monetary jurisdiction of the Small Claims Court and other noteworthy changes. The amendments to the *Rules* can be found on the [E-Laws Website as Ontario Regulation 438/08](http://www.elaws.gov.on.ca/html) (<http://www.elaws.gov.on.ca/html>). For ease of reference, I have noted the relevant sections of the *Rules* that I would be referring to in this paper.

Amendments to Simplified Procedure (Rule 76)

There are three primary important changes to the *Simplified Procedure*, namely:

1. the availability of discovery;
2. changes to the *Simplified Procedure Summary Judgment Rule*; and
3. the increased monetary jurisdiction.

Rule 76.04(2) now allows the party to conduct up to two hours of oral examinations for discovery. Formerly, no pre-hearing oral examination was permitted. There is now a provision for oral examinations however there is an absolute two hour limit. It should be noted that the two hour maximum applies regardless of the number of parties or persons to be examined. Written examinations and cross-examinations on affidavits remain unavailable pursuant to Rule 76.04(1).

The test for summary judgment which was formerly different under the Simplified Rules is now the same as the ordinary summary judgment procedure which is applicable to all cases pursuant to Rule 20.04. The new test for all summary judgment motions is discussed at greater length below.

Summary Trials

In the Honourable Coulter Osborne's *Civil Justice Reform Project* report, the effective cost-savings of the old Simplified Procedure was questioned, partly on the basis that few counsel were making use of the Summary Trial option. Under the amended *Rules* Summary Trials may become a more attractive option. Whereas a Summary Trial under the Simplified Procedure previously did not permit an oral examination-in-chief of the deponent of an affidavit, the new Rule 76.12(1) allows for a 10-minute examination-in-chief. It is to be noted that a party must however, give notice of its intention to conduct an oral examination-in-chief of a deponent of affidavit pursuant to Rule 76.

Monetary Jurisdiction of Simplified Rules

Most importantly, the majority of all employment law cases will now fall under the umbrella of the Simplified Procedure as its monetary jurisdiction will increase to \$100,000 as of January 1, 2010 pursuant to Rule 76.02(1). One characteristic of many employment law cases is that damages can often be accurately estimated based on the reasonable notice period. Plaintiffs must therefore be mindful of the adverse cost consequences in not commencing an action under the Simplified Rules pursuant to Rule 76.13. When it is reasonably apparent that damages in excess of \$100,000 would not be available on the action, commencing the action under the normal rules may result in a reduced costs award, no costs award, or the plaintiff being ordered to pay a portion of the defendant's costs. It is worth mentioning, however, that an employment law claim in many cases can legitimately seek damages in excess of \$100,000, yet settle at mediation for an amount less than \$100,000.

New Examination for Discovery Rules

As already noted above, one of the important changes for employment law regarding examination for discovery is the availability to conduct up to two hours of oral examinations under the Simplified Procedure. There are also substantial changes to the ordinary examination for discovery rules which may be equally of interest to employment lawyers. One of the most significant amendments to the discovery *Rules* is the requirement of a Discovery Plan pursuant to Rule 29.1(03). The Discovery Plan must be agreed upon between counsel within 60 days of the close of pleadings or longer periods as the parties may agree to pursuant to Rule 29.1(03)(2). The Discovery Plan must also be in writing pursuant to Rule 29.1(03) and shall include the various items detailed in the excerpts from the *Rules* just below:

DISCOVERY PLAN

Contents

- (3) The discovery plan shall be in writing, and shall include,
 - (a) the intended scope of documentary discovery under rule 30.02, taking into account relevance, costs and the importance and complexity of the issues in the particular action;
 - (b) dates for the service of each party's affidavit of documents (Form 30A or 30B) under rule 30.03;
 - (c) information respecting the timing, costs and manner of the production of documents by the parties and any other persons;
 - (d) the names of persons intended to be produced for oral examination for discovery under Rule 31 and information respecting the timing and length of the examinations; and
 - (e) any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action. O. Reg. 438/08, s. 25.

The Coulter Report identified some access to justice issues that have been created by extensive, lengthy, and costly examinations for discovery. As part of an effort to reduce the time spent on examinations, the new *Rules* have implemented a stricter relevance test. The “semblance of relevance” test or the “related to any matter in issue” principle has now been replaced with the “relevant to any matter in issue in the action” test. It is expected that this will restrict what was formally considered to be relevant and which may now be included in a Discovery Plan or by way of undertaking at an oral examination.

Another important change to the examination for discovery rules in the ordinary procedure is the imposition of a seven hour limit on examinations pursuant to Rule 31.05(1)(1). Parties may still agree to a lengthier discovery and the Court may grant leave for longer examinations pursuant to Rule 31.05(1)(2), but the default time limit is now seven hours.

The new *Rules* also explicitly discuss Electronic Discovery. Pursuant to Rule 29.1(03)(4), parties are required to consult the “Sedona Canada Principles Addressing Electronic Discovery” which are available at www.thesedonaconference.org.

Summary Judgment Rules

Probably the most important amendment to the *Rules* for employment lawyers are those which make summary judgment motions more appealing and less risky under the new *Rules*.

The first significant change to Rule 20.04(2)(a) is eliminating the former test for summary judgment which required the moving party to prove that there was “no genuine issue for trial.” This has been replaced with a new test of “no genuine issue requiring a trial.” Although the test has only been amended to add the single word “requiring” it is widely thought that this will broaden the application of summary judgment which will no longer be shutdown by the existence of any issue in dispute triggering a trial whereas now a judge will have to find that there is not only a material issue of fact in dispute but that the particular issue also requires a trial.

The most significant and interesting amendment to the Summary Judgement Rules are the new powers conferred to judges pursuant to Rule 20.04(2)(1) and 20.04(2)(2) which confer broad powers to weigh the evidence, evaluate credibility of a deponent and to draw any reasonable inference from the evidence. For the purpose of exercising these powers, a judge is now permitted to conduct what is referred to in the *Rules* as a mini-trial and to order that oral evidence be presented by one or more parties with or without time limits on its presentation.

Amendments to the *Rules* have reversed the presumption that an unsuccessful moving party shall be required to pay substantial indemnity costs has been removed in order to encourage the use of Rule 20. These changes are particularly relevant to employment lawyers. This means that in disputes over common law notice and other simple wrongful dismissal cases summary judgment may now be used without the fear of significant and adverse cost consequences if you are unsuccessful.

Employment law litigation will certainly experience a reinvigoration in the New Year due to these important changes to Rule 20. Plaintiffs will now be able to combat delaying defendants with this more refined tool and defendants will be able to deal more effectively with frivolous claims at an earlier stage and at a reduced cost.

Increase in the Monetary Jurisdiction of the Small Claims Court

Pursuant to Ontario Regulation 439/08 under the *Courts of Justice Act*, the monetary jurisdiction of the Small Claims Court has been increased from \$10,000 to \$25,000. This is not an amendment to the *Rules of Civil Procedure* but will also be an important change which takes effect at the same time as the changes to the *Rules of Civil Procedure*. It will certainly have an impact on employment law litigation as a number of wrongful dismissal cases will likely find themselves at or below the \$25,000 mark. This will be an important consideration due to the cost consequences of commencing a proceeding in the wrong forum. This may also assist the plaintiffs in litigating their employment matters at a lower cost and it is hoped that it will achieve more expedient results.

New Rules for Expert Evidence

Expert evidence is not as common in employment litigation as it is in some other types of litigation, but in certain circumstances experts are necessary. For example, actuaries are sometimes required to prove long-term damages in employment cases, to weigh in on complex pension issues that can arise, or to assist with injury or disability claims that are sometimes connected to employment issues. An important change under the new *Rules* is that Rule 4.1 now

specifically provides that experts have a paramount duty to the Court that supersedes any obligation the expert may have to the party that has retained his or her services. Another interesting rule amendment relating to experts is that an expert's report must be filed not less than 90 days before the pre-trial conference and this report must contain, among other things, the instructions that were provided to the expert in relation to the proceeding (Rule 53.03(2.1)).

Conclusion

The issues discussed above represent some of the highlights of the new *Rules* that I think would be particularly relevant to the employment law context. However, there are far more amendments than are canvassed here and I encourage everyone to review them all in greater detail. I hope that these comments were of assistance and that the new *Rules* prove to be useful to you in your practices.