GOOD NEWS FOR EMPLOYERS

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I. INTRODUCTION

Based on a review of the cases we have discussed over the past few years, local government employers may recall receiving various cautions and warnings regarding their dealings with employees and ever expanding obligations, particularly in the areas of dismissal and the duty to accommodate. We consider 2008 to be the Year of the Employer as the pendulum appears to be swinging back towards recognizing realistic limits to employers' obligations in the employment relationship. In this paper, we have the good fortune of reviewing 12 employment, labour and human rights decisions released this year by our Courts and Human Rights Tribunal, including five from the Supreme Court of Canada, about which employers will be pleased to hear.

II. EMPLOYMENT

A. SCC TO COMMON LAW OFFICERS: YOUR SERVICES ARE NO LONGER NEEDED

For local government administrators and elected officials, deciding to terminate an employee can be fraught with difficult challenges—not the least of which is determining whether the employee in question is entitled to procedural fairness rights like the right to know the reasons for the proposed termination and the right to a hearing before Council or the Board. The Supreme Court of Canada's reasons in *Dunsmuir v. New Brunswick*, 2008 SCC 9 released this March, will significantly change the way many local governments make these difficult employment decisions.

In *Dunsmuir*, the Court reconsiders its own analysis of common law procedural fairness rights from its 1990 decision in *Knight v. Indian Head School Division*. In *Knight*, the Court found that a school board's director of education was an "officer" at common law because the position had a "strong statutory flavour". The Court concluded that, unlike ordinary employees who are not "officers", the employee was entitled to procedural fairness with respect to important decisions affecting his employment, including the decision to terminate the employment relationship. In other words, the Court found the school board could not simply terminate the director in accordance with the terms of his employment contract—it had to also discharge its duty of procedural fairness to him.

Post-*Knight*, courts across the country expanded the concept of common law officers and afforded procedural fairness rights to employees in some surprising positions. For example, in B.C. a firefighter was found to be entitled to procedural fairness because in his position he exercised statutory powers and duties under the *Fire Services Act*. Even more surprisingly, a middle manager at a New Brunswick municipality was afforded procedural fairness rights because his position had an "official title" and a job description approved by Council.

Because of the seriousness of a breach of an employee's procedural fairness rights (i.e. it could void the employer's decision to terminate, which means the individual would be reinstated and the employer would be required to pay his or her wages and benefits for the period between the termination and the reinstatement), many local governments started affording procedural fairness to any senior managerial employee whose job was remotely "statutory" or "official".

The Court in *Dunsmuir* concluded that the reasoning in *Knight* and subsequent cases has extended procedural fairness rights too far. Most public employees are hired subject to an oral or written contract setting out the agreed terms and conditions of employment. These employees have private law rights if their employment is wrongfully terminated—they can sue for breach of contract. In certain circumstances, if their employers act unreasonably or in bad faith in the manner of dismissal, employees may also be able to make out a claim for additional damages. Given the availability and adequacy of private contractual remedies, the Court in *Dunsmuir* concluded that these types of employees do not need the added protection of public law procedural fairness rights. Except in the rare instances where an officer is not employed subject to any contractual terms (e.g. Ministers, judges), private employment law principles will govern. These employment law principles require reasonableness and fairness in the manner of dismissal, but do not require specific procedural safeguards like the right to know the reasons for a proposed dismissal or the opportunity to be heard by the decision-making body.

For local governments it is important to remember that statutory provisions affecting the termination of employees still apply even with the change in the common law arising from the Court's decision in *Dunsmuir*. Specifically, section 152 of the *Community Charter* and section 202 of the *Local Government Act* provide that "officers" may only be dismissed after certain preconditions are satisfied. These statutory preconditions are confusingly similar to the common law procedural fairness requirements discussed above (e.g. notice of the reasons for dismissal and the opportunity to be heard by the decision-maker), but remain unaffected by the *Dunsmuir* decision.

The million dollar question has now become this: to whom is this statutory procedural fairness owed? The number of local government employees in this category is likely quite limited. Officers specifically mentioned in municipal enabling statutes should be included (e.g. chief administrative officer, corporate officer, financial officer, chief elections officer, bylaw enforcement officer, etc.), as should positions designated as officers in a local government's bylaws.

It is the nebulous category of common law officers, not statutory officers, to whom procedural fairness will no longer generally be afforded: employees like firefighters and middle or senior managers who exercise statutory duties or have official positions and job descriptions but are not statutory officers under section 152 of the *Community Charter* or section 202 of the *Local Government Act*. According to *Dunsmuir*, most of these employees are sufficiently protected by private contract law principles. Those principles generally provide that the employment relationship may be terminated with cause and no notice or, as is most often the case, without cause but with notice (or pay in lieu of notice). The employer is not required to notify the

employee of the reasons for his or her dismissal or to offer the opportunity to be heard by the decision-maker.

B. EMPLOYERS NOT HELD TO STANDARD OF PERFECTION IN DISMISSAL

In March of this year (some three months in advance of the Supreme Court of Canada's decision in *Honda Canada v. Keays*, discussed below) the Ontario Court of Appeal overturned a trial court's award of *Wallace* damages to a former City of Ottawa secretary. *Wallace* damages, named after the plaintiff in the seminal 1997 Supreme Court of Canada decision in *Wallace v. United Grain Growers*, can substantially increase the length of notice or amount of severance pay in lieu of notice that employers are required to pay former employees. *Wallace* damages are awarded when an employer engages in unfair or bad faith conduct in the course of dismissing an employee.

In *Mulvihill v. City of Ottawa*, 2008 ONCA 201, the Court of Appeal overturned the trial court's award of 5.5 months' salary as *Wallace* damages on top of the 4.5 months' pay in lieu of notice to which Ms. Mulhill was entitled under her employment contract. Ms. Mulvihill was dismissed shortly after the City investigated and dismissed the harassment allegations she levied against two supervisors. She was off work on sick leave at the time the City purported to dismiss her with cause because of her insubordinate conduct following the investigation.

The trial judge awarded Ms. Mulvihill *Wallace* damages for two reasons: first, because the City alleged cause for dismissing her but ultimately withdrew that allegation at trial; and second, because the City dismissed Ms. Mulvihill while she was on medical leave. The Court of Appeal disagreed:

> The mere fact that cause is alleged, but not ultimately proven, does not automatically mean that *Wallace* damages are to be awarded. So long as an employer has a reasonable basis on which to believe it can dismiss an employee for cause, the employer has the right to take that position without fear that failure to succeed on the point will automatically expose it to a finding of bad faith. (para. 49) (emphasis added)

With respect to the second reason for awarding *Wallace* damages, the Court of Appeal implicitly agreed with the trial judge that, in the circumstances, it was a "mistake" to have dismissed Ms. Mulvihill while she was on sick leave. However, it concluded:

> …[T]he legal standard against which conduct is to be measured for the purposes of *Wallace* damages is not whether an employer made a mistake but, rather, whether the employer engaged in unfair or bad faith conduct. A mistake is not conduct that can be said to be unfair or bad faith.

> …The mere fact that Ms. Mulvihill was on sick leave at the time of termination does not necessarily mean the dismissal was conducted in an unfair or bad faith manner. There must be other evidence of bad faith, unfair dealing or 'playing hardball'… (paras. 65-66) (emphasis added)

This case confirms that employers are not held to a standard of perfection when dismissing employees. Provided that they act in good faith and not untruthfully or in a misleading, insensitive or high-handed manner, employers should not be liable for *Wallace* damages.

C. SCC's 3 *KEAYS* TO WRONGFUL DISMISSAL

Local government and other employers are by now likely familiar with the Ontario wrongful dismissal case *Honda Canada Inc. v. Keays*, 2008 SCC 39 if not for its legal principles then for its staggering damages award.

Mr. Keays worked for Honda for 11 years, first on the assembly line and then in a data entry position. When he was diagnosed with chronic fatigue syndrome, he ceased work for a period of time and was ultimately placed on Honda's attendance management program. When Honda became suspicious of his doctor's notes explaining his absences, it requested that he meet with Honda's doctor. Mr. Keays refused, and Honda eventually terminated his employment.

An Ontario trial court first awarded Mr. Keays 15 months' pay in lieu of notice and increased that to 24 months' pay because of *Wallace* damages, $500,000 in punitive damages, and two forms of costs premiums that entitled Mr. Keays to reimbursement for nearly all of his costs incurred pursuing the claim against Honda. The Court was clearly displeased with Honda's efforts to accommodate Mr. Keays, and in a colourful judgment described a prolonged corporate conspiracy to finally terminate Mr. Keays for refusing to submit to a medical examination by Honda's doctors.

Three years later, the Supreme Court of Canada released its decision this summer. The Supreme Court upheld the trial and appellate courts' finding that Honda had wrongfully dismissed Mr. Keays. However, the Supreme Court substantially reduced the quantum of damages payable under each head of damages.

The Supreme Court of Canada's decision highlights three important messages: (1) when determining what constitutes reasonable notice, context is—no pun intended—key; (2) *Wallace* damages are not automatic; and (3) punitive damages are reserved for the most outrageous employer misconduct.

The Supreme Court confirmed the award of 15 months' pay in lieu of notice to Mr. Keays. The Court confirmed that it is appropriate to consider the nature of the employee's position, his or her length of service, and the availability of similar employment having regard to the employee's training and qualifications when assessing what constitutes reasonable notice of termination, but said that no one factor should be given more weight than the others. In our opinion, this decision

confirms that the perceived "rule of thumb" that employees are entitled to one month's notice per year of service is an unprincipled and oversimplified manner of calculating reasonable notice.

The Court confirmed the principle arising from its 1997 decision in *Wallace* that when an employer engages in bad faith conduct in the course of dismissing an employee, the employee may be entitled to increased damages. However, the Court clarified that this should not be calculated as a "*Wallace* bump"—a simple extension of the reasonable notice period—but rather in the same manner as all other breach of contract damages are assessed. The employee has to prove that the parties contemplated at the time of entering into the employment relationship that a breach would cause mental distress, and then must prove that he or she did indeed suffer mental distress because of the manner of termination, not just because of the loss of employment. The employee has to prove and quantify these damages. The Court concluded Mr. Keays did not meet this test so did not award *Wallace* damages.

The Court overturned the trial and appellate courts' awards of punitive damages all together, finding punitive damages are only to be awarded when the employer acts with malice or otherwise engages in conduct so outrageous that it deserves punishment on its own. It held that Honda's alleged contravention of the Ontario *Human Rights Code,* even if proved, did not amount to an independent actionable wrong and therefore no award of punitive damages was warranted.

This Supreme Court of Canada decision is the latest in a number of cases confirming the employer's duty to treat all employees, but especially those with disabilities or those being terminated, respectfully and in good faith. In addition to confirming that reasonable notice is to be calculated based on a broad range of factors, it contains a clear reminder that not all employer conduct constitutes bad faith conduct warranting *Wallace* damages, and relegates punitive damages to those exceptional cases where an employer has acted egregiously.

D. VOLUNTEER FIREFIGHTER AN "EMPLOYEE" FOR ELECTIONS PURPOSES

Every election year, one of the most frequent questions we receive is whether volunteer firefighters are "employees" of a local government for the purposes of section 67 of the *Local Government Act*. Section 67 disqualifies local government "employees" from being nominated for, being elected to, or holding office unless they have met the notice and leave requirements set out in that section. Specifically, "employees" must provide written notice of their intention to their employer before being nominated. They must then commence an immediate leave of absence while the election unfolds and, if successful, resign from their employment before taking the oath of office as an elected official.

Unfortunately, the definition of "employee" in section 67 is less than helpful: "an employee or salaried officer of a municipality or regional district." This does little to clarify whether volunteer are "employees" of their local government, and has led to many elections officers wondering what to do with nomination packages from volunteer firefighters and other similar volunteers.

This issue was argued before the B.C. Provincial Court this October when the Deputy Chief Election Officer for the Cultus Lake Park Board applied for an order under subsection 75(7)(a) of the *Local Government Act* either confirming that the volunteer firefighter in question was a candidate or declaring that he was no longer a candidate.

In an as-yet unreported decision, Judge Crabtree concluded that the volunteer firefighter was indeed an "employee" for the purpose of section 67. He disqualified the individual as a candidate because he had not complied with the notice and leave requirements set out in the Act.

Based on the information before the Court, Judge Crabtree held that volunteer firefighters for the Cultus Lake Park Board were more akin to regular employees than to true volunteers. The Park Board runs an entirely volunteer fire service. It owns the "tools of the trade" such as the fire station, the trucks, and all the firefighters' gear. Prospective volunteers are required to fill out an application form, screened by the membership executive, and then subjected to a probationary period. Even once they become members, volunteers are expected to undergo training and testing in order to continue volunteering with the department. Like many volunteer fire departments, volunteers in the Park Board are paid an hourly rate for scheduled training sessions and for callouts. That remuneration, although modest, is treated as income for Revenue Canada purposes and reported on T4 slips. The Park Board also makes source deductions from this remuneration for CPP and EI, if applicable.

In this case, the volunteer Fire Chief's evidence was clear that he respected and enjoyed working with the candidate. He did not think there would be any insurmountable conflict if this particular individual was elected and therefore both his boss and a volunteer firefighter under his command. However, the Chief agreed that the situation could give rise to a conflict in other circumstances. The Court appears to have agreed that there is an inherent conflict between being an elected official responsible for the overall operations of the fire department and simultaneously a front-line firefighter in an organization where a clear chain of command is essential.

While the Court's analysis in this case certainly reflects the specific context of the Park Board's volunteer fire department, elections officers presented with a nomination package from a volunteer firefighter should inquire whether that volunteer has complied with the notice and leave requirements in the *Local Government Act* before accepting the nomination.

E. TERMINATED EMPLOYEE UNREASONABLE TO REFUSE WORK WITH FORMER EMPLOYER

It is a well established principle that a dismissed employee, although entitled to reasonable notice or pay in lieu of notice, is under a positive duty to mitigate his or her losses arising from the dismissal by finding alternate work. In *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, the Supreme Court of Canada determined that in some circumstances a dismissed employee's duty to mitigate will require the employee to return to work for his or her former employer.

Mr. Evans, a 23-year employee of the Union, was dismissed without notice following a contentious Union executive election in which he had publicly supported an unsuccessful candidate. Very shortly after being notified of his termination, Mr. Evans was contacted by the Union to discuss settlement possibilities. Mr. Evans told the Union that he felt he was entitled to 24 months' notice or pay in lieu of notice, and that he would accept a combination of 12 months' working notice plus 12 months' severance pay in lieu of notice. He subsequently offered to return to work if the Union rescinded his notice of termination and accepted certain other terms, including terms pertaining to the Union's employment of Mr. Evans' wife. After five months of negotiations, the Union countered by suggesting that Mr. Evans return to the job and work out the balance of his original 24 month notice period. He refused the offer and filed a wrongful dismissal claim against the Union.

The Supreme Court of Canada upheld the British Columbia Court of Appeal's decision to set aside the trial court's damage award, which was for damages equal to 22 months' salary and benefits. Both appellate courts concluded that Mr. Evans failed to discharge his duty to mitigate his losses by accepting the Union's offer of similar employment for the balance of the original 24 month notice period. Although Mr. Evans may have subjectively disliked the idea of ret6urning to work for the Union, there was no evidence that the parties' relationship was acrimonious, or that it would be embarrassing or humiliating for him to return. Further, it was evident from his settlement proposals that he specifically contemplated returning to work for the Union. Given the unavailability of similar work in Whitehorse for which he was qualified, the Courts applied an objective test and concluded that a reasonable person in Mr. Evans' shoes would have accepted the Union's offer for temporary work and therefore fully mitigated his or her damages arising from the dismissal.

The Court's decision is cautious to note that an employee's duty to mitigate upon dismissal will not extend to accepting alternate work with his or her former employer if the parties' relationship is hostile, if the offered work is demeaning or if the working conditions are substantially different. The decision does reaffirm, however, that the assessment of damages in a wrongful dismissal claim is meant to compensate an employee for the employer's failure to provide reasonable notice of the dismissal, not to penalize the employer for the dismissal itself.

F. OVERTIME PROVISIONS IN THE *EMPLOYMENT STANDARDS ACT* ARE NOT IMPLIED TERMS OF EMPLOYMENT CONTRACTS

In *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182, an employee who was terminated for just cause claimed damages for wrongful dismissal and payment of overtime hours even though there was no reference to overtime in her employment contract. The B.C. Supreme Court concluded that payment for overtime in accordance with the mandatory provisions of the *Employment Standards Act* ("*ESA*") was an implied term of the employee's employment contract and that the *ESA* did not preclude her from pursuing a claim for overtime in a civil court action.

The employer appealed this decision and the Court of Appeal concluded that the *ESA* provides a comprehensive administrative scheme with respect to the enforcement of overtime claims. The

Court concluded that where legislation provides for effective enforcement of a particular right, the general proposition is that such rights are to be enforced under the legislation and not by way of a court action. As the Court concluded (at para. 103):

> In this case, the *ESA* provides a complete and effective administrative structure for granting and enforcing rights to employees. There is no intention that such rights could be enforced in a civil action.

This case is important to local government employers because the *ESA* contains a six month limitation period and limits claims to the six months previous to the filing of the claim or the termination of employment, whichever is earlier. If an employee were able to pursue a claim for overtime as part of a wrongful dismissal action, the general six year limitation period would apply and an employer could be found liable for as much as six years' worth of overtime. It is important to note, however, that the principle in this case only applies where there is no reference to overtime in an employment contract. If there is a provision dealing with overtime in an employment contract, an employee would be able to pursue a claim based on a breach of the employment contract as part of a civil claim against an employer.

III. LABOUR

A. SCC CONFIRMS LIMITS TO THE DUTY TO ACCOMMODATE

In a recent decision, the Supreme Court of Canada confirmed that there are limits to an employer's duty to accommodate (*Hydro-Quebec v. Syndicat des employees*, 2008 SCC 43*)*. The Court also confirmed an employer's right to dismiss chronically absent employees who are unable to fulfill their basic obligations to their employers for the foreseeable future.

In this case, Hydro-Quebec had accommodated an employee who had an abysmal attendance record over a period of several years. The employer had taken various steps to accommodate the employee including giving the employee light duties, part-time work and allowing gradual returns to work. However, the employee's physician had recommended that she stop working for an indefinite period of time and a psychiatric assessment indicated that the employee would not be able to work on a regular and continuous basis without continuing to have absenteeism problems. The medical evidence showed that the employee had a personality disorder requiring the employer to periodically provide the employee with a new work environment, a new immediate supervisor and new co-workers. Furthermore, the employer would not be able to eliminate stressors related to the employee's family situation, which the Union's expert suggested was required.

Not surprisingly, the employer dismissed the employee on the basis of this medical evidence for not being able to attend at work. While an Arbitrator agreed with the employer that it had met its duty to accommodate in these circumstances and that the conditions suggested by the Union's expert were undue hardship, the Quebec Court of Appeal concluded that the employer had not proven that it was "impossible" to accommodate the employee's medical condition.

The Supreme Court of Canada, in this case, clarified the test for when an accommodation constitutes an undue hardship. There had been confusion about the test for undue hardship and whether an employer had to show it was "impossible" to accommodate an employee in order to prove that undue hardship would result from an accommodation. In practical terms, this is a very difficult standard for employers to meet. The Court rejected the notion that an accommodation had to be impossible in order to show undue hardship and made the following comments (at para.16):

> The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

The Court also confirmed that employees have their own duties under a contract of employment, that being the duty to perform work in exchange for remuneration. With respect to dismissals based on chronic absenteeism, the Court noted that an employer will meet its duty to accommodate where it can show that an employee will be unable to return to work in the reasonably foreseeable future despite measures taken to accommodate the employee.

While the Court stated that the concept of undue hardship and the duty to accommodate must be flexible and that rigid rules are not appropriate, this decision does assist local government employers by recognizing an employee's obligation under an employment or collective agreement and setting some limits to the duty to accommodate.

B. SUSPENSION UPHELD FOR FAILING TO PARTICIPATE IN BC FERRIES' INVESTIGATION

The B.C. Supreme Court recently considered an appeal by two employees of BC Ferries who were suspended from their duties when they refused to participate in a BC Ferries' inquiry into the sinking of the Queen of the North (*British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc.*, 2008 BCSC 1464). The Court concluded that the suspensions without pay were justified.

After the Queen of the North sank off the coast of northern British Columbia on the night of March 21, 2006, BC Ferries convened an inquiry with the objective of determining the cause of this accident and issuing a public report (the "Inquiry"). As part of the Inquiry, BC Ferries wanted to question two crew members who were primarily responsible for navigating the ship that night. The RCMP also initiated a criminal investigation into the accident. On the advice of legal counsel, both employees refused to answer questions put to them at the Inquiry regarding certain events of that night unless they were assured their answers would be considered privileged and held in confidence by BC Ferries pending the conclusion of a criminal investigation into the matter. BC Ferries refused to agree to the employees' request and when these employees continued to refuse to answer questions, BC Ferries suspended them without pay. The Union filed a grievance challenging these suspensions on the basis that these

employees were entitled to remain silent because of the ongoing criminal investigation into the accident.

The Arbitrator concluded that the suspensions were justified. The Arbitrator noted that the refusal by the employees to answer questions at the Inquiry about the critical time period before the ship ran aground had to be balanced against BC Ferries' legitimate business interests in having those questions answered and then making public its complete report. The Arbitrator relied on the leading case in British Columbia with respect to the issue of an employee's right to remain silent (*Tober Enterprises Ltd. and United Food and Commercial Workers International Union, Local 1518* (1990), 7 C.L.R.B.R. (2d) 148 (BCIRC)).

In *Tober*, the Industrial Relations Council agreed that employees generally cannot be disciplined for remaining silent where there is a related criminal investigation, subject to certain exceptions including where the circumstances and the nature of the employer's business interests favour the employer's right to require an employee's explanation. The Arbitrator noted whether or not an employee had an obligation to participate in an investigation depends on the facts of each case. With respect to the sinking of the Queen of the North, the Arbitrator noted that BC Ferries had legitimate business reasons and a public purpose to commence the Inquiry. The Court quoted the following comments by the Arbitrator (at para. 54):

> In this case, the grounding and sinking of the Queen of the North was a tragic incident, resulting in the presumed death of two passengers. The incident was the subject of enormous media attention and widespread public speculation on the safety and operational effectiveness of the B.C. Ferries system. The Company, through the Divisional Inquiry, has very legitimate business reasons and public purpose for its desire to have <u>all</u> information about <u>all</u> the events that occurred during <u>all</u> the time before the vessel's grounding. Messrs. Hilton and Lilgert had primary responsibility for navigation of the vessel and the information they have about the events and circumstances during the critical period before the vessel's grounding is crucial to the Divisional Inquiry's ability to complete its investigation and issue a full and complete public report.

While the Arbitrator recognized the concerns of the employees that the evidence they gave at the Inquiry might be used in subsequent criminal proceedings, he concluded that the obligation of BC Ferries to make full public disclosure of the incident outweighed the interests of these employees.

The Union applied to the Labour Relations Board to review the Arbitrator's decision. The Labour Relations Board upheld the Arbitrator's decision and the Union applied for judicial review of the decision of the Labour Relations Board. The Court denied the Union's application for judicial review and the decision to suspend the employees was found to be justified.

As a general rule, employees have a right not to participate in an employer's investigation where there is the possibility of criminal charges relating to the events being investigated. The Court in this decision confirmed that this general rule is subject to an exception where an employer's legitimate business interests and the public interest outweigh an employee's right to remain silent.

C. DISMISSAL OF ALCOHOL ADDICTED EMPLOYEE FOUND BY COURT NOT TO BE DISCRIMINATORY

In *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees Union*, 2008 BCCA 357, the Court of Appeal considered whether the Liquor Distribution Branch had discriminated against the manager of a liquor store when it fired him for stealing alcohol. When the employee was confronted about the thefts, he admitted to the thefts and told his employer he had a drinking problem. In the arbitration decision regarding this matter, the Arbitrator concluded that the employee's alcohol dependency was a mitigating factor to be considered in assessing whether his dismissal by his employer was justified. However, the Arbitrator concluded that notwithstanding the employee's alcohol dependency, the dismissal was justified.

The Union appealed the arbitration decision to the Labour Relations Board, which upheld the arbitration decision. The Union then applied to the Labour Relations Board for a reconsideration of this decision. The Union's application for reconsideration was heard at the same time as another case involving an employee who was dismissed for smoking marijuana at the work site. The Labour Relations Board ultimately determined that the grievance was to be remitted to the Arbitrator to be decided in accordance with the principles discussed in the Board's decision, particularly those related to the creation of a "hybrid test". This test was used in cases in which an employee had an addiction and it required employers and arbitrators to determine what is the appropriate response to workplace misconduct. Because of the "hybrid test", employers and arbitrators were required to consider the extent to which an employee should be held responsible for workplace misconduct if such conduct was related to alcohol or drug dependency.

In his reconsideration decision, the Arbitrator implicitly found that the employer had discriminated against the employee and did not accommodate the employee to the point of undue hardship when it dismissed him. The Arbitrator noted that the employer could have accommodated the employee short of terminating his employment. For example, the employer did not canvass what other positions may have been available to the employee or whether it could have returned the employee to the workplace under certain conditions. The Arbitrator reinstated the employee to a non-supervisory position and awarded him approximately seven years of back pay.

Despite the convoluted and very lengthy background to this case, the Court of Appeal determined that the issue before it was simply whether section 13 of the *Human Rights Code* requires an employer to accommodate an employee who is guilty of theft because he suffers from an alcohol dependency. Section 13 of the *Human Rights Code* prohibits an employer from

discriminating against an employee on the basis of a disability, which includes both drug and alcohol dependencies. The Court noted that the Arbitrator concluded that the employee's termination for theft was *prima facie* discriminatory because his alcohol dependency was a factor in that theft. However, the Court found that the test to be applied in this situation was whether there was a causal link between a disability and the decision to terminate. The Court stressed the importance of there being a link between an employee's disability and the employer's conduct. In finding that the employer did not discriminate against the employee in its decision to dismiss, the Court stated the following (at para.11):

> I can find no suggestion that Mr. Gooding's alcohol dependency played any role in the employer's decision to terminate him or in its refusal to accede to his subsequent request for the imposition of a lesser penalty. He was terminated, like any other employee would have been on the same facts, for theft. The fact that alcohol dependent persons may demonstrate "deterioration in ethical or moral behaviour", and may have a greater temptation to steal alcohol from their workplace if exposed to it, does not permit an inference that the employer's conduct in terminating the employee was based on or influenced by his alcohol dependency.

The Court further stated that there was no evidence that the employee's termination was based on preconceived notions regarding alcohol dependency. The decision was based solely on the fact that the employee stole from his employer. While the employee's conduct may have been influenced by his alcohol dependency, the Court concluded this was irrelevant if the alcohol dependency did not play a part in the employer's decision to dismiss. Furthermore, the employee was treated no differently than other employees who stole from the employer.

The Court also made the following interesting comments about whether the finding of *prima facie* discrimination in this case would be of benefit to employees with addictions (at para. 17):

> Moreover, to find such a decision to terminate to constitute *prima facie* discrimination would not benefit addicted employees. In my view, it would but encourage employers to lay criminal charges against employees who commit criminal offences to which drug dependency is no defence.

The Court ended up remitting this issue back to the Arbitrator so that he could determine whether the employee's dismissal was excessive in all of the circumstances. This is the third part of the test arbitrators consider in cases of discipline and dismissal.

This decision clarifies the very confusing and convoluted law relating to an employer's right to discipline employees with addictions—at least where the misconduct is of a criminal nature. Prior to this case, employers were required to consider the role that the addiction played with respect to the misconduct in determining the appropriate discipline. This was a very difficult

analysis to undertake and employers were given very little guidance in how to undertake such an analysis since it was such a highly fact specific inquiry.

Based on the principles in this case, as long as the employer can show that the fact that an employee had a drug or alcohol addiction played no role in the determination of the appropriate discipline for misconduct, the employee will not be able to prove that the employer has discriminated against him or her. It does remain to be seen, however, the extent to which arbitrators will take into account the fact that an employee has an addiction in determining whether the discipline imposed by the employer was justified and whether the principles in this case will be applied to misconduct that is not of a criminal nature.

IV. HUMAN RIGHTS

A. SCC CONSIDERS THE MEANING OF A "*BONA FIDE* PENSION PLAN"

In *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, the Court considered whether a mandatory retirement age of 65 set out in a mandatory retirement policy contained in an employer's pension plan was discriminatory under New Brunswick's *Human Rights Code*. The issue in this case was whether the standard for justifying distinctions on the basis of age in retirement or pension plans was different than when considering *bona fide* occupational requirements in the context of the duty to accommodate.

The New Brunswick Human Rights Commission had concluded that once a *prima facie* case of age discrimination has been made out, the employer must satisfy the three-part "*bona fide* occupational requirement" test that applies in the employment context. The Supreme Court of Canada concluded that a different test applies when considering whether a pension or retirement plan was *bona fide* for the purposes of New Brunswick's *Human Rights Code*. The Court noted that pensions have been treated differently in most human rights legislation because they arise from different protective concerns. As well, the purpose of the *Code* provision at issue was to confirm the financial protection available to employees under a genuine pension plan and at the same time ensuring that these employees were not arbitrarily deprived of their employment rights.

Accordingly, in order to meet the *bona fide* requirement in the New Brunswick *Code*, the Court concluded that a pension plan must be subjectively and objectively *bona fide* in that it meets the following requirements:

- it must be a legitimate plan;
- it must be adopted in good faith; and
- the purpose of the plan must not be for defeating protective rights.

This test has a lower standard than the three-part *bona fide* occupational requirement test referenced above. In making this assessment, it is the plan itself that is evaluated, not the

actuarial details or mechanics of the terms and conditions of the plan. Essentially, the Court confirmed that under the New Brunswick *Code*, age distinctions in legitimate and genuine pension plans will not constitute discrimination.

While local government employees contribute to the public Municipal Pension Plan, this case is relevant in that it confirms a different standard for assessing the meaning of "*bona fide"* in the context of retirement or pension plans. In our paper for the 2007 Local Government Law Seminar ("Mandatory Retirement and Provision of Services"), we discussed the issue of age distinctions under various insurance and benefit plans such as long term disability benefits. While the language in B.C.'s *Human Rights Code* as it applies to pension and benefits plans is different than in New Brunswick, it does allow generally for distinctions based on age under a *"bona fide"* group or employee insurance plan including third party plans. The decision in *Potash* indicates that courts are willing to assess age distinctions in such plans on a different basis than age discrimination in the broader employment context.

B. ELECTED OFFICIAL NOT AN "EMPLOYEE" FOR HUMAN RIGHTS PURPOSES

As service providers and as employers, local governments have broad statutory duties to refrain from acting in ways that discriminate against persons based on any of the enumerated grounds in the *Human Rights Code* such as age, religion, physical or mental disability, and sex. Given the important societal purpose of anti-discrimination legislation, courts and the B.C. Human Rights Tribunal have frequently stated the need for "large and liberal" interpretation of the protections provided in the *Code*. Despite the predominance of this "large and liberal" interpretation, the Beaver Creek Improvement District, a water improvement district outside of Port Alberni, successfully applied to have a human rights complaint filed against it dismissed because the complainant, a former elected trustee, lacked standing to bring the complaint under the *Human Rights Code*.

Section 13 of the *Code* prohibits local governments from discriminating with respect to employment matters:

> 13(1) A person must not
>
> > (a) refuse to employ or refuse to continue to employ a person, or
> >
> > (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary

> conviction offence that is unrelated to the employment or to the intended employment of that person.

In *Roth v. Beaver Creek Improvement District et al.,* 2008 BCHRT 133, the complainant held an elected seat on the Improvement District's Board. When the Improvement District suffered a staffing crisis, she and a number of other elected trustees offered to take on additional duties to help keep the Improvement District operational. Ms. Roth and the personal respondent, also an elected trustee, each performed important water quality monitoring and testing duties at the Improvement District's facilities for several months. Ms. Roth alleged that the other trustee sexually harassed her when she was performing these duties. Sexual harassment is a form of discrimination on the basis of sex that is prohibited by the *Code* and often gives rise to complaints under section 13.

The Improvement District succeeded in having the complaint dismissed. It argued that Ms. Roth did not become an employee of the Improvement District for the purpose of section 13 of the *Human Rights Code* simply because she volunteered to do work that otherwise would have been performed by the Improvement District's employees. Although many volunteer relationships and other employment-like relationships do fall within the ambit of section 13, the Improvement District led extensive evidence that it lacked any control over either Ms. Roth or the alleged harasser, such that it could have stopped the alleged harassment from occurring. Whereas the Improvement District would have the right (and perhaps also the obligation) to investigate, discipline and even dismiss employees for sexual harassment or other discriminatory conduct contrary to the *Human Rights Code*, the Tribunal agreed that the Improvement District had no legal or practical ability to control the conduct of two elected officials.

> …[G]iven the elected nature of the Board of the BCID, its legal and practical ability to control the relationship between two elected trustees is extremely limited. As a democratic institution, the primary check on the behaviour of elected officials who make up the Board is by the voters who choose whether to re-elect them. This factor suggests that the BCID's ability to remedy any discrimination Ms. Roth may have experienced is limited. (para. 54)

While recognizing the important work Ms. Roth performed, and the benefit the Improvement District received because of it, the Tribunal noted that the parties' relationship lacked a mutual intention:

> Ms. Roth's relationship with the BCID arose solely out of the fact that she was elected to serve on its Board as a trustee. The BCID is a form of local government. <u>I think there can be little question that an elected member of a local government is not, without more, an employee of that local government</u>. (emphasis added)
>
> […]

> …I accept the respondents' submission that a person cannot unilaterally choose to be an employee of someone else, just as an employer cannot force someone to be their employee. At the heart of any employment relationship is a mutual intention to enter into that relationship. That mutual intention to enter into an employment relationship is missing on the facts of this complaint.
>
> […]
>
> The lack of a mutual intention to form an employment relationship and associated lack of control on the part of the alleged employer is part of what distinguishes Ms. Roth's complaint from those complaints in which volunteer relationships have been found to be employment relationships for the purposes of the *Code*. (paras. 34, 42, 45)

While this decision recognizes the inherent difficulties local governments encounter in respect of managing interactions amongst their elected officials and relationships between elected officials and staff, we recommend all local governments draft and formally adopt policies addressing these important matters to set clear expectations of acceptable conduct. Such policies may lack "teeth" in terms of enforcement but, as was the case for Beaver Creek Improvement District, can be key to defending claims against the local government arising out of their elected officials' conduct.

C. WITNESSING HARASSMENT NOT ITS OWN FORM OF DISCRIMINATION

In a companion case to *Roth v. Beaver Creek Improvement District et al.* (discussed above), the Tribunal confirmed that an employee who alleges he or she has witnessed sexual harassment in the workplace does not necessarily have a discrimination complaint under the *Code*.

In *Hagyard v. Beaver Creek Improvement District et al.*, 2008 BCHRT 279, the question before the Tribunal was not whether Mr. Hagyard was the Improvement District's worker (it conceded that he was), but whether his allegation that he witnessed one elected trustee sexually harassing another elected trustee was itself a form of discrimination for which Mr. Hagyard had standing to file a complaint under section 13 of the *Code*.

The Improvement District argued that even if the sexual harassment had occurred as alleged, which it denied, Mr. Hagyard was not the subject of any discriminatory treatment because of any characteristics personal to him (i.e. his age, religion, mental or physical ability, sex, etc.). It also argued that this was not a case in which a worker's workplace becomes poisoned because of his or her sex due to exposure to sexual harassment directed at another. It said that any adverse consequences suffered by Mr. Hagyard as a result of his complaint about the alleged harassment were unrelated to his sex.

As noted above, the *Code* is given a broad and liberal interpretation to remedy discrimination, particularly in relationships such as employment relationships where actual or perceived differences in power can more easily result in both intentional and unintentional, but nevertheless unlawful, discrimination. In light of those principles, it was arguably open to the Tribunal to expand its interpretation of section 13 to include allegations of the nature advanced by Mr. Hagyard. However, the Tribunal accepted the Improvement District's argument and dismissed the complaint.

V. CONCLUSION

As the above cases indicate, 2008 was generally a positive year for legal developments that favour employers. While decision-makers continue to emphasize that employers owe their employees a duty of good faith and fair dealing, particularly when accommodating a disability or terminating the employment relationship, the cases confirm that this duty is not limitless and that honest mistakes by employers are not, without more, evidence of bad faith. Major decisions from the Supreme Court of Canada have revisited the role of procedural fairness in regular employment relationships and reined in what many employers viewed as unprincipled and ever-escalating damage awards. We have seen our Human Rights Tribunal choose not to expand the scope of protection from employment-related discrimination to elected officials or to persons who allege they witnessed workplace harassment. Above all, these cases reiterate that employment-related decisions are not made in a factual vacuum and that a contextual approach to resolving workplace conflict is necessary.