



# Bandhu Lakhani Campea LLP

EMPLOYMENT & LABOUR LAW

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## Dealing with Wrongful Dismissal Litigation in a World of Summary Judgment

Presented by: Albert Campea & Zaheer Lakhani  
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# Typical Course of Litigation

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- Pleadings
- Discovery Plan
- Document Disclosure
- Examinations for Discovery
- Motions
- Pre-Trial Conference
- Trial
- Appeal

- Most cases do not proceed to trial
- The vast majority of actions are settled
- Settlement is encouraged – litigation lengthy and costly
- Settlement offers throughout the litigation
- Mediation (Toronto, Ottawa, Essex)

# What is Summary Judgment?

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- Judgment without trial
- No genuine issues requiring a trial
- Motion with Affidavits and Cross-Examination
- Weigh evidence, evaluate credibility, draw inferences

# Summary Judgment: Pros

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- In actions where there are no complicated legal or factual issues
- The goal is to reduce costs and delays caused by trial
- Without cause terminations, the main issues: reasonable notice, mitigation

- The threat of summary judgment may encourage the parties to negotiate a settlement
- Even if motion is not successful: legal and factual issues narrowed + the parties are aware of each parties' position and evidence

# Summary Judgment: Cons

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- Costs savings?: Documentary disclosure and cross-examinations
- Cost consequences if unsuccessful
- Delays: Limited court resources depending on jurisdiction
- Moving for summary judgment early in the litigation process may provide insights into the other's strategy and the strength of their evidence

- Summary judgment may not be appropriate in circumstances where:
  - there is a dispute regarding character of employment
  - in cases involving several witnesses, or even expert witnesses
  - just cause alleged
  - other damages are sought



- Case Example: *Dawson v. Colt Food Services Ltd.*
- The plaintiff brought a motion for summary judgment alleging that he was wrongfully dismissed
- The defendant claims resignation or abandoned his employment
- The defendant argued that the evidence as to whether or not employee resigned from his employment was too contentious to be decided on a summary judgment motion
- The defendant also highlighted the clear credibility issues

- The Judge determined that the matter was ultimately not suitable for summary judgment because the evidence presented by the parties was “radically different”

# Summary Judgment: Mitigation

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- Onus on employer to show that reasonable efforts were not made to secure comparable alternate employment
- Income earned during notice period is deducted
- Employers may be more reluctant to have an action determined summarily, as dragging an action out may result in an employee securing alternate employment
- Cross-examination of the former employee on their job search efforts

- What if a summary judgment motion is heard and decided prior to the expiry of a notice period?
- Awards must account for the possibility of the employee earning income during the notice period

- *Contingency*: discount employee's damages due to the possibility of receiving income during the notice period
- *Trust Account*: employee obtains judgment but there is a trust in favour of the employer, and an obligation imposed on the employee to report mitigation income to their former employer
- *Partial Summary Judgment*: employee obtains a partial judgment but is required to return to court during or at the completion of the notice period to determine if any further payments are owing and disclosure of mitigation income

# Takeaways

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- The introduction of summary judgment motions has changed the landscape of employment litigation
- Summary judgment is an effective tool, mainly used by employees in the employment law context, to avoid the delays and the expense of trial
- However, not all actions will be amenable to the summary judgment process

# Questions?