Litigating Wrongful Dismissal Cases under the New Practice Direction

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On February 8th, 2005 the ADR Section held a dinner meeting to discuss the implications of the Ontario Superior Court Practice Direction regarding the Toronto Region Civil Cases (the "New Practice Direction") in respect to the area of wrongful dismissal and employment law. The speakers were Barry B. Fisher, Mediator & Arbitrator, David Harris , representing the plaintiff's perspective and John C. Fields of Hicks, Morley, Hamilton Stewart Storie LLP, representing the defendant's perspective.

The first topic of discussion was whether to start a wrongful dismissal action as a regular lawsuit or to use the Simplified Procedure under Rule 76. Prior to 2005, many wrongful dismissal actions were intentionally commenced as case managed claims with claims over $50,000 even though they were undoubtedly worth less than $50,000. This was done primarily so as to insure that the matter went to mandatory mediation. If the mediation did not result in a settlement, then the plaintiff would amend the claim by claiming less than $50,000 and have it treated as a Simplified Procedure case from that point forward. This would have the advantage of avoiding discoveries, which is often to the advantage of the plaintiff. However, now Simplified Procedure cases under the New Practice Direction are subject to mandatory mediation just like the traditional cases. This situation is now a plaintiff's dream. For cases under $50,000 the plaintiff can:

- Have a mediation
- Avoid discoveries
- Set the matter down for trial immediately after the mediation, if not before.

The consensus among the group was that if the case was realistically worth less than $50,000, the preferable way to start an action was under the Simplified Procedure.

The next topic discussed was mediation. The New Practice Direction changed completely the way in which mediation is used in non employment cases but in essence did not change the rules for wrongful dismissal cases. The major complaint about the old Case Management system with respect to mediation was that it was too early. However, it was conceded by even the harshest critics of Case Management that early mandatory mediation seemed to work well in employment cases. Mr. Justice Winkler recognized that employment law cases were different from other civil cases so he exempted them from the general rule about when the mediation must take place. The general rule is that the mediation must take place no later than 90 days after the matter is set down for trial, which means that the mediation must take place before a pre-trial. However for wrongful dismissal cases, both under the regular procedure and the Simplified Procedure, the mediation must take place within 150 days of the close of pleadings. This is very similar to the previous regime where a mediation had to occur within 90 days of the filing of the first defence, however a 60 day consensual extension was often obtained.

However it should be noted that the mediation does not need to hold up the other processes in the litigation. So the parties can, if they want, have discoveries, motions and document disclosure prior to the mediation. The time limits for mediation exist apart from the other steps in a lawsuit. In other words, the mediation must be held within the 150 day window whether or not there are other steps being taken in the interim. The gate keeper of the system is the pre-trial judge as no case will given a trial date without first having gone to mediation, unless the case is exempted from mediation.

The panel reminded the audience that in this new world the Court will not be urging the litigants on with each step, rather the parties are to regulate themselves and the Court will only be involved if a motion is brought by one of the litigants. No longer will the Local Mediation Coordinator send out notices to the parties telling them they need to schedule a mediation. In fact the only involvement that the Local Mediation Co-ordinator will have with new cases is where one of the parties requests that a mediator be appointed. The Local Mediation Co-ordinator will them appoint a mediator from the Roster. The general expectation is that parties will now agree on the mediator much more frequently than in the past and thus the number of mediations using assigned Roster mediations will probably fall dramatically. Please also note that the tariff of $600 per mediation (for a two party mediation) now only applies where the Local Mediation Co-ordinator appoints a Roster mediator. In all other cases the mediator's fee is set by the marketplace. This applies even to Roster mediators who are selected by the parties.

The third topic was pre-trials and trial dates. Pre-trials are now to have two distinct functions. There will some limited time available to the parties to try to resolve the case. In Simplified Procedure cases, the clients are to be present at the pre-trial. However, if a settlement is not achieved the parties will be required to resolve a number of critical trial scheduling issues at the pre-trial such as the steps remaining before the case can be tried, the time needed to complete these steps, the proposed length of trial, and the availability of counsel, witnesses and experts. The parties will leave the pre-trial and go immediately to the Trial Co-ordinator's office where a fixed date for trial will be

provided. If for some reason counsel cannot agree on a fixed trial date, then they will be required to immediately return to the pre-trial judge who will set the date.

The overall effect of the New Practice Direction should enhance the prospects of a voluntary settlement in that:

- Early mediation will be required in all cases.
- Absent any procedural conflicts between the parties the only involvement of the Court prior to trial will be the pre-trial.
- Fixed and unmoveable trial dates will make the parties realize that the decision day is quickly approaching and thus it may be better to settle earlier rather than later.