



NEWSLETTER – MAY AND JUNE 2008

**ARE STATUTORY RIGHTS CONFERRED ON EMPLOYEES BY
THE *EMPLOYMENT STANDARDS ACT* INCORPORATED INTO
THE EMPLOYMENT CONTRACT AS A MATTER OF LAW?
CAN A CLAIM BASED SOLELY ON SUCH RIGHTS
BE ENFORCED BY WAY OF A CIVIL ACTION?**

After they were issued at the end of 2006, the reasons for judgment in *Macaraeg v. E Care Contact Centers Ltd.*, [2006] B.C.J. No. 3211 (S.C.) garnered much attention in employment law circles in British Columbia.

As summarized in two of our newsletters from 2007, in *Macaraeg v. E Care Contact Centers Ltd.*, Madam Justice Catherine Wedge of the B.C. Supreme Court held that:

- the minimum overtime provisions of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the “ESA”) were incorporated as a matter of law into the employment contract between Cori Macaraeg and her former employer, E Care Contact Centers Ltd. (“E Care”); and
- Ms. Macaraeg’s entitlement to overtime in accordance with such provisions could be enforced by way of a court action.

Background

The background to *Macaraeg v. E Care Contact Centers Ltd.* was as follows.

Ms. Macaraeg was hired by E Care in May 2004 when she signed a written employment contract which set out her rate of pay, vacation entitlement and group benefits. Importantly, the employment contract was silent with regard to Ms. Macaraeg’s entitlement to overtime.

Long hours were worked by Ms. Macaraeg, but she was told that E Care did not pay for overtime. After 30 months of employment, she was dismissed on a without cause basis and provided with two weeks’ pay in lieu of notice.

Ms. Macaraeg responded by initiating a civil action against E Care. She sued for wrongful dismissal and sought damages in lieu of reasonable notice and payment for overtime worked during the course of her employment.

E Care objected to the overtime claim on the basis that, under the *ESA*, only the Director of Employment Standards had the jurisdiction to deal with such a claim. E Care took the position that the courts did not have jurisdiction to hear an overtime claim based solely on statutory rights conferred on employees by the *ESA*.

Decision of B.C. Supreme Court

Madam Justice Wedge disagreed with the position taken by E Care.

She held that the minimum provisions of the *ESA* – including statutory entitlement to overtime – were implied into the employment contract.

According to Madam Justice Wedge, “[T]he effect of a minimum benefit conferred by employment standards legislation [was] to introduce a further contractual term into the contract of employment as effectively as if it had been included by agreement of the parties.”

The chambers judge emphasized that the *ESA* must be read broadly as “benefits-conferring” legislation and described the purpose of the legislation as “to ensure that employers provide their employees with the minimum statutory employment rights required by the legislation”.

Madam Justice Wedge also held that the *ESA* did not preclude bringing a claim for payment of overtime by way of a court action.

The judge stated that “an employee may ... bring a civil action to pursue his or her statutory employment rights”. In her view:

- “The current provisions of the *ESA*, read as a whole, [did] not grant exclusive jurisdiction to the Director of Employment Standards to decide claims for benefits conferred by the *ESA*.”
- “[T]he statute [did] not expressly or impliedly prohibit an employee from commencing civil proceedings to enforce his or her statutory rights, whether or not the claim [was] part of a wrongful dismissal action.”

E Care initiated an appeal in respect of Madam Justice Wedge’s decision.

Decision of B.C. Court of Appeal

In *Macaraeg v. E Care Contact Centers Ltd.*, [2008] B.C.J. No. 765 (C.A.), the B.C. Court of Appeal allowed E Care’s appeal and overturned the chambers decision.

Mr. Justice Chiasson, delivering the unanimous reasons for judgment of the Court of Appeal, held:

“[A]s a matter of law, the minimum overtime pay requirements of the *ESA* were not implied terms of the contract of employment between E Care and Ms. Macaraeg.”

The appeal judge “reject[ed] the broad proposition that rights granted by employment standards legislation are implied terms of employment contracts”. He ruled that the “chambers judge erred in concluding that rights granted by employment standards legislation are incorporated into employment contracts as a matter of law regardless of the intentions of the parties”.

With regard to the question of enforcement of statutory employment rights by way of civil action, the appeal judge stated there is a “general rule that rights conferred by statute are to be enforced in the statutory regime”.

According to Mr. Justice Chiasson, the general rule is not invariable and “rights conferred by statute” may be enforceable by way of a court action if, considering the legislation as a whole, such was the legislative intent.

The judge went on to say:

*“[I]n ascertaining the intention of the legislators an important indicium is whether the legislation provides effective enforcement of the right conferred by statute. If the statute does so, there is no need for enforcement outside the statute and *prima facie* there is no civil cause of action. If the statutory remedy is inadequate, a logical conclusion is the Legislature intended the right to be enforceable by civil action. If it were not, the right would be pyrrhic.”*

[Emphasis added.]

Turning his mind to the question of whether the *ESA* “provides effective enforcement of the right conferred by statute”, Mr. Justice Chiasson ruled:

“An examination of the legislation shows it provides a comprehensive administrative scheme for the granting and enforcement of employee rights.”

The judge said the following provisions represent “a complete code for the granting and enforcement of statutorily-conferred benefits”:

“Section 74 provides for complaints to the Director of Employment Standards for contravention of the *ESA*. Complaints are investigated by the Director ... Since June of 2007, s. 84 of the *ESA* sets out in full the Director’s power to compel persons to answer questions and order disclosure. The authority to investigate now is given expressly to the Director who can obtain the assistance of the Supreme Court with the added force of potential contempt of court proceedings. If the Director were satisfied there has been a contravention, he can require compliance, which includes the payment of, in this case, overtime wages (s. 79). Pursuant to s. 98, contravention of the *ESA* attracts a fine in addition to the obligation to comply with the Director’s determination under s. 79.

The payment of interest is dealt with in s. 88.

There are a number of sections addressing enforcement. Unpaid wages constitute a lien on the assets of persons identified in a determination of the Director. The lien has priority over other named interests (s. 87). Payment can be obtained from third parties who owe money to a person identified in a determination (s. 89).

Pursuant to s. 91, the Director's determination can be filed in the Supreme Court and is enforceable in favour of the Director in the same manner as a judgment of the court. Section 92 authorizes the Director to seize assets owned or possessed by a person who is required to pay under a determination. Money obtained by the Director is held for the employee.

An appeal to the Employment Standards Tribunal from a determination of the Director is provided by s. 112 and s. 116 authorizes a reconsideration of the Tribunal's orders or decisions."

According to Mr. Justice Chiasson, it was not the legislative intent that statutory entitlement to overtime "could be enforced in a civil action". In the appeal judge's view, the *ESA* "provide[d] an effective mechanism for enforcement of Ms. Macaraeg's right to overtime" such that she was "not entitled to enforce her statutory right to overtime pay in a civil action".

Mr. Justice Chiasson concluded, "[T]he exclusive jurisdiction to determine such claims lies with the Director, subject to an appeal to the Tribunal, all pursuant to the provisions of the *ESA*."

Conclusion

The B.C. Court of Appeal has now definitively rejected the notion that an employee can bring a civil action in respect of a claim based solely on statutory rights conferred on employees by the *ESA*.

That is good news for employers in this province, many of whom viewed Madam Justice Wedge's decision in *Macaraeg v. E Care Contact Centers Ltd.* as having opened Pandora's box.

The chambers decision raised the spectre of class action proceedings being used in B.C. as a means of enforcing minimum benefits conferred on employees by the *ESA* (including statutory entitlement to overtime).

As outlined in our newsletter of April 2007, the experience of U.S. employers in that regard has not been a positive one. "Wage and hour" claims, brought by classes of current and former employees pursuant to federal and state minimum standards legislation, have seen many U.S. employers caught up in "bet the company"-type litigation.

In addition, the chambers decision in *Macaraeg v. E Care Contact Centers Ltd.* – together with a subsequent B.C. Supreme Court decision that followed it, *Holland v. Northwest Fuels Ltd.*, [2007] B.C.J. No. 858 (S.C.) – threw into question the applicability of section 80(1) of the *ESA* in circumstances where an employee chose to pursue his or her statutory employment rights through a court action. That section, as the reader may know, puts in place a statutory six-month cap on the "amount of wages" that an employer may be required to pay an employee who advances a successful employment standards claim.¹

¹ In *Holland v. Northwest Fuels Ltd.*, Madam Justice Kathryn Neilson held that the six-month cap was "related to considerations of procedural efficiency in dealing with complaints made under Part 10 of the current *ESA*" and was "not intended to be of general application to all claims for overtime".



The Court of Appeal's decision in *Macaraeg v. E Care Contact Centers Ltd.* has put to rest the consternation that many B.C. employers were feeling after the release of Madam Justice Wedge's reasons for judgment at the end of 2006.

In closing, we note that the law firm that provided representation to Ms. Macaraeg in *Macaraeg v. E Care Contact Centers Ltd.* presently indicates on its website that she intends on seeking leave to appeal to the Supreme Court of Canada.

If you have questions regarding the issues raised in this newsletter and how they may affect you or your company, please do not hesitate to contact any lawyer at our firm.

Lawyer contact information can be obtained by contacting us at (604) 806-0922 or visiting our website at www.ropergreyell.com.

* Every effort has been made to ensure accuracy in respect of this newsletter. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this newsletter. *