

### Supreme Court of Canada Provides Guidance on Terminating Employment for Excessive Absenteeism

*Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale*  
2000, 2008 SCC 43

When an employee is unable to regularly attend at work because of a medical disability the employer may decide to terminate the employment relationship. In the unionized setting the test has been whether (1) the attendance record demonstrates excessive absenteeism, (2) the employee is unlikely to be capable of attending work on a regular basis in the foreseeable future; and (3) the employer has accommodated the employee, and any further accommodation would result in undue hardship.

In the recent *Hydro-Québec* decision the Supreme Court of Canada provided important clarity with respect to the duty to accommodate in excessive absenteeism cases. *Hydro-Québec* involved an employee who had missed significant time from work over a seven year period due to medical problems. The employer had provided various accommodations over the years, including light duties, assigning the employee to different supervisors and allowing lengthy periods of time away from work. At the time of termination a medical evaluation said that the employee would likely continue to have difficulty attending work regularly in the future.

The original termination was upheld at arbitration, but the Quebec Court of Appeal overturned that award. The Court of Appeal found that the employer had to demonstrate it was "impossible" for it to accommodate the medical condition any further, a test it had not met. The Supreme Court of Canada disagreed with the Quebec Court of Appeal, and restored the arbitrator's decision.

In allowing the appeal, the Supreme Court of Canada clarified important principles with respect to the duty to accommodate in cases of chronic absenteeism:

- The employer's accommodation efforts must be assessed on the whole of the record, including the absenteeism it has already tolerated, other accommodations provided to the employee, and the medical prognosis at the time of dismissal. An employer is not required to demonstrate that it would be "impossible" to accommodate an employee further in order to justify termination.

(Continued on Page 2)

October 2008

#### IN THIS ISSUE

**Terminating Employment for Excessive Absenteeism .....1**

**What's New in Employment Law?.....2**

**Filling in the Labour Gap .....3**

**Adding New Grounds For Discharge After Termination.....4**

**The Supreme Court of Canada Rules on Bona Fide Pension and Insurance Plans .....5**

**The Standard of Review for the Human Rights Tribunal's Discretionary Decision to Dismiss a Complaint .....6**

**Severance Pay Cap in the Public Sector Employers Act Applies to Managerial Employees Represented by an Employee Association .....6**

Farris, Vaughan, Wills & Murphy LLP  
Barristers and Solicitors  
Email: [info@farris.com](mailto:info@farris.com)

A member of



*This summary is necessarily of a general nature and not the giving of legal advice.*

©2008 Farris, Vaughan, Wills & Murphy LLP

- The goal of accommodation is to ensure that an employee who is able to work can do so. The Court said “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”.
- If an employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.
- The employer’s duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.

This decision affirms that there is a reasonable limit to an employer’s duty to accommodate chronic employee absenteeism.

**Judith A. Macfarlane** Email: [jmacfarlane@farris.com](mailto:jmacfarlane@farris.com)  
Direct Dial: 604-661-9381

---

## What’s New in Employment Law?

Over the past few months, the Supreme Court of Canada has rendered four decisions in the realm of employment law which are likely to have a positive impact for employers, relieving them from some of the strictures imposed by legislation and the common law.

### Increasing Mitigation Duties of Wrongfully Dismissed Employees

In *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, a 6 to 1 majority of the Supreme Court held that a wrongfully dismissed employee breached his duty to mitigate when he refused the employer’s offer to return to work to serve out his notice period instead of suing for damages in lieu of notice. Although Canadian courts in the past have ruled that only constructively dismissed employees – that is, those who quit because the employer terminated their employment contract by unilaterally and fundamentally changing agreed terms – could be expected to mitigate their losses by returning to the dismissing employer, the Supreme

Court in *Evans* explicitly rejected drawing a distinction between constructive dismissal and wrongful dismissal in matters of mitigation. The Court reinforced the principle that “damages are meant to compensate for lack of notice, and not penalize the employer for the dismissal itself”. The Court held that whether an employee should accept an offer of re-employment with the dismissing employer in order to mitigate his/her damages is an *objective* inquiry and depends on whether a “reasonable person” would accept such an opportunity. Several factors here are relevant including: whether the salary and working conditions are similar; whether the work is demeaning; whether the personal relationships are acrimonious; whether the employee has commenced litigation; and whether the offer of re-employment was made while the employee was still working for the employer or only after the employee had left.

The critical element is that an employee not be obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation. However, the decision also articulates that not all damages are subject to mitigation. Specifically, Wallace damages, which may be awarded by a court when an employer acts in bad faith during an employee’s termination, are not subject to mitigation. It is unclear, however, whether the Court’s analysis in this respect will be relevant now that Wallace damages have been restated as set out below.

### Tightening the Rules Governing Damage Awards

In *Honda Canada Inc. v. Keays*, 2008 SCC 39, the Supreme Court struck down the largest award of punitive damages in a Canadian wrongful dismissal case. In doing so, the Supreme Court restated the law of damages in wrongful dismissal cases. While the Court upheld the wrongful dismissal and the 15 month notice period awarded by the trial judge, it overturned the award of punitive damages (the trial judge awarded \$500,000 which was reduced by the Court of Appeal to \$100,000) and the 9 month Wallace extension of reasonable notice period. In eliminating the 9 month Wallace extension, the Court changed the way in which such damages will be allocated – no longer by way of an “arbitrary extension of the notice period” but rather by a determination of actual damages suffered by the employee. The requirement to prove actual damages will hopefully curtail such routine claims. In overturning the punitive damages

award, the Court held that discrimination does not constitute an “independent actionable wrong” (the Court stated that to recognize a breach of the *Human Rights Code* as an independent tort would be to undermine the intent of the legislature) and made it clear that the threshold for punitive damages is very high and will only be awarded in exceptional cases. The Court warned that even in such exceptional cases, courts must still give careful consideration to whether punitive damages are appropriate, particularly where Wallace damages have already been awarded, as the additional damages may result in double-compensation. Finally, the Court confirmed that an employer’s “need to monitor the absences of employees who are regularly absent from work is a bona fide work requirement in light of the very nature of the employment contract and responsibility of the employer for the management of its workforce.” This will strengthen an employer’s ability to monitor and manage the attendance of its employees and to pursue documentation for absenteeism.

### Other Cases

In *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, 2008 SCC 43* (digested on page 1), the Supreme Court of Canada confirmed that there are limits to the employer’s duty to accommodate. The Supreme Court held that “the employer’s duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship in the foreseeable future”.

In *New Brunswick Human Rights Commission v. Potash Corporation of Saskatchewan Inc., 2008 SCC 45* (digested more extensively on page 5), the Court provided some important clarity on the question of what is required to fit the exemption of “bona fide pension plan” finding that it does not incorporate a duty to accommodate.

Both cases saw the Court take a more restrictive, rather than expansive, approach to employer human rights obligations.

**Dylana Bloor**

Email: [dbloor@farris.com](mailto:dbloor@farris.com)  
Direct Dial: 604-661-9355

## Filling in the Labour Gap

*Hiring International Graduates from Canadian Universities/Colleges into Entry-level Skilled Positions can create long-term success.*

### Post Graduation Work Permit

Recent changes to the Post Graduation Work Permit program available to international graduates from Canadian Universities and Colleges coupled with the introduction of a new In-Canada application stream for Permanent Residence applications (the Canadian Experience Class) and/or a Provincial Nominee Program makes long-term employment of these individuals a distinct possibility. Specifically, International Students who graduate from public Universities and Colleges (in certain two-year programs) are now eligible for a three-year work permit rather than the one year maximum work permit under the old rules. When used in conjunction with one of the below programs, this can help bridge the gap for that employee to gain Permanent Residence in Canada thereby allowing them to work and live long term in Canada.

Further information on the Post Graduation Work Permit can be found at:

<http://www.cic.gc.ca/english/study/work-postgrad.asp>

### Canadian Experience Class

The Canadian Experience Class is a proposed new immigration category available to foreign nationals already in Canada. While the class requirements have not yet been finalized, it is anticipated that this will be done by the end of this year. The category will allow certain skilled temporary foreign workers and international students with Canadian degrees and skilled work experience (of whom recent graduates working with a Post Graduation Work Permit, as described above, will qualify) to apply for permanent resident status without first having to leave Canada, as was required before.

Further information on the Canadian Experience Class can be found at:

<http://www.cic.gc.ca/EnGLIsh/departement/media/backgrounders/2008/2008-08-12.asp>

## Provincial Nominee Programs–International Student Streams

Many Provincial Nominee Programs offer an application stream for international students who have recently graduated from a Canadian University or College. Specifically, the British Columbia Provincial Nominee Program is particularly attractive to recent international graduates. While entry into the program requires a certain level of achievement during the student's course of study, the advantages that go with acceptance into the program are that the individual is entitled to a work permit during the processing of their application, and that the individual's application for permanent residence is fast-tracked through the Canadian Visa Office processing their application. In fact applications for permanent residence for Provincial Nominee's can be completed in a few months rather than a few years.

Further information on the BC Provincial Nominee Program – International Graduate program can be found at:

[http://www.ecdev.gov.bc.ca/ProgramsAndServices/pnp/so\\_internationalgraduates.htm](http://www.ecdev.gov.bc.ca/ProgramsAndServices/pnp/so_internationalgraduates.htm)

**Ryan Neely**

Email: [rneely@farris.com](mailto:rneely@farris.com)  
Direct Dial: 604-661-9359

---

## Adding New Grounds For Discharge After Termination

For years there has been a general arbitral principle that an employer ought to be restricted in an arbitration to the initial grounds it relied upon in justifying the termination of an employee. This principle came out of Justice Laskin's decision in *Aerocide Dispensers Ltd.* This principle has been characterised by both arbitrators and authors as "fraught with problems". As a result, arbitrators have attempted to craft limitations and exceptions to this principle to bring about a more common sense approach and reflect a true examination of the relationship between the employer and an allegedly aggrieved employee.

In an application by an employer to add new grounds the arbitrator will likely find support for the addition of new grounds if the following factors are present:

1. The company was not fully aware of the "new" ground until after the matter was submitted to arbitration. This is often because of the surreptitious nature of the grievor's offences which made it difficult to discover;
2. The "new" ground is not wholly disconnected from the original ground; and
3. The union and the grievor were or can be afforded the fullest possible opportunity to address the "new" ground. This is frequently accomplished by allowing for an adjournment in the case.

An application to add grounds may be necessary in instances where an employee has concealed certain misconduct or facts and through no fault of its own the employer was unaware of this misconduct at the time of termination. This exception to the principle is clearly intended to prevent any benefit to an employee who has been successful in hiding certain misconduct until after the termination. In saying that, an arbitrator will often look to whether an employer has through hasty action created its own ignorance and had it investigated a situation properly, these new facts and/or misconduct would have become known to the employer. It is unlikely that an arbitrator will grant the addition of new grounds where an employer is attempting to bolster its case or "switch horses" by raising a new ground and abandoning its original grounds for discharge. This is often seen as an attempt to re-characterise the grounds for discharge to fit the evidence the employer actually has, as opposed to the evidence it thought it had.

The exceptions to the principle that an employer must justify the dismissal of an employee on the grounds upon which the decision was made at the time of dismissal promote a common sense approach. If an application to add new grounds is not sought and the termination is ultimately not upheld, an employer may attempt to terminate the employee once again on the new grounds. An application to add grounds for termination can avoid this costly and lengthy practice.

In a recent preliminary decision of Arbitrator Brown between TELUS and the Telecommunication Worker's Union (June 10, 2008), the employer was successful in adding new grounds for termination which it

became aware of during testimony at the actual hearing. Arbitrator Brown held that the employer was unaware of the new grounds until certain records were produced during the hearing and that the new grounds were not wholly disconnected to the original grounds. Most importantly, Arbitrator Brown held that “it is important to consider the real substance of the issue in dispute, and to ensure that both parties receive full and fair hearing”. ([2008] C.L.A.D. No. 95 at para. 17)

**Donald L. Richards** Email: drichards@farris.com  
Direct Dial: 604-661-9318

**Jennifer A. Cowan** Email: jcowan@farris.com  
Direct Dial: 604-661-1727

---

***Bona Fide Pension and Insurance Plans:  
New Brunswick Human Rights  
Commission v. Potash Corporation of  
Saskatchewan Inc., 2008 SCC 45***

On July 18, 2008 the Supreme Court of Canada rendered its decision in *New Brunswick Human Rights Commission v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45. Despite the abolishment of mandatory retirement in many jurisdictions across Canadian, human rights legislation often exempts “*bona fide*” pension plans from age discrimination. The dispute in this case was over what legal test is triggered by the use of the exemption “*bona fide*” in connection with a pension plan in the *New Brunswick Human Rights Code*. The Court held that it is to be given the ordinary meaning of “good faith” and does not attract the more rigorous “bona fide occupational requirement” analysis unique to human rights law, or even a reasonableness requirement.

The Court ruled that in relation to a pension plan, “bona fide” means that the plan must be legitimate, adopted in good faith, and not be a sham or adopted for the purpose of defeating protected rights. An employer does not have to prove the reasonableness of the policy, or even that the mandatory retirement age provision is necessary to the operation and sustainability of the plan. The Court need only consider the overall bona fides of the plan, not the actuarial details or mechanics of the terms and conditions of the plan. The Court agreed with the New

Brunswick Court of Appeal that this test has both a subjective and objective component. As an example, the Court said that one objective indicator of the bona fides of the plan might be whether the pension plan in question has been registered.

In its reasons, the Court reviewed the legislative history in the adoption of the relevant provisions of the Code. The Court said that the expression “bona fide” when used with “occupational qualification” is a well-understood and accepted term of art in human rights law, but that pensions have been treated differently in most human rights codes because they arose from different protected concerns. The Court reasoned that, in enacting separate provisions exempting bona fide pension plans, the legislature was seeking to confirm the financial protection available to employees under a genuine pension plan while ensuring that they were not arbitrarily deprived of their employment rights under an employer orchestrated sham.

This decision may have repercussions in other provinces, depending on the wording of the specific human rights legislation. In B.C., where the *Zurich Insurance* test (employer must establish both the *bona fides* and the reasonableness of the policy) has been applied by the B.C. Human Rights Tribunal in examining “bona fide pension and other plans” under Section 13 of the B.C. Human Rights Code, this decision effectively creates a lower threshold for employers seeking to defend mandatory retirement policies in pension plans against claims of age discrimination by removing the reasonableness requirement.

This decision may also have wider ramifications regarding the meaning of the phrase “bona fide” in relation to other express exemptions in human rights legislation. The Supreme Court of Canada adopted the ordinary meaning of “good faith” in relation to pensions because it found that these provisions were intended to perform different protective functions, and should therefore be subject to a different legal test. It remains to be seen whether this will be extended in other instances where the phrase “bona fide” is used to qualify other provisions in different contexts.

**Oscar Allueva** Email: oallueva@farris.com  
Direct Dial: 604-661-9361

---

## **The Standard of Review for the Human Rights Tribunal's Discretionary Decision to Dismiss a Complaint**

*Evans v. University of British Columbia*, 2008 BCSC 1026

There is a debate underway about the effect in British Columbia of the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9. That decision changed the common law standard of review of administrative tribunal's decisions. It eliminated the "patently unreasonable" standard and replaced it with a "reasonableness" standard. In British Columbia, the question is what impact *Dunsmuir* will have because we have legislation called the *Administrative Tribunals Act* which seeks to codify the standard of review of decisions of administrative tribunals. Ironically, the *ATA* was meant to simplify the often challenging matter of determining the appropriate standard of review, but in light of *Dunsmuir*, which subsequently simplified the standard of review at common law, we in BC are left with further confusion about what standard applies – the *Dunsmuir* standard of review or the *ATA* standard of review? To make matters even more complicated, the *ATA* itself sets out different standards depending on the type of decision by the administrative tribunal, and the nature of the administrative tribunal itself.

For example, the *ATA* provides that a finding of fact or law by an administrative tribunal (whose enabling act has a privative clause) must not be overturned unless it is patently unreasonable. But the phrase "patently unreasonable" is not defined in this context. On the other hand, a discretionary decision by an administrative tribunal must also not be overturned unless it is "patently unreasonable", but here the phrase "patently unreasonable" is defined.

The recent case of *Evans v. University of British Columbia* (2008 BCSC 1026) has shed some light on this issue. This was a case that started with a Human Right Code complaint where the complainant, Ms. Evans, alleged that the University discriminated against her at the end of her maternity leave on the basis of her gender and family status. She alleged that the University fundamentally changed her job. The University denied that it had done so, and filed numerous affidavits with the Human Rights Tribunal in an effort to have her complaint dismissed on a

preliminary basis. The question of whether to dismiss a complaint on a preliminary basis is a "discretionary decision" of the Human Rights Tribunal, and the Tribunal agreed with the University and dismissed the complaint.

Ms. Evans then filed for judicial review, and one of the questions before the BC Supreme Court was whether the *Dunsmuir* "reasonableness" standard applied to this judicial review, or whether the defined *ATA* standard applied. Ms. Evans argued that *Dunsmuir* applied, but the University argued that the defined *ATA* standard applied. The BC Supreme Court agreed with the University and dismissed Ms. Evans' application for judicial review.

This case is important to employers because it demonstrates the importance of putting forward a compelling, persuasive case to try to convince an administrative tribunal to dismiss complaints that are, in the employer's view, without merit. It is also an important case for employers because it provides some clarity with respect to the standard of review of an administrative tribunal's decision.

**Michael Korbin**

Email: mkorbin@farris.com  
Direct Dial: 604-661-9330

---

## **Severance Pay Cap in the Public Sector Employers Act Applies to Managerial Employees Represented by an Employee Association**

*Association of Administrative and Professional Staff v. University of British Columbia*, 2008 BCCA 337

The Association of Administrative and Professional Staff (AAPS) is a non-union society that represents the management and professional staff at the University. AAPS and the University engage in collective bargaining over the Agreement on Conditions and Terms of Employment (ACTE) for the management and professional group. One of the terms that they agreed upon was a maximum severance package of 24 months (after 24 years of service).

In response to public concerns about high severance packages paid to public employees, the Provincial Government enacted legislation that set a cap of 18

months severance for those public sector employees “excluded from membership in a bargaining unit”. Though the University was unhappy about this legislative interference with its contract with its management and professional group, it confirmed to the government that it would follow the legislation.

When the University applied this 18 month cap to two managers who would have been entitled to greater severance under the ACTE, AAPS filed a grievance. Arbitrator Stan Lanyon dismissed the grievance finding that the legislation applied to managers at UBC such that their severance was capped at 18 months. AAPS unsuccessfully sought judicial review in BC Supreme Court, and then appealed to the BC Court of Appeal. The BC Court of Appeal recently dismissed AAPS’ appeal (2008 BCCA 337), confirming that the legislation applied to managers at the University and accordingly their severance was capped at 18 months.

This decision is important to public sector employers because it demonstrates how legislation can overcome contractual entitlements to severance.

**Michael Korbin**            Email: mkorbin@farris.com  
                                       Direct Dial: 604-661-9330

Farris is a leading Canadian law firm based in Vancouver, British Columbia. The Labour and Employment group is one of its cornerstones. Our lawyers represent a wide range of employers including governmental bodies, educational institutions, and businesses in many different industries. A number of our practitioners are acknowledged in the Canadian Legal Lexpert Directory and many are ranked in the top 500 leading lawyers in Canada.

For more information regarding the content of this newsletter or any other area of labour and employment law please contact any member of our Labour and Employment Group:

Keith Mitchell, Q.C.  
 Chair  
 604-661-9337  
 kmitchell@farris.com

Alan J. Hamilton, Q.C.  
 Managing Partner  
 604-661-9320  
 ahamilton@farris.com

Barry T. Gibson, Q.C.  
 604-661-9313  
 bgibson@farris.com

Peter Parsons  
 604-661-9314  
 pparsons@farris.com

Alison H. Narod  
 604-661-1702  
 anarod@farris.com

Donald L. Richards  
 604-661-9318  
 drichards@farris.com

Marylee A. Davies  
 604-661-1707  
 mdavies@farris.com

Michael H. Korbin  
 604-661-9330  
 mkorbin@farris.com

Judith A. Macfarlane  
 604-661-9381  
 jmacfarlane@farris.com

David Borins  
 604-661-9309  
 dborins@farris.com

Dylana Bloor  
 604-661-9355  
 dbloor@farris.com

Christopher J. Wiebe  
 604-661-1741  
 cwiebe@farris.com

Ryan S. Neely \*Immigration  
 604-661-9359  
 rneely@farris.com

Jennifer A. Cowan  
 604-661-1727  
 jcowan@farris.com

Alexander D. Mitchell  
 604-661-9397  
 amitchell@farris.com

Oscar Allueva  
 604-661-9361  
 oallueva@farris.com