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DRAMATIC SHIFT IN EMPLOYMENT LAW

Ontario Court of Appeal changes the reasonable notice analysis

For 50 years when determining the appropriate notice or pay instead of notice for an employee dismissed without cause, four key factors were considered:

- age of the employee,
- length of service of the employee,
- position held/character of employment, and,
- ability to find new employment.

The 1960 Ontario High Court decision of *Bardal v. Globe & Mail Ltd.* established these above-listed key (amongst other) factors to be addressed when determining the appropriate amount of notice or, more commonly, payment instead of notice for a without cause dismissal. Underpinning the relevance of the “position held/character of employment” factor was the accepted premise that, as there are typically fewer executive or managerial positions available, it would typically take a dismissed senior manager longer to find new employment than it would a non-manager. Thus a senior manager was usually entitled to greater notice/pay in lieu of such notice.

In my view, this reflects reality and common sense. Picture a pyramid: there is more space at the bottom than at the top. Most organizations are structured with one president, a number of vice presidents, various managers, and usually lots of “worker bees” who report to the various levels of management up through that pyramid structure. It is thus reasonable to accept that a 50 year old accounting clerk earning \$50,000 per annum will have an easier time to replace employment income lost by getting another job than would the 50 year old Vice President of Finance paid \$250,000 per annum.

Yet, the above assumptions were recently undone by a decision of the Ontario Court of Appeal. The factor of “position held/character of employment” was found by Mr. Justice MacPherson to be of “diminishing significance” which would not reduce a notice period for an employee otherwise entitled to a high amount of notice, referencing the other *Bardal* factors. That means that a long-serving executive employee may well have the same entitlement as a long-serving clerical/janitorial employee even though, again in my opinion, it should be self-evident that a 60 year-old clerical or maintenance worker will usually have an easier time replacing income lost from dismissal than would a 60 year old executive paid according to his/her senior position.

Some history: in a 1994 decision Mr. Justice MacPherson, then of the Ontario Court of Justice (trial court), decided in *Cronk v. Canadian General Insurance Co.* that Ms. Cronk should not be held to a lower range of notice or payment in lieu of notice just because she was a clerical employee. In his decision Mr. Justice MacPherson downgraded the factor of “position held/character of employment” to one of insignificance. In 1995, however, the Court of Appeal reduced Ms. Cronk’s entitlement to 12 months from the 20 months awarded by Mr. Justice MacPherson. Additional comments made by the Court of Appeal in its’ decision rejecting the premise of the trial Judge led to a theory that there was a 12 month notice “cap” for non-managerial employees despite length of service, age or the other *Bardal* factors when determining the appropriate level of notice/payment in lieu of notice. In 1999, however, a decision of the Court of Appeal in *Minott v. O’Shanter Development Co.* declined to find that there was a notice cap of 12 months for this plaintiff janitor employed by a property developer; thus not reducing Mr. Minott’s notice from what the trial court awarded and which the Court of Appeal called at the “upper end of the range”.

When acting for employers, for years I have attempted to rely on the nebulous existence of the so-called “cap” despite my view that, in reality, it did not exist. Rather, I believed that the four key *Bardal* factors enumerated above continued to govern the determination of the appropriate range of notice in each particular case, considering the particular facts of each case. None of the four factors are considered in isolation, and some of the factors may have more or less relevance depending upon the particular facts of a particular case.

In the June 2011 decision of the Court of Appeal in *Di Tomaso v. Crown Metal Packaging Canada LP*, Mr. Justice MacPherson, now on the Court of Appeal, upheld an award of 22 months of pay in lieu of notice for a 62 year old labourer employed for 33 years with the employer. Not only did the Court of Appeal categorically reject any notion of a 12 month “cap” for non-managerial employees, the Court further concluded that the “position held/character of employment” of the dismissed employee was a far less relevant factor.

The Court of Appeal rejected the above-discussed presumption that a more senior ranked employee is entitled to greater notice because such an employee could struggle longer to find new, comparable employment. Mr. Justice MacPherson concluded that there should be no assumption that a lower ranked labourer or clerical worker with no special skills would more easily find new employment than would a more senior-ranked counterpart.

Mr. Justice MacPherson, who first advanced his theory in the trial decision of *Cronk* in 1994, has now managed to affect a substantial change in employment law. Of course, the facts in *Di Tomaso* are compelling. Mr. Di Tomaso, after all, at age 62 with 33 years of service, was a most sympathetic plaintiff. The record also indicates that he made efforts to find new employment but, considering the overtime earned and his total compensation of \$75,000 annually, it was impossible for him to replace his lost employment with anything comparable.

Where do we go from here? Lessons to be Learned:

Practically speaking, employers who assert that “position held/character of employment” of the departing employee should reduce notice entitlement will now have to lead evidence to prove such assertions. A human resources expert or an experienced executive search consultant may well have to testify as an expert witness that, in the particular case, a non-managerial employee should likely find employment more easily than a similarly situated in age and length of service executive-level employee.

Having to prove what was until now assumed will add cost and complication to employment law cases. By emphasizing length of service and age, moreover, the Court of Appeal has rendered more formulaic the determination of appropriate notice, which increased notice costs will be borne by employers.

Thankfully, the final *Bardal* factor, the “ability to find new (comparable) work”, is still very relevant. Again, if evidence can be led to show that a dismissed non-manager, or manager for that matter, ought to have found new work in a shorter time than what the employee’s counsel has proposed, this remains a matter of proof upon which an employer can arguably rely. It will be, however, for the employer to prove such previously accepted assumptions.

Please call or email me with any questions or comments. A selection of past articles is available on our web-site, www.rickettsharris.com

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