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Reasonable Notice of Termination in an Executive, Short-Term Employment Context

By: Jonnette Watson Hamilton

Case Commented On: *Bahrami v AGS Flexitallic Inc*, 2015 ABQB 536 (CanLII)

The issue in this case was the appropriate amount of severance pay for a senior manager dismissed without notice and without cause after only eight-and-a-half months' employment with a company supplying industrial gaskets to the oil and gas industry. The decision may be of interest because most employees with executive status have employment contracts that include an end date or termination provisions; the common law seldom governs as it did in this case. However, because the dismissal occurred early in 2014 and the employee found similar work by August 2014, i.e., months before the collapse of oil prices that began in October 2014, it may not offer much guidance for those in similar circumstances in today's harsher marketplace. Additionally, because this decision was the result of a summary judgment application, there was less evidence than there might have been following full trial, and so some caution must be exercised in adopting the court's approach to the issue of the character of the employment.

Facts

Mr. Bahrami was hired as Vice President, Finance in late May 2013 at an annual salary of $150,000 plus allowances and benefits. The parties did not disagree about Mr. Bahrami's job title or duties, but they did differ on how much status he was accorded within AGS. Mr. Bahrami argued he was a member of the executive team, a true vice president with high-level responsibilities. AGS argued he was operating at a lower, albeit senior, management level. Approximately eight-and-a-half months after Mr. Bahrami started with AGS, the company terminated his employment without cause and without notice. He was paid $6250 in severance pay. After a little less than five months of searching for a new job, Mr. Bahrami was hired as a corporate controller, but at a lower salary.

General Principles

As Justice Shelley notes, employers may terminate the employment of their employees on indefinite-duration contracts without cause if the employee is given reasonable notice of termination (at para 18, citing *Machtinger v HOJ Industries Ltd*, 1992 CanLII 102 (SCC), [1992] 1 SCR 986 at 997). The question of what is a reasonable notice period is a matter of fact to be determined on a case-by-case basis. The factors which courts must consider are well settled and taken from the judgment of McRuer CJHC in *Bardal v Globe & Mail Ltd* (1960), 24 DLR (2d) 140 (Ont H Ct J) at para 21:

> The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of

> the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

This oft-cited starting point — approved by the Supreme Court of Canada in *Machtinger* at 998-99 and again in *Wallace v United Grain Growers Ltd*, [1997] 3 S.C.R. 701 at para 82 — lists four factors: (1) the "character" of the employment, (2) the length of the employment, (3) the age of the employee, and (4) the availability of similar employment. These factors are not exhaustive (*Wallace* at para 82), but, as Justice Shelley notes (at para 20), they were all that needed to be considered in Mr. Bahrami's case.

"Character of the employment"

While "character of employment" may include more than job status, it was the rank of Mr. Bahrami's job within the AGS hierarchy that was the focus of the court's analysis of this factor. As noted by Justice Shelley, courts generally apply a factual presumption (i.e., they take judicial notice) that the higher up an employee is in a company's hierarchy, the longer the length of notice the employee should receive if their employment is terminated without cause (at para 21). According to Justice Shelley (at para 23) and Peter Neumann and Jeffrey Sack, eText on Wrongful Dismissal and Employment Law, 1st ed, Lancaster House, Updated: 2015-03-30 (CanLII) at 6.2.2.1.1, this presumption is based on the idea that there are fewer employment opportunities with similar salaries and benefits open to those with the specialization and skills higher managerial positions demand. Why this is relevant to the "character of employment" factor and not the "availability of similar employment" factor is not made clear; it seems like there may be some double counting if this presumption is used.

Not only was there a disagreement between the parties about how much status Mr. Bahrami was accorded within AGS, there is also disagreement within the case law on the weight to be given to the "character of employment" factor. As Justice Shelley notes (at para 23), one of the leading cases on the challenge to the presumption that high status within an organization's hierarchy requires longer notice periods is *Cronk v. Canadian General Insurance Co*, 1994 CanLII 7293 (ON SC), 19 OR (3d) 515 (Gen Div), reversed, 1995 CanLII 814 (ON CA), 25 OR (3d) 505 (CA). The trial judge awarded a lengthy twenty month period of notice to a 55-year old clerical employee with 29 years' service but no university education, based on empirical studies showing that it was easier for those with post-secondary training to find alternative employment than it was for high school graduates. On appeal, the majority of the Ontario Court of Appeal reversed, upholding the distinction between clerical and managerial employees in the "character of the employment" factor.

Although the challenge to the factual presumption was unsuccessful in *Cronk*, the Courts of Appeal in New Brunswick and British Columbia subsequently refused to take judicial notice of the supposed nexus between the character of the employee's former position, and the length of time it might take that employee to find alternative employment: *Bramble v Medis Health and Pharmaceutical Services Inc*, 1999 CanLII 13124 (NB CA), 46 CCEL (2d) 45, and *Byers v. Prince George (City)*, 1998 CanLII 6422 (BC CA), 38 CCEL (2d) 83. Even the Ontario Court of Appeal has called the "character of the employment" a factor of "declining importance": *Di Tomaso v Crown Metal Packaging Canada LP*, 2011 ONCA 469 (CanLII) at para 27 and *Arnone v Best Theratronics Ltd*, 2015 ONCA 63 (CanLII) at para 11.

These diverging lines of cases have been considered previously in Alberta. However, in *Tanton v. Crane Canada Inc*, 2000 ABQB 837 (CanLII), Justice Watson expressly declined to resolve any disagreement between *Bramble* and *Cronk* (at para 163). The employee in *Tanton* was a warehouse worker with limited skills and the court held that his hourly rate of pay "already brings about enough recognition of any sort of 'senior/junior' discrepancy on character of employment". As a result, the employee was awarded a 22-month notice period, near the top end of notice periods for wrongful dismissal (at para 167). It does appear that the court in *Tanton* did favour the *Bramble* approach because Justice Watson rejected the presumption affirmed by the Court of Appeal in *Cronk.*

Justice Shelley did expressly indicate that she was persuaded by the reasoning in *Bramble* and the line of cases adopting the same approach (at para 33). She tied her disavowal of the presumption that high status within an organization's hierarchy requires longer notice periods to Alberta's post-2008 economic and job market uncertainty, the age of the *Bardal* and *Cronk* decisions (55 and 20 years respectively), and an increasing reluctance on the part of courts to make factual presumptions rather than rely on evidence. That this was a summary judgment application, with limited evidence, seemed to weigh heavily. Justice Shelley concluded that, without clear evidence of an employee's status within an organization's hierarchy and the relevance of that status to the employee's prospects for re-employment, she did not see any basis for taking judicial notice "of the difference made by a distinction between an executive-level employee and a non-executive senior manager in Alberta at the time of Mr. Bahrami's termination" (at para 33).

The distinction between an executive-level employee and a non-executive senior manager that Justice Shelley refused to draw is, however, a much finer distinction than that between an executive and a warehouse worker, as in *Tanton*, or between a senior manager and a clerical employee, as in *Cronk*. It is difficult to see the presumption, had it been applied, would have done much work in this case. Justice Shelley ends up characterizing Mr. Bahrami's employment as that of "a senior manager with substantial recognition of and key indicia of an executive status" (at para 34), a compromise between the parties' positions.

"The length of service of the servant"

AGS had argued that Mr. Bahrami's short period of service — less than nine months — required a shorter notice period, whereas Mr. Bahrami argued that the short period of employment was less relevant due to his higher status. Justice Shelley appears to have sided with the employer on this factor (at para 38).

"The age of the servant"

Mr. Bahrami's age of 44 years was not argued as something that called for either a longer or shorter notice period. It lay in the middle of the range of ages for typical productive employment (at para 35).

"The availability of similar employment, having regard to the experience, training and qualifications of the servant"

Justice Shelley acknowledged that "the availability of similar employment" factor is a prediction to be made as of the time of the employee's termination. The general rule is that the approach to this factor should be prospective, based on the situation at the time of dismissal, and not on how long it actually took the employee to find similar employment (at para 36). However, Justice Shelley relied on the British Columbia Court of Appeal decision in *Saalfeld v Absolute Software Corp*, 2009 BCCA 18 (CanLII), 71 C.C.E.L. (3d) 29, holding that a judge could consider the dismissed employee's job search as evidence of the availability of alternative employment (at para 36). The fact it took Mr. Bahrami slightly less than five months to find similar employment seemed to be relevant to the result.

Similar Cases

After discussing the four *Bardal* factors, Justice Shelley then turns to eight previously-decided cases she characterized as "similar" and sets out three of the four *Bardal* factors for each case. The availability of similar employment was not summarized in her review; only job title, age and length of employment were presented (at paras 40-47). Recall that Mr. Bahrami, age 44, had been employed for almost nine months in what Justice Shelley determined to be a senior position with indicia of executive status.

Case	**Title**	**Age**	**Length of employment**	***Severance pay award***
Harvey v Shoeless Joe's Ltd, 2011 ONSC 3242 (CanLII)	Vice-President, Operations	41	5-1/2 months	*2-1/2 months*
Taner v Great Canadian Gaming Corp, 2008 BCSC 129 (CanLII)	Marketing Vice President	36	Almost 11 months	*10 months*
Martin v International Maple Leaf Springs Water Corp (1998), 1998 CanLII 6739 (BC SC)	A senior operating and marketing position	46	9 months	*Almost 11 months*
Campbell v Wellfund Audio-Visual Ltd (1995), 1995 CanLII 294 (BC SC),	Vice President	40	8-1/2 months	*6 months*
Miller v Goldfan Holdings Ltd (1992), 44 CCEL 224 (Ont Ct J (Gen Div))	Vice President	46	5 months	*4 months*
McDonald v LAC Minerals Ltd, 1987 CarswellOnt 2333 (Ont SC (H Ct J))	Corporate Controller	37	Almost 11 months	*9 months*
Hall v Canadian Corporate Management Company Ltd (1984), 4 CCEL 166 (Ont SC (CA))	Vice President of Marketing and Merchandising	51	Almost 11 months	*6 months*
Hoff v Lampliter Lighting Corp (1978), 93 DLR (3d) 634 (BC SC)	Vice President of Finance	49	Almost 11 months	*3 months*

In addition to the missing "availability of similar employment" *Bardal* factor and the wide range in what has been considered reasonable notice in these cases cited as similar to Mr. Bahrami's

circumstances — from 2-1/2 months to 11 months — the age and jurisdiction of these cases is notable. When Justice Shelley stated that she was persuaded by the reasoning *Bramble*, one of the reasons she advanced was that *Bardal* was decided 55 years ago and *Cronk* was decided 20 years ago (at para 33). She contrasted the age of these decisions with the frequent reports of economic and job market uncertainty in Alberta these days. But only two of Justice Shelley's comparable cases were decided in 2008 or later; the rest were decided 17 to 37 years ago. None are Alberta decisions. As a result, the emphasis in this list of cases is on the job title and the length of employment and it is very acontextual.

Conclusion

Justice Shelley determined that a reasonable period of notice in this case was six months. Coincidently, that period is very close to the 6-1/2 month average of the comparable cases she cited. It is also very close to the five months it took Mr. Bahrami to secure similar employment.

As Mr. Bahrami did not receive six months' notice, he was entitled to damages of $60,000 in lieu for the five months between his dismissal and the start of his new job. He also received the difference between the salary of his new job as compared to his old job for the remaining one month, plus his car allowance and benefits and less the amount of severance pay he had already received.

Because this matter was heard as a summary judgment application, with no facts in dispute and with senior counsel experienced in employment law submitting written briefs, the decision was handed down only three weeks after the matter was heard and only eighteen months after Mr. Bahrami was wrongfully dismissed. That might seem like a long time to Mr. Bahrami, but it is a relatively quick resolution for a contested court action in the Court of Queen's Bench of Alberta. Probably the only way the dispute could have been resolved much quicker was if Mr. Bahrami's employment contract with AGS had contained termination provisions, thereby precluding the need for (and possibility of) a wrongful dismissal action.