

## Court of Appeal Confirms Employer's Financial Circumstances Are Irrelevant in Determining Employees' Right to Common-Law Notice of Termination



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Daniel is a partner of the firm and a member of our Employment & Labour Group. He represents and advises management and employers on a wide variety of labour, employment and human resources/workplace issues.

You are a senior manager at a medium-sized logistics and warehousing facility. You have been tasked with trimming costs given a drop in fiscal year sales and customer renewals. Unfortunately, that will result in a reduction of headcount.

Given your role and experience, you know that employees dismissed without cause are entitled to notice or pay in lieu of notice. You even know that, besides statutory requirements, sometimes severance packages are offered to employees in recognition of additional employee rights to "reasonable notice" at common-law. The amount of the severance packages has always reflected your organization's financial realities. Indeed, you have only previously "let go" staff due to budgetary concerns. As such, the packages have usually been lower than what you understand (from your HR friends) to be what is

"market" for bigger entities where financial concerns had not factored into the equation. Your employees have usually "signed off" without too much fuss.

However, with the recent dismissals, two employees have retained counsel and have asked for additional severance that is far beyond what your severance package has offered. The "ask" seems excessive and does not reflect either the size of your organization or the current financial difficulties confronting it. Surely, counsel for the employee must recognize your organization's current state of affairs and adjust (downward) his/her demand accordingly?

Unfortunately, given a very recent decision from the Ontario Court of Appeal, the answer to this question is "no".

## The Case

In *Michela v. St. Thomas of Villanova Catholic School*, one of the issues on appeal was whether the employer's poor financial situation should be considered in determining the employee's entitlement to pay in lieu of notice at common-law.

The three dismissed employees were employed for 13, 11 and 8 years. The lower Court had awarded the employees 12 months' pay in lieu of notice but then discounted the amount to 6 months in recognition of the employer's financial realities. The Court noted that the employees were well aware that the employer could not provide security of employment to the same extent as "larger, more established and better funded institutions."

The Court of Appeal reversed the decision and commented that an employee's right to reasonable notice at common-law is based on the following factors first set out in *Bardal v. The Globe & Mail Ltd.*: character of the employment, length of service, age, and availability of similar employment. The employer had tried to argue that its financial circumstances should be considered as part of the "character of employment", therefore reducing the notice period. The Court of Appeal was not impressed with this argument. In very clear and blunt reasoning, the Court of Appeal stated:

[15] In my view, the motion judge erred in considering an employer's financial circumstances as part of the "character of the employment".

[16] The character of the employment refers to the nature of the position that had been held by the employee – the level of responsibility, expertise, and so on...

[17] ...It suffices to say that the character of the employment, like the other *Bardal* factors, is concerned with the circumstances of the wrongfully dismissed employee. It is not concerned with the circumstances of the employer. An employer's financial circumstances may well be the reason for terminating a contract of employment – the event that gives rise to the employee's right to reasonable notice. But, an employer's financial circumstances are not relevant to the determination of reasonable notice in a particular case: they justify neither a reduction in the notice period in bad times nor an increase when times are good.

[Emphasis Added]

The Court of Appeal found that 12 months' pay in lieu of notice was appropriate and that no "discount" should apply.

### What does this mean for Employers?

While this decision does not exactly break new ground, it does affirm (from the highest Court in Ontario) that in assessing an employee's entitlement to notice of termination at common-law, Courts will not consider an employer's financial circumstances (even if those circumstances were the reason for the dismissal). The judicial enquiry is based on employee-specific factors like the employee's age, tenure, position, compensation and the likelihood of re-employment.

This decision will make it more difficult to control termination and severance costs for employers faced with budgetary problems that require staff reductions. As such, the decision is an important reminder that employers should have employees sign employment contracts with termination provisions. The termination provision can limit the employee's entitlement to the statutory minimum notice/pay in lieu of notice, which would have been 8 weeks' notice/pay for the employees in the case summarized above (assuming the employer's payroll was less than 2.5 million). Such a contract can be entered into at the time of hire or upon a promotion. Indeed, it can be entered into at any time provided the employee receives "consideration" (i.e. something of value). Besides limiting costs upon termination, perhaps more importantly an employment contract can provide certainty to the parties.

This decision also demonstrates that employers may have to adjust their budgets or, at least, their expectations when going through a restructuring or headcount reduction necessitated by difficult financial circumstances. If practical, consideration should be given to providing working notice of termination or offering alternative positions within the organization to staff in an effort to reduce any severance liability.

If you need any assistance with drafting contracts, undertaking a restructuring, or dealing with employee severance requests, please contact Daniel Pugen at [dpugen@torkinmanes.com](mailto:dpugen@torkinmanes.com).