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CHARACTER OF EMPLOYMENT AND
WRONGFUL DISMISSAL NOTICE:
CRONK V. CANADIAN GENERAL INSURANCE CO.

GRIFFITH ROBERTS†

A contract of employment contains an implied obligation that the employer will give reasonable notice of its intention to dismiss the employee without just cause. Any employer failing to give such reasonable notice is liable for breach of contract, with damages calculated by reference to "reasonable notice." If the court determines that an employee was entitled to six months notice, for example, damages will be awarded based upon the employee's income for that six month period.

The calculation of reasonable notice is highly fact-based. The main factors considered are those set out in *Bardal v. Globe & Mail Ltd.*¹

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 alternative employment, having regard to the experience, training and qualifications of the servant.²

The court will include other considerations, when appropriate, such as whether the employee was induced by the employer to leave her previous job.³

"Character of employment" has been an important consideration. The courts have consistently held that higher ranking employees—ones with more responsibilities, more education, more skills—are entitled to significantly longer notice periods than those em-

† B.A. (Memorial), LL.B anticipated 1995 (Dalhousie).

¹ (1960), 24 D.L.R. (2d) 140 (Ont. H.C.).

² *Ibid.* at 145. *Bardal* was recently cited with approval by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986.

³ D. Harris, *Wrongful Dismissal* (Toronto: Carswell, looseleaf ed.) at 4-6-4-7.

ployees with less valued skills. However, in *Cronk v. Canadian General Insurance Co.*,⁴ MacPherson J., of the Ontario Court of Justice, broke with precedent. Character of employment, he held, could not be used to reduce the award for a lower ranking, lesser skilled employee. A clerical employee was as entitled to her period of notice as was a company president, a managing editor, or a regional sales manager.

Should the judgment stand? If reference is made to prior case law, employment statistics, and underlying policy considerations, there appears no reason why it should not.

CRONK V. CANADIAN GENERAL INSURANCE CO.

In 1993, Canadian General Insurance Company (Company) made some substantial organizational changes. Edna Cronk, the victim of the Company's internal reorganization, lost her job. Cronk had been employed with the Company for 29 years. She possessed a Grade 12 education. She began working for the company in 1955, performing secretarial duties. In 1978 she received a minor promotion, from "rate clerk/stenographer" to "rate clerk/assistant underwriter." In this position, she performed mainly clerical functions. At the time of her dismissal, she was 55 years old.⁵

The Company offered Cronk a severance package equivalent to nine months' salary. Cronk refused, suing for the equivalent of 20 months' salary. The case proceeded on summary judgment motion.⁶

The Company acknowledged that Cronk's dismissal had not resulted from her performance, commitment or loyalty—she had not been dismissed with cause. Moreover, most of the factors set out in *Bardal v. Globe & Mail Ltd.*⁷ suggested that a lengthy notice award would be appropriate. Cronk was 55, a difficult age to find new employment. Twenty-nine years of service was a significant period of time. As she was dismissed during an economic downturn, there was little available alternative employment.⁸

⁴ (1994), 6 C.C.E.L. (2d) 15 (Ont. Gen. Div.).

⁵ *Ibid.* at 16–18.

⁶ *Ibid.*

⁷ *Supra* note 1.

⁸ *Ibid.*

The Company stressed "character of employment." As a clerical employee with little or no higher education or specialized training, Cronk, they argued, was not entitled to the same notice period as a senior manager or specialized employee. Higher ranking employees, they contended, were entitled to longer notice periods for two reasons. First, higher ranking and more specialized employees found it more difficult to find alternative, equivalent employment. Second, greater stigma attached to the dismissal of a senior employee, making it more difficult for that employee to find another good job.⁹

MacPherson J. refused to view Cronk's low position in the Company hierarchy as a negative consideration. "Character of employment" as an isolated factor, in his opinion, was irrelevant. In his view, any stigma created by a dismissal is not dependent on the employee's level of employment. A dismissal is a financial and emotional blow for all workers, a blow which the dismissed company president and the dismissed cafeteria worker suffer equally.¹⁰

MacPherson J. noted further that the Company had not presented any evidence that showed that senior and specialized employees had greater difficulty securing alternative employment. He noted that beyond the constructs of wrongful dismissal jurisprudence, it is generally accepted that those with education and training have greater access to employment. He cited two studies published by the Council of Ontario Universities that the unemployment rate of university graduates was significantly lower than the rate for those with only a high school education. The link between skills, education, and a difficulty obtaining suitable employment appeared far from clear.¹¹

Cronk was awarded damages in lieu of notice, based upon a 20 month notice period. The judgment is currently under appeal.¹²

⁹ *Ibid.* at 22-23.

¹⁰ *Ibid.* at 23.

¹¹ *Ibid.* at 25-26.

¹² B. B. Fisher, "Is Occupation Still a Relevant Factor In Determining Notice Periods in Wrongful Dismissal Cases?" (1994) 6 C.C.E.L. 29 at 39.

CASE LAW

Statistical Analysis

The courts have long distinguished between senior, high-level employees and those holding lesser positions. This proposition is supported by two statistical studies of wrongful dismissal court decisions. According to McShane and McPhillips,¹³ there are seven factors that significantly affect the length of a notice period: length of service, availability of alternative employment, age, salary, job status, employment cost, and the year in which the case was decided ("employment cost" refers to any losses which the employee incurred in order to acquire the employment, such as leaving a secure job or moving to another location).¹⁴

McShane and McPhillips found that length of service was the most important consideration, followed by the availability of alternative employment. The status and salary of the employee was also determinative. Individuals holding positions high in a company's hierarchy—chief executive officers and vice-presidents, for example—received longer notice awards than those in the lowest organizational positions. Similarly, employees with high salaries received more notice than employees who had been receiving lower salaries.¹⁵

Fisher and Goldfield analyzed wrongful dismissal cases across Canada reported between 1960 and 1987.¹⁶ In their study, they categorized job status according to six classifications: professionals; senior executives; middle managers; foremen, supervisors, and lower managers; sales managers and salespeople; and technical and clerical employees. Two sets of cases were studied: those involving employees 45 years of age and older with ten years or more service and those involving employees less than 45 years of age with less than ten years of service.

Senior ranking employees, on average, received higher notice awards than did lower ranking employees. For example, in cases decided between 1985 and 1987, a senior executive 45 years or older with more than 10 years of service received was entitled to approximately 21 months' notice. Similarly positioned professional

¹³ S. L. McShane & D. C. McPhillips, "Predicting Reasonable Notice in Canadian Wrongful Dismissal Cases" (1987) 41 Ind. Lab. Rel. Rev. 108.

¹⁴ *Ibid.* at 115.

¹⁵ *Ibid.*

¹⁶ Reported in Harris, *supra* note 3 at 4-43-4-49.

employees received 18 months' notice. Middle managers were entitled to 15 months' notice. Clerical and technical employees also received on average 15 months' notice, while sales managers and salespeople received 12 months' notice.¹⁷

In the case of employees less than 45 years old with less than ten years service, there were comparable differences in the length of notice awards. Professionals received on average nine months' notice; senior executives, seven months' notice. On the other end of the scale, clerical and technical employees received four months' notice. The results of this study indicate that lower ranking employees are generally held entitled to a significantly shorter period of notice.¹⁸

Historical Perspective

The idea that a contract of employment is terminable upon reasonable notice developed in the British courts in the nineteenth century.¹⁹ The courts gradually, and unevenly, moved away from the presumption of employment for a fixed term to a presumption of a contract terminable by notice.²⁰ What was "reasonable" depended largely upon the status of the job held.²¹ Freedland has commented:

[The English] common law, in applying the concept of reasonable notice, recognizes that a greater degree of security of employment is associated with the higher social standing of one type of occupation over another.²²

As early as 1908, Canadian courts had adopted the standard of reasonable notice, evaluating considerations quite similar to those considered today:

[W]hat is reasonable notice, depends upon the capacity in which the employee is engaged, the general standing in the community of the class of persons, having regard to their profession, to which the employee belongs [*sic*], the

¹⁷ *Ibid.* at 4-44-4-45.

¹⁸ *Ibid.*

¹⁹ M. R. Freedland, *The Contract of Employment* (Oxford: Clarendon Press, 1976) at 151-54.

²⁰ *Ibid.* at 143-51. See *Morrison v. Abernathy School Board* (1976), 3 Sess. Cas. (4th Series) 945 (H.L.).

²¹ *Ibid.* at 153-54.

²² *Ibid.* at 154.

probable facility or difficulty the employee would have in procuring other employment in case of dismissal, having regard to the demand for persons of that profession and the general character of the services which the engagement contemplates.²³

Current Canadian Case Law

In most current wrongful dismissal case-law it is acknowledged that character of employment is a relevant consideration. As a matter of course wrongful dismissal judgments contain a discussion of the employee's education, skills, and responsibilities.

The "character of employment" distinction is a fully developed principle. In the majority of cases, no justification or authority is provided to account for the proposition. For example, in *Coyes v. Ocelot Industries Ltd.*,²⁴ it is noted that the plaintiff performed duties which any "literate and ordinary minded labourer" could do, duties which required no high degree of skill or expertise and which entailed no supervisory responsibilities.²⁵ This was one of three factors that suggested that a lengthy notice period was not called for. Alternatively, in *Ansari v. B.C. Hydro and Power Authority*,²⁶ McEachern C.J.S.C. noted that the plaintiffs

are all highly skilled graduate engineers whom B.C. Hydro was satisfied to employ in responsible positions. Those factors alone are sufficient to entitle these employees to a longer notice period than in many other cases.²⁷

Though McEachern C.J.S.C. provided a relatively detailed review of the law of wrongful dismissal, he gave no reason or authority for this particular proposition.

Where any attempt is made to cite precedent for the proposition—and in most cases no such attempt is made—authority is cited in an anecdotal manner. For example, in *Gordies Auto Sales*

²³ *Speakman v. City of Calgary* (1908), 1 Alta. L.R. 454 (C.A.).

²⁴ [1984] 6 W.W.R. 248 (Alta. Q.B.). See also *Regan v. Commercial Union Assurance Co. of Canada* (1993), 48 C.C.E.L. 208 (B.C.S.C.).

²⁵ *Ibid.* at 248. See also *Augustine v. Nadrofsky Co.* (1986), 17 O.A.C. 297 (Div. Ct.).

²⁶ (1986), 13 C.C.E.L. 238 (B.C.S.C.).

²⁷ *Ibid.* at 244.

Ltd. v. Pitre,²⁸ Hughes C.J.N.B., writing for the New Brunswick Court of Appeal, stated:

From the cases referred to above and from the many others which I have read I conclude that the higher the rank or status of the position held by the servant and the larger the salary, the longer the period of notice must be to terminate the employment²⁹

Accordingly, the plaintiff, a shop foreman at a car dealership, was entitled to a lesser notice period.

On occasion, justification is given for the "character of employment" distinction. In the vast majority of these cases, reference is made to greater difficulties encountered by senior employees in the job market. In *Bohemier v. Storwahl International Inc.*,³⁰ Saunders J. stated:

A chief executive officer of a large corporation likely has fewer opportunities of similar alternative employment than does a general labourer. Therefore, it is said that the former is entitled to a longer period of notice.³¹

Similarly, in *Collins v. St. John's Publishing Co.*,³² Goodridge J. noted:

It may seem paradoxical that the higher up the employment scale one goes the longer period of notice one is entitled to. There are probably several reasons for this. One of the principal reasons probably is that there are fewer openings for alternative employment at the top than at the bottom.³³

The effect of the character of employment distinction is demonstrated clearly in *Foster v. Kockums Cancar Division Hawker Siddeley Canada Inc.*³⁴ At trial, the plaintiff, a sales manager with 26 years of service, had been awarded damages based upon a notice period of 20 months. The British Columbia Court of Appeal noted that the trial judge had relied upon *Smith v. Pacific National*

²⁸ (1977), 73 D.L.R. (3d) 559 (N.B.C.A.).

²⁹ *Ibid.* at 563.

³⁰ (1982), 142 D.L.R. (3d) 8 (Ont. H.C.J.).

³¹ *Ibid.* at 12.

³² (1980), 27 Nfld. & P.E.I.R. 45 (Nfld. S.C.T.D.).

³³ *Ibid.* at 56-57.

³⁴ (1993), 83 B.C.L.R. (2d) (C.A.) [hereinafter *Foster*].

Exhibition.³⁵ Hollinrake J.A., writing for the majority, distinguished the case:

Smith was clearly in upper management. At that level the availability of similar employment would be a very significant consideration [T]he notice period must be approached on the basis that the respondent was in middle management and in my opinion this is a significant difference. . . .³⁶

The notice period was accordingly reduced by five months.

It has been suggested in at least one case that low-paid unskilled employees are only entitled to the notice periods prescribed by statute. *Pelech v. Hyundai Auto Canada*,³⁷ a unanimous judgment of the British Columbia Court of Appeal, concerned an employee in his early twenties who had worked for Hyundai for three and one-half years, holding the position of "warehouse material handler." At trial he was awarded damages based on a notice period of four months. The Court of Appeal, however, noted that the employee was unskilled, had not been promoted, and held a position which entailed few responsibilities. The *Employment Standards Act*³⁸ set the appropriate, and in their opinion, generous standard for "hourly paid employees engaged in menial or unskilled positions."³⁹

Counsel for Canadian General, it would appear, were arguing a tried and true judicial nostrum: senior employees are disadvantaged in the job market. Longer notice periods for senior employees merely serve to level the playing field, so that the chief executive officer and the labourer are equal before the law. The case law reveals a level of legal reasoning that is uncritical, nonscientific and quite unconvincing. It is ironic that MacPherson J. has recently been criticized for the "serious error" of conducting and relying upon his own "social and statistical research."⁴⁰ Had he cited "cases I have read" and relied upon propositions completely unsupported by fact, his remarks would have passed without comment, becoming part of the accepted jurisprudence.

³⁵ (1991), 34 C.C.E.L. 64 (B.C.S.C.).

³⁶ *Supra* note 34 at 211.

³⁷ (1991), 63 B.C.L.R. (2d) 24 (C.A.).

³⁸ S.B.C. 1980, c. 10.

³⁹ *Supra* note 37.

⁴⁰ *Supra* note 12 at 39.

UNEMPLOYMENT: PERCEPTIONS AND STUDIES

Outside wrongful dismissal case law, there is a general perception that a skilled, educated population is an employed population. Recently, the Atlantic Provinces Economic Council noted with alarm the high number of people in the Atlantic provinces who had less than a Grade 9 education.⁴¹ Over 75 percent of such people were, according to the council, not employable, given their poor education and skills. The council stated: "Put simply, the less education you have, the less employable you are in the changing economy of the 1990s."⁴²

In business publications, it is often claimed that there is a mismatch between an unskilled population and skilled positions. Technological change is occurring at an increasing rate in Canada's manufacturing industries, with the percentage of unskilled positions decreasing.⁴³ The message is clear: despite high unemployment rates, jobs are available to those with the proper skills and education.⁴⁴

Studies based upon Statistics Canada data also suggest that the skilled and the educated are not disadvantaged when it comes to finding alternative employment. Those on long term unemployment have, on average, lower levels of unemployment than the work force in general.⁴⁵ Corak noted that statistically there is no simple relationship between education and length of unemployment, particularly during a severe economic downturn. A higher level of education would in some circumstances imply a longer duration of unemployment, and in other circumstances, a shorter duration of un-

⁴¹ "Of Cycles and Structures, Job Losses, and Education Levels" 37 *The Atlantic Provinces Economic Council Newsletter* (May, 1993) 1.

⁴² *Ibid.* at 2.

⁴³ "Until NAFTA Creates New Jobs, There's the Small Matter of Layoffs" 81 *Financial Times of Canada* (7 September 1992) 6. See also "Some Occupations Hit Harder: Workers with Least Skills Most Often Out of a Job" *Calgary Herald* (3 December 1991) B13.

⁴⁴ See, e.g., "A Scarcity of Jobs: With Unemployment So High, Why are Thousands of Jobs Going Unfilled" *Toronto Star* (17 July 1993) D1, D4. See also C. Ritchie, "Lost Jobs and the Skills Gap (Excerpt from Address by Bank of Nova Scotia Chairman Cedric Ritchie)" *The Globe and Mail* (4 February 1994) B6.

⁴⁵ G. Picot, *Unemployment and Training* (Ottawa: Statistics Canada, Social and Economic Studies Division, 1987) at 23. See also C. M. Beach & S. F. Kalinski, "The Distribution of Unemployment Spells: Canada, 1978-82" 40 *Ind. Lab. Rel. Rev.* 254.

employment. During periods of economic recovery, however, the better educated were the first to find new jobs.⁴⁶

The assumption made by the courts that the educated or skilled worker will have a more difficult time finding suitable alternative employment, if not wrong, is clearly unfounded.

POLICY CONSIDERATIONS

Christie *et al.* suggest that reasonable notice is based upon, among others, the following policy goals: cushioning the financial blow of unemployment, encouraging labour mobility by providing an employee with the resources to find alternate employment, recognizing that an employee has some form of propriety interest in her job, and acknowledging superiority based upon social and economic status.⁴⁷

Two of the factors set out in *Bardal v. Globe and Mail Ltd.*,⁴⁸—age of the employee and availability of alternative employment—relate directly to the concern that the dismissed employee should have a financial cushion while she searches for alternative employment. It is perceived, correctly,⁴⁹ that an older employee will have a more difficult time finding new work. Similarly, if there is less alternative employment available, the employee will need a longer period of time to find alternative work.

As discussed above, the “character of employment” distinction is justified on the basis that fewer comparable job openings exist for senior and skilled employees. The court provides more lasting financial aid to the senior employee, on the understanding that such an employee requires a longer time to find a similar job.

The “length of service” consideration clearly does not relate simply to the need of an employee for a financial cushion while she finds alternative employment. All other factors being equal, an

⁴⁶ M. Corak, *The Duration of Employment and the Dynamics of Labour Sector Adjustment: Parametric Evidence from the Canadian Annual Work Patterns Survey, 1978–80, 1982–85* (Ottawa: Economic Council of Canada, 1990) at 3, 23.

⁴⁷ I. M. Christie, G. J. England & W. B. Cotter, *Employment Law in Canada*. 2d ed. (Toronto: Butterworths, 1993) at 611.

⁴⁸ *Supra* note 1.

⁴⁹ See Statistics Canada: Household Surveys Division, *Labour Force Annual Averages: 1993* (Ottawa: Minister of Industry, Science, and Technology, 1994) at B-59.

employee with fifteen years of steady employment with one particular employer is not less employable than an individual who has worked for the employer for only five years. Such an employee would not require a longer period to find a new job.

The courts appear to recognize that long-term employees acquire—either as a reward or a right—a stronger entitlement to job tenure. As each year of service passes, the right to a longer period of notice accrues to an employee. It seems probable that the courts are also recognizing that high-ranking employees, like long-term employees, deserve a greater notice period. Job security flows from the status and importance of the employee's position.

This appears to be the subtext of many decisions. It is clearly the case in *Pilon v. Great West Steel Industries Ltd.*⁵⁰ There, the plaintiff was employed as the co-pilot of a small private jet operated by the defendant corporation. Murray J. noted that although the plaintiff did not hold a managerial position, his job was of great importance—he “had the lives and safety of eight passengers in his hands.”⁵¹ Accordingly, he was entitled to a longer period of notice. Obviously, Murray J. was not concerned that a person who had held such a position of responsibility would find it more difficult to find alternative employment. Employees holding “important” positions simply deserve more.

This line of reasoning, however, overlooks one important point. The reward for higher ranking employees is built into the calculation of damages. Managerial and specialized employees, employees holding positions of responsibility, and employees holding the lives and safety of others in their hands, generally receive higher salaries than employees who perform unskilled duties. The chief executive officer earns more than the cafeteria worker. The senior executive receives more than the “middle manager.”

A damage award for wrongful dismissal is the product obtained when reasonable notice—commonly expressed in months—is multiplied by the employee's monthly salary. An employee with a low salary will receive less damages than an employee with a higher salary, even if both are entitled to an identical notice period. If the courts see a need to further reward higher paid employees, surely it would be appropriate to provide a convincing justification for such a move.

⁵⁰ (1985), 8 C.C.E.L. 270 (B.C.S.C.).

⁵¹ *Ibid.* at 271.

IMPLICATIONS

Regardless of whether the Ontario Court of Appeal overturns *Cronk*, the case represents a notable development in the law of wrongful dismissal. MacPherson J. has squarely confronted an issue that for too long has been surrounded by soft reasoning and unsubstantiated assumptions. If there is a rational justification for the character of employment distinction, it is time for the courts to find it.