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LONG TERM EMPLOYEE AWARDED TWENTY-SEVEN MONTHS NOTICE

By Barry Kwasniewski*

A. INTRODUCTION

In *Markoulakis v. SNC-Lavalin Inc.* (*"Markoulakis"*)[1], a civil engineer who was terminated on a without cause basis by his employer at age sixty-five, after more than forty years of service, was awarded twenty-seven months compensation in lieu of notice by the Ontario Superior Court of Justice. As this decision demonstrates, and in light of the abolition of mandatory retirement in Ontario and elsewhere, all employers, including charities and not-for-profits, face potential challenges and liability risks in terminating older workers.[2] The court held that due to a variety of exceptional circumstances, the plaintiff was justified in receiving a substantial award.

This *Charity Law Bulletin* will review the *Markoulakis* decision and comment on how charities and not-for-profits, as employers, may limit liability exposure to terminated employees by the use of carefully drafted written employment contracts.

B. FACTS

Mr. Markoulakis was an employee with just over forty years of service as a senior civil engineer. During this time, he performed his employment exclusively with SNC-Lavalin ("SNC"). Prior to terminating his employment, SNC offered Mr. Markoulakis an opportunity to continue his employment if he was willing

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[1] *Markoulakis v SNC-Lavalin Inc.*, 2015 ONSC 1081 (available on CanLII) [*Markoulakis*].
[2] Barry Kwasniewski, "The End of Mandatory Retirement: Legal Implications for Employers" (2010) Charity Law Bulletin No 229 online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb229.htm>.

to relocate to Saskatchewan. For personal reasons, he declined to relocate. One month prior to his termination, Mr. Markoulakis was informed that he would receive thirty-four weeks of compensation in lieu of notice by SNC.

The plaintiff proceeded by way of a summary judgment motion.[3] Mr. Markoulakis argued that he was entitled to thirty months' notice in light of the exceptional circumstances of his situation. While the parties agreed that the Court had the discretion to award a reasonable notice period beyond twenty-four months in exceptional cases, the parties disagreed as to whether there were grounds to exercise that discretion in this case. While the Court disagreed with the length of notice argued by the plaintiff, it decided that extending notice beyond twenty-four months, to twenty-seven months, was justified based on the facts and application of the relevant case law.

C. EXCEPTIONAL CIRCUMSTANCES AND REASONABLE NOTICE

In the absence of an employment contract which at least complies with the minimum standards set out in the Ontario *Employment Standards Act, 2000*,[4] the amount of termination notice to which an employee is entitled at common law is determined on a case-by-case basis. The Court will consider the following factors (which are known as the "*Bardal factors*" after a case of the same name):

> (i) the character of employment; (ii) the length of service; (iii) the age of the employee; (iv) the availability of similar employment having regard to the experience, training, and qualifications of the employee, and any other relevant circumstances.[5]

Mr. Markoulakis, relied on a number of cases in which employees with an average age of fifty-six years and average length of employment of twenty-seven years were awarded an average notice period by various courts of twenty-five months.[6] Based on these cases, and the fact that he was older (age sixty-five) and had more years of service, he argued that a thirty-month notice period should be awarded.

[3] Under the *Rules of Civil Procedure*. O. Reg. 575/07, s. 6 (1) a summary judgment is a motion made before the court to pronounce judgment on matter before it without full trial proceedings. Summary judgments are made on an entire case or on certain issues within the case. Motions for summary judgments are made pursuant to rule 20 of the Rules.
[4] *Employment Standards Act* SO 2000 c41.
[5] *Supra* note 1 at para 28 citing *Bardal v Globe and Mail Ltd.*, [1960] OJ No. 149, 24 DLR (2d) 140 (HCJ) at para 21 and *Machtinger v HOJ Industries Ltd.*, [1992] 1 SCR 986, 1992 CanLII 102 (SCC) at para 22.
[6] *Supra* note 1 at para 27

In its defence, SNC made three arguments against an extended period of notice, all of which the Court rejected. Firstly, SNC put forward case law that supported the proposition that Mr. Markoulakis' situation did not support the award that was being sought. For example, SNC argued that *Kerr*[7] and *Hussain*,[8] two cases that dealt with employees with over thirty years of service at their respective places of employment, were distinguishable from the facts presented by Mr. Markoulakis. The court found the circumstances "exceptional" in those cases, in that the plaintiffs held managerial or supervisory roles, as opposed to a professional position held by Mr. Markoulakis. In both cases, those plaintiffs received notice periods at or beyond twenty-four months.

Secondly, SNC argued that because they had offered Mr. Markoulakis a position in Saskatchewan, the refusal to relocate constituted a failure of his duty to mitigate his alleged wrongful dismissal damages. However, as noted above, the court accepted Mr. Markoulakis' rejection of the move for personal reasons.

Thirdly, SNC argued that Markoulakis had training and qualifications that would enable him to find alternate employment. However, by the date of the summary judgment motion, Mr. Markoulakis had used up the thirty-four weeks of pay provided by SNC without successfully obtaining employment in a similar position, despite having diligently seeking re-employment.

The circumstances the Court considered exceptional, and justifying an extended notice period, were the plaintiff's over forty years of service, his age of sixty-six at the date of the motion, and that he had worked only for SNC for that entire period. In light of the evidence, the Court found that Mr. Markoulakis' exceptional circumstances justified a reasonable notice period extending notice beyond twenty-four months to twenty-seven months.

It is important to note that the motion was heard well before the expiry of the twenty-seven month notice period, and while it remains possible that the plaintiff would obtain new employment within that period, the Court ordered that SNC pay the compensation monthly for the remaining duration of the notice period. In the event the plaintiff secured new employment, SNC's monthly payment obligation would be reduced by the amount of the plaintiff's earnings from employment or business. By structuring the judgment in

[7] *Russo v Kerr*, 2010 ONSC 6053 (available on CanLII) [*Kerr*].
[8] *Hussain v. Suzuki Canada Ltd.*, [2011] O.J. No. 6355, 100 C.C.E.L. (3d) 295 (S.C.) [*Hussain*].

this manner, the Court addressed the possibility of the plaintiff being overcompensated if he did find new employment during the notice period.

D. CONCLUSION

The *Markoulakis* decision demonstrates the importance of carefully drafted employment contracts, which can effectively limit the termination obligations and liabilities of employers, including charities and not-for-profits. Where no contract exists, or where the contract does not contain an enforceable termination clause, charities and not-for-profits may find themselves faced with costly liabilities to terminated employees at common law. Employees of charities and not-for-profits who have long periods of service may be deemed by courts to fall within "exceptional circumstances", as was found in *Markoulakis*. Such situations could extend costly reasonable notice awards to twenty- four months, or more, upon termination. Charities and not-for-profits should have well-drafted employment contracts with clear termination clauses that, at the very least, meet the minimum standards under the ESA to limit these liabilities. Care must be taken in drafting termination clauses to ensure that they are compliant with the ESA, otherwise they may be held to be unenforceable, and the result being the employee will revert to his or her common law rights.

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