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## **EMPLOYER FINANCIAL STATUS WILL NOT REDUCE TERMINATION NOTICE**

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*By Barry Kwasniewski\**

### **A. INTRODUCTION**

Financial difficulties are a common reason for terminating employees, whether the employer is a not-for-profit or a for-profit business. In *Michela v St. Thomas of Villanova Catholic School*,<sup>1</sup> a recent decision of the Ontario Court of Appeal, the Court clarified that where an employer is in difficult economic circumstances, those circumstances “do not justify a reduction of the notice period to which an employee is otherwise entitled.”<sup>2</sup> This *Charity & NFP Bulletin* will review the *Michela* decision and comment on how charities and not-for-profits may reduce their exposure to liability so that, should financial difficulty arise, such as those that have been reported in the press recently concerning Goodwill Industries in Toronto and other Ontario locations, they will not be faced with unexpected and onerous financial burdens in terminating employees.

### **B. FACTS**

The appellants, Domenica Michela, Sergio Gomes and Catherine Carnovale (the “Teachers”), were employed as teachers for the respondent St. Thomas of Villanova Catholic School (“VCS”), which operates as a private school in King City, Ontario. The Teachers had each been employed by a series of one-year contracts, over a number of years: Gomes for thirteen years, Michela for eleven years, and Carnovale for eight years.

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\* Barry W. Kwasniewski, B.B.A., LL.B., a partner, practices employment and risk management law with Carters’ Ottawa office and would like to thank Shawn Leclerc B.A., J.D., for his assistance in preparing this *Bulletin*.

<sup>1</sup> *Michela v St. Thomas of Villanova Catholic School*, online: < <http://canlii.ca/t/gm6xq> > [*Michela*].

<sup>2</sup> *Ibid.*, at para 22.

On May 31, 2013, each of the Teachers received a letter from VCS informing them that, due to low enrollment, their contracts would not be renewed. The Teachers were also told that they would be informed prior to the end of the school year if circumstances were to change. On June 27, 2013, Michela and Carnovale were informed by letter that they had been terminated. Gomes was informed by email on June 30, 2013, that VCS was not able to offer him a position at that time. Each of the Teachers was requested by VSC to sign a release and return it one week later. The Teachers refused to sign the release forms and instead commenced an action for wrongful dismissal in the Ontario Superior Court of Justice. The parties agreed to proceed by way of summary judgment, which was heard by Justice Lederer (the “motion judge”)

### **C. FIXED VERSUS INDEFINITE-TERM CONTRACTS OF EMPLOYMENT**

In its defence of the summary judgment motion, VSC argued that because the Teachers had entered into one year fixed-term contracts they were not entitled to the notice they were claiming, on the basis that any obligations to the teacher ended as of the expiry of the term. Because of various ambiguities in the contracts, which the motion judge noted are required to be “clear and unambiguous,”<sup>3</sup> that argument was rejected.

In light of this finding, the motion judge characterized the Teachers’ contracts as being of indefinite duration, and the Teachers were entitled to receive notice of termination, or pay in lieu of notice, in accordance with their rights at common law.

Michela and Carnovale each claimed they were entitled to damages based on 12 months’ notice, and Gomes claimed 14 months’ notice. However, the motion judge held that each Teacher was entitled to damages based on a notice period of six months, based on the proposition that including the financial difficulties faced by VSC fit within the character of employment consideration for determining reasonable notice periods. It was this reasoning that gave rise to the appeal. The motion judge reasoned at para. 100:

...I find that the notice period proposed is too long. I point out that, if notice for 12 months is reasonable, the School will have to pay the same amount for these teachers as if they had remained on staff for the year that was upcoming. Assuming that the other two teachers who were terminated

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<sup>3</sup> *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONSC 15 online: <http://canlii.ca/t/gfxvr> at para 13.

maintained the same rights, it is not difficult to see that the School would be unable to reduce its prospective deficit by terminating staff it did not need. The law does not ignore the dilemma of the employer. The teachers should be taken to understand this aspect of their employment and, in this case, were made aware of the concern. In this situation, I reduce the claim for notice by half, to six months.<sup>4</sup>

## **D. FINANCIAL STATUS AND REASONABLE NOTICE – THE COURT OF APPEAL**

The common law, with respect to the requirement to provide reasonable notice of termination, was succinctly stated by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*:

...employment contracts for an indefinite period require the employer, absent express contractual language to the contrary, to give reasonable notice of an intention to terminate the contract if the dismissal is without cause.<sup>5</sup>

On appeal, the Court of Appeal was asked to review the validity of reducing the reasonable notice period based on the financial circumstances of the employer. The Court noted that although the financial status of an employer may be a good reason to terminate an employee, it is not a factor that the courts should consider as part of the “character of the employment.”<sup>6</sup> The Court further noted that the calculation of reasonable notice, a fact specific exercise, must consider the circumstances of the employee which include: the character of employment, age and availability of similar employment as it pertains to an employee’s training, experience, and qualifications.<sup>7</sup> Accordingly, character of employment, the Court stated, is “concerned with the circumstances of the wrongfully dismissed employee,” and not “the circumstances of the employer.”<sup>8</sup>

The Court was careful to point out that the proposition that the financial concerns of the employer can be a factor in consideration of reducing a notice period was based on an incorrect interpretation of the decision in *Boheimer v Storwal International Inc.*<sup>9</sup> The Court emphasized that *Boheimer* stands for the proposition that, in uncertain economic times, “difficulty in securing replacement employment should not have the effect of increasing the notice period unreasonably.”<sup>10</sup> Further, an employer’s financial circumstances do not form part of the “character of the employment”, one of the defined relevant factors to consider in the calculation of an appropriate notice period. The fact that an employer is facing

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<sup>4</sup> *Supra* note 1 at para 8, quoting *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONSC 15 at para 100.

<sup>5</sup> *Machtinger v HOJ Industries Ltd.*, [1992] 1 SCR 986, cited at para 12 of 2015 ONCA 801.

<sup>6</sup> *Supra* note 1 at para 15.

<sup>7</sup> Factors taken from *Bardal v. Globe & Mail Ltd.*, [1960] O.W.N. 253 (HC) cited in *Michela* at para 13.

<sup>8</sup> *Supra* note 1 at para 17.

<sup>9</sup> *Bohemier v. Storwal International Inc.*, 1982 CanLII 1764 (ON SC) online:< <http://canlii.ca/t/g1jrj>>.

<sup>10</sup> *Supra* note 1 at para 20.

difficult economic times is therefore not a justification for the conclusion that reasonable notice, to which an employee may be entitled, should be reduced. The Court accordingly allowed the appeal and increased the period of reasonable notice applicable to the Teachers to twelve months.

## **E. OBSERVATIONS**

For many charities and not-for-profit organizations, fixed-term contracts can be an effective way of ensuring good fiscal management when annual budgets are dependent upon government funding for staffing purposes. In particular, legitimate fixed-term contracts protect employers against lengthy notice requirements that indefinite term contract employees are entitled to under the common law,<sup>11</sup> as long as the terms of the contract conform to the minimum standards of the Ontario *Employment Standards Act, 2000* (“ESA”).<sup>12</sup> However, as demonstrated by this case, there are pitfalls about which charities and not-for-profits need to be concerned.

Because of the consequences that fixed-term contracts have with regard to the employee protections of the ESA, and because of a presumption that employees are vulnerable parties when bargaining for employment contracts, the courts require “unequivocal and explicit language”<sup>13</sup> to enforce the terms of the contract. The law imposes this requirement in order to protect employees against overzealous employers who use their superior position at the bargaining table to take advantage of employees, and thereby escape the protections afforded to employees under the ESA.<sup>14</sup>

Employers need to be careful in the decision to use fixed-term contracts, as the risk of such contracts being found to be indefinite term contracts increases with the years that employees remain with the same employer. The courts will be wary of employers seeking to avoid the application of employment standards through the use of successive fixed-term contracts.

As exemplified in *Michela*, when the court construes a contract in an employees’ favour, it can lead to a finding that the contract is an indefinite term contract: a finding which will make reasonable notice periods, or pay in lieu thereof, available to those employees.

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<sup>11</sup> *Ceccol v Ontario Gymnastic Federation*, 2001 CanLII 8589 online:< <http://canlii.ca/t/1fnnp>> at para 25 [*Ceccol*].

<sup>12</sup> *Employment Standards Act*, SO 2000, c 41.

<sup>13</sup> Geoffrey England, *Individual Employment Law*, 2000, Toronto: Irwin Law quoted in *Ceccol* at para 25.

<sup>14</sup> *Supra* note 3 at para 13, see also *Ceccol* at para 26.

## F. CONCLUSION

While legitimate fixed-term employment contracts can be an important part of managing the affairs of charities and not-for-profit organizations, *Michela* demonstrates the risks of using such contracts, particularly with longer term employees, and the costly consequences that may result. There are other options to fixed-term contracts worth considering that can legally limit employer liability in the event of terminations. Such options include indefinite term contracts with enforceable termination clauses, as well as clauses providing the right to temporarily lay-off an employee in accordance with the ESA. Employers can also consider providing working notice to employees in appropriate situations rather than pay in lieu of notice. Should employers be facing difficult termination decisions, which may give rise to liability, legal advice should be considered before making such decisions.