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## **CHARITY MANAGER AWARDED TWENTY FOUR MONTHS NOTICE**

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*By Barry W. Kwasniewski\**

### **A. INTRODUCTION**

In *Ozorio v Canadian Hearing Society*<sup>1</sup> (“*Ozorio*”), a managerial employee who was terminated on a without cause basis by her employer at age sixty after thirty years of service was awarded twenty-four months compensation in lieu of notice by the Ontario Superior Court of Justice. The *Ozorio* decision highlights and summarizes the pay in lieu of notice principles applicable for older employees with significant terms of service.

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

### **B. CIRCUMSTANCES OF TERMINATION**

Stephanie Ozorio (the “plaintiff”) was dismissed without cause on November 30, 2015 as a result of a corporate restructuring. The plaintiff had served as the Regional Director (Toronto Region) of the Canadian Hearing Society (the “defendant”) since 2004, having served in other capacities with the defendant since 1985. The plaintiff was presented with a separation offer of \$93,000 in mid-November of 2015, which would have provided her with less than her annual salary of \$97,309.22 (exclusive of benefits) in exchange for her signing a release of any further claims. She turned down the offer, believing

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<sup>1</sup> *Stephanie Ozorio v Canadian Hearing Society*, 2016 ONSC 5440 (CanLII), online: <<http://canlii.ca/t/gt6px>>.

it to be “unfair and inadequate.”<sup>2</sup> The defendant then sent the plaintiff a termination letter offering “12 months’ pay (approximately \$97,000) and limited contribution of benefits for 2 months.”<sup>3</sup> The court also noted that “[n]o offer was made to provide the plaintiff with a letter of reference or any out-placement counselling services to assist her with alternative employment.”<sup>4</sup>

The offer contained in the termination letter was not accepted and the defendant then provided the minimum required termination pay, severance pay and benefit continuance in accordance with the *Employment Standards Act, 2000*.<sup>5</sup>

The plaintiff commenced an action for wrongful dismissal on December 15, 2015, and subsequently brought a motion for summary judgment, which was heard on July 6, 2016.

### C. COMMON LAW REASONABLE NOTICE

Essentially, the issue on the summary judgment motion was the determination by the court of the appropriate reasonable notice period at common law. As there was no employment contract between the parties specifying in advance what would be provided upon termination of employment, there was no dispute that the plaintiff was entitled to compensation based on common law principles. The dispute was what was “reasonable” in the circumstances.

The seminal decision on common law reasonable notice is *Bardal v Globe & Mail Ltd.*, which was cited by the court, at para. 13 of the decision:

Reasonable notice must be decided in reference to the particular facts of each case having regard to the factors as set out in *Bardal v. Globe & Mail Ltd.* (1960), [citation omitted]:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of notice must be decided with reference to each particular case, having regard to the character of employment, the length of service of the servant, the age of the servant

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<sup>2</sup> *Ibid* at para 7.

<sup>3</sup> *Ibid* at para 8.

<sup>4</sup> *Ibid*.

<sup>5</sup> *Ibid* at para 9.

and the availability of similar employment, having regard to the experience, training and qualifications of the servant.<sup>6</sup>

The court also cited *Drysdale v Panasonic Canada Inc.*, which in turn quoted from the Supreme Court of Canada decision in *McKinney v University of Guelph*, which confirmed that “a longer notice period will be justified for older long term employees who may be in a competitive disadvantage securing new employment because of their age.”<sup>7</sup>

The court also noted that “while 24 months may be the notional cap, which can be exceeded where exceptional circumstances are demonstrated, there have been numerous cases in which older and long term employees in non-executive positions such as the plaintiff have been found to be entitled to 24 months’ pay in lieu of notice.”<sup>8</sup>

The court cited *Paquette v TeraGo Networks Inc.*, where “Perell J. observed that older and long term employees should receive greater damages because they are at a significant disadvantage competing for work.”<sup>9</sup>

#### **D. APPLICATION OF FACTORS TO THE PLAINTIFF AND THE REASONABLE NOTICE PERIOD**

The plaintiff had, as of the date of the motion, been unsuccessful in finding similar employment despite her efforts to do so. The plaintiff did have transferable skills, but the court cites *Drysdale v Panasonic Canada Inc.* where the court says “a potential new employer may view that individual as rather set in his ways and not as adaptable to change.”<sup>10</sup> As of July, 2016, the plaintiff was sixty-one, which the court observed can be an impediment to finding new employment, as she would need to compete with much younger candidates.<sup>11</sup>

As Regional Director the plaintiff’s responsibilities included “overseeing the day to day operations of a number of diagnostic, counselling, resources and support services, as well as the audiology clinic in the

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<sup>6</sup> *Ibid* at para 13, citing *Bardal v Globe & Mail Ltd.*, [1960] OWN 253, 24 DLR (2nd) 140 (HC) at para 21.

<sup>7</sup> *Ibid* at para 14, citing *Drysdale v Panasonic Canada Inc.*, 2015 ONSC 6878 at para 13, citing *McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545 at para 92.

<sup>8</sup> *Ibid* at para 21.

<sup>9</sup> *Ibid* at para 22.

<sup>10</sup> *Ibid* at para 16, citing *Drysdale v Panasonic Canada Inc.*, 2015 ONSC 6878.

<sup>11</sup> *Ibid* at para 17, citing *Hussain v Suzuki Canada Ltd.*, [2011] OJ No 6355, 100 CCEL (3d) 295.

Providence Hospital”, “involvement in community relations, relations with government funders, as well as providing long term program and services planning for the Toronto regional operations”, “manag[ing] up to 65 staff, with a number of managers reporting to her”, and “[s]he was responsible for overseeing a budget of \$8 million [...] report[ing] directly to the Chief Operating Officer.”<sup>12</sup>

The defendant argued that the plaintiff held a “mid to senior level managerial position - as such she is not entitled to a notice period of 24 months, which would be more appropriate with respect to an executive position.”<sup>13</sup> However, the court concluded that the plaintiff was “a very senior manager of the defendant’s largest regional office with significant operational responsibilities reporting directly to the defendant’s Chief Operations [*sic*] Officer.”<sup>14</sup>

In the result, the court ruled that “[g]iven the age of the plaintiff, the length of her employment with the defendant, more than 10 years as its Regional Director, a senior managerial position of significant responsibility, the limited availability of similar employment commensurate with her experience, training and qualifications, she is entitled to 24 months payment of salary and benefits in lieu of notice less compensation and benefits received under the ESA.”<sup>15</sup>

Finally, as there was a significant period of time before the expiration of that twenty-four month reasonable notice period, the court held that the entire monetary damage award was to be impressed with a trust in favour of the defendant. At the end of the twenty-four month reasonable notice period the plaintiff must account to the defendant any employment earnings obtained from new employment during that notice period. These earnings would effectively reduce the defendant’s monetary obligations under the judgment. The purpose of this aspect of the judgment is to avoid the payment of excessive damages to the plaintiff in the event that she was able to mitigate a portion of her damages by securing new employment during the notice period remaining as of the date of the judgment (August 30, 2016).

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<sup>12</sup> *Ibid* at para 4.

<sup>13</sup> *Ibid* at para 19.

<sup>14</sup> *Ibid.* at para 20.

<sup>15</sup> *Ibid* at para 25.

## E. CONCLUSION

While the court left it to the parties to calculate the precise amounts to be paid based on a twenty four month notice period, the final amounts to be paid to the plaintiff could easily exceed \$200,000 when the value of benefits are included. These are significant liabilities for most charities and not-for-profits. Any organizations that have long serving employees may face such liabilities in the event of a termination, whether due to a restructuring or any other reason. Not-for-profit or charitable status is not a factor that a court will consider in determining a reasonable notice period. Well drafted employment contracts with employees, with binding and enforceable termination clauses, remain the most effective way of limiting employer liabilities in the event of termination. However, care must be taken in the preparation of employment contracts, as termination clauses have been a frequent source of litigation.



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