
COURT AWARDS SUBSTANTIAL PAY IN LIEU OF NOTICE FOR SHORT TERM EMPLOYEE

*By Barry Kwasniewski**

A. INTRODUCTION

In *Brooks v Conference Board of Canada*¹ (“*Brooks*”), released on June 26, 2015, the plaintiff Nicole Brooks (“Ms. Brooks”), who was employed as a senior manager, was terminated without cause after only 2.5 years of service with The Conference Board of Canada. Despite concerted efforts to find re-employment, the plaintiff remained unemployed for nearly two years. Dissatisfied with the termination payment provided to her, equivalent to 3.38 months compensation in lieu of notice, Ms. Brooks commenced a lawsuit for wrongful dismissal in the Ontario Superior Court of Justice. For the reasons to be reviewed, the court awarded the plaintiff six months’ compensation in lieu of notice, citing the evidence of a difficult and saturated reemployment market in the region.

This *Charity & NFP Bulletin* will review the *Brooks* decision and comment on how termination without cause in a recessionary economy may expose employers to longer notice period awards for employees.

B. BACKGROUND

The Conference Board of Canada (“Conference Board”) is a private not-for profit organization which describes itself as “[t]he foremost independent, evidence based, not-for-profit applied research organization in Canada.”² The Conference Board offers a number of services to both the public and public

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¹ *Brooks v Conference Board of Canada*, 2015 ONSC 4087.

² See the description at “About Us” online: < <http://www.conferenceboard.ca/about-cboc/default.aspx>>.

service in a number of areas, and has expertise in research, economic forecasting and analysis, networking, conferences, leadership skill development, and building organizational capacity. Employees with the Conference Board are highly trained, many of them holding specialized skills and education.

C. FACTS

Ms. Brooks was hired by the Conference Board on November 1, 2011 as a “Senior Manager, Executive Networks” and was terminated on June 5, 2013. Her 2012 compensation statement stated her base pay was \$78,140, and with benefits her annual compensation totalled \$98,445. Termination payments made to Ms. Brooks by the Conference Board amounted to \$22,000, which was equal to 3.38 months of pay in lieu of notice.

Upon termination, Ms. Brooks actively sought employment, but was not successful in securing employment for a period of nearly two years. This was because of what the court accepted was a challenging job market for similar managerial positions in the Ottawa area. While both parties agreed that Ms. Brooks took reasonable steps to secure new employment, she argued that because of the downsizing of the Federal Public Service, reemployment opportunities with the region’s principal employer were severely limited. As the court noted: “[T]he downsizing has saturated the market with highly skilled people, many of whom do the same type of administrative work the Plaintiff does.”³

Ms. Brooks argued that reasonable notice should be 10 months in light of her particular skill set and the challenging job situation in the Ottawa area. The Conference Board argued that the appropriate notice period was 3.38 months based on the *Bardal*⁴ principles, which amounted to the \$22,000 already paid to her in compensation. The matter was determined by the Court by way of a motion for summary judgment brought by Ms. Brooks.⁵ The motion was heard before Justice Hackland.

D. RECESSIONARY MARKETS AND NOTICE AWARDS

The Court decided that the appropriate length of notice was six months. A substantial contributing factor leading to this assessment was the fact that the reemployment market in Ottawa during the period in

³ *Supra* note 1 at para 9.

⁴ *Bardal v Globe and Mail Ltd.*, [1960] OJ No. 149, 24 DLR (2d) 140 (Hcj)

⁵ Under the *Rules of Civil Procedure*. RRO 1990, Reg 194, 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.

question was a challenging one. This factor was evidenced by the numerous employment opportunities that Ms. Brooks attempted to pursue, without success, despite her diverse training and experience.

While both counsel cited a number of cases involving the termination of short-term employees, the Court held all of the cases were distinguishable on the basis of one or more of the *Bardal* factors. The monetary damages awarded to Ms. Brooks for six months of notice were fixed at \$45,315. The amount of \$22,000 was credited to the defendant for payment already made, and the difference of \$23,315 was awarded to Ms. Brooks in damages for breach of the employer's contractual obligation to provide reasonable notice or pay in lieu of notice.

E. CONCLUSION

The *Brooks* decision demonstrates how employers, including charities and not-for-profits, which terminate short-term employees without cause during a recessionary period, or in a saturated or difficult job market, may inadvertently be exposed to significant liability. While neither the state of the economy nor the job market are in the control of the employer, the fact remains that employers will likely bear some increased termination notice and/or pay obligations at common law in the event of a recessionary economy or a saturated job market. The *Brooks* decision also demonstrates the importance of having a carefully crafted employment contract. The Court noted that it was the Conference Board's "implied contractual obligation" to provide reasonable notice. Costly termination awards could be mitigated in circumstances such as those described in *Brooks* through written contractual termination clauses that meet at least the minimum standards prescribed by the *Employment Standards Act, 2000*.