

LONG-SERVING RADIO BROADCASTER PAID 21 MONTHS IN LIEU OF NOTICE

By Barry W. Kwasniewski*

A. INTRODUCTION

SUPPORTING EVIDENCE is essential for any employer arguing that an employee could have mitigated their damages by finding comparable employment after termination. The Ontario Superior Court in [*Rothenberg v Rogers Media Inc.*](#)¹ awarded a long-time radio broadcaster 21 months' compensation in lieu of reasonable notice after he was terminated by his employer and could not find another job in his field. Although the COVID-19 pandemic began during the plaintiff's reasonable notice period, the court did not hold that to be an exceptional circumstance, although the decision does not entirely settle the issue of how the pandemic may affect reasonable notice. This *Bulletin* summarizes the facts of the case and highlights the court's analysis of the issues.

B. BACKGROUND

THE FACTS of the case were not in dispute. Hal Rothenberg had worked for 55 years in radio — the entirety of his working life.² He had no high school or college diploma, and no other employment skills or training.³ He had worked as a news reporter and broadcaster for two Tillsonburg radio stations since 1998. When Rogers Media terminated his employment 20 years later in 2018, he was 73 years old, and they were paying him an annual salary of \$39,780.⁴ The company offered him 12.4 months of pay in lieu of

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¹ 2020 ONSC 5853 [Judgment].

² *Ibid* at para 4.

³ *Ibid* at para 10.

⁴ *Ibid* at para 7.

notice — 53.36 weeks’ of salary compensation; however, Rothenberg rejected that offer.⁵ As radio broadcasting is federally legislated by the *Canada Labour Code (CLC)*,⁶ Rogers then paid him the minimum statutory entitlement for termination and severance pay according to the *CLC*.⁷ They also offered him career counselling services. Unfortunately, he could not take advantage of those services because he required quadruple bypass surgery in December 2018 and regular medical treatment for a year thereafter.⁸

Rothenberg sued for wrongful dismissal damages in September 2019, after which Rogers paid him 18 months’ salary in lieu of notice (less deductions and tax as per CRA requirements): \$52,326.⁹ Although Rothenberg looked for similar employment, reaching out to contacts in the radio industry, he was unable to find a position within a one-hour commute of his home, which the court considered “reasonable”.¹⁰

As the economy in Southern Ontario significantly slowed down in March 2020 due to the COVID-19 pandemic and government response, the number of jobs dwindled while competition for fewer positions rose.¹¹ Rogers, which owned many radio stations, contended there were positions available in Woodstock, Brantford and London for which he could have applied; but Rothenberg was not aware of those openings since his termination.¹² Nightingale J. did not find Rogers’ evidence convincing that Rothenberg could have found unskilled work to compensate for the loss of his modest income, and he therefore did not look for any work outside his field due to his age, limited qualifications and health condition.¹³

C. ANALYSIS

THIS CASE was “one of those straightforward wrongful dismissal claims that is amenable to a Rule 20 summary judgment motion,” according to Nightingale J.¹⁴ Rule 20 of the *Rules of Civil Procedure* provides for a disposition without trial.¹⁵ The two issues to decide were: 1. What the appropriate notice

⁵ *Ibid* at para 8.

⁶ RSC, 1985, c L-2.

⁷ Judgment, *supra* note 1 at para 8.

⁸ *Ibid* at para 14.

⁹ *Ibid* at para 9.

¹⁰ *Ibid* at paras 12–13.

¹¹ *Ibid* at para 15.

¹² *Ibid* at para 16.

¹³ *Ibid* at paras 19–20.

¹⁴ *Ibid* at para 21.

¹⁵ RRO 1990, Reg 194.

period was; and 2. Whether Rothenberg failed to mitigate his damages. Citing *Hyrniak v Mauldin*,¹⁶ the judge found that neither of those two issues required a trial.¹⁷

1. What is the appropriate notice period?

Rothenberg sued for 30 months' compensation in lieu of notice, with no deduction for failure to mitigate his damages from loss of employment. Rogers, which had already paid him 18 months' compensation, argued the action should be dismissed, and further, that Rothenberg failed to mitigate.¹⁸ Citing precedent from the Ontario Court of Appeal, Nightingale J. noted that only "exceptional circumstances" would justify a reasonable notice period longer than 24 months.¹⁹

The "guiding principles" for reasonable notice from Ontario courts were provided in *Paquette v TeraGo Networks Inc.*,²⁰ and are as follows:

- a) An employee who is dismissed without reasonable advance notice of termination is entitled to damages for breach of contract based on the employment income the employee would have received during the reasonable notice period less any amounts received in mitigation of the loss.
- b) The purpose of requiring reasonable notice is to give the dismissed employee an opportunity to find other employment.
- c) The reasonableness of notice must be determined by reference to the facts of each particular case. In determining the length of notice, the court should consider, among other possible factors, the character of the employment, the length of service, the age of the employee and the availability of similar employment having regard to the experience, training and qualifications of the employee. The factors are not exhaustive and what is a reasonable notice period will depend on the circumstances of the particular case. The jurisprudence on the factors from *Bardal v Globe and Mail 1960*²¹ stresses that no one factor should be given disproportionate weight.²²

In Nightingale J's view, Rothenberg did not establish "exceptional circumstances" entitling him to damages greater than 24 months' of pay in lieu of notice, because the facts of his case were dissimilar to judgments where exceptional circumstances were found.²³ For example, exceptional

¹⁶ 2014 SCC 7, 366 D.L.R.(4th) 641 (S.C.C.).

¹⁷ Judgment, *supra* note 1 at para 22;

¹⁸ *Ibid* at paras 23–24.

¹⁹ *Ibid* at para 25; *Dawe v The Equitable Life Insurance Company of Canada*, 2019 ONCA 512.

²⁰ 2015 ONSC 4189.

²¹ [1960] O.J. No. 149.

²² Judgment, *supra* note 1 at para 26.

²³ *Ibid*, paras 28–30.

circumstances were assessed in *Keenan v Canac Kitchens Ltd.*²⁴ resulting in 26 months' compensation because the plaintiffs were supervisors with 32 and 25 years of service, and were "the public face of the employer to the world."²⁵ Rothenberg was evidently not in a similar position with his employer, according to the court. Citing *Minott v O'Shanter Development Company Limited*,²⁶ the judge also re-iterated there is no "rule of thumb" to calculate an appropriate number of months per years' of employment.²⁷

Applying the *Bardal* factors (above): due to his advanced age, the 20-year length of his service and limited employment prospects in a "shrinking industry" Nightingale J. found Rothenberg's reasonable notice period should be on the "higher" end of the scale.²⁸ His approximate salary under \$40,000 should not result in a reduced notice period.²⁹ The judge then discussed a number of cases to arrive at an appropriate notice period for Rothenberg of 21 months.³⁰

2. Did Rothenberg fail to mitigate his damages?

A terminated employee has a duty to mitigate the damages from the loss of employment, and is entitled to be put in as good a position as he would have been in if the contract had been performed properly by the employer, according to the principles of contract law.³¹ For an employment contract, mitigating damages means making reasonable efforts to find comparable employment.³² Nightingale J. found that Rothenberg made inquiries of contacts and internet searches but he did not find available positions within a reasonable driving distance, and Rogers did not challenge the evidence in this regard.³³ Based on the ruling in *Brito v Canac Kitchens*,³⁴ Rothenberg was under no obligation to mitigate his damages when he was incapable of working during his medical treatments.³⁵

Rogers did not provide evidence to the court that there were available positions potentially available to Rothenberg. Notably, the company did not provide evidence "from its own career counselling

²⁴ 2016 ONCA 79.

²⁵ Judgment, *supra* note 1 at para 29.

²⁶ (1999) 42 O.R. (3d) 321.

²⁷ Judgment, *supra* note 1 at para 32.

²⁸ *Ibid* at paras 32–36.

²⁹ *Ibid* at para 33.

³⁰ *Ibid* at paras 37–47.

³¹ *Ibid* at para 48.

³² *Ibid* at para 49.

³³ *Ibid* at paras 52–53.

³⁴ 2012 ONCA 861.

³⁵ Judgment, *supra* note 1 at para 54.

service to suggest there were any such radio broadcasting positions available in southwestern Ontario to Rothenberg since his termination including after the admitted significant economic downturn as of March 2020 because of COVID-19.”³⁶ Therefore, the employer did not satisfy the onus that Rothenberg failed to mitigate his damages by taking reasonable steps to find comparable employment during the notice period, or that he would have found such employment if he had been more diligent in searching for it, *Nightingale J.* ruled. The judge held the plaintiff entitled to 21 months’ of compensation — less 18 months already paid out — for an additional payment of \$9,945, plus pre-judgment interest.³⁷

D. CONCLUSION

THERE ARE two important takeaways for employers from this case. First, given the facts, it appears that COVID-19 does not necessarily provide “exceptional circumstances” that may allow for a reasonable notice period to exceed 24 months. Second, it is necessary for the employer to provide evidence substantiating any argument that the employee failed to mitigate damages in finding suitable, comparable employment. That burden is more onerous depending on the *Bardal* factors, especially if the employee has a lengthy term of service, is advanced in age, and has any medical conditions, even if those medical conditions arise after termination but during the reasonable notice period. This case does not completely settle the matter about whether the COVID-19 pandemic could provide exceptional circumstances, as the suit was filed before the pandemic began. It remains to be seen how reasonable notice periods may be treated if a termination occurred during the ongoing pandemic.

³⁶ *Ibid* at para 58.

³⁷ *Ibid* at paras 60–61.