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PREGNANCY A FACTOR FOR COURT IN REASONABLE NOTICE DECISION

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A. INTRODUCTION

A RECENT Ontario Superior Court decision considered pregnancy as a factor for calculating the reasonable notice period when an employee's position is terminated. Released on February 26, 2021, *Nahum v Honeycomb Hospitality Inc.*[1] cited Ontario precedent in awarding five months' pay-in-lieu of reasonable notice to the plaintiff, who had worked for the employer for a total of four-and-a-half months, but was pregnant at the time of her termination without cause. The court rejected the defendant's arguments that including pregnancy as a factor would create problems with human rights legislation, or that it would open up the determination to other physical factors, such as height, or even that a complainant must provide evidence that pregnancy negatively impacted their job prospects after termination.[2] This *Bulletin* summarizes the facts of the case and highlights some of the reasoning in the court's analysis on factors for assessing reasonable notice of termination that employers, including charities and not-for-profits, need to consider.

B. BACKGROUND

MS. SARAH NAHUM was hired by Honeycomb as Director of People and Culture on June 17, 2019, for $80,000 annually plus benefits.[3] She completed a three-month probationary period; then her employment

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[1] 2021 ONSC 1455 (CanLII), online: < https://www.canlii.org/en/on/onsc/doc/2021/2021onsc1455/2021onsc1455.html> [Judgment].
[2] The issue of whether or not the plaintiff may have been entitled to damages for breach of the Ontario *Human Rights Code* (RSO 1990, c H.19) was not before the court.
[3] *Ibid* at para 3.

was terminated on October 31, 2019 without cause, after a total of four-and-half months of service. Both parties agreed that the termination provisions of Nahum's employment contract were "not enforceable" — and consequently her reasonable notice would need to be calculated according to common law principles.[4] Nahum was 28 years old at the time of her termination, and five months pregnant. She gave birth to her baby at the end of February 2020. Despite "consistently" looking for work after a two-month period immediately following the birth, Nahum had not found employment as of the hearing on February 10, 2021. Nahum argued that she was entitled to eight months' payment in lieu of reasonable notice, while Honeycomb argued that it was "generous" for her to receive two months' pay-in-lieu of notice.[5]

C. ANALYSIS

1. What is the reasonable notice period?

J.T. Akbarali J summarized the established principles of calculating reasonable notice, based on the factors in *Bardal v Globe & Mail*:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training, and qualification of the servant.[6]

"To this list of factors, Ms. Nahum seeks to add pregnancy," Akbarali J noted, before considering each of the factors in turn.[7]

a) Character of the Employment

There was some dispute about the position Nahum held with Honeycomb: her employer contended that the plaintiff was "inflating her responsibilities" to argue for a lengthier period of reasonable notice.[8] According to Nahum, she was part of Honeycomb's management team, supervising human resources, and reported directly to the president with duties that included running a payroll for 350 employees.

[4] *Ibid*.
[5] *Ibid* at paras 4–7.
[6] 24 D.L.R. (2d) at 145, 140 (Ont. H.C.), online: 1960 CanLII 294 <https://www.canlii.org/en/on/onsc/doc/1960/1960canlii294/1960canlii294.html> [*Bardal*].
[7] Judgment, *supra* note 1 at paras 9–10.
[8] *Ibid* at paras 11–13.

Honeycomb's president, however, gave evidence that Nahum was not actually part of the management team and that she "made no hiring or firing decisions", nor did any staff report to her.[9] Her role was limited to administrative tasks, according to the president. Of all the employees with director titles at Honeycomb, Nahum was the lowest paid among them.[10] Akbarali J accepted that Nahum did not have hiring or "significant decision-making responsibilities at Honeycomb"; but based on the cross-examination of the company's president, which showed that Nahum was expected to develop human resources operations with her employer, Akbarali J concluded that her "position was that of mid-level management."[11]

b) Other *Bardal* factors

Nahum's four-and-a-half months of service at Honeycomb was, Akbarali J noted, "very short." At 28 years old at the time of her termination, her age "should not be an impediment to obtaining a similar position," the judge added.[12] From the other evidence offered about her background, skills and education, Akbarali J concluded that she is qualified for "many available positions" while the market is also competitive.[13] Nahum obtained her education and most of her work experience in the United States, including a Bachelor of Arts in Psychology and an MBA, with credentials and experience in human resources. After moving to Canada with her Canadian husband, Nahum turned down a position with the City of Toronto to work for Honeycomb, her only Canadian employment, which she argued was a disadvantage to her. She applied for "at least 36 jobs before her baby was born" and suspected that one position she interviewed "went to a candidate who was able to start work right away."[14]

Although he commented on the COVID-19 pandemic as a possible impact on the plaintiff's job search, Akbarali J did not consider it a "factor in determining the notice period in this case, because Ms. Nahum's termination pre-dated the pandemic, which could not have been anticipated at that time."[15]

[9] *Ibid* at para 14.
[10] *Ibid* at para 19.
[11] *Ibid* at paras 20–21.
[12] *Ibid* at paras 22–23.
[13] *Ibid* at paras 24–33.
[14] *Ibid* at para 28.
[15] *Ibid* at para 32.

c) Pregnancy as a factor

Honeycomb knew that Nahum was "about five months pregnant when she was terminated" and this was "the most contentious issue between the parties" in determining the reasonable notice period.[16] Akbarali J cited *Harris v Yorkville Sound Ltd*, in which the court added two months to the reasonable notice period in light of the plaintiff's pregnancy.[17] A 2002 Divisional Court decision, *Ivens v Automodular Assemblies Inc* found the appellant's pregnancy in that case was a "*Bardal*-type factor" that should have been considered in determining reasonable notice, "along with the other relevant factors."[18]

Honeycomb argued that pregnancy should not be considered as a factor for calculating reasonable notice for three reasons. First, if the court concluded that pregnant women are less likely to become employed, Honeycomb argued, that would imply a violation of human rights legislation by prospective employers. Second, concluding that pregnancy is a disadvantage for a job search requires evidence, which was not provided by the plaintiff. Third, considering pregnancy as an additional factor when calculating reasonable notice is "problematic because it opens the door to the inclusion of other factors that may impact an individual's professional success".[19]

Akbarali J rejected each of these arguments. "There is no certainty that an employer who prefers a candidate who is not pregnant is violating human rights legislation," the judge stated. Other courts have concluded, without evidence, that pregnancy "creates difficulties for a person searching for employment." And as for other factors like height, "there is no reason to suppose short people are going to need to take an imminent and possibly lengthy leave of absence shortly after being hired."[20] Akbarali J accepted Honeycomb's argument that pregnancy does not "automatically lengthen the notice period in every case" and like all the *Bardal* factors, the circumstances must be considered case-by-case.[21] "Weighing all the relevant factors together," Akbarali J concluded that a reasonable notice period of five months was

[16] *Ibid* at para 34.
[17] 2005 CanLII 46394 (ON SC), online: < https://www.canlii.org/en/on/onsc/doc/2005/2005canlii46394/2005canlii46394.html>.
[18] Judgment, *supra* note 1 at paras 38–40.
[19] *Ibid* at paras 42–48.
[20] *Ibid* at paras 43–49.
[21] *Ibid* at para 50.

appropriate in this case.[22] There was no assessment of how many months' of that notice were attributable to the plaintiff's pregnancy.

D. CONCLUSION

THE DECISION in *Nahum v Honeycomb Hospitality Inc.* considers earlier precedent and confirms that pregnancy is to be included as a factor for assessing reasonable notice of termination at common law. While not an issue in this decision, employers, including charities and not-for-profits, need to be aware of their obligations under applicable human rights legislation, including the Ontario *Human Rights Code*, which protects pregnant employees from unlawful discrimination. Terminating an employee because they are pregnant would likely be found by a court or a human rights tribunal to constitute unlawful discrimination.[23]

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[22] *Ibid* at para 58.
[23] See also Barry W. Kwasniewski, "Pregnant Employees: Employers Need to Know Their Legal Responsibilities," *Charity & NFP Law Bulletin No. 183* (18 December 2009), online: Carters <https://www.carters.ca/pub/bulletin/charity/2009/chylb183.pdf>.