

AIR CANADA EXECUTIVE WINS 24 MONTHS' DAMAGES FOR WRONGFUL DISMISSAL

*By Barry W. Kwasniewski & Martin U. Wissmath**

A. INTRODUCTION

A FORMER AIR CANADA senior executive was awarded over \$400,000 in damages in the Ontario Superior Court of Justice after he sued the airline for wrongful dismissal. In addition to pay in lieu of notice, Justice A.P. Ramsay (Ramsay J) also ordered Air Canada to pay the plaintiff, Roland Ruel, further damages arising from bonus plans he would have received during the 24-month reasonable notice period, including a potential bonus as part of a COVID-19 compensation program, as well as post-retirement travel privileges for reaching 25 years of service. Published April 4, 2022, *Ruel v Air Canada*¹ summarizes the legal principles for common law reasonable notice in Ontario. The case is important for employers of charities and not-for-profit organizations to understand how the court calculates wrongful dismissal damages and interprets language, or the lack thereof, in employment contracts or policies concerning termination of employees, especially where those contracts and policies purport to limit an employee's common law rights.

B. BACKGROUND

ROLAND RUEL had worked for Air Canada for over 24 years before he was terminated without cause in June 2020, shortly after the start of the COVID-19 pandemic. At the time of his termination, Ruel was nearly 52 years old and a senior executive with managerial responsibilities.² Air Canada offered him a

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¹ 2022 ONSC 1779 [*Ruel*], online: CanLII <<https://www.canlii.org/en/on/onsc/doc/2022/2022onsc1779/2022onsc1779.html>>.

² *Ibid* at para 3.

severance package, along with statutory service pay and the minimum two-week termination pay under the federal *Canada Labour Code*³. Ruel’s salary and compensation benefits at the time of his termination consisted of the following:

- a. a base salary of \$117,060.00;
- b. a discretionary annual incentive bonus (“AIP”) of \$35,000.00;
- c. participation in Air Canada’s Long-Term Incentive Plan (“LTIP”), whereby shares were issued at a value of 15% of his base salary in 2019 and 20% in 2020 and for the foreseeable future;
- d. enrollment in Air Canada’s defined benefit pension plan;
- e. coverage under Air Canada’s health benefits program; [and]
- f. eligibility for travel privileges including retiree travel privileges upon attaining 25 years of service.⁴

Ruel rejected Air Canada’s severance package and commenced the action for wrongful dismissal, claiming damages for pay-in-lieu of 24 months’ reasonable notice, “damages for lost bonuses, lost accrual of pension benefits and spousal survivor benefits, lost group health benefits during the notice period, and compensation for various post-retirement benefits, and retiree flight privileges” that Ruel claimed he would have been entitled to had he been given reasonable notice of his termination.⁵

Air Canada argued that the appropriate common law notice period was 16–17 months, with a further reduction because, they argued, Ruel failed to mitigate his damages by seeking and securing new employment. Furthermore, according to Air Canada, any of Ruel’s “pension, stock options, group and other benefits, and other privileges ended when he was terminated in June 2020.”⁶

C. DECISION

RAMSAY J FOUND that Ruel was entitled to 24-months’ pay-in-lieu of reasonable notice, and he was entitled to damages for each of the benefits claimed as part of his reasonable notice period. For two of those

³ As a federally regulated industry, minimum standards for airline employees are legislated under the *Canada Labour Code*, R.S.C. 1985, c. L-2, online: <https://laws-lois.justice.gc.ca/eng/ACTS/L-2/index.html>.

⁴ *Ruel*, *supra* note 1 at para 6.

⁵ *Ibid* at para 7.

⁶ *Ibid* at para 12.

benefits, namely the discretionary AIP, and health benefits that included a COVID-19 relief bonus, the court left the amount of damages to be decided in a subsequent summary trial pursuant to Rule 20.05(2) of the *Rules of Civil Procedure*.⁷

1. Calculation of Reasonable Notice Period

The court's decision followed the common law test for calculating the reasonable notice period. At common law, there is a presumption of reasonable notice, calculated according to case law precedents, which is rebuttable "if a contract of employment clearly specifies some other period of notice, whether expressly or impliedly."⁸ In this case, there was in fact no written employment contract, although there were "written plans (discussed below) with respect to certain benefits."⁹ Ramsay J emphasized the Supreme Court of Canada's precedent in *Matthews v Ocean Nutrition Canada Ltd.*,¹⁰ which stated, "The purpose of damages in lieu of reasonable notice is to put the employee in the position they would have been in had they continued to work through to the end of the notice period" (emphasis added).¹¹

To calculate the length of reasonable notice, the court cited the factors from *Bardal v. The Globe and Mail Ltd.* (1960):¹² "the character of the employment; the length of service; the age of the employee; and the availability of similar employment, having regard to the plaintiff's experience, training and qualifications."¹³ Due to Ruel's age, 52, which may place him at a "competitive disadvantage",¹⁴ and the length of his service — 24 years — that may impact his employability for appearing to potential employers as "set in his ways",¹⁵ a longer notice period was justified. The seniority of Ruel's position at the time of his termination, as a director with managerial responsibilities, overseeing 3500 employees and Air Canada's operations center at Pearson International Airport, further justified a lengthier reasonable notice

⁷ R.R.O. 1990, Reg. 194, under the *Courts of Justice Act*, R.S.O. 1990, c. C.43; *ibid* at paras 71, 94.

⁸ *Ruel*, *supra* note 1 at para 25, citing *Machtlinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986 [*Machtlinger*].

⁹ *Ruel*, *supra* note 1 at para 27.

¹⁰ 2020 SCC 26 [*Matthews*], online: CanLII <https://www.canlii.org/en/ca/scc/doc/2020/2020scc26/2020scc26.html>; for further commentary see Barry W. Kwasniewski, "Supreme Court Awards Over \$1M Damages for Pay In Lieu of Notice," *Charity & NFP Law Bulletin No. 479* (29 October 2020), online: *Carters Professional Corporation* <https://www.carters.ca/pub/bulletin/charity/2020/chylb479.pdf>.

¹¹ *Ruel*, *supra* note 1 at para 29, citing *Matthews*, *ibid* at para 59.

¹² 1960 CanLII 294 (ON SC) at 145, 24 D.L.R. (2d) 140 (Ont. H.C.) [*Bardal*], online: CanLII <https://www.canlii.org/en/on/onsc/doc/1960/1960canlii294/1960canlii294.html>.

¹³ *Ruel*, *supra* note 1 at para 30.

¹⁴ *Ibid* at para 31; *McKinney v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229, at p. 299, online: CanLII <https://www.canlii.org/en/ca/scc/doc/1990/1990canlii60/1990canlii60.html>.

¹⁵ *Ibid* at paras 32–33; *Drysdale v. Panasonic Canada Inc.*, 2015 ONSC 6878, at para. 14 [*Drysdale*], online: CanLII <https://www.canlii.org/en/on/onsc/doc/2015/2015onsc6878/2015onsc6878.html>.

period.¹⁶ Although Ramsay J noted the *Bardal* factors are not exhaustive, and testimony that the airline industry was “decimated” by the COVID-19 pandemic, the 24-month reasonable notice period claimed by Ruel was justified “even without taking into account the pandemic,” according to the decision.¹⁷

a) Mitigation of damage efforts

Air Canada argued that Ruel, who moved his family from Ontario to British Columbia after his termination, failed to mitigate his damages by not applying to jobs during a two-and-a-half-month gap. Ruel responded that he searched for jobs daily, and applied to 104 jobs over the span of 12 months, with three interviews but no placements.¹⁸

A terminated employee’s “mitigation efforts need only be reasonable, not perfect,” Ramsay J stated, and the onus is on the employer to show “that the employee’s conduct was unreasonable, not in one respect, but in all respects.”¹⁹ There was not a “scintilla of evidence” on the record from Air Canada about comparable jobs during the 2.5-month gap complained about, Ramsay J noted. “In contrast, the evidence before the court indicates a dogged and consistent reasonable effort by the plaintiff to apply to jobs since his termination.”²⁰ Accordingly, Air Canada had not discharged the evidentiary onus to show that Ruel failed to mitigate his damages.²¹

2. Entitlement to Benefits During Reasonable Notice Period

On the issue of whether Ruel was entitled to the benefits he would have received if he had continued to work through the reasonable notice period, the court likewise relied on case law precedent to find that Air Canada also owed Ruel damages for those benefits. The language in the written plans was not sufficient to exclude those benefits from the reasonable notice period.

With respect to the LTIP, Air Canada took the position that the shares “stop accruing and vesting on the date of termination and are calculated on a prorated basis as of the termination date. Air Canada submits that the language of the LTIP plan limits vesting of [restricted share units (“RSUs”)] to periods of active

¹⁶ *Ruel*, *supra* note 1 at paras 34–35, 38.

¹⁷ *Ibid* at paras 36–38.

¹⁸ *Ibid* at paras 43–44.

¹⁹ *Ibid* at para 47.

²⁰ *Ibid* at para 50.

²¹ *Ibid* at para 53.

service. It submits that the plaintiff is not entitled to have unvested RSUs vest in full following the Termination Date.”²²

However, Ramsay J found, “A term that requires active employment when the bonus is paid, without more, is not sufficient to deprive an employee terminated without reasonable notice of a claim for compensation for the bonus he or she would have received during the notice period, as part of his or her wrongful dismissal damages.”²³

For the lost flight privileges, which Ruel would have been eligible for after reaching 25 years of service, he sought \$1,814,775.00 in damages, based on a calculation of value, or specific performance — being reinstatement in the flight privileges program.²⁴ “In my view, since the travel privileges are subject to modification, amendment and termination by Air Canada,” Ramsay J stated, “specific performance in the circumstances is warranted as opposed to damages.”²⁵

The court granted Ruel summary judgment on the following:

- i. The plaintiff is entitled to twenty-four months’ notice, or damages in the amount of \$234,120.00, less any statutory amounts paid. A trust and accounting, as described above, is imposed on damages for any unexpired term.
- ii. The plaintiff is awarded damages for the lost value for the group health benefits during the notice period fixed at 10% of his base salary, or \$23,412.00.
- iii. The plaintiff is entitled to damages for the lifetime lost retiree benefits in the amount of \$73,361.00, which amount is to be reduced by 9.74%.
- v. The plaintiff is entitled to damages for lost LTIP accrual during the notice period and is awarded the amount set out in paragraph 63 of the plaintiff’s factum (as calculated by Air Canada).
- v. The plaintiff is entitled to damages in the amount of \$160,148.00 (grossed up) for lost pension accrual benefits over the notice period and lost spousal survivor benefits in the amount of \$27,629.00 (grossed up) over the same period.

²² *Ibid* at para 73.

²³ *Ibid* at para 75, citing *Matthews*, *supra* note 10 at para 65; *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618, 352 O.A.C. 1, at para. 16 [*Paquette*], online: CanLII <https://www.canlii.org/en/on/onca/doc/2016/2016onca618/2016onca618.html>.

²⁴ *Ibid* at para 133.

²⁵ *Ibid* at para 142.

vi. The plaintiff is entitled to specific performance with respect to Air Canada's retiree flight privileges.²⁶

D. CONCLUSION

THIS CASE OFFERS an updated and comprehensive review of the principles involved in calculating the common law reasonable notice period and the types of potential damages and remedies (including specific performance) which may be awarded by a court. In this decision, the damages in addition to pay in lieu of notice were substantial, based on the numerous benefits the plaintiff received while he was employed. Employers may face significant liabilities in terminating long term employees, especially in the absence of a written employment contract with legally enforceable termination clauses.

²⁶ *Ibid* at para 144.