Ontario Court Of Appeal Rules: No Cap On Dismissal Damages For Clerical Or Unskilled Workers

By: Barry W. Kwasniewski*

A. INTRODUCTION

At common law, employees who are dismissed without cause are entitled to receive reasonable notice or pay in lieu of notice. In the past, courts have grappled with the issue as to whether employees who occupy clerical or unskilled positions should be subject to a "hard cap" or ceiling on the notice or pay in lieu of notice they are entitled to receive. In the recent decision of *Di Tomaso v. Crown Metal Packaging Canada LP*,[1] the Ontario Court of Appeal rejected the employer's argument that there is, or ought to be, a twelve month cap on reasonable notice for unskilled, non-managerial employees. This article reviews this decision, which is an important statement of the law as to reasonable notice entitlements for many workers, including those who work for charities and not-for-profit organizations.

B. THE DECISION

Antonio Di Tomaso was employed for 33 years as a mechanic and press maintainer for Crown Metal Packaging. His job involved setting up the metal manufacturing line, minor repair work, and assisting the millwright with mechanical work on machines. Crown Metal closed the facility where Di Tomaso worked on February 26, 2010, ending his employment at age 64.

Dissatisfied with the notice of termination provided, Mr. Di Tomaso sued his employer for twenty-four months' pay in lieu of notice. In its defence, Crown Metal argued that given the type of employment, which was characterized as "unskilled", their former employee should be subject to a twelve month cap on his reasonable notice. In making this argument, Crown Metal relied on an earlier Ontario Court of Appeal decision in *Cronk v. Canadian General Insurance Co.*[2]

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[1] [2011] O.J. No. 2900, 2011 ONCA 469 (Released June 22, 2011)

[2] [1995], 128 D.L.R. (4th) 147

which, it argued, established a cap of 12 months on the notice required to be provided for clerical or unskilled workers.

In reply, Mr. Di Tomaso relied on a later decision of Ontario Court of Appeal in *Minott v. O'Shanter Development Company Ltd.*,[3] where the court stated: "...[T]he imposition of an arbitrary 12 month ceiling for all non-managerial employees detracts from the flexibility of the *Bardal* test and restricts the ability of courts to take account of all factors relevant to each case and of changing social and economic conditions."

The *Bardal* test mentioned above refers to the Ontario High Court decision in *Bardal v. Globe & Mail Ltd.*,[4] which held that reasonable notice periods are to decided with reference to the circumstances of each particular case, having regard to the character of the employment, length of the employee's service to the employer, employee age, and the availability of alternate employment given the employee's training, qualifications and experience. In upholding the decision of the Superior Court of Justice, the Court of Appeal agreed that a reasonable notice period of twenty-two months for Mr. Di Tomaso was appropriate in the circumstances.

The rationale to impose a twelve month cap on reasonable notice for clerical or unskilled employees is based on the assumption that such employees will have an easier time finding comparable alternative employment than managerial or highly skilled employees. In response to this argument, the Ontario Court of Appeal referred to the following passage from the New Brunswick Court of Appeal decision in *Medis Health and Pharmaceutical Services Inc. v. Bramble,*[5] at para, 64:

> "The proposition that junior employees have an easier time finding suitable alternate employment is no longer, if it ever was, a matter of common knowledge. Indeed, it is an empirically challenged proposition that cannot be confirmed by resources of indisputable accuracy."

[3] [1999], 168 D.L.R. (4th) 270
[4] [1960], 24 D.L.R. (2nd) 140
[5] [1999], 175 D.L.R. (4th) 385

C. CONCLUSION

The *Di Tomaso* decision clearly rejects the notion of a hard cap on reasonable notice for clerical or unskilled workers. For those many charities and not-for-profit organizations which employ that category of worker, this decision illustrates the need for written employment contracts, with clear termination provisions. A properly drafted employment contract will have the employer and employee agree at the outset on a reasonable notice period, rather than at the end of the employment relationship, when coming to an agreement may be more difficult. However, to be enforceable, it is important that the agreed notice period at least meet the minimum requirements as set out in the *Employment Standards Act, 2000*, or other applicable legislation in the jurisdiction where the organization operates.