SUPREME COURT OF NOVA SCOTIA
Citation: *Slater v. Halifax Herald Limited*, 2021 NSSC 210

Date: 20210617
Docket: Hfx No. 500058
Registry: Halifax

Between:

Jerry Slater

Applicant

v.

Halifax Herald Limited

Respondent

DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: June 9, 2021, in Halifax, Nova Scotia

Counsel: Colin Bryson, Q.C., for the Applicant
Sean Kelly, for the Respondent

By the Court:

[1] Jerry Slater started work with the Halifax Herald on March 23, 1981. He eventually became the Distribution Coordinator. That job included being a District Manager. He made a yearly salary of $43,000 and got 7 weeks of vacation, among other benefits. He devoted pretty much his entire working life to the Herald.

[2] On March 24, 2020, 39 years and one day after he joined the Herald, that ended. There was no suggestion that he had done anything wrong or anything to deserve losing his job. Jerry Slater was not "let go" for anything he had done or failed to do.

[3] That was just about 2 weeks after the World Health Organization announced that Covid-19 had become a pandemic. The Herald said that his 39-year long employment contract had been frustrated. They told him on March 24, 2020, that he would be temporarily laid off without pay for a period that was predicted to be about 3 months. He was told that the lay off was because of the drop in revenue caused by the pandemic. The newspaper industry had been in a period of decline even before the pandemic, but the pandemic made it worse.

[4] Three months later the lay off did not end. On June 23, 2020, Mr. Slater was told that his employment would be terminated on September 1, 2020. The letter that Mr. Slater received said that the impact of Covid-19 on the business could not be overstated and that the media industry across Canada was laying off large numbers of employees. It said that the Herald had to take drastic steps of restructuring, layoffs and eliminating positions. The letter made the case for the application of the legal doctrine of frustration. It stressed that no one knew if, or when, the industry would return to normal operation and that the impacts of the pandemic were going to be greater than anyone had predicted. It said that the employment contract had been frustrated through no fault of either Mr. Slater or the Herald. Because the contract had been frustrated termination would be without notice. On a "gratuitous basis" the Herald would pay Mr. Slater until September 1, 2020.

[5] If he wanted that pay Mr. Slater had to sign a full release. He did not agree to those terms. So, he went from being employed and close to retirement to being unemployed at 61 years old. If he wanted anything more, he was going to have to resort to legal action. That is what he did. And a bit more than a year after the termination of his employment Mr. Slater was in court with his former employer, the Herald.

[6] Through that year the Herald maintained the position that the employment contract had been frustrated. They legally owed him nothing at all. They might have offered to pay him until September 1, 2020, but that was just as a favour or a gift. Their legal obligations as they acknowledged them to him, as an employee of almost 4 decades, amounted to nothing. Nothing at all.

[7] On the day before the application in court was to proceed, the Herald advised that they would no longer be relying on the defence of frustration. Much of the evidence filed and much of the written argument put forward was then made unnecessary. The Herald acknowledged, somewhat more than a year after the termination of Mr. Slater's employment that they did owe him something after all. The only issue is how much. The Herald claimed that Mr. Slater failed to mitigate the damages he suffered from the termination of his employment. The Herald said that Mr. Slater should have accepted one of the two jobs that it offered him a year after his employment was terminated. The amount it owes him should be limited to his salary and benefits for that one year. The Herald also says that amount should be reduced even further. The CERB payments that Mr. Slater received from the Government of Canada should be deducted from the damages that it is required to pay.

Summary

[8] The Herald acknowledges now that it did not have the right to dismiss Jerry Slater without notice or compensation after 39 years of service. You just can't treat people that way, even during a pandemic. Mr. Slater was dismissed without reasonable notice and without just cause being asserted. His long service, his age and the nature of his work mean that he would normally be entitled to 24 months' notice.

[9] The Herald has not proved that Mr. Slater failed to mitigate his losses. He was not obligated to pursue other employment when he was medically disabled from performing most job functions. He was not obligated to accept lower paying and lower status positions offered to him by the Herald a year after his employment was terminated. It is not reasonable to expect an employee with 39 years of service to accept an 11% pay cut to take on a job with the same employer, doing work that has lower status, and is offered to him a year later after claiming for a year that it had absolutely no legal obligations to him.

[10] Damages should not be directly adjusted to consider CERB payments received by Mr. Slater. He will likely be required to repay those benefits.

[11] The period of reasonable notice is beyond the trial date. The damage award should be adjusted for the contingency that Mr. Slater may get another job in the next year, despite his medical limitations and for the potential that he might not be required to repay the CERB payments that he received. The adjustment for those contingencies is 2 months. Damages are awarded as the equivalent of 22 months' notice, and in the amount of $88,000.

Notice

[12] Mr. Slater is entitled to damages for wrongful dismissal based on the principles set out in *Bardal v. Globe & Mail Limited*, 1960 CarswellOnt 144 (Ont. H.C.). The *Bardal* factors include the character of the employment, the length of service of the employee, the age of the employee at the time of termination, and the availability of similar employment.

[13] Mr. Slater was performing a job that had a very broad range of responsibilities. He was a district manager for an area and managed the delivery of flyers within that area. He supervised the carriers in that area and sometimes did deliveries himself. He was responsible for processing invoices for contractors and distributors of the Herald for mainland Nova Scotia. He was responsible for the maintenance of newspaper vending machines on the mainland. He managed the flyer distribution to apartment buildings in HRM. He processed advertisements for newspaper carriers and flyer delivery personnel for publication in the province. Mr. Slater oversaw the delivery of the QEII Times with co-workers, three times per year and supervised 2 to 3 people in that job. He managed delivery of the Senior Living publication. He managed the clean-up of discarded flyers in HRM. And he assisted other departments with deliveries when requested.

[14] That broad range of responsibilities included some planning and supervision of employees and some management. It also included some physical work and basic administrative tasks. Mr. Slater would not be described as having performed executive functions, but he was a manager.

[15] His job and his career were in the newspaper industry. For 39 years he was involved with that industry and with that one employer, the Herald. While there may be other industries within which those skills might be valuable, he was for 39 years immersed in the business of delivering a daily newspaper in Nova Scotia. When his pension contributions and disabilities benefits are included, his remuneration was $48,000 per year. He had an entitlement of 7 weeks vacation.

[16] The nature of a person's employment is a factor because the kind of job will influence how difficult it may be to find comparable employment. There used to be a presumption that lower-level employment was easier to find than executive employment. That presumption no longer exists. The kind of business factors that prompted the Herald to terminate Mr. Slater's employment will apply to some other potential employers who might be able to make use of Mr. Slater's skills and experience. The changes in the industry may require more of a cushion than might have been the case in the past.

[17] That relates to the second *Bardal* factor. Almost all of Mr. Slater's working life has been with the Halifax Herald. He worked for that company for 39 years. That is a significant factor in determining the period of notice required to be given. It is one of strongest predictors of reasonable notice. And 39 years is, by any measure, a long career. It is a very long career with one employer. The long serving employee has a "moral claim which has matured into a legal entitlement to a longer notice period". *Ansari v. British Columbia Hydro and Power Authority*, 1986 CanLII 1023 (BCSC), para. 26. And, having served one employer for almost 40 years, a new employer may see the employee as set in their ways and not adaptable to change.

[18] Any potential employer would consider him as a new hire. Mr. Slater would begin with that employer with no job seniority so he would not have the protections against unilateral termination that he would have had as a long serving employee with the Herald. He would not be likely to be entitled to the same significant vacation benefit.

[19] The third *Bardal* factor considers the availability of alternative employment. That overlaps with the nature of the work that the person has been performing. Mr. Slater's combination of physical, administrative and managerial duties made up a job that was in some ways tailored to the needs of the Herald. Some combination of those skills might be attractive to another employer, but it would be unlikely that the same broad range of responsibilities would be found in many workplaces.

[20] It is difficult to assess the impacts of Covid-19 on the potential for Mr. Slater to obtain new employment. As we begin to move out of the restrictions that were aimed at limiting the scope of the pandemic there may be opportunities for new businesses and new business models to replace those that were adversely affected. How many of those new businesses would find a place for a 61-year-old man who

had spent 39 years immersed in the old models of doing business is an open question.

[21] No factor should be given disproportionate weight or significance, but it has been long acknowledged that for employees with long years of service, nearing retirement age, that factor is important. That counts for something. The caselaw strongly suggests that it does. Counsel have pointed to cases in which non-executive employees and even non-managerial long serving employees have been awarded damages toward the 24-month range of notice. In *Briggs v. Treco Machine & Tool Ltd*., 2009 O.J. No. 5208 (SC), a 62-year-old production worker with 39 years of service was awarded 24 months' notice. In *Di Tomaso v. Crown Metal Packaging Canada LP*, 2011 ONCA 469, another 62-year-old production worker with 39 years of service was awarded 24 months' notice. In *Kuny v. Owens-Corning Canada Inc.*, 1999 ABQB 540, a 60-year-old production shift supervisor was awarded 22 months' notice.

[22] The Herald argued that the appropriate notice period was 16-18 months, which must then be "offset to account for mitigation earnings". That position was supported by several cases, among them a Nova Scotia case which purportedly set a "high water mark" at 18 months for notice.

> *Horechuk v. I.M.P. Group International Inc*., 2012 NSSC 96 (Tab 6) where an assistant manager with 27 years service was awarded 18 months' notice - notably Justice Bourgeois confirmed that, absent extraordinary circumstances, 18 months is the "high water mark" for reasonable notice in Nova Scotia.

[23] In *Horechuk* Justice Bourgeois did find that 18 months' notice was reasonable in the circumstances. She did not use the words "high water mark" although that phrase in quotation marks could perhaps be intended to reflect her intent as opposed to her actual words. The problem is that the decision does not appear to confirm or suggest that 18 months should be the maximum expectation for notice provided to managerial employees absent extraordinary circumstances. That was the argument put forward by the employer. There is no such 18 month "high water mark".

[24] The Herald's decision to terminate Mr. Slater's employment after 39 years was based on business considerations. It was not a personal vendetta of some kind. Many Canadian newspapers and periodicals have ceased publication over the past number of years. Before the pandemic, the newspaper industry was experiencing steady and consistent year over year decline in revenues. Those were due, in large

part, to what Ian Scott the Executive Vice President of Saltwire Network, the parent company of the Herald, says was the global shift to digital and electronic consumption of news media. The pandemic particularly affected the Herald's business. There were significant declines in advertising revenues. There was an unprecedented number of subscription cancellations and a sharp decline in single newspaper sales and bulk distributed periodicals in retail outlets and vending boxes. Mr. Scott says that the Herald and its parent company have had to lay off hundreds of employees and to "furlough 142 permanently" as a result of "permanent changes to its product mix".

[25] Jerry Slater was caught up in that. An employee of 39 years has earned a moral right to be treated with dignity. They should be granted some level of protection against the financial consequences of termination. Jerry Slater lost his job with the Herald after a career of almost 4 decades through no fault of his own. The financial reasons for the business decisions that were made provide some context and explanation for what happened. And the circumstances of the termination should not be used to increase the period of notice and in some cases might justify a reduction. In this case they highlight the difficulty that Mr. Slater would have in finding another job.

[26] Someone in Mr. Slater's circumstances should receive pay in lieu of notice equal to 24 months.

Mitigation

[27] The Herald argues that Mr. Slater did not make reasonable efforts to mitigate his damages.

[28] When an employer makes that argument, they must show that there were jobs available had the former employee made the effort to look for them. There has been no evidence put forward in this case to establish that there were jobs with other employers that Mr. Slater could have had if he had applied for them. When he was physically able to work, Mr. Slater made those efforts. Since the termination of his employment, he has suffered from medical conditions that have limited his ability to take on other work. He has had emergency hernia surgery, recovery from that surgery and complications arising from it.

[29] There were two jobs offered to Mr. Slater by the Herald though. And they were the focus of much of the argument about whether Mr. Slater had made reasonable efforts to mitigate.

[30] On March 19, 2021, the Halifax Herald offered Mr. Slater the position of Administrative Services Clerk. Mr. Slater had experienced health issues, and this was less physically demanding than the Distribution Coordinator position. It was offered with a salary of $38,000 though the Herald says that it was open to new terms and conditions of employment. Mr. Slater did not accept the job.

[31] On April 9, 2021, the Halifax Herald offered Mr. Slater a security related position at its Hammonds Plains printing facility. This was a sedentary job that would involve monitoring and reviewing video cameras and greeting people who came into the facility. The hourly rate was $17-$18 per hour. The Herald says that it was willing to negotiate terms and conditions of employment.

[32] Employees who have been dismissed have a legal obligation to take reasonable steps to mitigate their losses. The burden remains on the employer to show that they have failed in that regard. Making reasonable efforts to mitigate loss does not equate to doing everything possible to help the employer to limit its losses. Former employees are not required to seek employment when they would be prevented from working by a health condition. *Brito v. Canac Kitchens*, [2012] O.J. No. 376 (CA).

[33] The dismissed employee must make reasonable efforts to seek comparable employment suitable to their abilities. That does not mean any employment, but employment comparable to the employment from which they were dismissed in terms of status, hours and pay. *Rothenberg v. Rogers Media Inc*., 2020 ONSC 5853.

[34] The employee's duty is one owed to themselves, to act reasonably in their own interest to maintain their income and position in their industry, trade, or profession. The former employer does not have the right to expect that the former employee will accept lower paying alternative employment and then sue for the difference between what they make in that job and what they would have received as notice. *Foreshaw v. Aluminex Extrusions Ltd*., [1989] B.C.J. No. 1527 (CA).

[35] That same limitation applies when the alternative employment is offered by the former employer. The employee can be expected to accept another position with the same employer, but not just any employment. Requiring an employee to take temporary work with the dismissing employer is appropriate because the purpose of a damage award is to compensate the employee for lack of notice and not to punish the employer. Employers can sometimes give employees "working notice" and in the absence of bad faith or other extenuating circumstances the

employee is not entitled to stop work and claim damages. The employee cannot claim at that stage that the job is fundamentally different because it has a finite term.

[36] The employer can offer the employee other work, that is not an extension of the previous job for the period of reasonable notice. The central issue is whether a reasonable person would accept the job offered by the employer. A reasonable person would be expected to do so where "the salary offered is the same, the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious." *Mifsud v. MacMillan Bathurst Inc*. (1989), 70 O.R. (2d) 701 (Ont. C.A.). Those are not the only relevant factors. Others include the history and nature of the employment, "whether the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she has already left". *Cox v. Robertson*, 1999 BCCA 640, paras. 12-18. While an objective standard is used, the Supreme Court of Canada in *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, noted that it was extremely important that the non-tangible elements of the situation, including the work atmosphere, stigma and loss of dignity be included in the evaluation.

[37] If an employer eliminates a position, but at the time of giving notice tells the employee involved that another job at a similar level, with the same pay and benefits can be made available to them, the employee cannot simply say no. If there has been an atmosphere of hostility or humiliation or acrimonious relationships the employee does not have to take the alternative job. There is a difference between a job offered at the time of the termination and one offered later, after litigation has been commenced. There may be mutual respect and minimum hostility, but the parties are still adversaries in litigation.

[38] In *Halifax Herald Limited v. Clarke*, 2019 NSCA 31, Mr. Clarke was a long-time account executive with the Herald. He had to go on sick leave and his accounts were assigned to others. The Herald created a new position of Business Development Specialist to sell other Herald products to its clients. When Mr. Clarke came back from sick leave the Herald wanted him to take on the new position. The base salary was the same and there was a three month guarantee on commissions earned. Mr. Clarke at first accepted the job.

[39] He thought more about his prospects and decided that based on his sales forecasts, his income prospects were not favourable. Rather than wait and see or

stay under protest, he quit and claimed constructive dismissal. He was concerned about the potential loss of income based on his projections for commissions.

[40] The Herald disputed those projections and argued that Mr. Clarke could earn more in the new position which was not in any way a demotion. The trial judge refused to allow cross-examination on the actual sales records and ruled that they were not relevant. She found that Mr. Clarke had been constructively dismissed. The Court of Appeal held that the trial judge erred in the decision to preclude cross-examination about the sales projections and in finding that to be irrelevant. The trial judge had not considered the magnitude of the unilateral change of terms of employment required to satisfy the test for constructive dismissal. It must be such that the employer has demonstrated an intention to no longer be bound by the employment contract. The trial judge did not reject the uncontested evidence about the real potential for increased income.

[41] In addressing mitigation, the Court of Appeal said that there was no evidence in that case of a poisoned atmosphere. Mr. Clarke was highly skilled, valued, and well-liked employee and the Herald wanted to keep him. While he did say that he was concerned about a drop in status he never voiced those concerns to the Herald when he resigned. The trial judge focused on the reduction in income, but that was flawed by the refusal to permit cross-examination on actual sales and the exclusion of evidence relating to that issue.

[42] *Clarke* was a case about constructive dismissal. Calvin Clarke was never fired by the Herald. He never received a notice of termination. He resigned. He was not satisfied that the new position to which he was assigned would allow him to earn the same income. There were flaws in the way the evidence at trial was admitted and considered.

[43] The employee's obligation is to look for and accept employment that is comparable. They are not required to take any job then sue their employer for the difference in pay, status or job security. That applies when alternative employment is offered by the terminating employer as well. But there are situations where that does not work even though the jobs are comparable. If an employee has been dismissed after an allegation of theft or other misconduct and the employer later realizes that the allegation is unfounded and offers the employee another job, there may be very good reasons why the employee would not be required to take it.

[44] The consideration of whether alternative employment offered by the same employer is reasonable requires a case specific analysis. The pay may be slightly

less, or the status may be slightly less, and the jobs could still be comparable. The job may involve longer hours, but better pay, or more income with less job security and better benefits. The jobs do not have to be the same. As the Supreme Court noted in *Evans*, non-tangible factors must be considered as well. If termination took place under circumstances involving allegations of misconduct that would be an important factor. If there is animosity remaining that must be considered. It also matters whether the replacement job was offered while the employee was still working or was offered later, or with a view to settling litigation.

[45] In this case, Mr. Slater received notice from the Herald on March 24, 2020, that he would be laid off temporarily. It would not be reasonable to expect him, as a very senior employee, to leave his job and look for another one on the assumption that the lay off might not be temporary. It was reasonable for him to wait. From June 24, 2020 until mid-October 2020 Jerry Slater was suffering from a hernia that required emergency surgery and a period of recovery. He could not look for work until he was medically cleared to work in mid-October. As of mid-October, he started applying for other jobs. He did not get any of them. No evidence was offered that there were other jobs available that he might have got. Then, in January 2021 Mr. Slater started to suffer from post hernia surgery complications. Those complications limited his ability to walk or stand for more than 30 minutes or to lift weights of more than 10 pounds. His surgeon told him that he was unable to work due to pain and discomfort. He would not be expected to look for work when he was not medically fit to do it. That evidence was not contested.

[46] Mr. Slater turned down two jobs with the Herald. They were offered to him in the spring of 2021. That was after litigation had started and about a year after his employment contract had been terminated. While neither Mr. Slater nor the Herald suggest that there was any degree of animosity, the offer of those positions, a year later, was quite different from an offer provided to an employee who is still on the job. The job offers could reasonably be seen as an attempt by the Herald to resolve the legal action that Mr. Slater had commenced or at least to limit the damages it might be ordered to pay. If he were to accept either of those jobs Mr. Slater would be returning to the company that he had sued and might still be engaged in litigation against. There may not be animosity, but it is reasonable to presume that there would be some awkwardness.

[47] That is a factor to consider, but it is not determinative. The nature of the jobs must be considered. The first was the Administrative Services Clerk position. It is

a clerk's position. Mr. Slater had been employed as a manager. The base salary was $38,000. Mr. Slater had been earning $43,000. The Herald was willing to negotiate, but what they offered him was $38,000. That $5,000 drop in income may appear to some people to be not all that significant. But it is a pay cut of a bit more than 11%. That is not something that most people would take lightly. Mr. Slater would then have hired a lawyer and incurred legal fees, only to come back to work at a lower status job with an 11% decrease in salary. He could perhaps continue with his case against his employer to try to recover the $5,000 yearly loss. Few people would think that makes much sense.

[48] On top of that, the clerk position involved lifting requirements that were not compatible with Mr. Slater's physical limitations, as defined by his doctor. The Herald was willing to waive the lifting requirements for 30 days. That might even have been extended. But Mr. Slater, after 39 years of service, would be reduced to having a tenuous position with job requirements that he might not be able to perform after 30 days, or 60 days, or 90 days.

[49] The second job offered to him was as a security guard. It was a sedentary job in the printing facility in Hammonds Plains. He would be monitoring and reviewing video surveillance cameras and greeting people who came into the facility. The hourly pay was $17-$18, and the work week would be 37.5 hours. That again is a substantial reduction in pay. Mr. Slater's yearly income would be reduced by $8,000 to about $35,000. That is a pay reduction of close to 19%. Again, not many people would jump at the opportunity, or returning to work on that basis.

[50] Both were lower paying and lower status positions. While pay is not the only consideration, it is not unreasonable for an employee with 39 years of seniority to question why he should be asked to take a pay cut of between 11% and 19%. Both jobs involved a reduction in job status. Status is not something that is associated only with executive or higher-level managerial positions. There is dignity in work. But if an executive is not required to take lower skilled or lower status employment to mitigate damages, someone in Mr. Slater's position should not have returned to work to do jobs that were lower skilled or lower status. An employee with 39 years of seniority is justified in questioning why he should go from having management responsibilities to having a clerical position or a security job. A more modest drop in income or status might be justifiable for an employee with more limited tenure on the job. But both the extent of the reduction of pay and status together with Mr.

Slater's long service would make it unreasonable to expect that he accept those jobs.

[51] Both jobs were offered to Mr. Slater a year after the termination of his employment and after he had started a legal action against the Herald. No reasonable employee would want to continue with private litigation to fight over the amount of the difference. While the Herald did not require a full release, practically taking either of these jobs would have had the affect of ending the litigation. And Mr. Slater, after 39 years of service would be required to come back to work, after being away for a full year, and adjust to working with his old employer, in a different kind of relationship, as a clerk or a guard. He would essentially have to "suck it up and take it". While that may be appropriate in some cases, it is an affront to the dignity of a person who has been working for the same employer for close to 40 years.

Canada Emergency Response Benefit (CERB)

[52] The Canada Emergency Response Benefit was paid during the pandemic, by the federal government, to several categories of people. Those who had to stop work because of Covid-19 received those payments. Mr. Slater started to receive CERB payments immediately after the first layoff notice in March 2020. Those payments were $2,000 each month and lasted until September 2020. He then began to receive Employment Insurance benefits. The EI benefits are subject to the provisions of the *Employment Insurance Act*, S.C. 1996, c. 23. A person who receives Employment Insurance benefits must repay them if their employer is later found to be liable to pay damages related to the termination of the employment contract and the Employment Insurance benefits were paid during the period of reasonable notice.

[53] The rules related to the repayment of CERB payments have not been set out as clearly. They were intended as a financial lifeline for people at a time when Employment Insurance benefits might not have been available. There is a requirement for repayment by the recipient if they are rehired or have received retroactive pay from their employer. The damages in this case are a form of payment for the period during which Mr. Slater would have been working had he received reasonable notice of his termination. Mr. Slater could then be required to repay the benefits that he received if they relate to the same time for which he is compensated through damages.

[54] If he is required to make that repayment it would be unfair if the damages to which he was entitled were already reduced. The Herald would have received credit for the money through a reduced damage award and Mr. Slater would be left with the responsibility of explaining to the authorities that they should not be chasing him for repayment. If, on the other hand, he is not required to repay the benefit he will have gained a windfall. The Herald in that case will not have been required to make a payment any greater than would be justified in the absence of the CERB program.

[55] Counsel have noted two recent cases dealing with the calculation of damages upon employment termination and how CERB is to be accounted for. In *Iriotakis v. Peninsula Employment Services Limited*, 2021 ONSC 998, Justice Dunphy of the Ontario Superior Court of Justice addressed the issue. That was in February of this year. The court held that CERB could not be considered in the same way as Employment Insurance. CERB was an *ad hoc* program that neither the employer nor the employee contributed toward beyond the fact of their being taxpayers. The amount of the benefit was considerably below what the employee in that case was earning and on balance it would not be equitable to reduce the former employee's entitlement given his limited entitlement from the employer in relation to his actual losses.

[56] More recently, on May 28, the Supreme Court of British Columbia released the decision in *Hogan v. 1187938 B.C. Ltd.*, 2021 BCSC 1021. Once again, the issue was raised of whether the CERB payments received by the former employer should be deducted from the damages to be paid. The court noted that the general principle is that the employee should be put in the same position as if a reasonable period of notice had been given. Pension benefits were not deductible because they are a form of deferred compensation and similarly benefits received from private insurance are not deducted because the employee pays for that benefit. Madam Justice Gerow took note of the earlier Ontario case. She distinguished that case on the basis that in *Iriotakis* the plaintiff had been terminated after 28 months and was awarded three months' notice. The employee was not entitled to payment for commissions upon termination. That was a significant loss. The amount of his salary was about one half of his actual income so deducting the CERB payments from the damage award would be unfair.

[57] In *Hogan* the damage award was based on the income that the plaintiff would have earned if he had continued to work during the reasonable notice period. If the deduction were not made, he would be compensated for income that

he had not lost. The employee would be in a better economic position than he would otherwise be. It is difficult to disagree with that logic. But the understanding of CERB seems to be developing.

[58] As the country begins to move out of the pandemic more questions are being asked about the nature of the *ad hoc* CERB program. Clearly there are people who will have to pay it back. Mr. Slater will likely have to repay EI benefits for the period to which the damages relate. EI benefits are not deducted from awards for damages for wrongful dismissal. They do have to be repaid. Mr. Slater may have to repay CERB as well. While CERB payments were not provided as part of an insurance program, they were intended as a form of income replacement, provided by the federal government. The requirement for repayment makes them analogous to EI benefits.

[59] If those payments are deducted from the award of damages the justification is that Mr. Slater should not be compensated for income that he has not lost. The party that benefits from CERB in that case would be the Herald. The purpose of an award of damages is not to punish the Herald, but to compensate Mr. Slater. Money paid under the *ad hoc* program set up to provide employees with some modest level of protection from the financial impacts of the pandemic would then be used to cushion the blow of termination payments awarded against an employer. There were other programs in place to assist employers. And Mr. Slater, after going through this situation over the last year, would have to face the prosect of explaining to the government why he should not have to pay back the CERB payments that he received.

[60] If it is not deducted from the damage award the likely result is that it will have to be paid back, like EI benefits. If for some reason it is not, Mr. Slater may gain a windfall. The alternative is that the Herald would benefit from the taxpayer funded CERB payments by having a reduced damage award and Mr. Slater would be left providing an explanation.

[61] The CERB payments will not be directly deducted from the damage award.

Notice Period Extending Past the Trial Date

[62] The issue then arises about how to address the potential that the employee, in this case Mr. Slater, might obtain suitable alternative employment after the award is made, but before the expiration of the 24-month notice period. That has

become more common with the use of expedited trial procedures, like applications in court.

[63] Several approaches have been considered. There may be a trust imposed so that if the employee earns income that would mitigate the damage award those funds are impressed with a trust in favour of the employer. Another approach is to award partial judgment and have the parties return to court at the end of the notice period. Another possibility is to adjust the award for the contingency that the employee may obtain employment during the balance of the notice period.

[64] Discounting the award for the contingency that Mr. Slater may obtain employment has the benefit of finality. It is consistent with the way that damages are generally calculated. It has the distinct benefit of avoiding the costly prospect of these parties returning to court months after the fact.

[65] In Mr. Slater's case there are health issues that limit his employment potential in the coming months. He is facing more surgery and more recovery time. The economic recovery from the pandemic may open new opportunities, but for someone in Mr. Slater's position, given his age and long service with one employer, the chances of him getting new work are not great.

[66] But contingencies are intended to account for the potential that Mr. Slater might be successful. There remains some chance that he might "beat the odds". That chance has some "value". There is also the potential that he might not have to pay back CERB payments received. Again, while the chances might not be great, they are worth something.

[67] That discount should not substantially reduce the damage award that he receives and to which he is entitled. The total award should be discounted by 2 months so that Mr. Slater is entitled to damages equal to 22 months of salary and benefits.

Costs

[68] As the successful party Jerry Slater is entitled to recover the costs of the application in court. The parties were not able to fully address the matter of costs at the time of the hearing. If they are not able to agree on costs within 30 days of the date of this decision, they should contact the court to arrange for a hearing or written submissions on that issue.

Campbell, J.