IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Bent v. Atlantic Shopping Centres Ltd., 2007 NSSC 231

Date: 20071018
Docket: ST 184818
Registry: Truro

Between:

Catherine Lynn Bent

Plaintiff

v.

Atlantic Shopping Centres Limited
a Nova Scotia corporation

Defendant

Judge: The Honourable Chief Justice Joseph P. Kennedy

Heard: January 8, 9, 10, & 11, 2007, in Truro, Nova Scotia

Last Written Submissions: February 2, 2007

Written Decision: October 18, 2007

Counsel: Robert H. Pineo for the Plaintiff
and Jennifer Hamilton, Articled Clerk

G. Grant Machum and Mark Tector for the Defendant

By the Court:

[1] The plaintiff is Catherine Lynn Bent (Bent) of Truro. At 41 years of age she is the married mother of two children.

[2] She, at one time, worked for the defendant, Atlantic Shopping Centres Ltd. (Atlantic) which is a subsidiary of Empire Company Ltd., the Sobeys holding company. Atlantic operates the shopping centres that Empire controls.

[3] Bent was terminated by the defendant, July 30th, 1999, at which time she was the manager of its Fundy Trail Mall, a shopping centre located in Truro.

[4] She brings this action for wrongful dismissal.

BACKGROUND

[5] Atlantic hired Bent by oral contract of employment on November 5, 1990. Atlantic claims that Bent knew that acceptance of transfers was an essential part of the employment relationship.

[6] Bent progressed with Atlantic, initially as an entry-level manager at the Roy Building in Halifax, then in February1991, was transferred to the Penhorn Mall in Dartmouth as assistant manager. In June 1993, she was again transferred to the Fundy Trail Mall in Truro, where she held the position of manager of that property until her employment with Atlantic ended in July 1999.

[7] On March 26, 1998, Bent suffered from pregnancy-related medical difficulties and, on the advice of her physician, she took a leave of absence from her employment until April 10, 1998. During this leave of absence, she received full salary and benefits pursuant to the employment contract.

[8] On August 14, 1998, unfortunately Bent lost her unborn child. She initially took two weeks leave of absence to recuperate, but then on August 26, 1998, her physician advised her to take a further six weeks leave of absence to recover emotionally from the effects of her loss. She did so. This leave was extended an additional two weeks until mid October 1998 when she remained emotionally unable to resume employment. During this entire leave of absence, Bent again received full salary and benefits.

[9] On September 24, 1998, while Bent was on leave of absence, her boss Jim Corbett, (Corbett) a Regional Manager with Atlantic, requested a meeting with her. During that meeting, at a restaurant in Truro, Corbett informed Bent that there was to be a reconfiguration of the Fundy Trail Mall. It was to be converted from an indoor mall to a strip mall. As a result, he told her, it would no longer require a manager. He told her further that her position as manager would end at the conclusion of the renovations. At this meeting, Corbett offered Bent a transfer to a position as assistant manager of several properties managed by Atlantic at and near Fredericton, New Brunswick. This offer was open to acceptance for four days, until September 28, 1998.

[10] On September 25, 1998, the day after the Corbett meeting, Bent had a telephone conversation with Michael McGrath, (McGrath) Human Resource Manager at Atlantic, during which she rejected the offer to relocate to Fredericton, New Brunswick.

[11] During that conversation she cited multiple reasons for not being able to accept this offer.

[12] During the meeting with Corbett the day before, Bent had asked for the offer of a transfer to Fredericton to be put into writing for her future reference. As a result McGrath wrote a letter to Bent dated September 25, 1998 and read it to her during their telephone conversation of that same day. In part, the letter provided:

> This letter will confirm the details of your recent meeting (September 24, 1998) with Jim Corbett concerning the conditions of our offer to transfer you to Fredericton, New Brunswick. Jim explained, that no later than mid 1999, your present job as manager of Fundy Trail Mall will no longer exist, due to the redevelopment of the site. As a valued employee, we are pleased to offer you the position of Assistant Manager of Fredericton Mall, in Fredericton, New Brunswick ...

[13] The meeting with Corbett on September 24th and the September 25th letter and conversation with McGrath are central to this matter because Atlantic claims that this communication, in its totality, constituted notice of termination and that Bent knew or should have known that having refused the Fredericton transfer, she no longer had a job with Atlantic when the conversion of the Truro property was completed.

[14] Atlantic submits that this notice was "appropriate and adequate" in the circumstances and thus Bent is not entitled to any further compensation. In the alternative, Atlantic argues that, during the September 1998 discussions, Bent agreed

to the arrangement that would see her employment with Atlantic continue until the reconstruction was completed in mid-summer of 1999.

[15] Bent responds that the communication of September 1998 did not constitute notice. She claims that she had no understanding that her career with Atlantic was over if she refused the Fredericton transfer. She says she believed that she would otherwise be employed with Atlantic after the mall conversion. She denies that she agreed to any notice period at that time, or any time.

[16] Bent argues that notice of termination was not accomplished until months later.

[17] On February 5, 1999, Atlantic, via McGrath, provided a letter to the plaintiff which read "re Notice of Termination". In part, the letter stated:

> In September I wrote to you concerning your present job as manager of Fundy Trail Mall and explained to you that no longer than mid 1999, the position of manager will no longer exist due to the redevelopment of the site. As a valued employee, you were offered a full relocation package and the job of Assistant Manager of Fredericton Mall including marketing and administrative responsibilities for Carlton Mall, Nashwaaksis Plaza and Bridgeview Plaza. You were unable to accept this offer due to personal commitments in Truro.
>
> Since the Fundy Trail Mall needs to be managed during the redevelopment stage we agree to maintain your employment until mid 1999, which is the expected date for

> completion of the project. Should a suitable opportunity become available during this time within the Truro area we are prepared to release you on very short notice. In the event that you do not find alternate employment prior to mid 1999, your termination date will be July 30, 1999.
>
> The Company will pay you, subject to any deductions required by law, wages and vacation pay, if any, owing to you up to the date of termination of employment, and any amount of money owing to you under the Company pension plan, subject to the terms of the plan.

[18] On August 9, 1999, Atlantic, again via McGrath, sent a letter to Bent which stated "Notice of Termination Dated February 4, 1999". *Inter alia*, the letter stated:

> As per my letter to you dated February 4, 1999 [sic] this letter is a reminder that your employment with Atlantic Shopping Centres did terminate on July 30, 1999.

[19] There is then dispute then between the parties as to when notice of termination was accomplished. Was it on September 24/25, 1998, when Corbett met with Bent and followed the next day by a conversation with and a letter from McGrath, or was it the McGrath letter of February 5, 1999?

[20] Bent had at one point suggested that notice may not have occurred until as late as the August 9, 1999 letter, however did not make this argument at trial.

ISSUES

(1) When did notice of termination occur?

(2) Was that notice sufficient?

(3) or was there notice by agreement?

(4) Do Wallace damages apply?

WHEN DID BENT HAVE NOTICE OF TERMINATION?

[21] Did Bent have notice of termination as early as the meeting with Corbett on September 24th, 1998, particularly when combined with the telephone discussion with McGrath on September 25th, and the letter from McGrath of the same date?

[22] Judicial analysis of the sufficiency of a notice of termination is, in reality, a consideration of whether or not the employer was fair to the employee. The following question must be answered by the court: Did the purported notice of termination fairly communicate to the employee that the employment relationship would definitely end and when it would do so? The courts require employers to be fair to the employee who must, following the announced termination, find alternate employment. The courts are aware of this dramatic negative effect that an employee is likely to suffer

when a job is ended. The employer holds the disproportionate power in the relationship and so fairness to the employee is mandated. This requirement of fairness applies to both the communication of the notice and the time that it allows the employee to adjust to the loss of job.

[23] As a result, when appropriate and adequate notice of termination is raised as a defence, the employer bears the burden of proving its acts constitute reasonable notice of termination. This statement of the burden was clearly set forth in *Yeager v. R.J. Hastings Agencies Ltd.,* [1984] B.C.J. No. 2722 (S.C.) [QL] per Wood, J. at paragraph 40:

> The onus of proving that such a notice has been given rests upon the employer who seeks to raise it as a defence to an action for damages for wrongful dismissal.

[24] The test to determine if documents or conduct constitutes appropriate notice of dismissal is an objective one that is employed on a contextual basis. This statement of the nature of the test was clearly set forth in *Wilson v. Crown Trust Co.,* [1992] O.J. No. 1765 (G.D.) [QL] per Craig J. at page 3:

I adopt as the applicable test for notice of termination an objective test as follows:

> ‘What would a reasonable man understand from the words used in the context in which they were used in the particular industry, in the particular working place, and in all of the surrounding circumstances? Ellen E. Mole, *Wrongful dismissal Practice Manual*, (1984), Sect. 216'.

The objective and contextual nature of the test has been accepted and applied in: *Kalaman v. Singer Value Co.,* [1997] B.C.J. No. 1393 (C.A.) [QL] at paragraph 38; and *Holmes v. Irving Shipbuilding Inc.*, [2001] N.B.J. No. 307 (Q.B.) [QL] at paragraph 53.

[25] In H. Levitt, *The Law of Dismissal in Canada*, 3rd ed., Looseleaf, (Aurora, Canada Law Book: 2007) (Release # 5 May 2007), the learned author states the general rule concerning the appropriateness of a notice of termination at pages 8-9:

> The general rule is that notice of termination must be specific, unequivocal and clearly communicated to the employee.[Emphasis Added]

This rule has been accepted judicially and applied in: *George v. The Hardman Group Limited* (1985), 66 N.S.R. (2d) 426 (C.A.) at paragraph 15; *Woodward v. Sound Insight Ltd.* (1986), 73 N.S.R. (2d) 396 (S.C.) at paragraph 19; *Gibb v. Novacorp International Consulting Inc.*, [1990] B.C.J. No. 1705 (C.A.) [QL] at page 3; *Kalaman*

v. Singer Value Co., supra, at paragraph 38; *Miller v. Fetterly & Associates Inc.* (1999), 177 N.S.R. (2d) 44 (S.C.) at paragraph 34; and *Holmes v. Irving Shipbuilding Inc., supra,* at paragraph 52.

[26] It is not enough for the employer to communicate to the employee that it is possible, or even probable, that the employment relationship will terminate. In *Woodward, supra,* at paragraph 19, Justice MacDonald of this Court accepted this proposition as set forth in the text, *Wrongful Dismissal* by D. Harris.

> Despite Mr. Buchanan's persuasive arguments, a warning of possible dismissal or even probable dismissal does not constitute notice of dismissal.

Also, the learned author in Levitt, *supra*, relying on several Canadian cases stated this proposition at pages 8-9:

> A warning of probable dismissal does not constitute notice of termination. 'There should be no doubt as to whether the relationship is being severed and when.'

[27] The issue of a certain date of termination referred to in the Levitt, *supra,* passage in the preceding paragraph, was stated directly by Justice MacFarlane of the British Columbia Court of Appeal in *Kalaman, supra*, at paragraph 38:

> ...A notice must be specific and unequivocal such that a reasonable person will be led to the clear understanding that his or her employment is at an end as of some date certain in the future...

[28] The employer must make it clear to the employee that he or she is being terminated from the employer and not simply from the employee's current duties. The learned author in Levitt, *supra,* states this proposition at pages 8-9, relying on *Reynolds v. First City Trust Co.,* [1989] B.C.J. No. 1684 (S.C.) [QL]:

> If an employee is told that his or her employment will end as of a certain date, but it is not clear that the employee will be terminated entirely from the company, there is no notice of termination.

[29] The plaintiff Bent submits, and I agree, that Atlantic must convince me, on a balance of probabilities, that a reasonable person would view the conduct of the defendant and find the point in time when Atlantic provided clear and unequivocal notice that employment would end on a certain date. This notice must also be determined objectively and in light of all the circumstances of the case, including the nature of the particular working place.

[30] Bent argues that the events of September 24/25, 1998 do not provide the "clear and unequivocal" notice that the defendant must show. She argues that she was not at that time told that she was being terminated, and did not understand this to be so.

[31] Rather she was, she submits, led to believe that even if she were unable to accept the Fredericton offer there would be another job for her with Atlantic.

[32] The defendant, Atlantic, in its effort to discharge its burden, has referred to cases it considers relevant.

[33] Atlantic cites *Gregg v. Freightliner Ltd.* (c.o.b. Western Star Trucks) B.C.C.A [2005] B.C.J. 1390. In that matter the B.C.C.A. upheld the decision of the trial court in circumstances with similarities to this case.

[34] In December 2001, Freightliner issued notices of termination to non-union employees due to a plant closing to take place September 30, 2002. Some employees, including Gregg, were offered the possibility of moving to Portland Oregon for new jobs with a related company.

[35] Gregg argued that the notice was not clear and unequivocal because of the possibility of employment held out and because there was a possibility that his employment would be ended sooner than expected. Paragraph 14 Lowry, J.A. states:

> The question in this case must be whether the possibility of continued employment could, in the circumstances, have reasonably caused the appellant and employees like him to consider they had any assurance of continued employment such that they need not be concerned about finding alternative positions. There can have been no such assurance. They were told their employment would end on 30 September 2002. The plant was closing then and only some of the employees of Freightliner were going to be offered employment with its related company in Portland. It was certainly clear that, while the appellant may have hoped that he would be offered an acceptable position at the Portland plant , his employment would be terminated at the end of September 2002.

[36] In *MacAlpine v. Stratford General Hospital,* [1998] O.J. No. 3239, Ont.C.A., Abella, J.A. (as she then was) found that there was no equivocation and a notice given to a nurse co-ordinator who was informed that her position “will become redundant .... effective 1992 06 15" (para. 14)

[37] Paragraph 15:

> Ms. MacAlpine was not employed in any capacity other than as a co-ordinator. The redundancy, therefore, of her position is the termination of her employment relationship with the hospital. The reference in the letter to the possibility of other jobs does not, on plain reading, detract from the clarity of the notice. There was no alternative employment offered, only the invitation to apply for other available jobs, for which she would be considered ‘along with any other applicants.’

THE COMMUNICATION OF SEPTEMBER 24/25, 1998

[38] Bent testified. She confirmed that at the September 24th meeting with Corbett, she was told that her position at Fundy Mall was ending because of the reconfiguration and was at the same time offered the transfer to Fredericton. She agreed that she refused the Fredericton offer the next day.

[39] She gave reasons: In Fredericton she would be demoted to an assistant manager position. Her husband would have to stay in Truro to finish the educational course he was taking. "I couldn't afford to pay rent (in Fredericton) and leave my husband here". His course was to end in the summer of 1999.

[40] Bent, on direct, stressed that she had no intention of leaving Atlantic after her husband completed his course, nor did she tell anyone at Atlantic that she intended to follow her husband to distant job opportunities upon graduation. Subsequently, however, on cross-examination, she agreed that "I might have" told Corbett that her position coming to an end would not be a negative because of job opportunities that her husband would have upon graduation. She also agreed with defence counsel's

suggestion that the July 30th, 1999, termination date was established in conversation with McGrath to coincide with her husband's graduation.

[41] Bent claimed to have understood that if she did not go to Fredericton, there would nevertheless be other job opportunities with Atlantic opening up down the road. She quoted Corbett as saying "Cathy - you know what this company is like, there are always other jobs coming up." She said "I stayed with them to the end of the Fundy Mall reconstruction because I hoped another job would be offered by then." "I thought that if a job came up I would be the first to get it." She agreed, again on cross-examination, that she understood that if the job didn't come along that she was "gone" in mid 1999, that she knew there was "no guarantee" that another job would happen.

[42] Subsequently, in March of 1999, she became interested in the Downsview Mall manager job in Lower Sackville which had become available. Her direct boss, Corbett, recommended her for that position. Bent said she expected to get that job. "I couldn't believe that they wouldn't give me that job."

[43] Atlantic's evidence as to the details of the September 24, September 25, 1998 communication is provided by Corbett and McGrath.

[44] Corbett testified that at the September 24th meeting he explained what was happening to Bent's Fundy Trail job and offered her the transfer to Fredericton. He agreed that he did not actually say that "if you refuse the transfer you will be terminated."

[45] He testified that she indicated that her husband was expecting job opportunities upon graduation and she would "most likely be following him around."

[46] Corbett said that Bent commented that the expected date of the end of construction of the Fundy Trial Mall, the summer of 1999, would coincide with her husband's graduation, which he took to be a positive for her.

[47] Corbett stated emphatically that he never offered her another job with Atlantic if she refused the Fredericton job, "...that was beyond my power."

[48] McGrath testified about his contact with Bent on September 25th.

[49] He first spoke of the nature of Atlantic's business. He said that they hire management trainees and the method used to develop managers is to move them from property to property.

[50] He said that this transferability is a condition of employment for every manager in the property group. "If not transferable then people leave the company." He suggested that this was a reality well understood by Atlantic Property employees.

[51] He confirmed that in September 1998, Atlantic decided to redevelop its Fundy Trail Mall as a strip mall, partially to address flooding problems. As such, it would no longer require a manager. "We decided to offer (Bent) a transfer to Fredericton - although it was an assistant manager job it was at one of our larger shopping centres." "It was a job that would allow her to acquire great experience." "We were giving her the full relocation package."

[52] He described himself as a 'note taker' and specifically had taken notes during his conversation with Bent on September 25, 1998. He made reference to those notes during his testimony.

[53] Bent was on sick leave at that time and Atlantic wanted her to hear about the situation "from the company and not from the street" so it was agreed that Corbett would meet with her on the way home from the meeting at which the future of the Fundy Trail Mall was decided.

[54] "After that meeting of September 24th I was informed (by Corbett) that she wanted the offer of transfer made in writing. So the next day, September 25, 1998, I wrote the offer letter."

[55] However, on that day, before the letter was sent, "Bent called me and told me that there was 'absolutely no way she would take the transfer.' "I told her that this was the offer - with Fundy Trail being redeveloped ... by mid 1999 we would no longer have a job for her. She understood that we would no longer have a job for her at that time. She absolutely knew that the only opening was Fredericton," "She knew that her employment would end."

[56] McGrath said that during this call she told him that she wanted to stay at the mall until it closed because her husband was taking a course.

[57] McGrath testified that Bent told him that her husband had prospective jobs in Spain and the State of Georgia upon graduation and had the opportunity to make $50,000 a year. She told him she required no additional time to consider the Fredericton offer. “It was my understanding that we were on good terms with that - she rejected the offer and that would not be a problem for her.”

[58] McGrath said that the anticipation was that they would be finished the reconstruction by June of 1999, so that Bent would have nine months to go. (In fact, her job did not end until July 30, 1999.)

[59] McGrath said that during the conversation Bent expressed no interest in staying with the company. “I thought she was going to be following her husband’s career.” “In fact”, he said, “the July 30th termination was at Bent’s suggestion.” It coincided with the completion of her husband’s course. McGrath testified the date was agreed upon as an accommodation to Bent. Thus the defendant’s suggestion that Bent agreed with the notice period provided.

[60] McGrath, on cross-examination, said that he could have told Bent that she was welcome to apply for jobs that might come up, however, “at no time did I ever suggest that she would have a job after July of 1999 ... never.”

[61] Subsequently in the spring of 1999, she did apply for two jobs that opened up, Highland Square in New Glasgow and Downsview Mall in Lower Sackville.

[62] McGrath testified, “I told her that she wasn’t qualified for the Highland Square job and wouldn’t be considered.” He understood that she agreed with this assessment.

[63] He said that Bent was considered for the Downsview job, however it was ultimately given to a “more qualified candidate”.

[64] Bent was very upset about not getting the Downsview job. After the decision was announced in March of 1999, she did not come back to work. She once again went on sick leave and did not ever return to Atlantic. She testified, “I was devastated. I couldn’t take it working at that mall anymore.” On cross-examination she agreed that she could have come to work.

[65] On this occasion Atlantic did not continue her salary. She applied for short term disability and was turned down.

[66] McGrath testified, “We do not pay employees who are not at work and not on S.T.D. or L.T.D.” However, he added, “We kept her employment open after March because we had agreed to and she was still eligible for medical benefits.” “I sent a letter (August 9, 1999) to confirm that July 30, 1999 had been her termination date.

FINDINGS

[67] After considering the totality of the evidence I conclude that the plaintiff, Bent did have “notice of termination” as a result of the communication that she had with Corbett and McGrath on September 24th and 25th, 1998. Particularly I accept McGrath’s testimony as to the details of the telephone conversation that he had with Bent on September 25th.

[68] In contrast, Bent recalls having had conversation with McGrath after her meeting with Corbett, but has no specific recollection of this September 25th phone call.

[69] McGrath's testimony was enhanced because he had reduced the conversation "Daytimer" notes proximate to it occurring.

[70] I accept McGrath's evidence that Bent understood on September 25th, 1998, that if she turned down the Fredericton offer her employment with Atlantic would end, and that he told her during the conversation that Fredericton was the offer being made to her and otherwise "by mid 1999 we would no longer have a job for her at that time." This statement, I find, to be clear and unequivocal.

[71] I am satisfied, further, that Bent did discuss with McGrath that the predicted time for the Truro Mall reconstruction to be completed would coincide with her husband's graduation and allow her to follow him to perspective job opportunities. McGrath's testimony on this point is corroborated both by Bent when she agreed that the July 30th termination date was established to suit her circumstances and also by the testimony of Corbett.

[72] Bent's testimony about the communication with McGrath is compromised because she doesn't remember the September 25th phone call with McGrath.

[73] Further, on cross-examination she contradicted definitive statements given on direct, an example being that she absolutely denied that she told Atlantic that she would be following her husband to job opportunities upon his graduation and then subsequently agreed that she might have told Corbett that her job ending would coincide with her husband's job opportunities.

[74] I find that Bent had no future job offer with Atlantic beyond the Fredericton proposal. The most that she could have reasonably anticipated was the possibility of continued employment, should job opportunities develop. The statement made to her by Corbett on September 24th, 1998, upon which she relies to establish her understanding that she was not being terminated, is in fact no more than a suggested possibility of another job.

[75] Her situation was akin to that of the plaintiff's in *Gregg v. Freightliner, supra,* and *MacAlpine v. Stratford General Hospital, supra*. That case standing for the proposition that the possibility of future employment does not compromise the quality of the notice of termination.

[76] I am satisfied that a reasonable person in the position of Bent would have known, in the circumstances of this case, that the communications of September 24th and 25th, 1998, in combination gave notice of termination, should she not accept the Fredericton transfer.

[77] This notice of termination was "specific, unequivocal and clearly communicated."

WAS THERE NOTICE BY AGREEMENT?

[78] I am not convinced that, as Atlantic submits, the notice period from September 24, 25, 1998 until July 30th, 1999, was by agreement.

[79] While McGrath testified, and Bent agreed, that the July 30th termination date was agreed upon to accommodate Bent, I am mindful that Bent was told, by both Corbett and McGrath, that her job was over when reconstruction was completed and it was then subsequently agreed that this date would be July 30, 1999.

[80] I do not conclude that an agreement as to when a job will actually end, even if that date is to accommodate the employee, is an acknowledgement by the employee that the notice is adequate.

[81] My impression of the evidence is that Bent, "seeing the handwriting on the wall," negotiated a termination date that would best suit her circumstances.

WAS THE NOTICE APPROPRIATE?

[82] Having found that notice of termination was accomplished as of September 24/25, 1998, thus giving Bent 10 months notice to the termination date of July 30, 1999, the question remains, was that notice appropriate in the circumstances? Again the onus is on the employer.

[83] The proper remedy for dismissal without just cause is "reasonable notice" or payment in lieu of notice. This remedy is calculated as a period of time in which the employee is deemed to have been entitled to continue to be employed after notice that the employer wished to terminate the contract of employment. Reasonable notice is calculated by the trial judge taking into account various factors to determine the extent

of the damage suffered by the employee. The leading judicial statement, accepted in all jurisdictions in Canada, is found in *Bardal v. Globe and Mail* (1960), O.J. No. 149 (Ont. H.C.), where McRuer C.J.H.C., stated:

> 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 qualifications of the servant.

[84] The plaintiff submits that the following facts are relevant to the termination of her *Bardal, supra,* damages:

[85] Bent stressed that as a mall manager she exercised considerable responsibility dealing with constant tenant issues, maintenance issues, particularly acute at the Truro location due to its susceptibility to flooding. She also coordinated the mall's marketing projects and had extensive interaction with head office.

[86] Bent was employed with Atlantic for close to nine years, the bulk of her working life being 35 years old at the point of termination.

[87] She testified that to her attempts to find employment of a similar nature in the Truro area after she left Atlantic, the reality being that she has never been able to find a position of similar responsibility.

[88] Bent cited cases that she submitted would give this Court guidance as to a proper range of notice.

[89] *Wells v. Mack Maritime Ltd.* (1975), 21 N.S.R. (2d) 434 (S.C., per Cowan C.J.T.D. The plaintiff was employed as a general manager of a truck dealership for eight years. The employer met with the plaintiff who had been managing the employer's business and informed the plaintiff that he was not being a "good general manager" and that the employer was considering appointing a new general manager and offered to the plaintiff the position of sales manager. Shortly after this warning, the employer appointed a new general manager stating that the employer was not happy with the plaintiff's performance. The employer did offer to the plaintiff the position of sales manager, which the plaintiff refused. This Court awarded damages of one year's salary as payment in lieu of notice.

[90] *Scott v. Atwoods Furniture Showrooms Ltd.*, [1994] O.J. No. 721 (G.D.) [Q.L.] per Lane J. The plaintiff was a female manager who was employed by the defendant for seven years. For the final three years of her employment, she held the position of store manager, responsible for supervision and training of staff, approval of interior design layouts, conducting weekly sales meetings and general problem solving. She refused to accept a change in duty and was dismissed as a result. The plaintiff attempted to find alternate employment but in the 10 months following her termination could not find anything in the interior design business. The general division assessed her damages for payment in lieu of notice as 12 months.

[91] Bent contends that when the *Bardal* factors are considered in this case, that a reasonable notice period would be 14 months.

[92] She then asks the court to consider so-called *Wallace* case factors and suggests that in the circumstances, I should consider an increase in the notice period awarded due to the suggested bad faith conduct of Atlantic.

[93] Atlantic, on the other hand, submits that were I to find that the notice of termination was accomplished as of September 1998, then the 10 month notice period was reasonable in the circumstances.

[94] In *Boheimier v. Storwal International Inc.* (1982), 40 OR (2d) 264, Saunders, J. in considering the *Bardal* test, found that the notice period must be fair to the employer as well as the employee. The court said:

> In my opinion, there is another factor to be considered. As this is a contract matter, the notice period must also be reasonable for the employer. What may be a reasonable period to allow a discharged employee to find new employment may be more than an employer should be asked to pay. An employer may dismiss for cause without notice but the economic requirements of the business or even the incompetence or negligence of the employee do not constitute cause. If the period of notice is extended too far, the ability to dismiss employees for economic or other reasons may be seriously impaired or rendered illusory.

[95] More recently, Justice Davison of this Court in *Holland v. Midland Walwyn Capital Inc.* (1993), 124 N.S.R. (2d) 204 applied the *Bardal* test in finding that a reasonable notice period for a plaintiff stockbroker who had worked for the defendant for 31 years was 14 months.

[96] I refer as well to the recent Ontario Court of Appeal decision in *Cronk v. Canadian General Insurance Co.,* [1995] O.J. No. 2751 (Sept. 21, 1995). The main

issue before the court was the weight to be given to the character of the employment in setting a reasonable notice period. At trial, the judge had determined that the plaintiff, a non-managerial employee, was entitled to the same length of notice period as a senior corporate executive.

[97] The Court of Appeal overturned this decision, relying on the test in *Bardal, supra.* The Court indicated that the jurisprudence had clearly awarded senior executives lengthier notice periods than other employees. Lacourciere, J. speaking for the majority noted at para. 18:

> The result arrived at has the potential of disrupting the practices of the commercial and industrial world, wherein employers have to predict with reasonable certainty the cost of downsizing or increasing their operations, particularly in difficult economic times. As well, legal practitioners specializing in employment law and the legal profession generally have to give advice to employers and employees in respect to termination of employment with reasonable certainty. Adherence to the doctrine of stare decisis plays an important role in that respect: *Cassell & Co. Ltd. V. Broome*, [1972] 1 All E.R. 801 at p. 809, [1971] A.C. 1027 (H.L.)
>
> In my opinion, the character of the employment of the respondent does not entitle her to a lengthy period of notice." [paras. 27-28]

[98] In reversing the motions judge, the Court of Appeal awarded the plaintiff, a 55 year old assistant underwriter who had worked for the company for approximately 37

years, a reasonable notice period of 12 months. This was a reduction from the 20 months awarded by the trial judge.

[99] I am satisfied that in the circumstances, using the *Bardal* factors, that the 10 month notice period of termination given this employee was both adequate and reasonable.

[100] In so concluding, I have considered that Bent was a nine year employee who exercised what I consider to have been a lower management responsibility. She was 35 years of age at the time of the termination. Her age should not have affected her ability to obtain comparable employment.

[101] Her evidence, as to finding similar employment in the Truro area, was that she did not work after leaving Atlantic in March of 1999 until March of 2000, when she worked for a short time as a clerk and thereafter at various jobs on a part time basis. None of these jobs were comparable to the mall manager position.

[102] She testified that anxiety and depression caused by the loss of her job at Atlantic, compromised her ability to work full term.

[103] It troubles me that Bent left her employment with Atlantic in March of 1999 when she admitted that she could have continued to work. This act causes me to have concerns about her diligence in finding a comparable full time job after termination.

[104] I agree with Atlantic's suggestion that in the cases cited by Bent on this issue, the employees commonly had been employed for longer periods, or had more responsibility, or both.

[105] The 10 month notice period is not compromised by Atlantic's failure to pay Bent between March of 1999 and July 30, 1999.

[106] I find no fault with McGrath's suggestion that employees who do not come to work and are not eligible for short term disability do not get paid

AS TO WALLACE DAMAGES

[107] In *Wallace v. United Grain Growers Ltd.* (1979), 219 N.R. 161 (S.C.C.), per Iacobucci J., the Supreme Court of Canada added to the reasoning enunciated in *Vorvis v. Insurance Corp. Of British Columbia,* [1989] S.C.J. No. 46, by holding that aggravated damages could be awarded in an action for wrongful dismissal even in the absence of an independent actionable wrong. Conduct of an employer that is not sufficient to find an independent actionable wrong, but has impacted negatively on the employee's future employment prospects, can lead to aggravated damages.

[108] In *Wallace, supra*, the Supreme Court of Canada awarded to the employee an extension of notice to account for the employer's bad faith conduct. The plaintiff was a 14 year employee of the defendant. He was terminated without cause. The trial judge awarded 24 months notice and the Manitoba Court of Appeal reduced the award to 15 months in accordance with the *Bardal* factors. The Supreme Court of Canada restored the trial judge's award of 24 months as compensation for the aggravation caused by the bad faith conduct of the employer. Facts held by the Supreme Court to constitute aggravating factors sufficient to warrant an increase in the notice period

were: that the employer played "hardball" concerning the litigation of the claim, that it continued to assert cause when there was no good faith basis to do so, and that it terminated him just days after complimenting his job performance.

[109] Also cited by the defendant was the Nova Scotia case of *Wal-Mart Canada Inc. v. Day* (2000), 188 N.S.R. (2d) 69 (C.A.), in which a 17 year employee was terminated without just cause. The jury awarded 17 months notice and an additional 12 months for the bad faith conduct of the employer. The employer appealed to the Nova Scotia Court of Appeal, alleging that there was insufficient evidence upon which a jury could have found bad faith and that the trial judge erred by leaving the issue of aggravated damages with the jury. The Court of Appeal disagreed and upheld the jury's award of 12 months aggravated damages, noting that it was "generous". The evidence of bad faith was that the employer had been less than honest and forthright with the plaintiff concerning the investigation leading to the termination.

[110] As examples of "bad faith" on the part of Atlantic, Bent suggests, among other things the following: That she was asked to make a major career decision, (ie. the transfer to Fredericton) while on medical leave for emotional difficulties, that Atlantic refused to continue to pay her salary after March 9, 1999, when she did not come to

work after the Lower Sackville Mall decision and at the same time refused to pay her S.T.D. benefits knowingly leaving her family without income.

[111] It is Bent's submission that these suggested "bad faith" actions on the part of Atlantic compromised her well-being to an extent that prevented her from finding any alternative employment until two years following her termination.

[112] As a result, Bent asks for an additional 12 months notice by way of *Wallace* compensation.

[113] I find no "bad faith" or unfair dealing on the part of Atlantic. The evidence does not disclose that Bent was pressured or stressed in relation to her response to the Fredericton transfer offer, in fact she turned the offer down the day after it was made, although she had been given four days to respond.

[114] As to Atlantic not paying her salary after March 9, 1999, when Bent did not return to work, she admitted on cross-examination that she was able to work but did not.

[115] In *Suleman v. British Columbia Research Council (B.C.C.A.)*, [1990] B.C.J. No. 2707, Hutchehon, J.A. for the Court of Appeal states at page 4:

> In other words the contract of employment is not terminated until the end of the notice period and during that period the employer has the right to the services of the employee. It follows that the employee must remain ready and willing to carry out the contract of service. In the present case, the named day was March 31, 1987. It was not until that date that the cause of action accrued for the alleged breach of the contract to continue the relationship.

[116] As indicated, McGrath's explanation that Atlantic did not pay employees who did not come to work without reason makes sense to me.

[117] Bent, despite her failure to come to work, was kept on as an employee until the termination date in order to maintain her benefits provided by Atlantic.

[118] I do not find any bad faith in Atlantic's response to Bent's failure to show up for her job in March of 1999.

[119] The suggestion that Atlantic unfairly refused Bent short term disability after March 9, 1999, is also not supportable.

[120] Dorothy McKay, Atlantic's payroll supervisor testified. She said that the company dealt with Bent's claim for S.T.D. in March of 1999, the same as it treated any other claim. Atlantic's S.T.D. insurer, Sunlife, had recommended against payment of this claim because it said that the supporting documentation from Bent's family doctor did not show the employee to be continuously, totally disabled.

[121] It is to be remembered that Bent agreed on cross-examination, that after March 9, 1999, she could have come back to work.

[122] It was argued that Atlantic could have and should have paid S.T.D., ignoring Sunlife's recommendation, however I accept that Atlantic was dealing with Bent in a manner consistent with the usual company policy and was not singled out for negative treatment.

[123] On the totality of the evidence, I conclude that Bent's failure to come to work after March 9th, 1999, was a reaction to the obvious disappointment that she experienced when she was not given the Downsview Mall job. On cross-examination she agreed that she could have come back to work.

[124] I do not find bad faith on Atlantic's part in the decision not to pay her short term disability.

[125] I find that *Wallace* damages are not payable to Bent herein.

[126] Having found notice of termination of 10 months to have been appropriate and adequate herein and otherwise finding no fault on the part of Atlantic, I find no damages payable by this employer.

[127] If necessary I will hear the parties on costs.

Chief Justice Kennedy