Claim No: 343392

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Peters v. Eastlink, 2011 NSSM 43

BETWEEN:

CHRISTOPHER PETERS

Claimant

- and -

BRAGG COMMUNICATIONS INC. c.o.b. as Eastlink

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on May 2 and May 12, 2011

Decision rendered on June 20, 2011

APPEARANCES

For the Claimant	self-represented
For the Defendant	Jessica L. White, counsel Ryan Baker, student at law

BY THE COURT:

[1] The Claimant worked in a managerial job for approximately six and a half years for the Defendant, Eastlink, before events culminated in what is either a resignation or, as the Claimant contends, a termination on November 17, 2010.

[2] The ultimate issues that I must decide are:

a. Did he resign his employment, or was he terminated?
b. In either case, was there just cause for him to be terminated without notice?
c. If there was no just cause, what would constitute reasonable notice?

The facts

[3] The basic facts which gave rise to the Claimant's departure from his employment are not seriously in dispute.

[4] The Claimant managed a small team of employees who work in the area called "Provisioning Carrier Services" which I understand has to do mostly with transfers of phone service between Eastlink and other telephone companies. The Claimant was earning approximately $52,000.00 per year plus benefits.

[5] The events in question concern his management of a particular employee under his charge, Lynn Hamood, in connection with her excessive overtime work. The Claimant was issued a written letter of reprimand approximately a year earlier for allowing Ms. Hamood to bank overtime hours, which was contrary to Eastlink policy and possibly a violation of the *Canada Labour Code* ("the

Code"). The Claimant had contended that there was an unwritten rule that permitted this practice, but he was set straight by management on this point.

[6] Shortly before the Claimant left his employment, it was discovered that, while he was not allowing Ms. Hamood to bank hours, she was nonetheless working consistently more than the 48 hours per week that are allowed under the *Code.* The Claimant had advised her that she would only be paid for up to 48 hours, which meant that she was working excess hours for which she was not being paid nor given time off in lieu of payment.

[7] When this was first discovered in about October of 2009, the Claimant was given a written letter warning him that this was a serious violation and that any repetition could result in further discipline, up to and including dismissal. The Claimant testified, and I accept, that he took this very seriously as he had worked his entire career so far, including eleven years with Rogers and five with Eastlink, without any form of discipline.

[8] Despite this, about a year later it again surfaced that Ms. Mahood was working routinely in excess of 48 hours per week.

[9] Why would an employee such as Ms. Mahood work this much overtime, placing herself in danger of burnout? And why would a manager such as the Claimant allow this to continue for a protracted period of time? The superficial answers to these questions are fairly easy, although what to make of these answers is more challenging.

[10] The Provisioning Carrier Services department was faced with growing work demands. The Claimant knew that he was somewhat understaffed, and

made repeated requests to upper management for additional people to be hired, or for existing temporary people to be given permanent status. He also knew that some of his staff were not trained to do all of the tasks required of his department. He had also been promised that there were technical advances in development that would eventually make the work get done more efficiently.

[11] Ms. Mahood was an obviously capable employee who also had the responsibility to provide training to other employees. She was someone whose dedication to the job was extraordinary, and who appears to have been willing to sacrifice her private life and possibly her health to get the job done on a daily basis. She (and the Claimant) both understood that Eastlink could get into trouble with its regulator, the CRTC, if customer demands were not met in a timely manner, and she performed overtime consistently to the point of exhaustion in order not to have her department fall behind.

[12] Because she was so busy performing the actual work, she did not have time to spare to do some cross-training of staff. This created a kind of vicious circle, where the possibility of some relief was an ever-receding horizon.

[13] As I understand the evidence, there were other employees who routinely did not work overtime, either by preference or because they did not have the necessary training to do some of the tasks that kept Ms. Mahood busy for all of these extra hours.

[14] This did not make for a particularly happy workplace. Ms. Mahood was unhappy doing all of this extra work, and some other employees resented the fact that Ms. Mahood was getting the opportunity for so much overtime.

[15] Ms. Mahood testified that part of the reason she kept working this hard was that she believed that the Claimant was informing upper management and that she was, in effect, getting credit that would enhance her status and career. She eventually blew the whistle on the Claimant, in part because of her exhaustion, and in part because she concluded that it was the Claimant and not she who was getting credit for all of the work getting done.

[16] She also testified that the Claimant encouraged her with praise, and that he assured her that his requests for extra staff were lodged with upper management. In this way, the pattern was allowed to continue for far too long.

[17] The Claimant placed some of the blame for why this went on so long on his own manager's unavailability. He testified that he had mentioned on more than one occasion to Tracy Vaslet that he needed to talk about the Lynn Mahood situation, but that he was unable to have that conversation, in part, because of Tracy's long-term absences during some of that time. When asked why he did not go over his manager's head and speak directly with upper management, his answer was to the effect that he much prefers to stay within the chain of command. The real reason, I find, is that he did not quite understand the seriousness of the situation and its potential to undermine his career.

[18] In the result, this situation persisted for far too long. Human nature being what it is, there was some procrastination and some studied ignorance going on. Difficult as it may be for some people to believe, the fact is that the Claimant appears to have lacked the ability to stop his employee Lynn Mahood from working excessive hours. It appears that he thought that telling her that she would not be paid for these hours would suffice to keep her down to 48 hours a week. He did not seem to appreciate that Ms. Mahood would simply continue to

work whatever hours were necessary, in order to do the job that she was committed to doing.

[19] There is no evidence that the Claimant ever simply ordered Ms. Mahood to STOP. Had he done so, and had she obeyed, it is possible that he would have precipitated a different crisis than the one he eventually faced. Work would have backed up, with the potential for missing client service targets and deadlines, which might have gotten him and his staff into some trouble. It would also have likely provoked an effort to find a solution other than working one employee half to death.

[20] As such, it appears to me that the Claimant failed to take the difficult but ultimately more productive course of action. He almost certainly could have stopped Ms. Mahood from putting in the extra hours. He could have withdrawn her approval to work overtime at all. He could have sought the authority to discipline her. Instead, he chose what must have seemed like the easier course by allowing the pattern to continue, hoping against hope that something else would happen to ease the workload and cause the problem to solve itself.

[21] In all of this the Claimant clearly exercised poor judgment and bad management.

[22] However, poor management in itself is not grounds for termination of employment except where clear warnings are given and an opportunity to improve is afforded to the manager. In the case here, the Defendant does not attempt to characterize this as a performance-based dismissal. Instead, it argues that the actions of the Claimant were in direct violation of the Employer's written policies. Failing to observe policies is a form of insubordination, which

involves an element of intentional behaviour rather than just a performance shortcoming.

Eastlink Policies

[23] As a telecommunications company, Eastlink is federally regulated which means that it comes under the jurisdiction of the *Code*. One of the sections of the *Code* that this and other employers must respect is s.171:

> **Maximum hours of work**
>
> 171. (1) An employee may be employed in excess of the standard hours of work but, subject to sections 172, 176 and 177, and to any regulations made pursuant to section 175, the total hours that may be worked by any employee in any week shall not exceed forty-eight hours in a week or such fewer total number of hours as may be prescribed by the regulations as maximum working hours in the industrial establishment in or in connection with the operation of which the employee is employed.

[24] It is possible for an employer such as Eastlink to obtain temporary exemptions, such as during certain peak demand times, but by and large it must respect the underlying policy of the law that employees are not to be overburdened with overtime.

[25] The specific policy that the Claimant is said to have breached is this (with the most relevant sections underlined):

> **5.2 Hours of Work Policy**
>
> **EastLink Policy**
>
> Hours of work of the employees will be adjusted to reflect the needs of our customers and the nature of the work. The Company for its part will endeavour to provide maximum advance notice of employee schedules and to minimize the

incidence of changes and inconvenience to employees. Split shifts will be avoided as far as possible.

The Workweek

For the purposes of scheduling, the workweek is a period between midnight on Saturday and midnight on the immediately following Saturday. The work day comprises 24 hours commencing at midnight.

For all full-time employees, the scheduled workweek will be 40 hours; work schedules will be posted as early as possible each week for work in the following week.

Subject to exceptional circumstances, the Company will ensure that every employee has a rest day in each work week. An employee will not be required to work on such a day.

Overtime Pay

The following overtime provision will apply for hours worked by staff other than Management and Professional staff, including commissioned sales personnel:

All overtime must be approved, in advance, by the employee's Supervisor/Manager;

For employees working a regular schedule:

> For hours worked in excess of the scheduled shift in any work day or 40 in any work week, except where the extra hours are to accommodate a schedule change requested by the employee, the employee shall be paid for each extra hour at the rate of time and one half (1½). Hours paid at overtime rate under this provision shall not be used in calculating hours in excess of 40 in the same week.

For employees working an irregular schedule:

> If the nature of the work necessitates an irregular schedule for some employees, overtime provisions will be modified to allow averaging of working hours over a selected period. Such averaging or modified work schedules will be in accordance with applicable Federal Labour Standards.

"Banked" overtime will not be allowed and will not be recognized or approved by the Company. All hours worked as "overtime" should be paid out as quickly as possible.

[26] Typically, or at least most often, when employers allege a breach of a policy or rule, the employee has run afoul of the rule for some personal gain or advantage. And typically there is a covert act which breaches the rule or policy.

The case here is a bit peculiar in the sense that the Claimant was not seeking any personal advantage. He understood the policy and was actually trying to keep within it. He instructed Ms. Mahood that she would only be paid for 48 hours. It was not the Claimant, but was rather Ms. Mahood, that made the decision to put in the extra time and work in excess of 48 hours. The Claimant did not engage in the practice of banking hours, which he had been ordered to stop doing a year earlier, other than possibly on a couple of minor occasions. It was more a case of him being aware that Ms. Mahood was putting in this extra time, and he lacked the managerial skill to stop her.

[27] Furthermore, the Claimant was faced with conflicting priorities: observe one policy or rule, and allow another one to be breached. He understood the workload problem and the potential consequences of falling behind on customer orders, which could have caused Eastlink problems with the CRTC, not to mention with the customers. He knew that Ms. Mahood was working extra time and keeping them afloat, so to speak. He knew that she was doing this extra work against orders and with no expectation of pay or time off in lieu. He was hoping against hope for some relief in terms of extra staff or other promised efficiencies that would have the effect of getting the work done faster, which would have rescued the situation. He was between the proverbial rock and a hard place: put the brakes on Ms. Mahood and stay within the law and policy, but fall behind in the work and potentially create other legal and public relations problems for Eastlink.

[28] Obviously this went on for far too long, and the Claimant allowed an employee to work in excess of 48 hours per week on a regular basis, to the point where she complained to management and precipitated the actions which led to the Claimant losing his job.

[29] But was it a case of insubordination, or deliberate breach of a policy? I have a hard time characterizing it as that. The letter of the policy says that all overtime must be approved and is to be paid out rather than banked. The Claimant only approved overtime up to 48 hours, and did not allow Ms. Mahood to bank hours in the way he had done prior to the 2009 discipline. What he did was stand by knowing that Ms. Mahood was voluntarily working additional unpaid and (technically) unapproved overtime.

[30] I note that there were a few occasions when the Claimant manipulated Ms. Mahood's hours submitted to payroll which effectively allowed her to take a bit of time off, while still being paid. In these instances the justification was that she had put in the time on other days. This might technically be considered banking hours, but since it was all within the same pay period it could be more benignly characterized as allowing some flexibility in the schedule. It is not clear how many times this occurred, but it was fairly limited, and I get the sense that the Claimant felt that he did not have much choice but to keep Ms. Mahood happy and go along with this.

[31] While I would not condone these incidents, I am not convinced that they would have justified the Claimant's termination as, once more, they appear to me to be simple failures of management.

[32] In the end, it is my conclusion that management had grounds to discipline the Claimant, short of dismissal for cause, and were certainly justified in coming to the conclusion that he was no longer the right man for the job.

[33] This leaves open the question of whether or not he resigned his job, in which case he would not be entitled to any compensation.

The resignation

[34] The Claimant was summoned to a meeting on November 17, 2010 (following meetings a day earlier) where he knew his fate was likely to be decided. When he looked around the table it was clear that he was going to be fired. He was asked if there was anything he might like to offer the company, which he understood was his resignation. After some brief discussion, and without the benefit of any advice or even real time for reflection, he agreed to hand write a letter of resignation.

[35] The initial wording was:

> **To: Donald Rankin**
>
> **After discussions with yourself and David Craig, I feel it is in my best interest to tender my resignation with Eastlink effective immediately. I appreciate my time here at Eastlink.**
>
> **Regards,**
> **Christopher Peters**

[36] The Claimant was told that the company wanted something further to indicate that he was doing this without coercion or duress, so he added a sentence: **"I submit this under no duress."**

[37] He was then basically escorted out of the building and was only able sometime later to retrieve his personal belongings, under supervision.

[38] There is no dispute that the Claimant did not seek to rescind his resignation, not even after obtaining legal advice some weeks later.

[39] The Claimant's reasons for agreeing to resign rather than be fired are what one would expect. He believed that a termination would look worse on his record. He figured that saying he had left voluntarily would be a better story line for prospective employers. Possibly a resignation would have sit slightly better with his wounded pride.

[40] Based on all of the evidence that I heard, I have no hesitation in finding that the Claimant was in something of a state of shock, or at least in a kind of fog, when he made this decision, although I am sure that he was technically of sound mind, for what that is worth. He was in unfamiliar territory and appears not to have seriously anticipated that he was in jeopardy of losing his job.

The Law concerning resignation

[41] The Defendant cited several cases where employees had tendered their resignations and later sued for wrongful dismissal, in particular: *Lane v. Canadian Depository for Securities Ltd.* 1993 CarswellOnt 960, 49 C.C.E.L. 225 and *Kordyban v. Riso Canada Inc.* 2000 CarswellBC 683, 2000 BCSC 550.

[42] In *Lane*, the judge stated his conclusion thus:

> 19 My review of the facts and the case law leads me to the conclusion that Lane, in these circumstances, did effectively resign. The evidence satisfies me that Currie, the Chief Executive Officer, communicated with Lane to indicate that there were serious concerns with respect to his performance. These concerns were expressed in writing and in some particular areas it was emphasized to Lane that they were issues that deal

> with integrity and that his special position as Vice-President of Internal Audit made it such that it was difficult for him to continue in that regard unless matters were changed. Lane was specifically cautioned that if that progress was not forthcoming, Currie would be asking for his resignation. I accept Currie's evidence that up to and including the incident when the letter or resignation was demanded on January 6, Lane was provided with every opportunity to change his conduct. Even then, Lane apparently did not want to accede to the Chief Executive Officer's request. In my view, the defendant Currie acted reasonably by trying to correct the situation with the plaintiff and attempting to encourage him to improve his performance (see Siu (Sui) above). There was no obligation on the part of Currie to go any further with respect to providing him with counsel. It is up to the employee to decide for himself whether or not and when he wishes to consult counsel. In the circumstances of this particular case, I am satisfied that Lane was an experienced executive who had the full capacity to make his own decision whether to accept the proposal to resign or be fired (see Lacey above). Because Lane is a mature and experienced executive, I am satisfied on the evidence that there was nothing wrong or improper in either the words or the actions taken by Currie on January 6, when he presented Lane with the option of signing the letter of resignation or being fired. I am satisfied that the resignation was free and voluntary, that there was no duress or coercion and that Lane acted according to his own free will (see *Head* cited above). Despite Lane's letter to Currie some weeks after resigning wherein he asked Currie to change his mind because of the turmoil that Lane was going through, I am satisfied that there was no indication whatsoever that Lane was changing his mind with respect to the resignation letter that he had signed. Indeed, in the greater part of the letter to Currie, Lane is requesting, in addition to reconsideration, letters of recommendation and assistance with respect to seeking other employment.

[43] *Lane* was among the cases cited by the judge in *Kordyban*, who stated:

> 72 The plaintiff says that the test for determining whether someone has voluntarily resigned is set out in *Assouline v. Ogivar Inc.* (1991), 39 C.C.E.L. 100 (B.C. S.C.) at 104:
>
> > Given all the surrounding circumstances, would a reasonable man have understood by the plaintiff's statement that he had just resigned?

> The plaintiff says he was forced to resign or face dismissal. He also says his resignation was conditional on receiving severance pay, and the bonus due to him with respect to the Surrey School District transaction.
>
> 73 The defendant argues that the plaintiff was a mature and experienced employee who, when asked for his resignation, made a free and voluntary decision to give it. A resignation may be voluntary, even when the only other option is dismissal; *Lane v. Canadian Depository for Securities Ltd.* (1993), 49 C.C.E.L. 225 (Ont. Gen. Div.), *Siu (Sui) v. Westcoast Transmission Co.* (1986), 14 C.C.E.L. 117 (B.C. C.A.), *Lacey v. Nova Scotia Sand & Gravel* (1988), 83 N.S.R. (2d) 102 (N.S. T.D.).
>
> 74 While there are some distinguishing features between the plaintiff's situation and those in the cases cited by the defendant, I am satisfied that the plaintiff's resignation was free and voluntary. I find there is no evidence to establish duress, coercion or undue influence of such a nature as to render his decision otherwise. While there was no discussion of dismissal at the meeting on January 14, 1998, the plaintiff was an intelligent and experienced manager, who recognized the choices he had, the fact that a dismissal was the likely next step, and the benefit of resigning rather than having a dismissal recorded on his employment record. I also accept Mr. Patrick's account of his telephone conversation with the plaintiff later that day as further evidence that the plaintiff resigned voluntarily. Finally, I note that on a number of occasions prior to January 14, 1998, the plaintiff had indicated to various employees of the defendant that he might resign.

[44] I find these cases helpful, although there are facts which I believe distinguish them from the case before me.

[45] Unlike the Plaintiff in *Lane*, the Claimant here was not “an experienced executive who had the full capacity to make his own decision.” Nor had he been through an extensive process of counselling to improve his performance. He had, clearly, been disciplined a year earlier for his breach of the policy not to bank overtime, but his behaviour over the following year was that of someone who was trying to adhere to the policy but was being ineffective in managing an employee who, despite being told that she could not bank overtime and would not be paid for it, was nevertheless putting in unpaid overtime.

[46] The Claimant here was a relatively young man in a lower management job, with minimal experience in employment relations. This was only his second job, and he had left his previous one voluntarily to join Eastlink.

[47] Unlike the Plaintiff in *Kordyban*, who was also an experienced executive, the Claimant here had never mused about possible resignation - indicating that he counted resignation as among his options.

[48] Both of those cases recognize that the question of whether or not the resignation was fully voluntary and should stand, is a question of fact to be decided in each case.

[49] I note that in both of those cases, the court was prepared to find that the dismissal would have been justified based on misconduct. In the case of *Lane* it was the misuse of company credit cards (in an organization that handled billions of dollars of other people's money) while in *Kordyban* it was insubordinate conduct in the face of multiple warnings to change his behaviour. It is very difficult to uncouple the findings of just cause and resignation, because a Plaintiff truly in jeopardy of being dismissed with cause has little or nothing to lose, and something to gain, by resigning. Faced with a likely dismissal that (viewed in retrospect) does not stand up to scrutiny as grounds for summary dismissal, the Plaintiff would be resigning with much to lose and little to gain.

[50] Another way of looking at the situation is this: if an Employer is threatening to dismiss an employee summarily, alleging just cause but without sufficient grounds, the Employer is already in breach of contract and the employee is effectively excused from performance. Indeed, such a resignation is technically

justified as a component of a constructive dismissal. As put by Richard J. of the Nova Scotia Supreme Court in *Fisher v. Eastern Bakeries Ltd.* (1987)[1], 14 C.C.E.L. 123 at p. 128:

> Whether or not an employee has been unjustly dismissed is largely a question of fact. Where a plaintiff has resigned from his employment, as in the present case, and claims that the resignation was merely the final result of a constructive dismissal, the Court ought to scrutinize all of the facts very carefully and determine whether or not a reasonable interpretation of those facts supports the plaintiff's contention.

[51] Yet another lens through which to view the situation is that of adequacy of consideration. Should the employee be held to an alleged bargain, namely the bargain of "allow me to resign rather than be fired" where the employee gains very little and forgoes what might be considerable compensation in lieu of reasonable notice? And should he be held to the bargain where the decision to resign is made in a pressure-filled atmosphere, with his emotions in a turmoil, and without the benefit of any professional advice?

[52] I believe that under the particular circumstances of this case, the so-called bargain was so improvident and, notwithstanding the disclaimer, was made under a form of duress, that it would be unconscionable to enforce it as a resignation.

[53] Had the Claimant been asked at the meeting whether he would prefer to resign, and be entitled to no compensation, or be summarily dismissed notwithstanding no sufficient just cause existed, in which case he could bargain

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[1]Cited in Lacey v. Nova Scotia Sand & Gravel (1988), 83 N.S.R. (2d) 102, 210 A.P.R. 102 (N.S. T.D.) which was one of the cases relied upon in *Kordyban*.

or sue for the equivalent of reasonable notice, the answer given might have been very different.

Reasonable notice

[54] It is trite law that absent just cause, a dismissal is wrongful where the employee has been given less than reasonable notice. A wrongfully dismissed employee is entitled to damages based upon what would have been earned over the period of "reasonable notice", had it been given as required, subject only to principles of mitigation. The length of reasonable notice will depend on a number of factors. As stated by McRuer, C.J.H.C. in *Bardal v. Globe & Mail Ltd.* (1960) 24 D.L.R. (2d) 140 at 145:

> There can be no catalogue laid down as to what was 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.

[55] Weighing the Bardal factors must be done with regards to the purpose of reasonable notice, namely to give the employee time to locate other employment, and also time to allow him to adjust to the new economic reality that may have implications for his lifestyle and well-being. This purpose was stated more than a century ago by Lord Deas in *Morrison v. Abernathy School Board* (1875-6) 4th Series, Vol. 3, S.C. 945 at 950:

> The object ... is ... to give the servant a fair opportunity of looking out for and obtaining another situation, instead of being thrown suddenly and unexpectedly upon the world, with, it may be a wife and family to support,

> and no means, other than savings or otherwise, of supporting either himself or them.

[56] As expressed in more modern terms by Wimmer J. in *Smith v. General Recorders Ltd.* (1994) 121 Sask.R. 296 (Q.B.) (quoted by Harris in his text on Wrongful Dismissal, at p.3-12), reasonable notice is that period of time that:

> ... enables an employee to disengage himself from the lifestyle to which, by reason of his employment, he had every right to become accustomed, or to secure other employment to support that lifestyle, or to adapt his style of living to the measure of his new level of employment ...

[57] This underlying rationale is important to bear in mind in light of the career crossroads that faced the Claimant, as I will elaborate upon below.

[58] In attempting to arrive at a reasonable notice period, courts are attempting to weigh a variety of factors, with some reference to what are the prevailing "tariffs" in the courts and the working world.

[59] Despite denials in some quarters of its very existence, the so-called one-month-per-year rule of thumb has received some explicit recognition, mostly in Ontario but also elsewhere. Molloy J. in *Bullen v. Protor & Redfern Ltd.* (1996) 20 C.C.E.L. (2d) 36 has suggested, convincingly, that it remains a useful starting point for the analysis, with adjustments upward or downward made according to the relevant criteria:

> 18 ... there is an informal `rule-of-thumb' applied in the legal profession to calculate reasonable notice based on one month's notice for every year of employment. This figure is then adjusted upwards or downwards depending on particular factors which move the case out of the norm. Counsel for the plaintiff in this case made reference to this formula in argument. Counsel for the defendant acknowledged that this formula is

> often applied but argued that it only has application to senior management employees.
>
> 19 The only case of which I am aware which makes reference to the one-month-per-year formula is the decision of MacPherson J. in *Ryshpan v. Burns Fry Ltd.* (1995) 10 C.C.E.L. (2d) 235 (Ont. Gen. Div.). After referring to the factors listed in *Bardal*, MacPherson J. held at p.239:
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> > Applying these factors to the present case, Mr. Ryshpan seeks 15 months' notice. Burns Fry argued for a 9-month period. I suspect that the choice of these periods reflects the reality that in perhaps the majority of wrongful dismissal cases courts apply a `rule of thumb' that an employee should receive notice of one month for every year of service. Counsel in this case appear to recognize this `rule of thumb' and their choice of numbers, three months higher or lower, is a matter of advocacy based upon their perception of whether Mr. Ryshpan's position under the Bardal factors is better or worse than the norm.
>
> 20 In my opinion there is considerable merit in applying the one-month-per-year formula in this case, subject to upwards and downwards adjustments to reflect the particular facts of the case. This rule of thumb has the advantage of providing some predictability and certainty to the calculation of reasonable notice while at the same time allowing for flexibility by adjusting for various factors." (per Molloy, J. at p.42-43)

[60] In *Bullen*, the judge went on explicitly to consider the factors of Length of Service, Character of Employment, Age and Availability of other employment. I will consider these in brief.

Length of Service

[61] The starting point for the analysis would be 6½ months based on the 6½ years of employment.

Character of Employment

[62] The employment was lower management, in the sense that he was at the lowest level in the management structure. There was also a technical component to the job but not at a professional level. In my view this would tend to reduce the notice period slightly.

Age of the employee

[63] At the time of his dismissal the Claimant was 37 years old, which would generally be considered on the young side. Certainly his age would not hold him back from job opportunities.

Availability of other employment

[64] Based on the evidence, the Claimant did not find there to be many opportunities for him in Nova Scotia. He had left Ontario to take the Eastlink job, and had established his family here and did not want to consider returning to Central Canada. This would tend to support notice at the higher end of the scale.

Mitigation

[65] A dismissed employee is under a duty to mitigate. The evidence here is that the Claimant started looking for work immediately, but the time of year was against him in that it is well known that few companies hire just before Christmas. He testified that he looked for management and sales jobs, but was hard pressed to find anything that met his career objectives. He had a serious offer from Ontario Hydro but that would have required him to move to Hamilton, which he was not willing to do. In the end, he made a decision to change careers

entirely and decided to become a real estate agent. As at the time of trial he had yet to make a sale, but had a position with a real estate company and was hopeful that this would be a good career for him.

Decision on reasonable notice

[66] In my view, reasonable notice for this Claimant would have been five months. Higher notice periods of six months or more would be reserved for higher management or workers with more specialized skills, and in particular for older employees.

[67] I see nothing wrong with his mitigation efforts. A period of reasonable notice is designed to facilitate such soul-searching and provides the opportunity for the employee to act from his long-term, rather than just short-term interests.

[68] The value of the Claimant's employment package was approximately $56,470.00 including salary and benefits, or approximately $4,705.00 per month. At five months of notice, his damages total $23,525.00. He is also entitled to his costs in the amount of $179.35.

[69] The order will reflect the fact that the Claimant has repayment obligations to HRDC because he has collected employment insurance, and the Defendant's obligations at law are to determine the repayment obligation and remit same directly to HRDC. The Defendant also has an obligation to withhold income tax on the proceeds of this award. It is expected that counsel for the Defendant will be familiar with these procedures and will be able to pilot this matter to a conclusion without further assistance from the court.

Eric K. Slone, Adjudicator