# Bardal v. Globe & Mail Ltd.

Ontario Supreme Court - High Court of Justice
McRuer C.J.O.

April 21, 1960.

F.A. Brewin, Q.C. and I.G. Scott, for the plaintiff.
R.D. Poupore, Q.C., for the defendant.

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**1** **McRUER C.J.O.**:— This is an action brought for damages for wrongful dismissal.

**2** In the year 1942 the plaintiff, who at that time was manager of the Canadian Street Car Advertising Company and had been previously assistant advertising manager of the Winnipeg Tribune, a paper published in the City of Winnipeg, was approached by the Globe Printing Company Limited with a view to interesting him in becoming the assistant advertising manager of that company. It was explained to him that when the advertising manager retired he would likely succeed him.

**3** During the discussions the plaintiff says that he impressed on Mr. Butler, who was interviewing him on behalf of the Globe Company, that it was important at his age that his employment should be permanent. In due course the plaintiff was interviewed by Mr. McCullagh, the publisher, to whom he repeated what he had previously said with reference to the importance of a decision to change his employment at his age. After full consideration the plaintiff decided to accept the office as offered with an initial salary of $6,500 a year, his employment commencing on the 1st of October, 1942.

**4** In 1955 the assets of the Globe Printing Company were sold to The Globe and Mail Limited and the plaintiff, together with other employees, transferred their employment to the purchaser without any new agreement as to terms of employment. In 1954 the plaintiff was appointed advertising manager and in 1955 he was appointed director of advertising and a member of the Board of Directors of the defendant.

**5** Throughout his employment with the defendant the plaintiff's salary was increased periodically until on the termination of his employment he was receiving $1,479.16 per month, together with one week's salary by way of a Christmas bonus. In addition to the salary received the plaintiff was a beneficiary of three distributions made to selected employees pursuant to a profit sharing plan which was administered under the sole direction of the principal shareholder of the defendant. The receipts from this source were as follows:

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|---|---|---|
| April 1956 | - | $6,538.00 |
| April 1957 | - | $6,467.00 |
| December 1958 | - | $3,095.00 |

In addition to salary and bonuses received the plaintiff participated in a pension plan for employees.

**6** On the 23rd of April, 1959, the plaintiff was called to the office of Mr. Dalgleish, the president, publisher and editor of the defendant, who with a few preliminary remarks asked him for his resignation. Mr. Dalgleish told the plaintiff that if he resigned he would be given six months' salary and allowed one month to look around for new employment. According to the plaintiff's evidence, the reason given to him for requesting his resignation was that the defendant had been losing money and Mr. Dalgleish wanted to get someone who could improve business in the advertising department. The plaintiff told Mr. Dalgleish that he couldn't agree to accept accusations of incompetency and he would consider what course he should take. In an interview the next day the plaintiff refused to resign either as an employee or as a director and he was thereupon given a letter signed by Mr. Dalgleish which reads as follows:

> "Dear Mr. Bardal:
>
> This is to confirm the notice given to you today of the termination of your employment with the Globe and Mail Limited as of this date."

**7** The plaintiff was given a cheque for the balance of his salary owing to the date of his dismissal. Immediately after his dismissal the plaintiff made efforts to secure other employment and finally made arrangements with another employer in the advertising business for employment at a salary of $15,000 a year for two years, with provision for certain stock option rights.

**8** At the time of his dismissal under the provisions of the defendant's pension plan the plaintiff had earned a right to receive a refund of his contributions with interest which would amount to approximately $5,000, or an alternative right to accept a pension of approximately $1,350 per annum, commencing on the 1st of February, 1970. The plaintiff accepted the latter alternative.

**9** In the statement of defence filed the defendant denied that the plaintiff was wrongfully dismissed and pleaded that he voluntarily withdrew from the employment of the defendant. In the alternative it was pleaded that if the defendant did terminate the plaintiff's employment it was justified in doing so by reason of the fact that the advertising department did not, during the period the plaintiff was advertising manager, obtain the results which the defendant was reasonably entitled to expect. During the trial it was admitted both by Mr. Dalgleish and counsel for the defendant that it could not be contended that the defendant was justified in dismissing the plaintiff without notice. No improper conduct on the part of the plaintiff was proved or suggested and I think the evidence of Mr. Dalgleish can be summed up by saying that he had come to the conclusion that he thought he could get an advertising manager who would produce better results than the plaintiff. In view of this it is quite unnecessary for me to discuss the evidence of the plaintiff with reference to the results he produced and the circumstances that gave rise to some decline in revenue from the advertising department preceding his dismissal. It remains only for me to consider what damages the plaintiff is entitled to recover.

**10** In every case of wrongful dismissal the measure of damages must be considered in the light of the terms of employment and the character of the services to be rendered. In this case there was no stipulated term during which the employment was to last. Both parties undoubtedly considered that the employment was to be of a permanent character. All the evidence goes to show that the office of advertising manager is one of the most important offices in the service of the defendant. In fact, it is by means of the revenue derived under the supervision of the advertising manager that the publication of a newspaper becomes a profitable enterprise. The fact that the plaintiff was appointed to the Board of Directors of the defendant goes to demonstrate the permanent character of his employment and the importance of the office.

**11** It is not argued that there was a definite agreement that the plaintiff was employed for life but the case is put on the basis of an indefinite hiring of a permanent character which could be terminated by reasonable notice.

**12** In Carter v. Bell & Sons (Canada) Ltd. (1936) O.R. 290 at p. 297, Mr. Justice Middleton concisely and with great clarity stated the law applicable to this case in this way:

> "In the case of master and servant there is implied in the contract of hiring an obligation to give reasonable notice of an intention to terminate the arrangement."

**13** On this branch of the case the only remaining matter to be considered is what should be implied as reasonable notice in the circumstances of the contract in question. In Carter v. Bell, Middleton J.A. went on at p. 297 to say:

> "This notice in case of an indefinite hiring is generally six months, but the length of notice is always a matter for inquiry and determination, and in special circumstances may be less."

**14** The contractual obligation is to give reasonable notice and to continue the servant in his employment. If the servant is dismissed without reasonable notice he is entitled to the damages that flow from the failure to observe this contractual obligation which damages the servant is bound in law to mitigate to the best of his ability.

**15** In the second edition C.E.D., vol. 13, p. 227, it is stated:

> "In Ontario damages in cases of indefinite hiring are limited to wages for six months."

I am convinced this is not a correct statement of the law. The authority for this statement is Norman v. National Life Assurance Co. of Canada (1938) O.W.N. 509. In this case the plaintiff was employed at a yearly salary as a medical referee. At the time of his employment he was told that the defendant would require a medical referee and that he had no cause to worry about the duration of employment. During his employment he carried on a medical practice in addition to the services he rendered to the defendant. On the termination of his employment he was paid approximately six months' salary in lieu of notice. Godfrey J. stated:

> "In this Province, however, it seems to be well established that six months is the maximum notice required to terminate a contract of indefinite hiring."

He referred to Harnwell v. Parry Sound Lumber Co., (1897) 24 O.A.R. 110, Normandin v. Solloway Mills, (1931) 40 O.W.N. 429, Messer v. Barrett, (1926) 59 O.L.R. 566, and Carter v. Bell (supra). With great respect I do not think any of these cases warrant a statement as a proposition of law that a Court in Ontario cannot decide that the reasonable notice required as implied in the contract of hiring should not in any case be greater than six months.

**16** In Abbott v. G.M. Gest Ltd., (1944) O.W.N. 524, Hogg J. made reference to the Norman case, but cannot be said to have passed on it as the learned Judge found on the facts of the case he was considering that the plaintiff was only entitled to four months' notice.

**17** In Campbell v. Business Fleets Limited (1953) O.W.N. 707, and in appeal (1954) O.L.R. 87, the contract in question was an oral one of somewhat indefinite terms. The trial Judge held that it came within the statute of frauds and the action was dismissed. The only evidence of the contract was the evidence of the plaintiff who, as the learned trial Judge put it, referred to it as a contract "for life" or "as long as there was no wrongdoing on my part I would be there". The Court of Appeal held that the statute of frauds did not apply and at page 95, Mackay J.A., writing the judgment of the Court, said:

> " The Court is of opinion that the contract in the case at bar was one that could be terminated only on reasonable notice and reasonable notice in all the circumstances of this case, in the considered opinion of this Court, is one year."

**18** In Duncan v. Cockshutt Farm Equipment Limited, (1956) 19 W.W.R. (N.S.) 554, Campbell J. considered the passage from the Canadian Encyclopedic Digest which I have quoted and Norman v. National Life Assurance Co. in relation to an action brought for wrongful dismissal of the branch manager of a farm equipment company who had been employed for 27 years under an indefinite hiring and who, had he been continued in the defendant's employment, would have been entitled to a pension. He came to the conclusion that the cases relied on in Norman v. National Life and the learned authors of the Canadian Encyclopedic Digest were not comparable with the case under consideration and should be distinguished on their facts. He also said:

> "Furthermore, different economic conditions prevailed then, and pension plans, for instance, were rare. Effect should now be given to these factors."

**19** In Grundy v. Sun Printing and Publishing Association, 33 T.L.R. 77, the plaintiff was an editor of a newspaper earning a salary of 20 pounds a week. The jury Awarded the plaintiff damages based on the failure to give 12 months' notice of termination of the contract. On appeal to the Court of Appeal this award was sustained. In delivering the judgment of the Court Lord Justice Swinfen Eady said at p. 78:

> " In cases which had come before this Court a custom has been proved that an editor was entitled to 12 months' notice, and a sub-editor to six months' notice. In the absence of evidence of custom it could not be said that the view of the jury in this case was unreasonable, ..."

**20** There is no evidence of custom in the case before me and I think I must determine what would be reasonable notice in all the circumstances and proper compensation for the loss the plaintiff has suffered by reason of the breach of the implied term in the contract to give him reasonable notice of its termination.

**21** 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.

**22** Applying this principle to this case, we have a servant who, through a lifetime of training, was qualified to manage the advertising department of a large metropolitan newspaper. With the exception of a short period of employment as manager of a street car advertising agency, his whole training has been in the advertising department of two large daily newspapers. There are few comparable offices available in Canada and the plaintiff has in mitigation of his damages taken employment with an advertising agency, in which employment he will no doubt find useful his advertising experience, but the employment must necessarily be of a different character.

**23** I have come to the conclusion, as the jury did in the Sun Publishing Company case and as the Court of Appeal agreed, that one year's notice would have been reasonable, having regard to all the circumstances of this case.

**24** That being true, the next question to decide is what damages have flowed from the failure of the defendant to give a year's notice and how far have those damages been mitigated by the receipt by the plaintiff of a salary from another employer.

**25** The plaintiff's salary with the defendant was $17,750 per year. In his new employment he has been receiving $15,000 per year since July 1st, 1959. He is therefore entitled to recover $3,254.15 for loss of salary from April 25th to July 1st and $2,245.20, being the difference between the salary which would have been received from July 1st, 1959 to April 24th, 1960, and the salary actually received in his new employment during that time.

**26** Upon the termination of the plaintiff's employment with the defendant his pension rights were said to have been valued as an employee with 16 to 17 years' service. According to Exhibit 7 the pension allowed to the plaintiff was based on the defendant's contribution to his pension at 40 percent. If he had been continued in the service for another year, pursuant to proper notice, the defendant's contribution would have been on a higher basis. The matter of what the dollar value of the plaintiff's pension would have been had he been employed for another year is a matter for actuarial computation. This aspect of the case was not developed in argument. It is, however, quite clear that had the

plaintiff been given proper notice according to the implied term of the contract he would have had another year's service with the defendant which would have increased his pension allowance. In view of the unsatisfactory condition of the evidence, I am unable to make a proper assessment of what damage the plaintiff has suffered in loss of pension by reason of his employment having been terminated a year sooner than it ought to have been terminated. If the parties cannot agree as to these damages, I would direct a reference to the Master to ascertain these damages.

**27** Three other aspects of damage remain to be considered: the alleged loss of the Christmas bonus, participation in the profit sharing plan and loss of director's fees. I do not think the plaintiff is entitled to recover under any of these heads. The Christmas bonus was a purely voluntary gift distributed among the employees as a matter of goodwill between employer and employee. I do not think this case comes within the principles applied in Manubens v. Leon, (1919) 1 K.B. 208. In that case Lush J. allowed a plaintiff who was a hairdresser's assistant damages for loss of tips that he might reasonably have expected to have received from his customers, if his employment had not been wrongfully terminated. It was held that it was within the contemplation of the parties at the time of the engagement that the assistant would receive gratuitous payments from his customers. I think that is quite different from the case before me where the bonus was something that came from the employer and was not within the contemplation of the parties at the time that the plaintiff entered the service.

**28** The case for claiming damages for loss of any share in the distribution of profits is still weaker. The profit sharing plan was not founded on contract. It was instituted by the chief shareholder of the defendant and was not applicable to all employees but only those who were selected by a committee appointed by him. There was no obligation to put anyone on the list of those who should receive benefits in this way. It would appear to me that it would have been very improbable that the committee would have distributed profits to an employee who had received notice of the termination of his contract. I therefore allow no damages under this heading.

**29** The appointment of the plaintiff to the Board of Directors of the defendant was an appointment at the will of the shareholders of the company and they were under no obligation to continue him on the Board for any period of time. There is no foundation for a claim for loss of director's fees.

**30** It was argued that in his new employment the plaintiff is entitled to certain stock option rights and some allowance should be made in assessing damages on this account. I do not think it has been established in evidence that any allowance should be made in mitigation of the damages by reason of these alleged benefits. In the first place, the value of the stock option rights is purely speculative. There is no evidence that any events have happened to entitle the plaintiff to stock under the agreement nor is there evidence that the stock would be worth anything if he did become entitled to it under the provisions of the agreement.

**31** The plaintiff will therefore be entitled to judgment for $5,499.35, with a reference to the Master to ascertain the amount by which the dollar value of the plaintiff's

participation in the pension plan was reduced by reason of the termination of his employment before April 24th, 1960. The plaintiff will have the costs of the action. I may be spoken to as to the costs of the reference after the Master's report.

McRUER C.J.O.