



[6] Russell was 57 years old at the time of termination. He had worked at The Brick for just over 36 years.

[7] Both parties agree that Russell is entitled to reasonable notice at common law. They disagree as to what the notice period should be.

### **Bardal Factors**

[8] Russell takes the position that based on the factors expressed in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) at p. 145, he is entitled to a notice period in excess of 24 months. Mr. Russell submits that there are extraordinary circumstances that warrants notice beyond 24 months, and that the COVID-19 pandemic serves as reason to extend the reasonable notice at common law even further.

[9] Russell thus submits that he is entitled to 30 months' notice.

[10] In addition, Russell seeks "aggravated, moral and punitive damages" for breach of the duty of good faith.

[11] The Brick replies that there is no justification for extending the reasonable notice period to 24 months and that the court is therefore precluded from considering extraordinary circumstances. Furthermore, there is no basis for aggravated, moral or punitive damages, because any mistakes The Brick made during the course of terminating Russell's employment were inadvertent.

[12] The Brick submits that 18 months is the appropriate notice period in the circumstances of this case.

### **Analysis**

[13] The Brick dismissed a number of employees, including Russell, as part of a restructuring necessitated by the economic downturn as a result of the COVID-19 pandemic.

[14] At the time of his termination, Russell's annual compensation was comprised of the following components:

- a) A base salary of \$74,859.00;
- b) Group benefits consisting of health and dental coverage, long term disability, accidental death and dismemberment and life insurance coverage;
- c) Participation in the group RRSP and DPSP programs, pursuant to which he contributed 4% of his annual salary to the RRSP and The Brick contributed 2.8% to his DPSP;
- d) Six weeks of paid vacation; and

- e) An amount of \$500 in 2019, which Russell called a bonus, but The Brick characterized as a onetime payment in lieu of a salary increase in 2020.

[15] At the time of termination, Russell was provided with a termination letter dated July 21, 2020 (the “termination letter”), which set out a without prejudice offer (which will be the subject of further discussion later in these reasons).

[16] Russell was provided with the following benefits which extended beyond the termination date:

- a) supplemental life insurance for eight weeks;
- b) short-term disability for eight weeks;
- c) life insurance for eight weeks;
- d) dependent life insurance for eight weeks;
- e) accidental death and dismemberment for eight weeks;
- f) spousal life insurance for eight weeks;
- g) dental insurance for one year;
- h) health insurance for one year; and
- i) optional Accidental Death & Dismemberment coverage for eight weeks.

[17] Long-term disability was not extended beyond the date of termination as a result of the terms and conditions of the third-party insurer’s policy.

[18] Thus, most of the benefits were, in fact, extended during the statutory notice required under the *Employment Standards Act* (“ESA”).

[19] However, The Brick inexplicably did not advise Russell that his benefits were continuing until its representative admitted this to be the fact in cross examination held on March 10, 2021. This is despite the fact that Russell’s lawyer had raised this issue prior to the cross examination but received no response to his queries. This admission was seven months’ post termination, and past the time that many of the benefits expired.

[20] In the “without prejudice” termination letter, benefits were to be extended as follows:

- a) health and dental benefits, if applicable, until July 20, 2021, but not Russell’s Long Term Disability, Accidental Death and Dismemberment coverage, or participation in the Group RRSP and DPSP programs;

- b) life insurance coverage was to be extended for 31 days from the date of termination, and Russell would have the option of converting his Life Insurances from The Brick group plan to an individual plan also within 31 days from the date of termination.

This was contingent on Russell signing a Release.

[21] On July 23, 2020, Russell provided a counter-proposal, and requested that the funds be paid into his RRSP without deductions or withholdings. He also requested that his vacation entitlement be accrued to September 12, 2020 and that The Brick provide him with a positive reference letter.

[22] Through inadvertence, on July 31, 2020, The Brick provided Russell with double his statutory notice and severance entitlements, plus unpaid wages and vacation pay accrued to the date of termination, calculated in the gross sum of \$104,055.05. After statutory deductions, Russell received the net payment of \$66,464.26. The error was the result of calculating Russell's pay based on 34 pay periods or 68 weeks' pay instead of 34 weeks' pay.

[23] Russell retained Mr. Bell to represent him in negotiations with The Brick. On August 21, 2020, The Brick requested that Mr. Bell hold the overpayment in trust pending future discussions. However, The Brick advised that it did not object to Russell retaining his net entitlements under the *ESA*. Mr. Bell advised The Brick that he was not prepared to undertake holding the overpayment in trust.

[24] Accordingly, on October 6, 2020, The Brick requested that Russell return the overpayment, being \$48,946. In response, Russell returned the entirety of the funds to The Brick. On October 19, 2020, The Brick received a letter from Russell enclosing a cheque in the amount of \$66,464.26 being the full net amount that had been paid by The Brick to Russell.

[25] In the interim, Russell served his statement of claim.

[26] On November 12, 2020, The Brick wrote to Mr. Bell and enclosed a cheque in the amount of \$28,207.72. The Brick advised that the delay in facilitating this payment was as a result of waiting for Russell's cheque in the amount of \$66,464.26 to clear. However, the amount that The Brick admits it should have paid was the statutory entitlement of \$38,256.54. The Brick admits that it made an error in paying the lower amount and provided an explanation.

[27] Russell's lawyer's response was that as the funds had not been directed to Russell's RRSP, as Russell had requested on July 23, 2020, the cheque would be returned. The cheque was returned on November 18, 2020.

[28] The Brick then delivered a statement of defence.

[29] On December 22, 2020, The Brick issued a cheque in the amount of \$10,048.82 representing the difference between the November 12, 2020 net payment of \$28,207.72 and the amount that reflected the statutory entitlements of net \$38,256.54. However as this amount was again not directed to Russell's RRSP, it too was returned on January 6, 2021.

[30] Through this series of missteps, Russell's entitlement to his eight weeks' of termination pay and 34 weeks' of severance pay under the *ESA* was not paid into his RRSP until March 5, 2021, after he started this litigation. This was also the date that he received payment of his last week of wages. The amount ultimately deposited into Russell's RRSP was \$53,645.66. Russell was never provided with a letter of reference.

[31] Russell's statutory entitlement was calculated by The Brick as follows:

- a) outstanding wages in the amount of \$2,015.45;
- b) 8 weeks' termination pay in the sum of \$11,516.88;
- c) 26 weeks' severance pay in the sum of \$37,428.86; and
- d) accrued but unused vacation, in addition to vacation payable during the 8 week statutory notice period, in the sum of \$2,764.10.

### **Reasonable Notice Under the Common Law**

[32] In *Bardal* at p. 145, the Court set out four factors based upon which reasonable notice at common law is generally informed.

[33] Those factors are:

- a) length of the employment;
- b) character of the employment;
- c) age; and
- d) availability of similar employment having regard to the experience, training and qualifications of the employee.

[34] Applying those factors to the case at bar, Russell, as at the date of his termination:

- a) was 57 years old at date of termination which puts an employee towards the end of their working career;
- b) had just over 36 years' tenure with the employer, which can be considered to be a long tenure;
- c) was in a senior supervisory position with 20 employees reporting to him, but he had to report to a manager who had ultimate decision-making authority. While there was a dispute as to whether Russell's position was managerial or supervisory, I am guided by the Court of Appeal's decision in *Di Tomaso v. Crown Metal Packaging Canada*, 2011 ONCA 469, 337 D.L.R. (4th) 679 at para. 28 to say that the purported difference between the two characterizations is irrelevant. *Di Tomaso* affirmed that

the character of employment for those with lesser skills should not receive less notice on the alleged basis they purportedly would have an easier time finding alternative employment; and

- d) has challenging circumstances in terms of finding alternative work due, in part, to the COVID-19 pandemic. Unlike the situation in *Marazzato v. Dell Canada Inc.*, 2021 ONSC 248 at para.14, I do have some evidence before me upon which to conclude that COVID-19 will likely adversely affect Russell's attempts to find other comparable employment. This evidence arises from the fact that in the termination letter The Brick admitted that the economic downturn caused by COVID-19 was the reason why Russell, and several other employees, had been terminated in the first place: See *Lamontagne v. J.L. Richards & the Associates Limited*, 2021 ONSC 2133 at paras. 63-64.

[35] One additional factor that I find compelling in this circumstance is the fact that Russell was a life-long employee of The Brick having worked full time, continuously, at this establishment since he was 21 years old. This factor militates in favour of the employee.

[36] As observed by others, the exercise of fixing a reasonable notice period is more of an art than a science: See *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 at para. 66. Furthermore, each case must be determined on its own facts.

[37] Both parties advanced case law in which the above factors could be applied to favour their own respective positions. On balance, however, it is my view that the *Bardal* factors favour a notice period that is at the high end of the reasonable notice spectrum.

[38] I find that Russell's employment circumstances fall within the range of notice found by this court in the following cases: *Hussain v. Suzuki Canada Ltd.*, [2011] O.J. 6355 (S.C.); *Ozorio v. Canadian Hearing Society*, 2016 ONSC 5440; *Lalani v. Canadian Standards Association*, 2015 ONSC 7634; *Kwasnycia v. Goldcorp Inc.*, 1995 CanLII 7276; *Lowndes v. Summit Ford Sales Ltd.*; *Maasland v. Toronto (City)*, 2015 ONSC 7598 (aff'd on other grounds, 2016 ONCA 551). In these cases the terminated employees were between 57 and 65 years old, and had 30 plus years of service with the employer at the time of dismissal. In each case, the reasonable notice period awarded was in the range of 24 – 26 months.

[39] Accordingly, having regard to the *Bardal* factors, I find that the appropriate notice period for Russell is 24 months at common law, without a consideration of extraordinary circumstances.

### **Extraordinary Circumstances**

[40] In *McLean v. Dynacast Ltd.*, 2019 ONSC 7146 at para. 58, citing *Lowndes v. Summit Ford Sales Ltd.*, 2006 CanLII 24 (Ont. C.A.), the Court stated:

It is generally accepted that while there is no absolute upper limit or cap or on what a long-term employee might expect in the way of notice, exceptional circumstances are required before the notice period can exceed 24 months and those exceptional

circumstances must include more than a lengthy period of loyalty and dedication to the employer and the business venture.

[41] While there does not appear to be any definitive list of exceptional circumstances identified by the jurisprudence to date, the case law tends to require some extraordinary measure to have been taken by the employer which either makes reemployment by the terminated employee more difficult, involved terminated employees who held highly compensated positions, or where some measure of an employer's high-handed conduct occurred. The mere refusal to provide a reference letter, for example, was found in *Mikelsteins v. Morrison*, 2018 ONSC 6952, rev'd on other grounds 2019 ONCA 515 at para. 13, not to qualify as an extraordinary circumstance where no prospective employers had asked for one. See also *McLean* to highlight the high bar of what can amount to an extraordinary circumstance.

[42] In *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512, the Court of Appeal found that age, length of service and the fact that the employee was a lifelong employee were not exceptional circumstances for purposes of extending the notice period beyond 24 months.

[43] Russell submits that his age, years of service, life time service to The Brick, his "limited" high school education, COVID-19, lack of a reference letter and relocation counselling and post termination conduct of The Brick constitutes extraordinary circumstances justifying a longer notice period. In my view, the factors Russell advances have been factored into the notice period already, with the exception of The Brick's termination and post termination conduct. The Brick's termination and post termination conduct is better addressed under a moral/aggravated damages analysis.

[44] Consequently, I do not find extraordinary circumstances have been proven in this case and decline to extend the notice period on this basis.

### **Moral or Aggravated Damages**

[45] In his submissions and his factum, Russell focused his claim on moral or aggravated damages, though he did request punitive damages. Accordingly, I will focus on the moral/aggravated damages argument. In any event, punitive damages are not warranted based on the evidence.

[46] In *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362, at para. 57, the Supreme Court of Canada held that moral damages can be warranted where the employer engages in a breach of the duty of good faith and fair dealing at the time of termination:

Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive [Emphasis added].

[47] In *Keays*, at para. 54, the Court also held that an independent actionable wrong is not required in order to sustain an award of damages for mental distress resulting from a breach of employment contract.

[48] In *Keays*, at para. 59, Bastarache J., writing for the Court, wrote:

... there is no reason to retain the distinction between “true aggravated damages” resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded, not through an arbitrary extension of the notice period but through an award that reflects the actual damages.

[49] This category of damages is intended to compensate employees for mental distress beyond the usual distress and hurt feelings associated with being dismissed: *Doyle v. Zochem Inc.*, 2017 ONCA 130 at para. 47.

[50] In the oft-cited decision of *Galea v. Wal-Mart Canada Corp.*, 2017 ONSC 245 at para. 232, Emery J. listed factors to be considered in assessing a claim based in moral or aggravated damages as follows:

- a) where an employer has breached its duty of good faith and fair dealing in the manner in which the employee was dismissed;
- b) conduct that could qualify as employer’s breach of good faith or the failure to deal fairly in the course of a dismissal includes employer’s conduct that is untruthful, misleading or unduly insensitive, and a failure to be candid, reasonable, honest and forthright with the employee;
- c) where it was within the reasonable contemplation of the employer that the manner of the dismissal would cause the employee mental distress;
- d) the wrongful conduct of an employer must cause the employee mental distress beyond the understandable distress and hurt feelings normally accompanying a dismissal; and
- e) the grounds for moral damages must be assessed on a case-by-case basis.

[51] In considering the factors that inform an award for moral damages, the court is to look at the manner in which the dismissal was carried out. This can include conduct at the time of the dismissal and following the dismissal provided it is related to the dismissal: See *Doyle* at paras. 26 and 39.

[52] The termination letter provided to Russell, dated July 21, 2020, is the focus of this analysis. It provided a without prejudice offer to settle Russell’s termination and severance obligations by providing terms that were, generally, more generous than the statutory minimum entitlement, but less than his common law entitlement for other aspects of his compensation. Russell had three days to accept this offer and would have had to sign a Release in favour of the employer.



[53] The termination letter was not fully compliant with the minimum statutory entitlements of the *ESA* insofar as it did not reflect an extension of Russell's employment related long term disability, accidental death and dismemberment coverage or ongoing participation in the Group RRSP and DPSP programs during the statutory notice period. Furthermore, the termination letter provided that vacation pay would only be paid accrued to the date of termination. Under the *ESA*, vacation pay continues to accrue over the statutory notice period, or eight weeks beyond termination in Russell's case.

[54] More importantly, the termination letter did not advise that if Russell declined the offer, he would be immediately provided with his statutory entitlements under the *ESA*. I find this to be a serious defect with the termination letter, as it implies employees will know that they can demand their statutory entitlements forthwith upon rejection of these types of offers. This defect reflects a failure by The Brick to deal fairly with Russell. By failing to include this proviso in the termination letter, The Brick was not being honest and forthright with Russell.

[55] Furthermore, while The Brick's failure to immediately transfer the correct amount of severance and termination pay into Russell's RRSP was largely due to a series of "inadvertent" missteps on its conduct post termination, it nonetheless reasonably caused Russell distress beyond the "normal" hurt feelings that accompany termination without cause.

[56] There is some evidence in the record that supports the requisite degree of mental distress, recognizing that mental distress need not be proven by medical evidence: *Groves v. UTS Consultants Inc.*, 2019 ONSC 5605 at para. 113.

[57] I recognize that an employee, like Russell, does not have a statutory entitlement to have his severance and termination pay directed to an RRSP. However, there is no suggestion by The Brick that it would not accommodate such requests from terminated employees and Russell made this request on July 23, 2020 – three days' after receiving the termination letter – and this request was repeated by his lawyer. Eventually, The Brick did arrange for a direct deposit into Russell's RRSP.

[58] Russell was without income or, to his knowledge, benefits for approximately seven and a half months post termination. His spouse was forced to go back to work full time and Russell had to use his savings to make ends meet for the family during this period. Russell has been receiving some medical treatment and medication for stress related issues according to his unchallenged evidence. There was no good reason for The Brick to have failed to advise Russell by at least July 23, 2020 (after receiving his counterproposal) or shortly thereafter that the majority of his benefits would be extended beyond termination, in compliance with the *ESA*. There was also no good reason for The Brick to have not immediately advised Russell that he would receive his statutory notice and severance pay in the event its without prejudice offer was rejected. This is no way to treat any employee, much less a long-term loyal employee of over 36 years.

[59] The fact that The Brick offered for Russell to keep the funds totalling the net *ESA* entitlements does not relieve it from its errors and lack of timeliness (see the chronology and evidentiary cites at para. 16 of Russell's factum). The whole point was that Russell wanted the funds deposited into his RRSP so that there would be no personal tax withholdings from it. The

Brick had already taken far too long to get the statutory entitlements right irrespective of the date when it was provided with the RRSP bank deposit information by Russell's lawyer.

[60] Furthermore, The Brick used the same basic template termination letter, modified to the circumstances of each terminated employee, as was used for Russell. While no direct evidence was led on the issue of how the "template" termination letters were modified, the inference is either none of the termination letters reflected the advice to employees terminated at around the same time as Russell that if The Brick's offer to settle was rejected, they would receive the statutory minimum entitlements, or the other letters did reflect that advice and it was omitted from Russell's termination letter. Either way, this factor supports an award of moral or aggravated damages, in combination with the other factors reviewed.

[61] Russell asks for an award of \$50,000 as moral or aggravated damages.

[62] In the circumstances of this case and having regard to awards made by this Court in other cases featuring similar types of unfair dealings during the course of termination, I am awarding \$25,000.00 as moral damages for the following reasons:

- a) A lack of transparency and fair dealing by The Brick in the termination process by failing to advise that Russell would be provided with his full statutory (*ESA*) entitlements in the event he rejected the offer reflected in the termination letter;
- b) A lack of transparency and fair dealing by failing to advise Russell that his benefits would be extended consistent with his statutory notice period irrespective of whether he accepted The Brick's offer;
- c) The failure of the offer to meet all of the statutory entitlements, including vacation pay accrued over the course of the statutory notice period; and
- d) Mental distress Russell suffered beyond the usual hurt feelings and distress of being dismissed, and which was reasonably foreseeable to The Brick arising from its lack of transparency and fair dealing in the manner of terminating his employment.

See: *Halupa v Sagamedica*, 2019 ONSC 7411 at paras. 33, 40; *Ruston v Keddco Mfg. (2011) Ltd.*, 2018 ONSC 2919.

### **Mitigation**

[63] The Brick did not challenge Russell's efforts to mitigate his damages. However, The Brick submits that a contingency discount of 10% should be applied to reflect the chance that Russell will find alternative employment at some point in the future during the balance of the notice period: See *Linton v. Blaney McMurtry LLP*, 2021 ONSC 321; *Peticca v. Oracle Canada ULC*, 2015 ONSC 2584.

[64] Russell submits that should I adopt the contingency approach (as distinct from the trust and accounting approach), I should find he only has a 1% chance of finding employment during the

balance of the notice period: See *Hussain; Ziten v Sadie Moranis Realty Corp.*, 2015 ONSC 7987; *Paes v. Cascades Canada ULC*, 2015 ONSC 7356; *Patterson v. IBM Canada*, 2017 ONSC 1264.

[65] As we appear to be coming out of the COVID-19 pandemic, and Russell at age 58 has some transferrable skills, I will impose a constructive trust on Russell's earnings he may earn during the balance of the notice period, in favour of The Brick under the trust and accounting approach: See *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189 at paras. 48, 67, 68.

### **Calculation of Benefits**

[66] The majority of Russell's benefits were extended for eight weeks following his termination. He also has had continuation of his dental and health benefits for one year. However, The Brick did not tell him that he had this benefit continuation, despite requests between August 21, 2020 and January 6, 2021, until the cross examination of The Brick's deponent in March 2021, approximately seven months after his termination.

[67] In terms of Russell's life insurance, there is evidence that supports that in order to purchase replacement insurance, following termination of coverage under The Brick's plan in July 2021, it will cost Russell \$416 per month which translates into \$4,992 for the balance of the notice period. Further, Russell is entitled to the monetary value of the benefits even if they are not replaced: See *Ruston* at paras. 114-15 and 117; *Groves v. UTS Consultants Inc.*, 2019 ONSC 5605 at paras. 95-97.

[68] On balance, I favour the approach of awarding loss of benefits in the equivalent of 10% of the pay in lieu of notice as reasonable in the circumstances of this case: See *Halupa v. Sagamedica Inc.*, 2019 ONSC 7411 at para. 23; *Andros v. Colliers Macaulay Nicolls Inc.*, 2019 ONCA 679 at para. 65; *Mikelsteins* at paras. 21-24; *Ruston* at para. 117. I am making this award for the full two years of notice because Russell was not told his benefits had been extended until approximately 7.5 months after the fact, and after which the majority of his benefits had expired.

[69] An award for loss of an employer's RRSP contributions may also be made in addition to an award for loss of benefits: See *Ruston*. By analogy I am making a separate award for loss of The Brick's contributions to the DPSP on behalf of Russell during the notice period.

[70] Russell submitted that he was entitled to a bonus of \$500. However, I find on the evidence that this bonus was a one-time payout in 2019 in lieu of a pay increase in 2020. It was not an integral part of his compensation as defined by the jurisprudence.

### **Calculation of Damages**

[71] Accordingly, I fix damages for wrongful dismissal in favour of Russell as follows:

- |   |            |
|---|------------|
| a) 2 years times annual salary of \$74,859:                     | \$149,718  |
| b) 1 week of unpaid wages:                                      | \$2,015.45 |
| c) Loss of DPSP employer contributions of 2.8% of \$149,718.00: | \$4,192.10 |

d) Loss of benefits at 10% of \$149,718:	\$14,971.80
e) Vacation pay accrued to September 12, 2020:	\$4,491.54
f) Moral/Aggravated Damages:	\$25,000
g) Less sum paid:	(\$53,645.68)
TOTAL:	<u>\$146,743.21</u>

[72] As stated, any earnings made by Russell during the remainder of the notice period (calculated from the date of the hearing of this motion) will be impressed with a trust in favour of The Brick by way of mitigation.

[73] This award will have prejudgment and postjudgment interest in accordance with s. 128 and s. 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

**Costs**

[74] Russell has uploaded his costs outline on to CaseLines.

[75] In the event the parties cannot agree on costs, Russell will have ten business days following release of these reasons to provide submissions, and The Brick will have five business days to provide responding cost submissions. The respective costs submissions will not exceed three pages double spaced. The Brick may also provide a cost outline.

Vella, J.

---

Vella J.

**CITATION:** Russell v. The Brick Warehouse LP, 2021 ONSC 4822  
**COURT FILE NO.:** CV- 20-649548  
**DATE:** 20210709

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

TOM RUSSELL

Plaintiff

– and –

THE BRICK WAREHOUSE LP

Defendant

---

**REASONS FOR JUDGMENT**

---

Vella J.

**Released: July 9, 2021**