

**Ontario Supreme Court**  
**McNamara v. Alexander Centre Industries Ltd.,**  
**Date: 2000-05-24**

Kenneth McNamara, Plaintiff

and

Alexander Centre Industries Limited, Defendant

Ontario Superior Court of Justice Hennessy J.

Heard: April 3-4, 2000

Judgment: May 24, 2000

Docket: C1450/95

*David Harris, for Plaintiff.*

*Norman A. Keith, for Defendant.*

***Hennessy J.:***

1 The Plaintiff, a chartered accountant, was terminated from his employment as President of the family owned Corporation after he advised that he required time off for medical reasons. At the time of the termination, the Plaintiff was 59 years of age and had worked for Alexander Centre Industries Limited for 24 years.

2 At the opening of trial, counsel for the Defendant indicated that they were withdrawing all allegations of cause, that liability had been admitted and that the only issue before the Court was damages.

3 The following issues were identified by counsel as those requiring determination:

- a) Length of notice
- b) Whether this was a case for extended notice as defined in *Wallace*, Supreme Court of Canada.
- c) The components of and value of the compensation package to form part of the notice.
- d) Whether the payments received under the disability policy are to be set off against notice.
- e) Whether the Plaintiff had mitigated his damages.

**Background:**

4 In 1971, Mr. McNamara was invited to meet with the owner of Alexander Centre Industries Limited to explore the possibility of a position. The Plaintiff was already employed. The Defendant Corporation supplied the construction trades with sand, gravel, ready mix concrete, made concrete blocks, among other things.

5 The Plaintiff met with Mr. Cliff Fielding, the owner of the Company and discussed the position of controller. The job was offered to him in this meeting and when the Plaintiff raised the matter of salary, Mr. Cliff Fielding referred him to his son, Jim. The Plaintiff met with Jim Fielding and discussed salary and benefit expectations. A salary of \$22,000 was offered. Before accepting the salary, the Plaintiff asked about the benefit plan. He testified that he was particularly interested in the benefits because his wife had a medical condition at the time.

6 On being satisfied with the benefit package, Mr. McNamara accepted the salary and the job. He commenced work as controller, was promoted to Vice President of Finance in 1977 and to President in 1986. He worked in that capacity until July 1995.

7 As President, Mr. McNamara was responsible for the day to day operations of Alexander Centre Industries Limited and reported to the Chief Executive Officer of the Company, Mr. Cliff Fielding and to the Executive Committee which was composed of Fielding family members.

8 As of September 30, 1995, the company had assets of \$60 million, excluding the market value of portfolio investments, annual sales in the range of \$15 million and approximately 150 employees in all.

9 At the time of termination, July, 1995, Mr. McNamara was earning \$175,462 per annum.

**Termination:**

10 On July 24th, 1995, the Plaintiff went to Cliff Fielding's office to discuss a recent contract and to advise him that he was taking some time off work for medical reasons. He had been experiencing significant work related stress and had recently seen Dr. Anderson. The physician had written a letter, which the Plaintiff handed to Cliff Fielding. The letter from Dr. Anderson read:

Dear Mr. Fielding:

Mr. McNamara, on my advice, is required, for medical reasons, to be off the job indefinitely.

With proper signed releases, I will forward any medical information to you about Mr. McNamara's medical condition.

Best Regards

11 Mr. Fielding took the letter and said something to the effect, "Your health is important, take care of it". The meeting ended at this point after approximately 15 or 20 minutes.

12 On August 1, 1995, a letter dated July 31st, 1995 was hand delivered to the Plaintiff at home. It read:

Dear Ken:

I have your letter of Monday July 24, 1995. I am distressed to receive the medical information and to learn that your condition will prevent you from ever returning to work at Alexander Centre Industries Limited. It is with regret that I accept that reality and your leaving the company. Obviously, you will be entitled to benefits of the disability insurance coverage with London Life. Please contact J.D. Lamont, Bill Sutton or the Head Office of London Life, 255 Dufferin Avenue, London, Ontario, N6A 4S1. I hope you will be able to call myself or Nemi in the next few days, so we can make the necessary arrangements to get your personal effects to you and make the transition as easy as possible. In the meantime, we will have to try to find a successor to replace you. I am grateful for your long and loyal service and I hope things go well for you in the future.

Sincerely,

13 There had been no communication between Messrs. Fielding and McNamara between the July 24th, 1995 meeting and the letter of July 31st, 1995. However, the Plaintiff had seen Dr. Anderson one more time on July 28th, 1995 and then saw his own family physician, Dr. Bakker on July 31st, 1995, who advised him to stay off work a further two weeks.

14 Upon receipt of the letter of July 31, 1995, the Plaintiff telephoned the office and tried to arrange a meeting with Fielding. A meeting was scheduled for the next day, August 2nd, 1995. The Plaintiff wanted to explain the doctor's letter, in

case it had been misinterpreted and to let Fielding know that he would be ready to return to work shortly. However, the next day, the Plaintiff was advised that the meeting would not take place, that Fielding was busy organizing his 80th birthday and that the Plaintiff could talk to the accountant from KPMG.

15 At no time was there any communication with the Plaintiff regarding his possible return to work date or other matters arising from his medical leave.

16 The Plaintiff visited Dr. Anderson the next day and asked him to write a letter to Cliff Fielding explaining his first letter and confirming the return to work date two weeks hence. The Plaintiff also wrote his own letter to Cliff Fielding on August 3rd, 1995 confirming that he was ready, willing and able to return to work on a full time basis as set out in the letter from the physician. There was never any response to this letter.

**Notice:**

17 The Plaintiff commenced litigation in August, 1995. He also commenced proceedings to obtain the statutory payments, both notice and severance under *The Employment Standards Act*. The Defendant opposed the claim, on the grounds that the Plaintiff had been terminated with cause and appealed the officer's report. Ultimately, statutory payments of \$109,056.73 were made.

18 With respect to the first issue, notice, the test in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) continues to be the authority. The Plaintiff was 59 years old, a President of a large company, had 24 years service. There was no evidence presented to demonstrate that there was any similar employment available. There is no doubt that the Plaintiff is entitled to a lengthy period of notice. (*Ditchburn v. Landis & Gyr Powers Ltd.* (1995), 16 C.C.E.L. (2d) 1 (Ont. Gen. Div.) and *Paitich v. Clarke Institute of Psychiatry* (1988) Ontario Judgments (1988), 19 C.C.E.L. 105 (Ont. H.C.), affirmed on appeal (1990), 30 C.C.E.L. 235 (Ont. C.A.)).

19 I find the appropriate notice period to be 24 months.

20 I have considered whether the Defendant's conduct gives rise to enhanced damages under the principles articulated by Iacobucci J. in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.) at paragraph 98:

The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

21 I find that Mr. Fielding's conduct is the type of conduct that ought to trigger compensation by way of an addition to the notice period. His acts exacerbated the existing condition of the Plaintiff, of which he was aware. Here was the senior and most responsible employee telling the owner CEO that he needed time off work. In response, the Defendant fires him by way of a cavalier letter which transparently misinterprets the employee's request.

22 Mr. Cliff Fielding was the witness for the Defendant. He was the CEO of the Company the entire length of the Plaintiff's employment. He gave two different explanations for his letter of July 31 which I will call the "termination letter".

23 The first reason given by the Defendant for the termination was that the Plaintiff, in effect, advised the Company that he would not be returning to work. The Defendant's representative acknowledged that he did not ask the Plaintiff about his expected return to work date. He said this about the letter received from the Plaintiff. It meant that he was not going to be around indefinitely. "That's forever, until it is changed. My understanding is he was not going to show up on the job. I started looking for a replacement right away. I took it at face value that he would not be back".

24 Mr. Fielding wanted the Court to believe that he genuinely understood the letter to effectively end the employment relationship.

25 But Mr. Fielding gave a second explanation for the termination in evidence. He candidly acknowledged that he and others in the Company were losing faith in the Plaintiff; that he had been upset that the Company had experienced its first loss in 65 years. He said that he held the Plaintiff largely accountable for the loss.

26 This first explanation is completely unreasonable. It is hard to believe that any employer could come to that conclusion on the basis of the letter before him. There was no evidence of any prior employment issues which would have given rise to this conclusion. No information

was asked of McNamara and no indication was given to him that this absence or notice of a medical condition caused the Company any concern.

27 Fielding was neither candid nor forthright if he sincerely believed that the physician's note constituted notice that the employee would not be returning. There was no expressed intention to terminate the employment relationship. If Fielding found that the letter lead him to infer such an intention, unlikely as that appears objectively, he was under an obligation to clarify McNamara's intent. It is obvious from the Plaintiff's actions after the July 31st letter that he could have and would have provided Mr. Fielding with any and all information that was necessary to give his employer some level of comfort and a reasonable return date from this leave. Fielding never gave the Plaintiff any reason to provide more information before his letter of July 31st and I find that he deliberately lulled the Plaintiff into believing that there was no problem at all with his absence.

28 In *Veer v. Dover Corp. (Canada) Ltd. / Société Dover (Canada) Ltée* (1997), 31 C.C.E.L. (2d) 119 (Ont. Gen. Div.), at 137, aff'd, (1999), 45 C.C.E.L. (2d) 183 (Ont. C.A.), (May 19, 1999), Lax J. said:

...although there is no upper limit on the appropriate period of notice, it is only the exceptional cases which will warrant a notice period in excess of 24 months.

29 The damages to be awarded on this principle do not arise from the mere fact of the termination, but from the manner in which the dismissal was carried out. I find that the Plaintiff is entitled to an additional two months notice as a result of the manner in which the termination was conducted.

30 Mr. McNamara received statutory payments of \$109,056.73 during the notice period which counsel agree must be deducted from the notice.

### **Components of Compensation Package:**

31 Turning now to the third issue, that is, the components and the value of the components of the compensation package which would form part of the damages. Counsel agree on the following as of date of termination:

Salary	\$175,462.00	per annum or (\$14,621.83 per month)
Group Insurance	\$ 839.12	per month

Pension	\$	546.00	per month
Social Club	\$	28.09	per month
Professional Dues	\$	60.63	per month

Counsel are in dispute on the value to be attributed to the car and whether vacation pay should be included.

32 In October, 1990, the parties signed an agreement with respect to the Plaintiff's remuneration. That agreement was in place at the time of termination. It called for adjustments on October 1 of each year by the percentage change in the CPI. Those adjustments shall be applied to the base salary for the calculation of this award.

As at October 1, 1995—2.29%

As at October 1, 1996—1.49%

33 On the question of vacation, there is conflicting case law on the subject. No evidence was lead either way on the practice or the intention of the parties to have McNamara take or be paid for vacation. I conclude that McNamara would have taken vacation had he remained employed and consequently do not add to the damages any amount for vacation pay. (*Garvin v. Rockwell International of Canada Ltd.* (1993), 50 C.C.E.L. 295 (Ont. Gen. Div.).

34 In *Davidson v. Allelix Inc.* (1991), 86 D.L.R. (4th) 542 (Ont. C.A.), The Ontario Court of Appeal confirmed that the proper measure of damages for a wrongfully dismissed employee, in addition to lost salary is the "pecuniary value of the lost benefits flowing from such dismissal". On the question of the car, I am persuaded that the analysis in *Campbell v. Petro-Canada Inc.* (1992), 44 C.C.E.L. 234 (Ont. Gen. Div.) is applicable here.

35 The Plaintiff was provided with the use of a leased vehicle, primarily to perform his duties. All expenses were paid by the Defendant. The Plaintiff had the unrestricted use of the vehicle for personal purposes. Throughout this period the Plaintiff reported that the vehicle was used for personal use, approximately 10% of the time. The Plaintiff explained that much of his personal use had also been mixed with business use and therefore reporting was not completely useful for the analysis required for the assessment of the value of the lost benefit. The vehicle had been purchased for \$27,000. The annual costs for the car were approximately \$300.00 per month exclusive of the lease cost. The Plaintiff lost not only the

percentage use he calculated for Revenue Canada purposes but also the availability of the vehicle at all times. I accept the proposal by the Plaintiff that the vehicle be valued at \$500.00 per month.

***Are the Disability Payments Set-Off Against the Notice Period?***

36 In *Sylvester v. British Columbia* (1997), 29 C.C.E.L. (2d) 1 (S.C.C.) at p.9, Major J. dealt with the question of whether disability payments received by the employee during the notice period from a plan established solely by the employer should be deducted from the damages. In *Sylvester*, the Plaintiff was a government employee who had received benefits under the short term sick leave plan only. Both the long term and short term disability plans were funded entirely by the employer. The employee had not made any direct or indirect contributions to either plan. The Supreme Court of Canada held that the payments were deductible. The Court found that to do otherwise, would require employers who set up disability benefits plans to pay more to employees upon termination than employers who do not set up plans. Major J. said:

There may be cases where an employee will seek benefits in addition to damages for wrongful dismissal on the basis that the disability benefits are akin to benefits from a private insurance plan for which the employee has provided consideration. That is not the case here.

37 In the case before me, there are a number of distinguishing features. Firstly, the plan at Alexander Centre Industries Limited was purchased from a private third party. When the employee was in receipt of benefits, it was not the employer who was paying the employee. The payment came directly from London Life to the employee. One can assume, in fact, that the reason for such a plan is to provide income replacement to the employee from a source other than the employer while the employee is not able to provide service to the employer. The employer insured himself against the risk of providing replacement income, and paid benefits to do so.

38 Secondly, Major J. specifically notes that there was no consideration by the employee for this benefit. Evidence from the Plaintiff, in this case, was directly to the contrary and there was no evidence from the Defendant on the point. McNamara stated that the question of

benefits was integral to his discussions on salary at the time of hire, that he would not have accepted the salary but for the benefit package as part of the overall compensation scheme.

39 In *Sills v. Children's Aid Society of Belleville (City), Hastings (County) & Trenton (City)* (1999), 46 C.C.E.L. (2d) 30 (Ont. S.C.J.), Chilcott J. found that the Plaintiff contributed indirectly to the private plan based on the evidence that the disability benefits were earned as part of the her compensation plan and as part of a trade off in arriving at benefits and salary. This is the case before me. I find that McNamara did contribute indirectly to the benefit plan and that his benefits were part of a compensation package for which trade-offs were made. The Plaintiff stated this in his evidence and it stood uncontradicted.

40 Given these facts, I find that the disability payments received by Mr. McNamara during the relevant notice period are not deductible from the award of damages.

### **Mitigation**

41 The onus is on the Defendant to show that the Plaintiff could have avoided some or all of the loss claimed by showing that other employment opportunities were available of which the Plaintiff ought reasonably to have taken advantage. (*Michaels v. Red Deer College* (1975), [1976] 2 S.C.R. 324 (S.C.C.)). No evidence was lead by the Defendant on this point. The Plaintiff sketched out his job search and consulting activities during the notice period which of course were delayed or interrupted by his periods of disability as certified by his physician. There was lengthy cross examination of the Plaintiff on his efforts and the choices he made during this time frame. I am of the view that the Plaintiff reasonably and properly mitigated his loss, either initiating job search activities in the community or engaging in remunerative consulting work. His job search activities were consistent with his age and extent of connections in the community, that is he made contact with the various local accounting firms and asked about opportunities and generally made it known that he was available for work. Some of those contacts resulted in consulting work as opposed to employment.

42 The Plaintiff must account for income received as a result of his mitigation efforts. He testified that he earned \$62,075.00 during the notice period against which he claims expenses. The Defendant challenged a number of these expenses, notably the office expense of \$ 12,000, for which there was no actual outlay of money but rather this figure represented a value attributed to the space within the Plaintiff's residence for his consulting

activities. I find that \$10,000 is a reasonable figure for expenses for the period in which the Plaintiff engaged in consulting. Consequently, the amount of \$52,075.00 shall be deducted from damages.

**Conclusion:**

43 In summary, I find that the Plaintiff is entitled to judgment under the following categories:

Notice - 24 months and

Extended Notice - 2 months - both adjusted as per employment agreement

Including Benefits, Pension, Social Club, Car and Professional Dues

Less amount received pursuant to statutory obligations

Less income from mitigation efforts

Plus pre-judgment interest.

44 If counsel wish to make representations as to costs, they can do so by making arrangements with the trial coordinator for either written or oral submissions. If there is no notice to the trial coordinator before June 15, 2000 at 4 p.m., costs to the Plaintiff.

*Action allowed.*