Scapillati v. A. Potvin Construction Limited

[Indexed as: Scapillati v. A. Potvin Construction Ltd.]

44 O.R. (3d) 737
[1999] O.J. No. 2187
Docket No. C28440

Court of Appeal for Ontario
Austin, Laskin and Goudge JJ.A.
June 17, 1999

Employment -- Wrongful dismissal -- Notice -- Plaintiff working as finishing carpenter in residential building industry -- Seasonal and fluctuating nature of building industry well-known -- Notice not customarily given by employers or employees in industry -- Plaintiff not entitled to notice of termination.

The plaintiff was employed by the defendant residential contractor as a finishing carpenter. He was laid off a number of times, usually in the winter, because of lack of work, but was always called back until the final lay-off, when he was not recalled. No notice of termination was given. Cause was not an issue. The plaintiff brought an action for damages for wrongful dismissal. The trial judge held that the plaintiff, who was excluded from the coverage of the Employment Standards Act, R.S.O. 1990, c. E.14 because he was employed in the construction trade, was not entitled to notice at common law by reason of a custom of his trade. The action was dismissed. The plaintiff appealed.

Held, the appeal should be dismissed.

The establishment of a custom or usage as to the appropriate length of notice of dismissal does not end the discussion; the

court may accept or reject the custom. If a custom or usage is proven, it becomes simply a factor to be taken into account, with other factors, in determining what is reasonable notice in the particular circumstances of a case. The on-site construction industry is notoriously seasonal and irregular. Given that fact, it is questionable how useful notice would be. When one employer is laying off, it is unlikely that others will be hiring. In the circumstances, it was reasonable that the plaintiff receive no notice of termination.

Andrews v. Pacific Coast Coal Mines Ltd. (1909), 13 W.L.R. 306, 15 B.C.R. 56 (C.A.); Cronk v. Canadian General Insurance Co. (1995), 25 O.R. (3d) 505, 128 D.L.R. (4th) 147, 23 B.L.R. (2d) 70, 14 C.C.E.L. (2d) 1, 95 C.L.L.C. 210-038 (C.A.); Krewenchuk v. Lewis Construction Ltd. (1985), 8 C.C.E.L. 206 (B.C.S.C.); S & A Strasser Ltd. v. Richmond Hill (Town) (1990), 1 O.R. (3d) 243, 45 O.A.C. 394, 49 C.P.C. (2d) 234 (C.A.), consd

Cases referred to

Allison v. Amoco Production Co., [1975] 5 W.W.R. 501, 58 D.L.R. (3d) 233 (Alta. S.C.); Bardal v. Globe & Mail (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.); Boyd v. Culliton Brothers Ltd. (1995), 13 C.C.E.L. (2d) 205 (Ont. Gen. Div.); Gordon v. Saint John Shipbuilding & Dry Dock Co. (1983), 47 N.B.R. (2d) 150, 124 A.P.R. 150 (Q.B.); Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, 7 O.R. (3d) 480n, 91 D.L.R. (4th) 491, 134 N.R. 386, 40 C.C.E.L. 1, 92 C.L.L.C. 14,022, 11 C.P.C. (3d) 140 (sub nom. Lefebvre v. HOJ); Susan Shoe Industries Ltd. v. Ricciardi (1994), 18 O.R. (3d) 660, 3 C.C.E.L. (2d) 153 (C.A.) (sub nom. Susan Shoe Industries Ltd. v. Ontario (Employment Standards Officer)); Thomson v. Bechtel Canada Ltd. (1983), 3 C.C.E.L. 16 (Ont. H.C.J.)

Statutes referred to

Employment Standards Act, R.S.O. 1990, c. E.14, ss. 4, 6(1) 57(1)(a), 10(e)

Rules and regulations referred to

Termination of Employment Regulation (Employment Standards Act), R.R.O. 1990, Reg. 327, s. 2(e)

Authorities referred to

Christie, Employment Law in Canada, 2nd ed. (Markham, Ont.: Butterworths, 1993), p. 626
Freedland, The Contract of Employment (Oxford University Press, 1976), pp. 149, 150

APPEAL from a judgment of Bell J. (1997), 152 D.L.R. (4th) 563, 30 C.C.E.L. (2d) 233, 98 C.L.L.C. 210-001 (Gen. Div.) dismissing an action for damages for wrongful dismissal.

Janice B. Payne, for plaintiff/appellant.
Eric M. Appotive, for defendant/respondent.

The judgment of the court was delivered by

AUSTIN J.A.: -- This action considers the impact of a custom of the trade on the reasonable notice required for dismissal from employment.

The plaintiff appeals from the decision of Bell J. [reported (1997), 152 D.L.R. (4th) 563, 30 C.C.E.L. (2d) 233] that, although the plaintiff received no notice of termination of his employment because he was excluded from the coverage of the Employment Standards Act, R.S.O. 1990, c. E.14 by reason of the nature of his trade, he was not entitled to notice at common law either, by reason of a custom of his trade.

In my view, Bell J. came to the correct conclusion. However, I disagree with her reasoning and would reach that conclusion by a different route.

Facts

The plaintiff was trained as a carpenter in Italy. In 1953, at age 19 he came to Canada. From 1957 to 1993, he worked as a finishing carpenter for residential contractors in the Ottawa area. Generally speaking, finishing carpenters work inside and rough or framing carpenters work outside. He was always paid on an hourly basis and was non-union.

Mr. Scapillati worked for Hobin Homes for four and one-half years and then for Campeau Corp. for 18 years. He said he left Campeau because Campeau closed down and didn't build any more houses. He said Campeau let him know three or four months ahead that there would be no more jobs. He then worked for Joe Perez Construction for less than a year before going to work for the defendant.

Alain Potvin was a superintendent at Perez and in 1980 he left to start the defendant company. In 1981 Potvin's foreman, Rejean Guindon, asked the plaintiff to come to work for Potvin at $1 more per hour than he was making at Perez. Guindon said it would be for a long time and that as long as he, Guindon, was with Potvin, the plaintiff would have a steady job. The plaintiff was persuaded and went to work for Potvin on March 12, 1981. He stayed there until April 12, 1991.

During that decade he was laid off from time to time but went back each time. He said the layoffs were short - two weeks, three weeks, one month, mostly around Christmas, between Christmas and New Year's and then a few times in the spring, because of a lack of work. Each time he would be told it was temporary: "we will call you back as soon as possible".

One year an arrangement was made whereby he remained on Potvin's payroll but lived in a hotel in Toronto and worked on Campeau's mansion in Toronto from May until Christmas.

After being laid off by Potvin in April 1991, the plaintiff went on unemployment insurance. He also looked for work and starting on July 15, 1991, worked for Urbandale Corporation building houses. This lasted until January 29, 1993 when he was again laid off due to a shortage of work.

In April 1993 he ran into Guindon at the Home Show. Guindon asked him if he was working and when the plaintiff said he was not, Guindon invited him back to Potvin. He went back to Potvin a few days later. He was there from April 12, 1993 until December 21, 1993 when he was again laid off. Again, he was told that it was temporary and that he would be called back. Others were called back but he was not.

No notice of termination was given. Cause was not an issue; he was regarded as an excellent employee. No explanation was provided as to why others were called back but the plaintiff was not. The employer does not contest that the plaintiff was terminated.

Soon after being laid off, he went on unemployment insurance. In November 1994, he applied to the Canada Pension Plan for a retirement pension. He was notified that his pension would start in December 1994.

Defence evidence was given by Potvin, by Richard Sachs of Urbandale and by Jeffrey J. Doll, an employee or former employee of Teron Inc., Wimpey Construction and Coscan, all well known house builders. Mr. Doll was president of the Ottawa-Carleton Homebuilders' Association in 1997. The defence evidence dealt with two matters - the way the home building industry in the Ottawa area worked and the matter of notice to hourly rated workers.

Apart from the ups and downs of the economy, local and general, employment was directly affected by the way the home building industry worked. Builders would subcontract actual construction to organizations such as that of the defendant and Urbandale. These latter would bid on a builder's work, the bids being based upon drawings or models of homes and the anticipated number of each model to be built. A new contract would be entered into each year.

Those anticipated numbers, however, were only that. The contract would not specify the number of houses. When construction got underway, the number of houses actually built

would be the number the builder had been able to sell. That, in turn, would vary depending upon a variety of factors. Thus, the demand for persons such as the plaintiff could rise or sink rapidly and, to some extent, unpredictably. According to Mr. Doll, "quite often, the work was not continuous".

All of the defence witnesses testified that hourly rated, non-union, on-site workers in the residential building sector in the Ottawa area did not get notice of termination. Nor did they give notice; they could work for one contractor one day and another the next. They would usually move for more money, but they were free to change employers as they saw fit, and did so without notice. The plaintiff moved from Perez to Potvin in 1981 because he could earn a dollar more per hour at Potvin. Potvin testified that that happened a lot.

Potvin testified that in his time he had probably done 4,000 lay offs, all without advance notice or pay in lieu of notice. He also said that in calculating his costs he did not include anything for severance. He continued:

> That's why union companies can't bid on residential right now, because they would be a lot more expensive than us.

That is, one of the reasons why unionized businesses could not compete on residential contracting was because they would have to include termination or severance pay.

Like the plaintiff, Potvin testified that the people working on site "can see if there's work ahead or not. You know that the lay off is coming. Almost every year it's the same story. When winter comes, there's a very slow down [sic]; and then it starts back around April. It's been that way in construction since I know it."

Mr. Doll testified that if notice or pay in lieu of notice were required to be given to hourly rated on-site construction workers, it would change the industry and greatly increase the price of houses. He was unable to quantify that impact.

The evidence of the defendant's witnesses was that much of

the labour force under discussion was transient but that the practice of termination without notice applied to all, whether long term or not, skilled or not. The trial judge accepted the evidence that there was such a custom and that it would apply to the plaintiff.

She went on to find that the custom was reasonable. In this respect, she relied upon the defence evidence and upon the fact that, "By permitting an exemption in s. 2 of Regulation 327 of a person employed on-site in the construction buildings [sic] the Legislature has recognized no need to given even the minimum protection accorded to other long term employees under s. 57(1)(h) of the Act".

The trial judge concluded her reasons as follows [at p. 571 D.L.R.]:

> Having considered all of the evidence, I conclude that there was no implied term in the plaintiff's contract of employment that, if he were terminated, he would receive notice, payment in lieu of notice or severance pay. Accordingly, the plaintiff has not proved his claim for damages for breach of his employment contract.

The trial judge dismissed the action but, before doing so, assessed the plaintiff's damages in the event of an appeal. She found that the appropriate notice period would have been ten months and the plaintiff's damages $24,960.

Employment Standards Act

Before reviewing the analysis by the trial judge of the common law right to reasonable notice, reference should be made to the Employment Standards Act.

No claim was made under this Act by the plaintiff and no mention of the Act was made in the statement of claim. Reference, however, was made to the Act in the statement of defence.

Section 57(1)(a) of the Act reads as follows:

57(1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employer gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

. . . . .

and such notice has expired.

Where the employment has been between one and three years, then two weeks has to be given and so on. Eight weeks notice in writing is appropriate if his period of employment is eight years or more: s. 57(1)(h)

Section 57(10)(e) reads as follows:

57(10) Subsections (1) and (2) do not apply to,

. . . . .

(e) an employee employed in an activity, business, work, trade, occupation or profession, or any part thereof, that is exempted by the regulations.

Ontario Regulation 327, s. 2(e) reads as follows:

2. Section 57 of the Act does not apply to a person who,

. . . . .

(e) is employed in the construction, alteration, decoration, repair or demolition of buildings, structures, roads, sewers, water or gas mains, pipelines, tunnels, bridges, canals or other works at the site thereof;

Returning the to Act itself, ss. 4(1) and (2) and 6 are as follows:

4(1) An employment standard shall be deemed a minimum requirement only.

(2) A right, benefit, term or condition of employment under a contract, oral or written, express or implied, or under any other Act or any schedule, order or regulation made thereunder that provides in favour of an employee a higher remuneration in money, a greater right or benefit or lesser hours of work than the requirement imposed by an employment standard shall prevail over an employment standard.

. . . . .

6(1) No civil remedy of an employee against his or her employer is suspended or affected by this Act.

The Act requires employers to give written notice of termination of employment. Minimum lengths for such notice depending upon the duration of the employment are prescribed. In the event of failure to give notice, the employer is required to pay the employee an amount equal to the amount the employee would have earned during the notice period. Some industries are exempted from the application of these provisions. The standards are minimums and do not detract from an employee's rights at common law or otherwise. An employee cannot contract out of the Act's requirements.

The trial judge dealt with the Act and its relationship to this claim in her reasons as follows [at pp. 567-68]:

It was not disputed and there is no question that the plaintiff was a person who was employed in the construction of buildings at the site thereof. Consequently, s. 57(10) of the Act and s. 2 of Regulation 327 would apply to the plaintiff, thereby disentitling the plaintiff to the benefits under s. 57(1) of the Act, i.e. for an employee employed for less than one year a minimum notice of one week and for an employee employed for more than eight years a minimum notice of eight weeks.

Counsel for the defendant submitted that the plaintiff had no common law right to damages for wrongful dismissal because the common law no longer applies, the Legislature having enacted the Employment Standards Act, which, in this case, would not entitle the plaintiff to any notice because of the exemption in s. 57(1) of the Act and s. 2 of Regulation 327.

Section 2 of the Act provides that the Act applies to every oral contract of employment in Ontario. However, s. 4(1) makes it clear than employment standard in the Act is only a minimum requirement. Section 4(2) provides that a greater benefit, express or implied, under an oral contract will prevail over an employment standard. Further, s. 6 specifically preserves an employee's civil remedy against his or her employer.

Notwithstanding the language of the Act and regulations and notwithstanding the clear and correct findings of the trial judge, counsel for the plaintiff asserted in her factum that her client was entitled to benefits under the Act. Counsel was advised at the outset of the appeal that if she were asserting any claim under the Act, it should be brought in the first instance before an enforcement officer of the Ministry of Labour pursuant to the provisions of the Act. Susan Shoe Industries Ltd. v. Ricciardi (1994), 18 O.R. (3d) 660 at p. 662, 3 C.C.E.L. (2d) 153 (C.A.). In my view, the sole relevance of the Act and Regulations to this action is to indicate the position taken by the Ontario government with respect to on-site construction workers.

Section 57 was added to the legislation in 1981. In introducing the legislation, the Minister of Labour, the Honourable Robert Elgie said amongst other matters:

Regular full-time and part-time employees are eligible for severance payment, but not those casual employees who have a right to elect whether to work when requested. Construction industry employees who work at construction sites will not be eligible. Their employment is typically irregular and intermittent due to the limited duration of most construction projects. The special nature of this industry is recognized

by all jurisdictions in Canada, which have exempted construction workers from the notice-of-termination provisions.

. . . . .

On-site construction workers are excluded from severance pay coverage because of the special nature of the industry, where employment is typically irregular and intermittent; that principle is recognized by all jurisdictions in Canada through exclusion from the termination notice provisions.

(Emphasis added)

Analysis

I turn now to the question whether the trial judge was correct in concluding that "there was no implied term in the plaintiff's contract of employment that, if he were terminated he would receive notice, payment in lieu of notice or severance pay".

Although reference is made to both "termination" and "severance", what is in issue in the instant case is "termination", the ending of the employment of an individual employee. "Severance" has been appropriated by s. 58 of the Act to refer to employees of at least five years where 50 or more are discharged over a period of six months or less, or one or more are discharged by an employer having a payroll of $2.5 million or more.

Having decided that the Act did not take away the plaintiff's common law remedy, the trial judge turned directly to the question whether there was a custom in the plaintiff's trade that no notice was required. In so doing, the matter of the giving of reasonable notice was bypassed. In my respectful view, an understanding of the giving of such notice and the factors that go into the calculation of such notice, including customs and usages, is necessary to an understanding of the resolution of this matter.

The precise nature of the origin of the giving of reasonable notice of termination has been the subject of much writing. In Allison v. Amoco Production Co., [1975] 5 W.W.R. 501 at p. 508, 58 D.L.R. (3d) 233 (Alta. S.C.), MacDonald J., speaking of the source of a term requiring reasonable notice quoted from 3 Halsbury 58 (Contract) as follows:

> A contract is in some cases said to be implied by law. Such an implied contract is really an obligation imposed by law independently of any agreement between the parties, and may be imposed notwithstanding an expressed intention by one of the parties to the contract. It is not a contract in the true sense of the term at all, but an obligation of the class known in civil law as quasi-contracts.

In Thomson v. Bechtel Canada Ltd. (1983), 3 C.C.E.L. 16 (Ont. H.C.J.), Osborne J. said at p. 19:

> The reasonable notice term of this oral contract of employment is an implied term. Whether this term and a term relating to the amount of notice are implied by resort to pure policy or by an oblique consideration to what the parties would have agreed to had they considered the issue at the time of hiring, does not matter. The policy approach seems to me to be more realistic than does resort to the law of implied contract.

In Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, 91 D.L.R. (4th) 491, Iacobucci J. reviewed the subject, concluding at p. 998 that:

> For the purposes of this appeal, I would characterize the common law principle of termination only on reasonable notice as a presumption, rebuttable if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly.

At p. 1008 McLachlin J. said:

> Requirements for reasonable notice in employment contracts fall into the category of terms implied by law: Allison v.

> Amoco Production Co. [citation omitted]. They do not depend upon custom or usage, although custom and usage can be an element in determining the nature and scope of the legal duty imposed. Nor do they fall into the category of terms implied as a matter of fact, where the law supplies a term which the parties overlooked but obviously assumed.

Whatever the origin and nature of the practice of giving reasonable notice of the termination of a contract of employment, it must be accepted as law. Two more matters must be considered, namely, what does "reasonable" mean in this context - and where does "custom or usage" fit in.

In so far as "reasonable" is concerned, the seminal case is Bardal v. Globe & Mail (1960), 24 D.L.R. (2d) 140, McRuer C.J.H.C. listed the factors at p. 145 as follows:

> . . . 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.

Since 1960, a substantial number of additions and refinements have been made to this list, but these items remain the foundation upon which what is reasonable is to be determined.

In some cases, there is a custom or usage as to the appropriate length of notice of dismissal. In The Contract of Employment, Freedland M.R. (1976), Oxford University Press at p. 149 the author states that the best known custom of this nature is that of a month's notice in the case of domestic servants. It is so well established that judicial notice is taken of it.

When a custom is alleged, its proponent has to satisfy the tests of certainty reasonableness and notoriety or universality. The role of trade customs in providing for notice of termination has largely been supplanted by collective agreements and by statutory provisions, in this case the Employment Standards Act: Freedland, ibid, p. 150.

In Bardal, supra, McRuer C.J.H.C., before turning to the question of reasonable notice, stated that "there is no evidence of custom in the case before me".

Sometimes the nature of the trade, rather than a specific usage is relied upon. In Thomson, supra, Osborne J. said at pp. 19-20:

> The defendant takes the position that the amount of notice to which the plaintiff is entitled must take into account the nature of the industry in which the plaintiff became a small, but relatively important, yet eventually dispensable part. The cyclical nature of the defendant's business is conceded, and is beyond dispute. The defendant's business, and for that matter, that of its U.S. parent, is a project-oriented business. The emphasis seems to have tended towards mega-projects. How does the nature of the industry and the nature of the defendant's business affect the issue of notice to which the plaintiff is entitled? . . .
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> If the purpose of reasonable notice is to provide a period in which, in theory, an employee can readjust by finding other employment the defendant's argument becomes somewhat circular. The more precarious the industry, or the more sensitive an industry is to economic downturns, the more it can be said that additional time will be required to relocate within that industry.
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> . . . . .
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> At best, I view the general issue of the cyclical nature of the industry and the economic factors issue as being factors to be considered along with many others in determining what notice the plaintiff should have been given.

The custom of the trade was not argued in Thomson, rather it was suggested that by reason of the nature of the trade in which the plaintiff was employed, relatively short notice should have been anticipated.

Nor was custom of the trade argued in Boyd v. Culliton

Brothers Ltd. (1995), 13 C.C.E.L. (2d) 205 (Ont. Gen. Div.). In that case, the issue was whether or the plaintiff was exempted from the minimum notice requirements of s. 57 of the Employment Standards Act by reason of being in the construction industry. Again, no issue was raised with respect to custom of the trade. In his reasons, however, Misener J. said at p. 213:

> The construction industry exceptions are intended to recognize the employment problems peculiar to that industry. The industry suffers from frequent, unpredictable, and rapid expansions and contractions in its activities, not only because of the sudden ups and downs of the market, but as well because of changes in the seasons. Unlike other industries, a significant percentage of its work force is hired on a temporary basis, and for the execution of a specific project or a specific number of projects. It was my impression that the government was of the view that the industry should not be saddled with requirements of notice of termination, termination pay and severance pay with respect to these temporary employees, and that that was the purpose - and the only purpose - that the exceptions with which I am dealing were intended to accomplish.

Krewenchuk v. Lewis Construction Ltd. (1985), 8 C.C.E.L. 206 (B.C.S.C.) is on its facts very close to the instant case. The plaintiff had been employed from 1956 to 1982 as a carpenter's apprentice, a journeyman finishing carpenter and a foreman, with interruptions for short lay-offs and a two-year period of self-employment. In 1982, he was laid off but not asked to return. He sued for damages for wrongful dismissal. The defendant raised, by way of defence, a custom of the trade that persons in the plaintiff's class were dismissed without notice. Sheppard J., allowing the plaintiff's claim, said at p. 211:

> On the evidence, the defendant has failed to satisfy me that there is a custom and usage in the non-union construction industry that long term employees can be terminated without notice and without severance pay. The evidence clearly establishes that short term employees can be laid off between projects without notice or severance pay, but that is not the

case here.

Clearly then, as counsel have agreed, at common law, the plaintiff is entitled to notice. The question is how much.

He concluded that 12 months' notice was appropriate.

The establishment of a custom or usage does not end the discussion; the court may accept it or reject it. In Andrews v. Pacific Coast Coal Mines Ltd. (1909), 13 W.L.R. 306, 15 B.C.R. 56 (C.A.), Irving J.A. held at p. 310 that a usage of no notice at all might be proven but not given effect because it "could not be sanctioned by the court".

In any event, if a custom or usage is proven, it becomes simply a factor to be taken into account, with other factors, in determining what is reasonable notice in the particular circumstances of a case. In Employment Law in Canada, 2nd ed., Christie (Markham: Butterworths, 1993), at p. 626, it is stated that:

Custom

A custom regarding the length of the notice period should theoretically take precedence over the determination of "reasonable" notice under the "strict contractualist" paradigm, for a custom will only be recognized by the courts if it is "reasonable, certain and notorious" such that it can be said to represent the parties' unexpressed intention. Indeed, some courts have acknowledged this logic even to the extent of upholding one custom which provided for no notice at all and another which provided that an hourly wage-rated employee was entitled to only one hour's notice. However, other more modern courts have held that even a strictly proven custom will not automatically dictate the notice period, but simply constitutes another factor to take into account in determining "reasonable" notice. The latter approach, of course, relegates the "strict contractualist" paradigm firmly to second place, allowing the court to effectuate its own policy choices under the "reasonable" notice test.

(Emphasis added)

The case cited for the upholding of a custom which provided for no notice at all is Andrews v. Pacific Coast Coal Mines Ltd., supra. In my view, it does not support the proposition. In that case, the trial judge rejected evidence of the custom of the trade, found that a month's notice would be reasonable and awarded damages in lieu thereof. On appeal, the four person panel split two and two so the trial judgment remained.

In my view, the instant case resolves itself into the question what is reasonable notice here and in the light of all the circumstances, including custom, can that be no notice?

In reaching this conclusion, I rely on the evidence of both Mr. Scapillati and Mr. Potvin to the effect that a person on the site could see what was going to happen. Mr. Scapillati said that "at Urbandale . . . we could see it was slowing down. They told us it was getting bad. You don't need the boss to tell you when you're running out of work; you just have to look where they're building the homes and you can tell that they're running out of work. The workers can figure that one out". Potvin testified that the people working on the site "can see if there's work ahead or not. You know that the lay off is coming . . . . Almost every year it's the same story. When winter comes, there's a very slow down [sic]; and then it starts back around April. It's been that way in construction since I know it.

I rely as well on the fact that Potvin did not choose the plaintiff's trade; Mr. Scapillati did. That trade, at least in Ontario, is seasonal. It also both prospers and declines, being strongly influenced by business cycles both general and local, by interest rates and by legislation.

The irregular nature of the on-site construction industry is not limited to the Ottawa area. It is specifically recognized in the legislation of this province and, apparently, in the legislation of other provinces as well: see also Krewenchuk, supra.

Consideration must be given to the purposes of notice, perhaps the main one being to alert the employee to the necessity of looking for other employment. In light of the description of the industry in the evidence, it is questionable how useful notice would be in the circumstances. When one employer is laying off, it appears unlikely that others will be hiring.

The parties are agreed that the slow down in work and the end of work is foreseeable. In the circumstances, where the plaintiff admittedly can foretell his lay off, is there still a duty on the part of the employer to give notice? Not surprisingly, the court was referred to no jurisprudence on this point. In the instant case, I would answer in the negative and agree with the trial judge that the usage, at least in these circumstances, is reasonable.

In reaching this conclusion, I attach considerable significance to the fact that Mr. Scapillati worked for Urbandale for approximately a year and a half. The circumstances are therefore not similar to the situation in Cronk v. Canadian General Insurance Co. (1995), 25 O.R. (3d) 505, 14 C.C.E.L. (2d) 1 (C.A.). There Mrs. Cronk "spent practically all her working years as an employee" of the defendant, leaving only to raise a family, and working two-thirds of that time for the same employer through a temporary employment agency. That is not the instant case.

Mr. Krewenchuk also had interruptions in his employment. He, however, was back with his employer for eight years before the final lay off. In this regard, the trial judge said at p. 212, "Here I regard the interruptions in employment as being relatively unimportant and look on the plaintiff as a long-term employee who was trusted sufficiently by his employer that he was named foreman on many projects." In reaching the conclusion that the interruptions in employment were relatively unimportant, the trial judge appears to have relied on the decision in Gordon v. Saint John Shipbuilding & Dry Dock Co. (1983), 47 N.B.R. (2d) 150 (Q.B.). In that case, there was a total of 39 years employment with an interruption at the 30

year point. Hoyt J. said at p. 155:

> In the circumstances, I am not convinced that it is a matter of substantial importance in considering the notice to which Mr. Gordon is entitled, that is, should it be based on nine years or thirty-nine years.

In Krewenchuk, supra, the question was whether he was an employee of 23 years, seven years or three and a half years. In the instant case, the periods are ten and three-quarters years and just over nine months, but between them is a year and a half at Urbandale. In these particular circumstances, the plaintiff must be regarded as a relatively short-term employee in considering what would be reasonable notice.

In all of these circumstances, I am unable to find that the trial judge erred in reaching the conclusion she did. I would therefore dismiss the plaintiff's appeal with costs.

The trial judge awarded the defendant its costs on a party and party scale to April 23, 1997 and on a solicitor and client scale thereafter. The appellant asks for leave to appeal this award.

The trial judge's endorsement respecting costs reads as follows:

> Counsel have made submissions today on costs. In this case the plaintiff's claim was dismissed. On April 23, 1997 immediately after the pre-trial, the defendant made a written offer that the action be dismissed without costs. At that time, the defendant's actual costs were over $10,000. The plaintiff rejected that offer in writing and proceeded to trial.
>
> Counsel for the plaintiff submitted that no costs should be awarded because there was no Ontario precedent in an area of important public concern to the residential construction industry. Notwithstanding the lack of precedents in Ontario there was precedent in British Columbia which should have alerted the plaintiff to the need to support his legal

position with appropriate evidence. None was called and I accepted the defendant's expert and other evidence on the issue. Consequently, this is not a case for no costs.

In my view the case falls within the principles enunciated in S & A Strasser Ltd. v. Richmond Hill (Town) (1990), 1 O.R. (3d) 243 (C.A.). Accordingly, I award the defendant party and party costs to April 23, 1997 and solicitor and client costs thereafter.

The defendant has sought to have me fix costs. Counsel for the plaintiff submitted that costs should be assessed because no Bill of Costs had been prepared. However, all bills rendered to the defendant had been produced and counsel for the plaintiff made no specific reference to any item in those accounts in his submission. I am satisfied that I have sufficient information to fix costs and that it is appropriate that I do so.

Accordingly, I fix costs in the amount requested by the defendant of $22,835.62.

As the plaintiff's claim failed, Rule 49 has no application whatever: S & A Strasser Ltd. v. Richmond Hill (1990), 1 O.R. (3d) 243, at p. 245, 49 C.P.C. (2d) 234 (C.A.). But the principle upon which solicitor and client costs were awarded in Strasser is a very narrow one. The plaintiff had made a claim for $1 million, the defendant made an offer after discovery of $30,000 and the action was dismissed at trial. In the instant case, no similar offer was made. While the trial judge in the instant case made an award of solicitor and client costs, it does not appear from the record that she felt as strongly about it as the trial judge in Strasser who said "I think this case, in these circumstances, screams for solicitor and client costs".

I agree with the trial judge's opinion that in view of the complete disclosure made by the defence, the plaintiff should have been better prepared. I do not however see that as justifying a award of solicitor and client costs.

I would grant leave to appeal the award of costs, allow that appeal and vary the order below by reducing it to an award to the defendant of party and party costs to be assessed.

Appeal dismissed.