

BC Court of Appeal rules refusal by an employee to work during the working notice period does not extinguish his right to damages arising from inadequate notice

In *Raymond Giza v. Sechelt School Bus Service Ltd., Randy Gould*¹, the employer, Sechelt School Bus Service Ltd., employed Mr. Giza as a bus driver starting in September 2005. Over the course of the next 5 years, the employer grew disenchanted with Mr. Giza's conduct and on September 30, 2009, about 5 years into his employment, terminated his employment without cause by giving him 5 weeks' working notice under the *Employment Standards Act*. Mr. Giza, who was 61 years old at the time of the termination of his employment, did not take it well and decided not to return to work to serve his working notice. Instead he commenced a wrongful dismissal action in the Supreme Court claiming, *inter alia*, damages for wrongful dismissal. While the Supreme Court found that 5 weeks' notice was inadequate, when Mr. Giza did not return to work to serve out his working notice, he repudiated the employment agreement and effectively quit and therefore he was not entitled to damages for wrongful dismissal.

On appeal of the Trial decision by Mr. Giza, the Court of Appeal disagreed with the Trial Court's conclusion that failing to work during the notice meant that Mr. Giza lost his entitlement to reasonable notice or damages in lieu thereof. Instead, the Court of Appeal reasoned that the employer breached its contract of employment with Mr. Giza when it gave him inadequate notice of termination. Relying on the decision of the Supreme Court of Canada in *Hadcock v. Georgia Pacific Securites Corp.*², the Court of Appeal went on to conclude that Mr. Giza's right to damages in lieu of reasonable notice had accrued when he received inadequate notice by the employer. While Mr. Giza's subsequent failure to work during the notice period amounted to a repudiation of his contract of employment and brought it to an end, the Court of Appeal said it did not take away or extinguish Mr. Giza's cause of action for damages in lieu of notice. However the Court of Appeal recognized the fairness of taking into account the notice, however inadequate, Mr. Giza was provided by the employer and concluded that the reasonable notice of 6 months Mr. Giza would be entitled to should be reduced by the period of actual notice he was given by the employer during which he could have worked and been paid.

While in this case the employer apparently mistook the appropriate notice Mr. Giza was entitled to as that which was provided in the *Employment Standards Act*, unless an employer has a properly drafted employment contract restricting the employee's entitlement to notice upon termination of employment to the minimum statutory notice provided in the *Employment Standards Act*, the employer will be exposed to a potential claim for common law reasonable notice, which indubitably far exceeds the minimum in the *Employment Standards Act*.



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¹ 2012 BCCA 18

² [1999] 3 S.C.R. 425)