Cronk v. Canadian General Insurance Company

[Indexed as: Cronk v. Canadian General Insurance Co.]

25 O.R. (3d) 505
[1995] O.J. No. 2751
No. C19272

Court of Appeal for Ontario,
Morden A.C.J.O., Lacourcire and Weiler JJ.A.
September 21, 1995

Employment -- Wrongful dismissal -- Damages -- Clerical worker dismissed without cause at age 55 after 29 years' service -- Motions judge holding on basis of studies which he discovered through his own research that lower level employees less able than managerial or professional employees to obtain new employment after dismissal -- Motions judge rejecting proposition that lengthier notice periods reserved for managerial and professional employees and fixing notice period at 20 months -- Employer's appeal allowed -- Appropriate notice period 12 months.

The plaintiff was employed as a clerk-stenographer by a predecessor of the defendant from April 1958 to April 1971, when she resigned to raise her family. Over four of the following six years, she worked at the defendant's offices through the auspices of a temporary employment agency. In March 1977 she was rehired directly by the defendant, attaining the full-time position of assistant underwriter in 1978. Her duties were essentially clerical. In 1993, as a result of internal reorganization by the defendant, the plaintiff's employment was terminated. She brought an action for damages for wrongful dismissal and moved for summary judgment, seeking damages based on a notice period of 20 months. The motions judge rejected the defendant's submission that a calculation of the plaintiff's

length of service should take into account only that period following her return to work in 1977. Observing that the length of notice requested by the plaintiff had traditionally been reserved for more senior employees, he stated that he could find no principled reason why this should be so. He stated that managerial and professional employees are better, not worse, positioned than clerical workers to find employment after dismissal. In support of this assertion, he cited two social science studies which he had discovered through his own research. The motions judge granted judgment for the plaintiff based on a notice period of 20 months. The defendant appealed.

Held, the appeal was allowed.

Per Lacourcire J.A.: There was no error in the calculation of the plaintiff's period of employment. In the circumstances of this case, where the employee left full-time employment to raise a family while continuing to work part-time in the employer's business, and particularly where her resumption of full-time employment was at the invitation of the employer, the period of notice should take into account the employee's total service.

The motions judge erred in awarding additional damages in respect of vacation pay, accruing after termination and during the notice period. To award damages for vacation pay on top of an award of full salary for the notice period is to provide compensation for loss which has not been suffered.

The motions judge erred in departing from the established principle that clerical workers are generally entitled to a shorter period of notice than senior management or specialized employees who occupy a high rank in the organization. He erred in doing so on the basis of his own sociological research without providing counsel an opportunity to challenge or respond to the results of the studies relied upon. The factual conclusions which he drew from those studies were beyond the scope of proper judicial notice.

The result arrived at by the motions judge had the potential of disrupting the practices of the commercial and industrial

world, wherein employers have to predict with reasonable certainty the cost of downsizing or increasing their operations. As well, legal practitioners specializing in employment law and the legal profession generally have to give advice to employers and employees in respect of termination of employment with reasonable certainty. Adherence to the doctrine of stare decisis plays an important role in that respect.

The character of the plaintiff's employment did not entitle her to a lengthy period of notice. In calculating the period of notice for the plaintiff it was necessary to balance the traditional factors enumerated in Bardal v. Globe & Mail Ltd., which the motions judge improperly collapsed into the re-employability factor. While the character of the plaintiff's employment restricted her to the level of a clerical, non-managerial employee, her age and lengthy faithful service properly qualified her for the maximum notice period in her category. The appropriate notice period was 12 months.

Per Weiler J.A. (dissenting in part): The motions judge was not entitled to rely on the social science studies without giving counsel an opportunity to call expert evidence to rebut their applicability to the situation before him and to make submissions as to the inferences that could or could not be drawn from them. Alternatively, it was open to him to dismiss the motion for summary judgment with respect to the issue of reasonable notice and to indicate that there was a genuine issue for trial as to the weight to be given to character of employment. He could have told counsel about the studies he felt were relevant. Where the parties on a motion for summary judgment take the position that there is no genuine issue for trial, the court is not bound by their position. On an appeal arising from a motion for summary judgment the appellate court is entitled to reach its own conclusions as to which issues raise the need for trial and which do not.

None of the propositions put forward by the defendant provided a rational reason for adopting, as a principle of law, a necessary distinction between the length of reasonable notice given to a clerical employee and that given to a management employee of the same age and years of service. Nor did stare

decisis preclude examination of it. The approach articulated in Bardal v. Globe & Mail Ltd. constitutes the appropriate legal standard to be applied by a court. The factors articulated in that case are the considerations to be applied in determining the amount of reasonable notice. The application of those factors does not require that a clerical employee automatically be placed in a category that has a lower range of notice than executive employees. To do so is to take one factor, the employee's character of employment, and to place undue emphasis on it. The application of a legal standard requires a more flexible approach.

Within the application of the standard, the weight to be given to character of employment is not solely a legal question. It requires the determination of a factual question: to what extent does an employee's position in the hierarchy of a company have any correlation to his or her ability to obtain alternate employment? There was a genuine issue for trial in this case. The appeal should be allowed and the trial of an issue as to reasonable notice should be ordered.

Per Morden A.C.J.O.: Lacourcire J.A.'s disposition of the appeal is agreed with, as are his reasons generally. The "availability of similar employment" factor in Bardal must be something different from the "character of employment" factor, since they are listed as separate factors. "Character of employment" indicates the employee's level of employment. The motions judge erred in collapsing the "character of employment" factor into the re-employability factor.

It may be that it cannot be said dogmatically that senior employees take longer to find new employment than do junior ones. However, if the policy of the law which makes responsibility of employment a factor favouring longer notice periods is one that requires reconsideration, then, having regard to the record in this case and the positions taken by the parties before the motions judge, this was not an appropriate case in which to embark on such a reconsideration. In any event, even if the motions judge was correct in concluding that no valid distinction exists for the purpose of determining the proper notice period between the positions of

senior and junior employees, it did not follow from this that the plaintiff was entitled to 20 months' notice. Once the distinction is gone, then substantially reducing the notice period for senior employees is just as logical, if not more logical, than increasing it for junior employees.

The motions judge erred in concluding that there is an obligation on the employer to adduce evidence respecting the proper notice period.

The 12-month notice period proposed by Lacourcire J.A. was appropriate. There was no genuine issue in this case requiring a trial.

Bardal v. Globe & Mail Ltd., [1960] O.W.N. 253 (H.C.J.), consd

Other cases referred to

Addison v. M. Loeb Ltd. (1986), 53 O.R. (2d) 602, 25 D.L.R. (4th) 151, 13 O.A.C. 392, 11 C.C.E.L. 100 (C.A.); Ansari v. British Columbia Hydro & Power Authority (1986), 2 B.C.L.R. (2d) 33, [1986] 4 W.W.R. 123, 13 C.C.E.L. 238 (S.C.) [affd (1986), 55 B.C.L.R. (2d) xxxiii (C.A.)]; Bohemier v. Storwal International Inc. (1982), 40 O.R. (2d) 264, 142 D.L.R. (3d) 8 (H.C.J.), revd in part (1983), 44 O.R. (2d) 361, 4 D.L.R. (4th) 383, 3 C.C.E.L. 79 (C.A.), leave to appeal to S.C.C. refused 3 C.C.E.L. 79; Cassell & Co. v. Broome, [1972] 1 All E.R. 801, [1972] A.C. 1027, [1972] 2 W.L.R. 645, 116 Sol. Jo. 199 (H.L.); Dafoe v. Microtel Ltd. (1987), 6 A.C.W.S. (3d) 433 (B.C.C.A.); Desaulniers v. Wire Rope Industries Ltd. (1995), 10 C.C.E.L. (2d) 267 (B.C.S.C.); Eaton v. Brant (County) Board of Education (1995), 22 O.R. (3d) 1, 27 C.R.R. (2d) 52, 123 D.L.R. (4th) 43 (C.A.); Hall v. Giant Yellowknife Mines Ltd. (1992), 44 C.C.E.L. 101 (N.W.T.S.C.); Hester v. International Land Corp. (1995), 10 C.C.E.L. (2d) 81 (B.C.S.C.); Kwasnycia v. Goldcorp. Inc. (1995), 10 C.C.E.L. (2d) 65 (Ont. Gen. Div.); Lazarowicz v. Orenda Engines Ltd., [1961] O.R. 141, 26 D.L.R. (2d) 433 (C.A.); Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, 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, 7 O.R. (3d) 480n sub nom. Lefebvre v. HOJ Industries Ltd.; Marzetti v. Marzetti, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 20 Alta. L.R. (3d) 1, 169 N.R. 161, [1994] 7 W.W.R. 623, 26 C.B.R. (3d) 161, 5 R.F.L. (4th) 1; McHugh v. City Motors (Newfoundland) Ltd. (1989), 58 D.L.R. (4th) 753, 74 Nfld. & P.E.I.R. 263, 26 C.C.E.L. 57 (Nfld. C.A.); McKay v. Camco Inc. (1986), 53 O.R. (2d) 257, 24 D.L.R. (4th) 90, 11 O.A.C. 356, 11 C.C.E.L. 256 (C.A.); Moge v. Moge, [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456, 81 Man. R. (2d) 161, 145 N.R. 1, [1993] 1 W.W.R. 481, 43 R.F.L. (3d) 345; Morrison v. Abernathy School Board (1875-76), 3 S.C. (4th) 945; Pelech v. Hyundai Auto Canada Inc. (1991), 63 B.C.L.R. (2d) 24, 40 C.C.E.L. 87, 92 C.L.L.C. 14,028 (C.A.); R. v. Askov, [1990] 2 S.C.R. 1199, 75 O.R. (2d) 673, 49 C.R.R. 1, 74 D.L.R. (4th) 355, 42 O.A.C. 81, 113 N.R. 241, 59 C.C.C. (3d) 449, 79 C.R. (3d) 273; R. v. Desaulniers (1994), 65 Q.A.C. 81, 93 C.C.C. (3d) 371 (C.A.); R. v. Heywood, [1994] 3 S.C.R. 761, 24 C.R.R. (2d) 189, 120 D.L.R. (4th) 348, 174 N.R. 81, 94 C.C.C. (3d) 481, 34 C.R. (4th) 133; R. v. J. (M.A.), [1992] 2 S.C.R. 166, 9 C.R.R. (2d) 194, 140 N.R. 157, 75 C.C.C. (3d) 128n, 9 O.R. (3d) 64n, affg (1991), 3 O.R. (3d) 241, 7 C.R.R. (2d) D-2, 46 O.A.C. 136, 64 C.C.C. (3d) 483 (C.A.); R. v. McCraw, [1991] 3 S.C.R. 72, 49 O.A.C. 47, 128 N.R. 299, 66 C.C.C. (3d) 517, 7 C.R. (4th) 314; R. v. Parnell (1995), 80 O.A.C. 297, 98 C.C.C. (3d) 83 (C.A.); R. v. Potts (1982), 36 O.R. (2d) 195, 134 D.L.R. (3d) 227, 66 C.C.C. (2d) 219, 26 C.R. (3d) 252, 14 M.V.R. 72 (C.A.); Reference re Alberta Legislation, [1938] S.C.R. 100, [1938] 2 D.L.R. 81 [affd [1939] A.C. 117, [1938] 3 W.W.R. 337, [1938] 4 D.L.R. 433 (P.C.)]; Ron Miller Realty v. Honeywell, Wotherspoon (1991), 4 O.R. (3d) 492, 1 C.P.C. (3d) 134 (Gen. Div.) [revd in part (1993), 16 O.R. (3d) 255n (C.A.)]; Royal Bank of Canada v. Cadillac Fairview/JMB Properties (1995), 21 O.R. (3d) 783 (C.A.); Scott v. Lillooet School District No. 29 (1991), 60 B.C.L.R. (2d) 273 (C.A.); Stevens v. Globe & Mail (1992), 7 O.R. (3d) 520, 86 D.L.R. (4th) 204, 39 C.C.E.L. 1, 92 C.L.L.C. 14,005 (Gen. Div.) [supp. reasons 45 C.C.E.L. 50, 93 C.L.L.C. 14,038 (Ont. Gen. Div.)]; Szwez v. Allied Van Lines Ltd. (1993), 45 C.C.E.L. 39 (Ont. Gen. Div.); TFP Investments Inc. Estate v. Beacon Realty Co. (1994), 17 O.R. (3d) 687 (C.A.); Wiebe v. Central Transport Refrigeration (Manitoba) Ltd. (1994), 95 Man. R. (2d)

65, 1 L.W.R. 746, 70 W.A.C. 65, [1994] 6 W.W.R. 305, 3 C.C.E.L. (2d) 1 (C.A.)

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APPEAL from a summary judgment of MacPherson J. (1994), 19 O.R. (3d) 515, 6 C.C.E.L. (2d) 15, 94 C.L.L.C. 14,032 (Gen. Div.), awarding damages of 20 months' salary in a wrongful dismissal action.

William G. Scott and M. Philip Tunley, for appellant.

W. Graydon Sheppard, for respondent.

LACOURCIRE J.A.: -- This is an appeal from the summary judgment of the Honourable Mr. Justice MacPherson, dated July 14, 1994 (and now reported 19 O.R. (3d) 515, 6 C.C.E.L. (2d) 15), awarding damages of 20 months' salary in an action for wrongful dismissal against the appellant. Among other issues, this appeal raises the central question of the weight to be given to the character of an employee's occupation in setting the period of compensation to which the employee is entitled when he or she is dismissed without cause.

I. The Facts

From April 1958 to April 1971 the respondent, Edna Cronk, was employed as a clerk-stenographer by the United States Fidelity & Guarantee Co., the predecessor to the appellant company, Canadian General Insurance Company. In 1971 she resigned from the company in order to raise her family. Over four of the following six years, however, she worked at the offices of the appellant through the auspices of a temporary employment agency. In March of 1977 she was rehired directly by the respondent, attaining the full-time position of assistant underwriter by October of 1978. She held that position until her employment was terminated.

At the time of termination, the respondent was 55 years of age. She had spent practically all her working years as an employee of the appellant. There is no dispute that her duties at the company were essentially clerical, and that, despite the length of her tenure, her position was junior. Nor is there any question that her termination was not for cause; it has been the consistent position of the appellant that the elimination of the respondent's position was the result of internal reorganization, in no way reflecting the appellant's performance, commitment or loyalty as an employee.

The respondent was given notice of termination of employment on September 9, 1993 to take effect immediately. The appellant offered her bi-weekly payments equal to nine months' salary. These payments would be reduced by half if she found new employment. The respondent refused the offer. Subsequently, in order to meet its statutory duties, the appellant deposited into her bank account payments representing eight weeks' salary in lieu of notice, and 16 weeks' severance pay, the latter amount calculated on 16 years of service. As well, in accordance with its original offer, the appellant made payments representing an 8 per cent vacation pay entitlement for the period ending December 31, 1993. The respondent continued to dispute the sufficiency of these payments and no further payments were made to her, although the original offer remained open. In the meantime, the respondent had difficulty finding another job. Her efforts to secure alternate employment consisted of attending regularly at the Canada Employment Centre and once at a private employment agency whose services

were provided to her by her former employer. Because she does not have a driver's licence, her job search was restricted to areas accessible by public transport within the Hamilton area.

II. The Summary Judgment

On December 2, 1993, the respondent commenced the action now on appeal to this court, seeking a judgment reflecting a notice period of 20 months. In granting judgment in her favour, MacPherson J. noted that "the factors to be considered in determining reasonable notice have remained more or less constant for over 30 years", having been enunciated by McRuer C.J.H.C. in Bardal v. Globe & Mail Ltd., [1960] O.W.N. 253 (H.C.J.) at p. 255:

> There could be no catalogue laid down as to what was 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.

It was the opinion of MacPherson J. that some of the factors enumerated in Bardal militated in favour of a generous notice period for the respondent. In this regard, he felt that her age made her particularly vulnerable, as she was probably too old to embark on a lengthy or strenuous retraining program, yet may well have been too young to contemplate retirement. As well, her limited training rendered her qualified only for clerical jobs within the insurance industry; her lack of mobility meant that even those jobs, were they to be found, would have to be in the Hamilton area. Finally, the learned motions judge took account of the fact that the respondent had devoted virtually her entire career to the appellant company, pointing out that the case-law throughout Canada attaches great significance to what he termed the "long and loyal service factor".

In this regard, MacPherson J. rejected the appellant's submission that a calculation of the respondent's length of

service should take into account only that period following her return to full-time work in 1977. In ruling that her length of service should also incorporate the period prior to the six-year absence during which she raised her family, he found authority in the case-law for the proposition that where an employer actively seeks to rehire an employee, an interruption in employment does not wipe out the first period of employment for purposes of calculating reasonable notice. He reasoned that if the law had evolved to protect employees who left a job to take a position with another employer, it would be unconscionable were it not to afford similar protection for a woman who had interrupted her career to stay home and raise a family. Finally, he felt it significant that the interruption of the respondent's employment was not complete, as she had worked part-time for the firm during the 1971-78 period.

Addressing the role played by the character of employment in determining the requisite notice period, MacPherson J. observed that the length of notice requested by the respondent had traditionally been reserved for persons with positions more senior to hers. Having said that, he could find no principled reason why this should be so. He rejected the proposition that senior employees are more stigmatized by the loss of employment than are their underlings. Likewise, he could find no support for the notion, frequently articulated in the case-law, that senior, specialized employees have greater difficulty in securing new employment. Apart from the fact that the appellant had not provided any evidence to that effect, and the fact that the respondent was still out of work eight months after her dismissal, MacPherson J. found another basis on which to dismiss the proposition (at p. 525):

> Third, the reality is -- as we are all told by our parents at a young age -- that education and training are directly related to employment. The senior manager and the professional person are better, not worse, positioned to obtain employment, both initially and later in a post-dismissal context. Higher education and specialized training correlate directly with increased access to employment.

(Emphasis in original)

In support of this assertion, the learned motions court judge cited two studies published by the Council of Ontario Universities, as well as a May 21, 1994 article in the Economist magazine. He discovered these materials through his own research. For those reasons, he refused to accept the defendant's argument based on a managerial-clerical distinction.

Finally, MacPherson J. ruled that the respondent had made appropriate efforts to mitigate. He felt that in light of her age, her inability to drive, and the existence of a province-wide recession, her decision not to look for employment outside the Hamilton area was reasonable. He found no merit in her complaint that the appellant's decision to pay her severance in lump sum payments had increased her tax liability.

III. Discussion

The appellant submitted that the question to be determined by this court is whether the assessment of the respondent's damages in lieu of notice are based on errors in law in respect of the following issues.

(a) Whether the learned motions court judge erred in law in his application of the factors to be considered in determining the period of reasonable notice, and specifically:

(i) in departing from the established principle that a clerical employee, such as the respondent, is generally entitled to a shorter period of notice than a senior management or specialized employee occupying a position of higher rank and responsibility within an employer's organization;

(ii) in treating the respondent's period of employment with the appellant as continuous, despite a seven-year break in that employment from 1971 to 1978 for personal reasons; and

(iii) in failing to consider the respondent's experience, training and qualifications as enabling her to seek and accept similar, clerical employment in fields other than the insurance industry.

(b) Whether the learned motions court judge erred in law in his determination of the issue of mitigation of damages, specifically:

(i) in concluding that the respondent's effort to mitigate were reasonable; and

(ii) in granting judgment for damages in respect of a period of notice which had not elapsed at the time of the motion, thereby dispensing with the respondent's legal duty to mitigate her damages.

(c) Whether the learned motions court judge erred in law in awarding additional damages in respect of vacation pay, accruing during the period of notice, after termination, at the rate of 8 per cent of salary.

(d) Whether the learned motions court judge erred in law in purporting to take judicial notice of the facts, and in referring to the statistics and studies cited at pp. 525-26 and elsewhere in his reasons for judgment concerning the relationship between education and employment, which were not proven, cited or referred to in evidence or argument at the hearing of the motion for summary judgment.

IV. The Break in the Respondent's Employment

With respect to the issue listed above as (a)(ii) it appears that the break in employment was six years only, between April 1971 and March 1977, but it was not until January 1978 that the respondent became a full-time employee again. I find no error in the calculation of the respondent's period of employment, notwithstanding the break in employment. But, even if the period preceding the break period had been subtracted, the respondent could still, at termination, be described as an employee with considerable length of service. In all the cases

cited by the trial judge, except one, the past service of the returning employee was explicitly recognized upon rehiring in the amount of remuneration, vacation pay, etc. The one exception appears to be Stevens v. Globe & Mail (1992), 7 O.R. (3d) 520, 39 C.C.E.L. 1 (Gen. Div.), where there is no mention of special consideration upon rehiring. In one case, Hall v. Giant Yellowknife Mines Ltd. (1992), 44 C.C.E.L. 101 (N.W.T.S.C.), the trial judge failed to give any weight to service rendered prior to the interruption in employment. In all the circumstances of this case, however, the trial judge was correct in recognizing the period of employment ending in 1971. The contractual or statutory benefits that the respondent obtained when she voluntarily left the company in 1971 are not determinative of the issue whether the length of service should be calculated to include the period in respect of which those benefits were paid. In the circumstances of the present case, where the employee left full-time employment to raise a family while continuing to work part-time in the employer's business, and particularly where her resumption of full-time employment was at the invitation of the employer, the period of notice should take into account the employee's total service: see Addison v. M. Loeb Ltd. (1986), 53 O.R. (2d) 602 at pp. 606-07, 25 D.L.R. (4th) 151 (C.A.).

V. The Issue of Mitigation

In my opinion, the issues listed above as (a)(iii) and (b)(i) and (ii) were properly determined by the motions court judge. The respondent's training and experience qualified her for clerical jobs in the insurance industry. Her lack of mobility restricted her to the Hamilton area, and her age made the search for suitable re-employment very difficult in the prevailing economic climate. The respondent gave evidence that she attended regularly at the Canada Employment Centre and once at a private employment agency. The onus was on the appellant to prove that the respondent by reasonable effort could have obtained alternate employment consistent with her experience and ability, an onus which it made no attempt to discharge: Szwez v. Allied Van Lines Ltd. (1993), 45 C.C.E.L. 39 at p. 48 (Ont. Gen. Div.).

I reject the appellant's submission that the judgment unfairly releases the respondent from her obligation to mitigate her damages by seeking other employment. That obligation continues during the period of notice set by the court, even if it extends beyond the date of the judgment. The respondent remains accountable to the appellant for any income earned during that post-judgment period.

VI. The Award of Vacation Pay

Ground (c) of the appeal, above, alleged error in law in the additional damages in respect of vacation pay calculated at 8 per cent during the period of notice. This was in accordance with the usual practice as illustrated by Bohemier v. Storwal International Inc. (1982), 40 O.R. (2d) 264 at p. 270, 142 D.L.R. (3d) 8 (H.C.J.) (approved by this court at (1983), 44 O.R. (2d) 361, 4 D.L.R. (4th) 383, leave to appeal to the Supreme Court of Canada refused at 3 C.C.E.L. 79), which contains no discussion of the issue. The appellant's submission is that this statutory benefit accrues only when the employee has unused vacation entitlement accruing and owing at the time of termination. The vacation allowance, it is said, is merely an entitlement to time away from work during the employment period, and that it cannot accrue during the notice period. The entitlement to vacation pay is not part of the common law but is governed by Part VIII of the Employment Standards Act, R.S.O. 1990, c. E.14.

I agree with the per curiam judgment of the British Columbia Court of Appeal (a five-judge panel) in Scott v. Lillooet School District No. 29 (1991), 60 B.C.L.R. (2d) 273, which contains a full discussion of the vacation pay issue at pp. 276-80, and which concludes as follows:

> Vacation pay arises as a result of the contract of employment providing for a period of time during the employment year when the employee is not required to "work" but yet is entitled to pay.
>
> During the 15-month notice period awarded to the respondent, he was free from any obligation to the appellant,

either to go to work or to expend any effort on its behalf.

In the case at bar, the respondent led no evidence of loss or expense associated with lost vacation benefits nor did he lead any evidence that he had suffered in any way as a result of his not being able to take a meaningful holiday.

To award the respondent damages for vacation pay, on top of an award of full salary for the period of notice to which he was entitled, (which necessarily includes payment of his salary for any vacation he may have taken had he worked during that notice period), is to provide double indemnity, or put another way, to provide compensation for loss that he has not suffered.

The respondent was entitled to receive vacation pay upon the termination of her employment. The statutory benefit must obviously be calculated in accordance with the provisions of the statute and does not apply to the period of notice to which the respondent is entitled at common law if that period exceeds the period to which the statutory benefit applies.

VII. The Distinction Between Clerical and Managerial Employees in Characterizing the Employment

The appellant submits that the learned motions court judge erred in law in calculating the period of reasonable notice. In particular, it is argued that it was an error to depart from the established principle that clerical employees are generally entitled to a shorter notice period than senior management or specialized employees who occupy a high rank in the organization and, accordingly, have more responsibility: Bohemier v. Storwal International Inc., supra. "Character of the employment" as used in Bardal refers to the status or position of the employee and has become the equivalent of the level of employment.

The appellant's submission is that this common law principle has developed based upon reason, common sense, and the experience of the courts. In its factum, the appellant posited several propositions supporting the continuing validity of the

principle:

(a) The work skills of a clerical employee (in this case, typing, data entry, reviewing financial statements and general office administration) are more general and more likely to be relevant to a broader range of employers and businesses, whereas technical and managerial employees' skills are more likely to be relevant only to a narrower range of industries or businesses.

(b) There are likely, at any given time, to be a greater range and a greater number of available positions for which a clerical employee is qualified, and can apply, than for a more highly specialized or senior manager employee.

(c) Specifically in a case of economic downsizing, as in this case, the mere fact of dismissal without cause is unlikely to affect any subsequent employer's assessment of a clerical worker, whereas a senior manager or specialized employee, who has undertaken greater responsibility for the success of the business, is more likely to be implicated in its failure or downsizing, even where no cause for dismissal is asserted, and so is more likely to experience difficulty in securing alternate employment.

(d) Again, specifically in the case of older employees, as in this case, the more specialized the skills an employee has, the more likely they are to be perceived as outdated or to require upgrading through retraining, so as to adversely affect the ability to find alternate employment.

(e) It takes account of the fact that more senior and specialized employees are in a better position to negotiate favourable contractual notice provisions in employment contracts than unskilled employees, and reflects the reasonable expectations and intentions of the parties arising from that fact.

For the resolution of this appeal it is not necessary to comment on the validity of each of these propositions.

It may be, also, that while chief executive officers and other senior managers may usually obtain other employment within a reasonable period of time, the new employment is not necessarily at the same level of responsibility or remuneration.

The principle that senior employees are entitled to lengthier periods of notice has also been applied in Ansari v. British Columbia Hydro & Power Authority (1986), 2 B.C.L.R. (2d) 33 at p. 43, 13 C.C.E.L. 238 (S.C.), where McEachern C.J.S.C. stated:

> At the end of the day the question really comes down to what is objectively reasonable in the variable circumstances of each case, but I repeat that the most important factors are the responsibility of the employment function, age, length of service and the availability of equivalent alternative employment, but not necessarily in that order.
>
> In restating this general rule, I am not overlooking the importance of the experience, training and qualifications of the employee but I think these qualities are significant mainly in considering the importance of the employment function and in the context of alternative employment.

The argument before MacPherson J. proceeded on the express acceptance by both parties of the distinction between clerical and managerial employees, and on the concession that the respondent's function was clerical and did not involve specialized knowledge or managerial responsibilities. Despite these concessions, the motions court judge rejected a principle which has been widely accepted and applied by trial judges and Canadian appellate courts and which has found favour with the Supreme Court of Canada in Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, 91 D.L.R. (4th) 491. Iacobucci J. quoted the classic statement of McRuer C.J.H.C. in Bardal, noting that it is the most frequently cited enumeration of factors relevant to the assessment of reasonable notice (at p. 998). The following cases are indicative of the wide acceptance by appellate courts of the Bardal principle: Dafoe v. Microtel Ltd. (1987), 6 A.C.W.S. (3d) 433 (B.C.C.A.), McHugh v. City Motors (Newfoundland) Ltd. (1989), 58 D.L.R. (4th) 753, 74

Nfld. & P.E.I.R. 263 (Nfld. C.A.), Wiebe v. Central Transport Refrigeration (Manitoba) Ltd. (1994), 3 C.C.E.L. (2d) 1, 95 Man. R. (2d) 65 (C.A.), Pelech v. Hyundai Auto Canada Inc. (1991), 63 B.C.L.R. (2d) 24, 40 C.C.E.L. 87 (C.A.).

In Desaulniers v. Wire Rope Industries Ltd., a judgment of the British Columbia Supreme Court released April 21, 1995 [now reported 10 C.C.E.L. (2d) 267], Baker J. referred to Justice MacPherson's decision under appeal and stated at p. 34 [p. 270]:

> Whether Justice MacPherson is correct in his interpretation and application of the law in Ontario, the applicable law in British Columbia is expressed in Ansari and Pelech.

In another judgment of the British Columbia Supreme Court, Hester v. International Land Corp. (released March 28, 1995) [now reported 10 C.C.E.L. (2d) 81], Errico J. refused to depart from the principle enunciated in the Ansari decision and rejected the conclusions reached by MacPherson J. in the judgment under appeal. The Cronk decision on the notice period was, however, followed by Ferrier J. in Kwasnycia v. Goldcorp. Inc., an unreported decision of the Ontario Court (General Division), delivered January 10, 1995 [now reported 10 C.C.E.L. (2d) 65].

In my opinion, the learned motion court judge's reasons do not justify departing from the widely accepted principle. He erred in doing so on the basis of his own sociological research without providing counsel an opportunity to challenge or respond to the results of the two studies relied upon. I agree with the appellant that the factual conclusions which he drew from these studies are beyond the scope of proper judicial notice. As noted by this court in R. v. Potts (1982), 36 O.R. (2d) 195 at p. 201, 134 D.L.R. (3d) 227:

> [I]t has been held that, generally speaking, a court may properly take judicial notice of any fact or matter which is so generally known and accepted that it cannot reasonably be questioned, or any fact or matter which can readily be determined or verified by resort to sources whose accuracy

cannot reasonably be questioned.

The conclusion of the motions court judge based on the studies prepared by the Council of Ontario Universities are obviously not so generally known or accepted as to challenge the validity of an established principle which has found judicial acceptance for over three decades. It is not, as the respondent contended, an undisputed "social reality" as was the background information concerning the circumstances encountered by spouses at the dissolution of a marriage, in Moge v. Moge, [1992] 3 S.C.R. 813 at p. 874, 99 D.L.R. (4th) 456.

Before taking new matters into account based on statistics which have not been considered in the judgment under appeal, the adversarial process requires that the court ensure that the parties are given an opportunity to deal with the new information by making further submissions, oral or written, and allowing, if requested, fresh material in response.

The result arrived at has the potential of disrupting the practices of the commercial and industrial world, wherein employers have to predict with reasonable certainty the cost of downsizing or increasing their operations, particularly in difficult economic times. As well, legal practitioners specializing in employment law and the legal profession generally have to give advice to employers and employees in respect of termination of employment with reasonable certainty. Adherence to the doctrine of stare decisis plays an important role in that respect: Cassell & Co. v. Broome, [1972] 1 All E.R. 801 at p. 809, [1972] A.C. 1027 (H.L.).

VIII. Conclusion and Disposition

In my opinion, the character of the employment of the respondent does not entitle her to a lengthy period of notice. As pointed out by Saunders J. in Bohemier v. Storwal International Inc., supra, at p. 269:

> It seems to me that the character of the employment of the plaintiff with Storwal does not entitle him to a lengthy period of notice on the basis of decided cases and the

reasons I have stated. If the issue had been addressed at the time he was first employed, it would not have been reasonable for his employer to have agreed to a notice period sufficient to enable him to find work in difficult economic times. In saying this, I hope that it is not thought that I am unsympathetic to the plight of the plaintiff. His claim, however, is based on contract and it is not reasonable to expect that his employer would or could have agreed to assure that his notice of termination would be sufficient to guarantee that he would obtain alternative employment within the notice period.

In calculating the period of notice for this respondent it is necessary to balance the traditional factors enumerated in Bardal, supra, which the motions court judgment appears to have improperly collapsed into the re-employability factor. While the character of the respondent's employment will restrict her to the level of a clerical, non-managerial employee, the respondent's age and lengthy faithful sentence for the appellant properly qualify her for the maximum notice in her category.

For these reasons, I would vary the judgment of MacPherson J. so that the plaintiff respondent will recover damages based on a salary calculation covering 12 months from September 9, 1993, including vacation pay for the amount accrued at the date of termination plus the statutory entitlement, less appropriate deductions and after allowing credit for amounts previously paid. I confirm the obligation of the respondent to account to the appellant for any income earned during the post-judgment period of notice. I would not interfere with the dispositions of costs on the motion. In the special circumstances of this case, the appellant has properly not sought an order for costs, and the disposition of the appeal will be without costs.

WEILER J.A. (dissenting in part): -- I have had the benefit of reading the reasons of Lacourcire J.A. I agree with him that the appeal must be allowed. Lacourcire J.A. is of the opinion that a clerical employee should be entitled to a category or range of notice which is less than that for an employee who exercises management or executive functions. He has accepted the

appellant's argument that this is "A principle of law". I cannot agree that the application of the four factors in Bardal v. Globe and Mail Ltd., [1960] O.W.N. 253 (H.C.J.) requires this result.

The justification for placing less weight on the factor of character of employment in the case of a clerical employee is based on several factual propositions or assumptions put forward by the appellant. Lacourcire J.A. does not find it necessary to deal with the validity of these propositions because they were not challenged in argument before MacPherson J. MacPherson J. did, however, question the validity of these factual propositions. In my opinion he was not prevented from doing so although he erred in not giving the parties an opportunity to lead evidence and to make submissions respecting his rejection of these factual propositions.

This is an appeal from summary judgment. The record before us, which includes the decision of MacPherson J., raises a question to be tried which is of considerable public interest. The question is the weight to be placed on character of employment when deciding the appropriate notice period for a clerical employee. This question requires the court to resolve certain factual propositions in order to accurately discern the appropriate length of reasonable notice. I would therefore direct that a trial be held. In order to explain my position it is necessary for me to review the history of the litigation and the development of some of the relevant jurisprudence.

Canadian General Insurance ("C.G.I.") dismissed Ms. Cronk, a clerical employee who was 55 years of age, and who had 28 years of service, without cause. Ms. Cronk commenced an action for wrongful dismissal on the basis that she had not been given reasonable notice. The position taken by the defendant in its statement of defence was that the action should be dismissed because it had paid Ms. Cronk six months' salary in lieu of notice and had made all required payments under the Employment Standards Act, R.S.O. 1990, c. E.14. The plaintiff brought a motion for summary judgment on the statement of claim.

In the absence of a contract specifying the amount of notice on termination an employer has a right to terminate an employee

without cause by giving reasonable notice or upon payment in lieu of notice. The purpose of reasonable notice is to give the dismissed employee an opportunity to find other employment: McKay v. Camco Inc. (1986), 53 O.R. (2d) 257 at p. 267, 24 D.L.R. (4th) 90 (C.A.), per Blair J.A. on behalf of the court (Finlayson J.A. not dissenting on this point) adopting the words of Lord Deas in Morrison v. Abernathy School Board (1875-76), 3 S.C. (4th) 945 at p. 950.

The issue of what constitutes reasonable notice requires consideration of the factors set out in Bardal, supra. In that case, McRuer C.J.H.C. stated at p. 255:

> There could be no catalogue laid down as to what was 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.

Applying this approach to the case before him, McRuer C.J.H.C. observed that the plaintiff, who was dismissed from his position as director of advertising for the Globe and Mail:

> . . . through a lifetime of training, was qualified to manage the advertising department of a large metropolitan newspaper. . . . 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.

McRuer C.J.H.C. was undoubtedly correct that there would be few positions in Ontario or indeed in Canada similar to that occupied by Mr. Bardal.

Subsequent case-law has generally equated the phrase, "character of employment", with the person's position in the hierarchy of a company as opposed to simply meaning the kind of

work the person does. Courts have awarded managerial employees longer notice than that given to ordinary workers citing as a general principle or rationale that executives have greater difficulty finding other employment. The comment by Saunders J. in Bohemier v. Storwal International Inc. (1982), 40 O.R. (2d) 264 at pp. 267-68, 142 D.L.R. (3d) 8 (H.C.J.) (varied by this court at (1983), 44 O.R. (2d) 361, 4 D.L.R. (4th) 383, leave to appeal to the Supreme Court of Canada refused at 3 C.C.E.L. 79) is illustrative of this tendency:

> The principal reason an employer must give reasonable notice is to enable an employee to find new employment.
>
> . . . . .
>
> Experience, training and qualification of an employee must be taken into account in considering availability. A chief executive officer of a large corporation likely has fewer opportunities of similar alternative employment than does a general labourer. Therefore, it is said that the former is entitled to a longer period of notice.

As a result, Saunders J. awarded the plaintiff, a labourer, eight months' pay in lieu of notice after 35 years of employment. On appeal, the court observed that Saunders J. had correctly discerned all the applicable principles but the court increased the notice period from eight months to eleven months, on the basis that Saunders J. failed to give sufficient weight to other factors enumerated in Bardal, supra, aside from character of employment.

The question of the weight to be given to character of employment in determining the amount of reasonable notice is not solely a question of law but also involves the assumption of fact articulated in Bohemier, supra, that a clerical employee will more readily find employment than a management executive. The weight assigned to the factor of character of employment in determining the appropriate period of reasonable notice is the reason management executives are given longer notice than clerical employees of the same age and years of service.

On the motion for summary judgment, the so-called principle that clerical employees are generally entitled to a shorter notice period than senior management employees was not challenged. The plaintiff's position was simply that Ms. Cronk was entitled to 20 months' notice based on the duration of her employment, her age, and the economic factors concerning each party.

The plaintiff's position failed to take account of the existing case law. No judicial decision had awarded a long-term employee over fifty years old, who did not exercise supervisory or highly specialized functions, 20 months' notice. The Court of Appeal's award of eleven months in Bohemier, supra, is indicative of the notice period for ordinary employees who do not exercise any supervisory or managerial functions but who have longstanding service and who are similar in age to Ms. Cronk. [See Note 1 at end of document.] On the basis of the existing case law MacPherson J. could only consider granting the respondent's request for twenty months' notice by re-examining the emphasis to be placed on character of employment and its factual underpinning.

MacPherson J. gave three reasons for rejecting C.G.I.'s submission that a distinction must be drawn between the length of notice available for clerical employees and management employees. First, C.G.I. offered no evidence to support its argument that non-management employees need less time to find a job. Second, MacPherson J. considered Ellen Mole's Wrongful Dismissal Practice Manual (1984, with regular loose-leaf updates). It contained six Ontario cases between 1980 and 1994 in which senior management employees were awarded notice periods of 20 and 21 months. He cited her finding that the average period of post-dismissal unemployment was only nine and one-third months for these employees. Ms. Cronk had been unemployed for eight months at the time that the motion was heard and MacPherson J. considered her future employment prospects to be bleak. He thus concluded that the traditional rationale for granting senior managerial employees longer notice periods on the assumption that they had greater difficulty in securing alternate employment was not borne out

by the evidence. Third, MacPherson J. concluded that higher education and specialized training correlate directly with increased access to employment. Ms. Cronk had only a high school education. Accordingly, he found that Ms. Cronk would have a harder, not an easier, time of finding employment than a senior executive. He awarded Ms. Cronk 20 months' notice.

MacPherson J. supported his conclusion that Ms. Cronk should be entitled to the same notice period as that given to management employees of the same age and years of service by reference to two studies published by the Council of Ontario Universities: The Financial Position of Universities in Ontario: 1994 and Facts and Figures: A Compendium of Statistics on Ontario Universities (1994). The latter study indicates that over a ten-year period the unemployment rate for high school graduates in Ontario ranged from 5.7 to 12.5 per cent. For university graduates, the range was from 1.6 to 5.1 per cent. In the year Ms. Cronk was fired, the unemployment rate for university graduates was 4.2 per cent whereas for high school graduates it was 12.5 per cent.

The appellant's position is that MacPherson J.'s three reasons for rejecting the importance of character of employment in determining the length of the notice period disclose error. With respect to the first reason given by MacPherson J., the appellant contends that it should not have been expected to lead evidence that the longer notice periods are reserved for supervisory or managerial employees given his belief that he could rely on the distinction as a principle of law. The appellant says it was essentially taken by surprise when MacPherson J. refused to accept as a "principle of law" that a clerical employee is generally entitled to a shorter notice period than an executive. Second, the appellant says that the six decisions from the Wrongful Dismissal Practice Manual, supra, relied on by MacPherson J. to conclude that executives do not have greater difficulty finding employment within the time frame for reasonable notice given to clerical employees is too small a statistical sample to be of any practical guidance. Third, the appellant submits that MacPherson J. was not entitled to take judicial notice of the studies he relied on. In addition, the appellant says it did not have an opportunity

to make submissions on the studies or to challenge the inferences that MacPherson J. drew from them.

The respondent submits that MacPherson J.'s reasons disclose no error in principle. The respondent submits that MacPherson J. was entitled to take judicial notice of the studies relied on and to use them as general background information. In Reference re Alberta Legislation, [1938] S.C.R. 100 at p. 128, [1938] 2 D.L.R. 81, the Supreme Court referred to a court's duty to take judicial notice of facts that are "known to intelligent persons generally".

It is not an easy task for a judge to know when it is possible to take judicial notice of studies which are not before the court without having to hear submissions from counsel. The answer depends on the use to be made of the research and the type of case before the court. [See Note 2 at end of document.] In "Re-examining the Doctrine of Judicial Notice in the Family Law Context" (1994), 26 Ottawa L. Rev. 551, Justice L'Heureux-Dub examines the role of social science research with respect to issues before the courts and she discusses the doctrine of judicial notice in Canada in general terms before dealing with its potential application in the area of family law. In her article, L'Heureux-Dub J. adopts a structure and definitions, which I will also employ here, that divides social science research into three categories: (1) social authority; (2) social framework; and (3) social facts. Where social science relates to the lawmaking process in the same way as judicial precedent then it may be treated in the same manner as courts treat legal precedents. [See Note 3 at end of document.] Such materials are useful background when dealing with policy or constitutional questions. The second category, social framework, refers to research that is used to construct a frame of reference or background context for deciding a case. [See Note 4 at end of document.] Used as a social framework, the generality of social research causes it to bear greater resemblance to social authority than it does to social facts. When social science studies are used as social authority or as a social framework by a trial judge or tribunal without giving the parties an opportunity to comment on the studies it is usually considered to be an error but not one which will itself result in reversal: see

Eaton v. Brant (County) Board of Education (1995), 22 O.R. (3d) 1 at p. 8, 27 C.R.R. (2d) 52 (C.A.); R. v. Parnell (1995), 80 O.A.C. 297, 98 C.C.C. (3d) 83 (C.A.), per Brooke J.A. for the majority at p. 306; R. v. Desaulniers (1994), 65 Q.A.C. 81 at p. 92, 93 C.C.C. (3d) 371 (C.A.). On the other hand, where social science research is used to resolve a dispute that is specific to the proceedings, the social science research takes on a character akin to the judge making a finding of fact based on it. If used in this manner, it appears to be necessary for trial courts to ensure that an opportunity is provided to the parties to properly introduce the evidence and to have it tested through cross-examination.

The authors Hart and McNaughton in an article entitled, "Evidence and Inferences in the Law" in Evidence and Inference, Lerner, ed., at pp. 64-65, suggest that in order for a judge to draw inferences based on judicial notice, the inferences drawn must be within the reasonable range of expectation of the parties as to the outcome of the dispute. Otherwise the parties must have an opportunity to make submissions. Another concern expressed by the authors is that unless counsel have an opportunity to call experts and to make submissions, the judge, not being an expert in the interpretation of the results of studies, may draw erroneous inferences from the studies.

Here, because the respondent did not challenge the factual assumption articulated in such cases as Bohemier, supra, that clerical employees are able to obtain employment more easily than management executives, the appellant was taken by surprise by MacPherson J.'s rejection of this rationale. Even though the studies were public documents, it was not within the reasonable range of the parties' expectation that MacPherson J. would conclude that Ms. Cronk's employment prospects were no different and perhaps worse than the employment prospects of a senior management executive and further conclude that for this reason the amount of notice required should be that traditionally given to a senior executive.

In the circumstances, MacPherson J. was not entitled to rely on the studies without giving counsel an opportunity to call

expert evidence to rebut their applicability to the situation before him and to make submissions as to the inferences that could or could not be drawn from them. This is part of a trial judge's responsibility, as indicated in "A Trial Judge's Freedom and Responsibility" by Charles Wyzanski Jr., (1952), 65 Harv. L. Rev. 1281. Wyzanski quotes a passage by Edmund Burke at p. 1293:

> A judge is not placed in that high situation merely as a passive instrument of the parties. He has a duty of his own, independent of them, and that duty is to investigate the truth.

Wyzanski then states at pp. 1295-96:

> Usually, to be sure, diligent counsel offer in evidence enough relevant material. But where this has not been done, there have been times when a judge has tended to reach his result partly on the basis of general information and partly on the basis of his studies in a library. This tendency of a court to inform itself has increased in recent years following the lead of the Supreme Court of the United States . . .
>
> Thus the focus of the inquiry becomes not what judgment is permissible, but what judgment is sound. And here it seems to me that the judge, before deriving any conclusions from any such extra-judicial document or information, should lay it before the parties for their criticism.

I agree with these remarks.

A trial is a search for the truth. When a trial judge reviews jurisprudence and finds it rests on a factual assumption, that may no longer be true or which may not apply in all cases, the judge is not obliged to continue to accept this assumption as a fact. Naturally, the judge wishes to avoid the expense and delay of requiring counsel to re-attend for further argument concerning the material he has discovered and upon which he seeks to rely. However, where a judicial approach rests on a factual proposition with which the judge disagrees, and counsel

are unaware that the judge is considering a break with the past, I can see no alternative but for the judge to allow counsel an opportunity to call evidence and to make submissions. The reason for this is two-fold. The general studies or material that the judge sees as rebutting the factual proposition may, as a result of expert evidence, be susceptible to other interpretation. In addition, the parties have a right to expect that if a judge disagrees with a factual assumption, which has found its way into the jurisprudence and which has gone unchallenged, the judge will give the parties an opportunity to make submissions concerning the studies he sees as rebutting this assumption. MacPherson J. erred in not doing so. The parties should have been recalled.

Alternatively, it was open to MacPherson J. to dismiss the motion for summary judgment with respect to the issue of reasonable notice and to indicate that, in his opinion, there was a genuine issue for trial as to the weight to be given to character of employment. He could tell counsel about the studies that he felt were relevant. He could suggest that at a trial, if counsel desired, these and other studies could be introduced into evidence through experts who could be cross-examined as to their ramifications respecting Ms. Cronk. Inasmuch as the purpose of reasonable notice is to give the employee time to find other employment, the court's prediction as to the amount of reasonable notice required should if possible be based on correct assumptions.

Where, as here, the court is dealing with a motion for summary judgment and both parties take the position that there is no genuine issue for trial, the court is not bound by their position. On a motion under rule 20.04(2) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, it is the court that must be satisfied that there is no genuine issue for trial: Royal Bank of Canada v. Cadillac Fairview/JMB Properties (1995), 21 O.R. (3d) 783 (C.A.); TFP Investments Inc. Estate v. Beacon Realty Co. (1994), 17 O.R. (3d) 687 (C.A.). On an appeal arising from a motion for summary judgment this court is entitled to reach its own conclusions as to which issues raise the need for trial and which do not: Royal Bank v. Cadillac Fairview, supra, at p. 786.

The appellant submits that, in addition to allowing the appeal from MacPherson J.'s decision on the motion for summary judgment, this court should fix the period of reasonable notice based on the existing jurisprudence which gives significant weight to character of employment. The court should ignore the challenge to the factual assumption on which this jurisprudence rests. The appellant's submission is that it is a principle of law that a clerical employee is entitled to a shorter period of notice than a senior management employee occupying a position of higher rank and responsibility within an employer's organization.

In my respectful opinion, there is a distinction between a rule, a principle, and a standard, which the appellant's submission ignores. Arguments based on legal principle are based on what rights people have. A legal principle is a justification for invoking an obligation. Principles are based on shared values such as justice, fairness, and procedural due process. The purpose of a legal standard is to give expression to a principle: see R. Dworkin, A Matter of Principle (Cambridge: Harvard U.P., 1985) at pp. 3, 69, 374; R. Dworkin, Law's Empire (Cambridge: Harvard U.P., 1986) at pp. 145, 204, 211, 214, 216, 217, 219. A legal standard is a general formulation of an approach to a problem. Legal standards require a variety of factors to be balanced some of which may point in one direction and some of which may point in another. A legal standard involves weighing the facts of a particular case with what generally happens in other cases in order to determine how the particular case should be decided: see Paul Weiler, "Legal Values and Judicial Decision-Making" (1970), 48 Can. B. Rev. 1 at p. 36; see also Hart Jr. and McNaughton, supra, at p. 60. Legal standards represent what the community would fairly feel. As stated in "Two Models of Judicial Decision-Making" by Paul Weiler (1968), 46 Can. B. Rev. 406 at p. 435:

> Such standards do not come fully formed to the court and do not represent simply average behaviour, or average sound reaction to behaviour. Rather, the court has the independent role of engaging in a reasoned colloquy with society, of

collaborative articulation of what truly are the enduring, shared moral standards and purposes of the society.

Rules are themselves a source of obligation: see Dworkin, Law's Empire, supra, at p. 210. Although rules, like principles, are based on a shared commitment, rules do not take a generous and comprehensive view of what that commitment is. Rules govern the outcome of conduct in recurring situations. With a rule, predictability of outcome is enhanced by removing discretion: see Paul Weiler, supra, "Legal Values and Judicial Decision-Making" at p. 10.

According to this jurisprudential theory, an example of a principle would be the right of an accused person to be tried within a reasonable time. The legal standard used to determine whether an accused's right to trial within a reasonable time has been infringed involves the weighing of four factors: (a) the length of the delay; (b) the reasons for the delay; (c) whether the accused waived his right to be tried within a reasonable time; and (d) prejudice caused to the accused's defence by the delay: R. v. Askov, [1990] 2 S.C.R. 1199 at pp. 1231-32, 49 C.R.R. 1.

After the Askov decision was released, it was initially interpreted in some quarters as though it had articulated a rule that unreasonable delay would be found if more than six to eight months passed from committal to trial in the case of adults charged with a criminal offence. In R. v. J.(M.A.) (1991), 3 O.R. (3d) 241, 64 C.C.C. (3d) 483 (C.A.), affirmed without reasons [1992] 2 S.C.R. 166, 9 C.R.R. (2d) 194, a youth court judge had concluded that six to eight months' systemic delay represented a ceiling for trial in adult court and that this ceiling should be adjusted downward when applied to persons prosecuted under the Young Offenders Act, R.S.C. 1985, c. Y-1. Osborne J.A. rejected this notion by pointing out that in taking this approach the trial judge had imposed what amounted to a limitation period. He had placed undue emphasis on one factor instead of weighing all of the required factors.

The right to reasonable notice on termination of employment in the absence of any cause for dismissal is a legal principle.

The decision in Bardal, supra, is a classic example of the use of a legal standard to give expression to this principle. In the circumstances of a particular case, some of the facts when compared with the facts in other cases, may point towards a longer period of notice while others will point towards a shorter period. In applying the standard more or less weight is given to the various factors.

By singling out character of employment, which is one of the factors comprising the legal standard articulated in Bardal, supra, and holding that the upper limit of notice for clerical employees must always be less than the upper limit for executives, the appellant is asking the court to sanction a limitation period with a scale that should be adjusted downward when applied to clerical employees. Acceptance of this argument gives undue weight to character of employment instead of permitting all the factors to be weighed.

On a more fundamental level, the appellant is asking the court to make a statement about justice and fairness. The elevation of character of employment means that, other factors such as age and length of service being equal, Ms. Cronk is entitled to approximately 40 per cent less notice than that which MacPherson J. considered would be given to senior management employees. This is troubling. Our notion of justice is bound up with equality. In Law's Empire, supra, at p. 213, Dworkin indicates that the rationale of principle assumes that each person is as worthy as any other, that each must be treated with equal concern according to some coherent conception of what that means. Another way of saying this is that we expect litigants in equal positions will obtain an equal result unless there is a good reason to differentiate: see "Legal Values and Judicial Decision-Making", supra, at p. 14.

A number of reasons have been advanced to differentiate between management executives and ordinary employees. I will deal with them in three groups.

The first group consists of the following propositions: (a) the work skills of a clerical employee are more general and

more relevant to a broader range of employers while the skills of management employees are relevant to a narrower range of businesses; (b) a clerical employee can apply for a greater number of positions than can a senior management employee; (c) senior management employees, being more specialized, require more training and upgrading. These three propositions are all different ways of asserting as a fact the assumption that it takes longer for a senior management employee to find work than a clerical employee. It is this very factual assumption that is called into question by MacPherson J. When a fact is in dispute, repeating the factual proposition by rewording it does not provide a rational reason to accept the disputed fact. One can just as easily say the following by way of rebuttal:

(a) Although there are a greater number of positions available to a person with clerical skills, there are also a greater number of persons with clerical skills seeking those positions. At the same time computerization has reduced the number of persons required to do various aspects of clerical work.

(b) The contacts that senior management employees are likely to make because of the positions they occupy are likely to assist them to find re-employment whereas a clerical employee is likely to have to call on prospective employers "cold".

(c) Senior management employees, being already better educated, can more readily learn new ways to manage. A management employee, who, like Ms. Cronk, is 55 years of age and has 27 years of service may not be able to obtain comparable employment but is more likely to have the money to start his or her own business or to buy an interest in an existing one. It is unlikely that a clerical employee would be able to do this.

The second reason given for differentiating between a clerical and a management employee is that in the case of economic downsizing, a senior manager is more likely to be implicated in the downsizing and, presumably because of the stigma attached to downsizing, is likely to experience

difficulty in securing employment.

Economic downsizing may bear no relationship to firm profitability and it is therefore no reflection on a management employee's skills. As stated by John Kilcoyne in "Risks, Rights and Reification" in "Developments in Employment Law: The 1993-94 Term", 6 S.C.L.R. (2d) 343 at pp. 349-50:

> The competitive presssures spawned by global economies mean that profits alone are no longer determinative [of the risk to job security]. Where a higher rate of return on capital investment can be realized in another industry or, more likely, another country, balance sheets in the black provide no guarantee against layoffs or plant closures.

As has already been indicated, the purpose of reasonable notice is to give the employee a fair opportunity to obtain re-employment instead of being thrown suddenly and unexpectedly upon the world: McKay v. Camco, supra, at p. 267. A management employee may be less likely to be taken by surprise when his or her job is terminated because a management employee is better informed about the company than is the clerical employee. As a result, a management employee may be more likely to have an informal period of notice that job security is in jeopardy.

I would also note that in Ansari v. British Columbia Hydro & Power Authority (1986), 2 B.C.L.R. (2d) 33 at p. 38, 13 C.C.E.L. 238 (S.C.), McEachern C.J.S.C. rejected the idea that an employee's efforts and contribution to the financial success of the undertaking should be a factor to be taken into account in fixing reasonable notice. If the employee's contributions or lack thereof are not a consideration, then character of employment is nothing other than the status given to the kind of work the employee does.

The third group of reasons for giving management employees more notice than clerical employees because of character of employment is that senior management employees are in a better position to negotiate favourable contractual notice provisions in employment contracts than are unskilled employees. The longer notice periods for senior management employees given at

common law are said to reflect the reasonable expectation and intention of the parties if at the time of hiring they had addressed themselves to the question of notice. This reason was articulated by Saunders J. in Bohemier v. Storwal, supra. It is based on the approach of the Court of Appeal in Lazarowicz v. Orenda Engines Ltd., [1961] O.R. 141 at p. 144, 26 D.L.R. (2d) 433. In that decision the court did not consider or mention the decision in Bardal.

The approach of determining what the employer and employee intended at the time of hiring, in order to determine the amount of reasonable notice which is required on termination of an employee, was rejected by the Supreme Court in Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, 91 D.L.R. (4th) 491. In Machtinger, two employees entered into a contract at the time they were hired that provided for less notice on dismissal than the minimum standard required by the Employment Standards Act, R.S.O. 1980, c. 137. The Supreme Court, like the Ontario Court of Appeal, held that the effect of ss. 3 and 4 of the Act was to make any attempt to contract out of the minimum employment standards in the Act null and void. A determination therefore had to be made as to how notice was to be assessed. The approach used by the Court of Appeal in determining the amount of notice was to imply a term in the contract stipulating the minimum notice requirement under the Employment Standards Act. This was based on what the Court of Appeal thought could be inferred from the intention of the parties at the time of hiring in light of the court's interpretation of the Act. The Supreme Court unanimously rejected this approach. Iacobucci J., who wrote the majority opinion, held that the two employees with this term in their contract were entitled to reasonable notice at common law and used the Bardal approach to determine the amount of reasonable notice. He did so on the basis that a clause in a contract that is null and void should be given no effect and should not be used as an indication of the intention of the parties. In addition, on policy grounds, he felt that the contract should be interpreted so as to encourage employers to comply with the Act: implying reasonable notice would give employers more incentive to obey the law. McLachlin J., however, in a separate concurring judgment, went further than Iacobucci J. and found contractual intention to be

irrelevant to determination of the notice period. She commented on the factors in Bardal, at p. 1009:

> These considerations determine the appropriate notice period on termination. They do not depend upon contractual intention. Indeed, some of them -- such as the length of service and prospects of employment -- are usually not known at the time the contract is made.

The decision of the trial judge in awarding seven and seven-and-a-half months' pay in lieu of notice to the two employees respectively was unanimously restored by the court.

In Wiebe v. Central Transport Refrigeration (Manitoba) Ltd. (1994), 3 C.C.E.L. (2d) 1 at p. 6, 95 Man. R. (2d) 65 (C.A.), Twaddle J.A. observed that when the Supreme Court quoted the Bardal test in Machtinger, supra, that language was "an endorsement of the Bardal approach and a rejection of the implied intention approach in deciding what is reasonable".

A more philosophical approach is taken by Patrick Macklem in "Developments in Employment Law: The 1991-1992 Term" in 4 S.C.L.R. (2d) 279 at pp. 284-88. Professor Macklem views the decision of the Court of Appeal as a contractualist approach to reasonable notice, that is, one based on discerning the intent of the parties at the time of employment, whereas the approach of Iacobucci J. relies on external justifications for determining reasonable notice. He observes that, once the court moves beyond the confines of attempting to discern the intent of the parties at the time of employment, the approach to reasonable notice need not be status-based. In Machtinger, supra, Iacobucci J. stressed as part of his reasons for rejecting the contractualist approach in determining reasonable notice the importance of work to individual identity and noted that non-unionized employees do not possess a great deal of bargaining power. These comments support the opinion that the determination of reasonable notice on termination of employment is no longer a matter to be left to implied contractual terms as to what the parties would have intended.

A related reason for low notice periods for ordinary

employees, which is also based on the idea that contractual relations govern reasonable notice, is that found in Bohemier v. Storwal, supra. It is stated that the economic outlook for both the employer and the employee must be considered in determining the amount of reasonable notice. The employer must be able to reduce its workforce at a reasonable cost. In the case under appeal, the employer is a large profitable organization. This was not a case of mass termination. As a result, the cost to the employer of reducing its workforce is not a factor that would reduce the length of Ms. Cronk's notice period.

None of the three groups of propositions put forward by the appellant provides a rational reason for adopting, as a principle of law, a necessary distinction between the length of reasonable notice given to a clerical employee and that given to a management employee of the same age and years of service. Nor, in my view, does stare decisis preclude examination of it.

The fact that the overall approach in Bardal has been widely accepted by trial and appellate courts and has found favour with the Supreme Court in Machtinger, supra, does not, in my respectful opinion, mean that these courts have approved of making one factor contained in this approach, character of employment, into a legal principle or a rule that clerical employees can never be entitled to the longer notice periods given to management employees. The requirement of reasonable notice on termination of an employee was referred to by Iacobucci J. as a principle of law which is subject to rebuttal by a contract of employment that specifies otherwise. Character of employment and the balance of the matters listed in Bardal, were indicated at p. 998 to be "factors relevant to the assessment of reasonable notice".

In Machtinger, supra, it was in the context of protecting and enlarging the rights of ordinary employees that the factors constituting reasonable notice in Bardal were adopted. Once reasonable notice was required there was no issue before the court as to the relevance or weight to be given to the individual factors in Bardal. The trial judge's determination of the amount of reasonable notice was not challenged on appeal

and this was specifically noted by Iacobucci J. at p. 999. The decision in Machtinger, supra, cannot therefore be viewed as an endorsement of the position that based on character of employment clerical employees can never be entitled to the same notice period as a management employee of the same age and years of service.

There will be few employees at any level who have the longstanding service of Ms. Cronk. Indeed such long service may increasingly be considered an historical relic: see Kilcoyne, in "Risks, Rights and Reification", supra, at pp. 345-46. It may be that in cases of exceptionally long service the weight to be given to character of employment should not be the dominant factor in determining reasonable notice because the employee, whether clerical or management, may be unable to find another job. The employee with long service has few remaining years in which to retrain, fewer years in the workforce to offer another employer, and, depending on the pension plan of the employer, the contribution the employer would be required to make for the newly hired employee in comparison to a younger employee with the same skills would be higher. Long-term service was said by McEachern C.J.S.C. in Ansari, supra, at p. 39, to be a moral claim that matures into a legal entitlement. In cases of long service it may be that more weight should be given to the length of service that the employee has given to the employer than to character of employment.

In summary, the approach articulated in Bardal constitutes the appropriate legal standard to be applied by a court. The factors articulated by McRuer C.J.H.C. are the considerations to be applied in determining the amount of reasonable notice. The application of these factors does not require that a clerical employee automatically be placed in a category that has a lower range of notice than executive employees. To do so is to take one factor, the employee's character of employment, and to place undue emphasis on it. The application of a legal standard requires a much more flexible approach.

Within the application of the standard, the weight to be given to character of employment is not solely a legal question. It requires the determination of a factual question.

The question is: To what extent does an employee's position in the hierarchy of a company have any correlation to his or her ability to obtain alternate employment? At least in the case of the long-serving older employee, the factual proposition supporting the view that clerical workers are in a better position to find employment may no longer be valid. If the prospects of re-employment for both the clerical employee and the management executive are generally equally bleak when they are 55 and have given long years of service to the same employer, then, in the absence of any other valid reason for doing so, we ought not to weigh them differently.

Without the benefit of evidence and argument thereon, I am of the opinion that this court is not in a position to decide the question of the weight to be given to the character of employment in this case. I am of the view that there is a genuine issue for trial.

I would allow the appeal, set aside the judgment of MacPherson J. respecting reasonable notice, and in its place, substitute an order pursuant to rule 20.04(3) directing the trial of an issue as to the amount that Ms. Cronk is entitled to be paid in lieu of notice.

I would dispose of the balance of the appeal as indicated by Lacourcire J.A.

I am in agreement that there should be no costs of the appeal.

MORDEN A.C.J.O.: -- I have had the benefit of reading the reasons of Lacourcire J.A. and Weiler J.A. I agree with Lacourcire J.A.'s proposed disposition of this appeal and agree, generally, with his reasons. I shall state my particular reasons briefly.

The governing rule is that a dismissed employee, in the position of Ms. Cronk, is entitled to reasonable notice or payment in lieu of it. The legal precept of reasonable notice, which is the essence of this rule, is a standard and not, itself, a rule. Unlike a rule, it does not specify any detailed

definite state of facts which, if present, will inevitably entail a particular legal consequence. Rather, its application enables a court to take all of the circumstances of the case into account. It allows for individualization of application and, obviously, involves the exercise of judgment: see Pound, "The Theory of Judicial Decision" (1923), 36 Harv. L. Rev. 641 at pp. 645-46; Paton, Jurisprudence, 4th ed. (1972), at pp. 236-37; Schlag, "Rules and Standards", 33 U.C.L.A. Law Rev. 379 (1985); and Posner, The Problems of Jurisprudence (1990), at pp. 42ff.

The exercise of judgment involved in determining what is reasonable notice is not, however, an untrammelled one. It is undertaken in the context of a structure which is designed to give the application of the standard a measure of predictability. The formulation of the approach in Bardal v. Globe & Mail Ltd., [1960] O.W.N. 253 (H.C.J.), quoted in the reasons of my colleagues, while stating that "[t]here could be no catalogue laid down as to what was reasonable notice in particular classes of cases" does go on to list the major factors to be taken into account.

It appears to be clear in Bardal, that the "availability of similar employment" factor must be something different from the "character of employment" factor, since they are listed as separate factors -- although I recognize that none of the factors are the same as the elements of a legal rule and that there may be some overlap in the considerations underlying each of them.

I agree with Lacourcire J.A. that "character of the employment" in Bardal indicates the employee's level of employment with the employer. In Ansari v. British Columbia Hydro & Power Authority (1986), 2 B.C.L.R. (2d) 33 at p. 43, 13 C.C.E.L. 238 (S.C.), McEachern C.J.S.C. refined the description of this factor to "responsibility of the employment function". There can be no doubt that the case-law in this country, before and after Bardal, and in England, has generally recognized seniority as being a factor favouring longer notice periods. Freedland, The Contract of Employment (1976), at p. 154; Chitty on Contracts -- Specific Contracts, 27th ed. (1994), at pp.

781-82; Hepple & O'Higgins, Employment Law, 3rd ed. (1979), at pp. 241-42; and Christie, England and Cotter, Employment Law in Canada, 2nd ed. (1993), at pp. 615-17 (it is critical of the law in this respect).

In Bohemier v. Storwal International Inc. (1982), 40 O.R. (2d) 264 (H.C.J.) at pp. 267-68, Saunders J. said:

> Most of the decided cases deal with employees who have held positions superior to that of the plaintiff in this action. It was argued that the character of the plaintiff's employment was only relevant to assist in determining the availability of similar employment.

Saunders J. did not give effect to this submission. At p. 269, he said:

> It seems to me that the character of the employment of the plaintiff with Storwal does not entitle him to a lengthy period of notice on the basis of decided cases and the reasons I have stated.

On the plaintiff's appeal to this court in Bohemier (reported (1983), 44 O.R. (2d) 361, 4 D.L.R. (4th) 383), the court said at p. 362, with respect to the award for inadequate notice, that Saunders J. "correctly discerned all of the principles" -- but that he had given insufficient weight to certain factors, such as the length of the plaintiff's employment and the fact that the separation was but two years before he had earned full pension entitlement.

I agree with Lacourcire J.A. that MacPherson J. erred in collapsing the "character of employment" factor into the re-employability factor. It may be that it cannot be said dogmatically that senior employees take longer to find new employment than do junior ones. However, if the policy of the law which makes responsibility of employment a factor favouring longer notices is one that requires reconsideration, I do not think, having regard to the record in this case and the positions taken by the parties before MacPherson J., that this is an appropriate case in which to embark on such a

reconsideration.

In any event, even if MacPherson J. was correct in concluding that no valid distinction exists for the purpose of determining the proper notice period between the positions of senior and junior employees, it does not follow from this, on the materials which he considered to be relevant, that Ms. Cronk is entitled to 20 months' notice. Once the distinction is gone, then substantially reducing the notice period for senior employees is just as logical, if not more logical, as increasing it for junior employees. This is so particularly in the light of the fact that, in the sample of cases on which the learned judge relied in arriving at his conclusion, the average period of unemployment following dismissal was, as he noted more than once, 9.3 months. If the availability of other employment is to swallow up the character of employment factor then it would seem that the period of reasonable notice for senior employees should be substantially reduced.

There is a further point which is related to the narrow selection of the cases relied upon as the basis before indicating, in the learned judge's view, Ms. Cronk's proper entitlement. In this regard I refer to a comment on the judgment under appeal by Barry B. Fisher in 6 C.C.E.L. (2d) 29 at p. 36, which indicates the other choices which could reasonably have been made among the decisions with different results respecting the appropriate notice period. See also Harris, Wrongful Dismissal (1990 ed.) at pp. 4-42 to 4-42.8 (cases involving plaintiffs 50 years of age and over).

Related to the learned judge's view that character of employment meant availability of other employment, he appears to have thought that the law imposed an obligation on the employer to adduce evidence in support of its position on the proper period of reasonable notice that senior specialized employees have greater difficulty in securing new employment. In this regard he quoted the following passage from the judgment of Gibson J. in Stevens v. Globe & Mail (1992), 7 O.R. (3d) 520 at p. 528, 86 D.L.R. (4th) 204 (Gen. Div.):

> No evidence was adduced on behalf of the Globe & Mail that

any other suitable employment positions (management or otherwise) were available to the plaintiff in 1989 or 1990.

Gibson J. said this, however, in the context of considering the issue whether the plaintiff had failed to mitigate his damages, an issue with respect of which the Globe and Mail had the burden of proof. Accordingly, Stevens does not support MacPherson J.'s conclusion that an obligation rests on the employer to adduce evidence respecting the proper notice period.

In my view, the 12-month notice in the proposed disposition of Lacourcire J.A. is in general accord with what one would have predicted on the basis of the decisions applying the Bardal test and, in light of my observations in the preceding paragraphs, I am not persuaded that the reasons of MacPherson J. justify the departure reflected in his disposition.

The parties were content to have MacPherson J. and this court dispose of Ms. Cronk's motion for summary judgment on the basis of the materials which they had filed with the court. They were satisfied that the court could come to a just conclusion on what was a reasonable notice period on these materials. Although this would involve the court's consideration of the parties' competing contentions on the application of the reasonable notice standard to differing views of the facts, a trial was not required for this purpose. There was no genuine issue requiring a trial: see Ron Miller Realty v. Honeywell, Wotherspoon (1991), 4 O.R. (3d) 492, 1 C.P.C. (3d) 134 (Gen. Div.). I think that the parties are to be commended for adopting this approach. In the light of this and, also, the consideration that character of employment is not commensurate with availability of other employment, and, even if it were, my doubt that this would necessarily result in the upward adjustment of notice periods for clerical employees (rather than the downward adjustment of those for senior employees), I do not think, with respect, that a trial should be directed.

As I have said, I agree with the disposition of this appeal proposed by Lacourcire J.A.

Appeal allowed.

Note 1: The case comment on Cronk at 6 C.C.E.L. (2d) 29 at p. 30, referred to in the reasons of Morden A.C.J.O., makes reference to a statistical study by the author Barry B. Fisher, entitled "Computerized Analysis of Notice Periods -- 1990 Update", Canadian Institute, June 11, 1991. Using a database of over 1,400 cases from the common law jurisdictions of Canada where the employee's age was over 50, the employee had seniority of between 20 and 35 years and the employee's occupation was classified as clerical, Mr. Fisher found that clerical employees were awarded a range of between 12 and 18 months' notice with the statistical average (not the medium, which is lower) being 14 months. Using the same factors but changing the occupation category to middle or upper management Mr. Fisher found that the average notice period awarded was 17.2 to 18 months.

Note 2: The decision of Cory J. for the majority in R. v. Heywood, [1994] 3 S.C.R. 761, 24 C.R.R. (2d) 189, is illustrative. Speaking for the majority, Cory J., at pp. 787-88, observed that the court had repeatedly stated that in construing statutes, legislative debates were not admissible as proof of legislative intent. Legislative debates might, however, be admissible for the more general purpose of showing the mischief Parliament was attempting to remedy with the legislation. In constitutional and Charter cases, a broader approach to legislative history could be taken.

Note 3: In Moge v. Moge, [1992] 3 S.C.R. 813 at pp. 854-56, 99 D.L.R. (4th) 456, L'Heureux-Dub J. took judicial notice of the acceptance of social studies and cited them as authority that the economic effect of divorce results in many women living in poverty. In Marzetti v. Marzetti, [1994] 2 S.C.R. 765 at p. 801, 116 D.L.R. (4th) 577, Iacobucci J., writing on behalf of the court, cited the decision of L'Heureux-Dub in Moge v. Moge, supra, and held that, as a matter of policy, a statutory interpretation of a section of the Bankruptcy Act, R.S.C. 1985, c. B-3, which helped to defeat the "feminization of poverty" was to be preferred over one which did not.

Note 4: An example may, I believe, be found in R. v. McCraw,

[1991] 3 S.C.R. 72 at p. 84, 66 C.C.C. (3d) 517, where Cory J., on behalf of the court, was dealing with the question of whether the threat of rape could cause serious bodily harm to the person threatened. As part of his analysis he noted at pp. 84-85 that the psychological trauma suffered by rape victims had been well documented and that to ignore the fact that rape frequently results in serious psychological harm to the victim would be a retrograde step, contrary to any concept of sensitivity in the application of the law. With this background in mind he concluded that the threat to rape could, depending on the circumstances, constitute serious bodily harm.