

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
GAZMEND KONDAJ)	<i>Kimberly Sebag, for the Plaintiff</i>
)	
Plaintiff)	
)	
– and –)	
)	
CROSSBRIDGE CONDOMINIUM SERVICES LTD., and DUKA PROPERTY MANAGEMENT INC.)	<i>Matthew R. Vella and Caroline DeBruin, for Crossbridge Condominium Services Ltd</i>
)	
Defendants)	<i>Andrew Reynolds and Alisha Kassam, for Duka Property Management Inc.</i>
)	
)	
)	HEARD: February 21, 24, 2025 with supplementary submissions delivered April 7, 2025

KOEHNEN J.

REASONS FOR JUDGMENT

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Overview

[1] This is a motion for summary judgment by the Plaintiff arising out of the termination of his employment. All parties agree that the matter is appropriate for summary judgment. There are two issues: the identity of the Defendant responsible for the Plaintiff’s common law notice and the amount of notice.

[2] The issue concerning the identity of the liable Defendant arises out of Part XIX of the *Employment Standards Act* (the “Act”) ¹ Part XIX applies to building services providers and stipulates in s. 75(2) that where a building services provider for a building is replaced by a new provider, the new provider shall comply with the termination and severance provisions of the *Act* with respect to every employee of the replaced provider who provides services at the premises and whom the new provider does not employ, as if the new provider had terminated the employee’s employment. Subsection 75(3) goes on to state that the new provider shall be deemed to have been the employee’s employer for the purposes of subsection 75(2).

¹ *Employment Standards Act*, RSO 1990, c E.14.

- [3] The issue here is to determine who is responsible for the common law notice that the employee is owed: the old building services provider or the new one.
- [4] For the reasons set out below, I find that ascribing the responsibility for common law notice to the new building services provider is more consistent with the legislative intention underlying the *Act*, the overall scheme of the *Act*, and the statutory language than it would be to ascribe responsibility to the former services provider.
- [5] I set the Plaintiff's common law notice at ten months.

I. **Background Facts**

- [6] The Plaintiff, Gazmend Kondaj ("Kondaj"), was employed as a building manager by the Defendant, Crossbridge Condominium Services Ltd. ("Crossbridge"). He provided services to the SoHo Hotel and Residences at 348 Wellington St. West, in Toronto, Ontario.
- [7] On November 21, 2023, Crossbridge informed Kondaj that its contract with SoHo would terminate at the end of November 2023, and that the Defendant, Duka Property Management Inc. ("Duka"), would be assuming the property management contract.
- [8] On November 29, 2023, Duka met with Kondaj. During the meeting, Kondaj expressed interest in being considered for a more senior role such as District or Regional Manager with a desired annual salary between \$95,000 and \$105,000.

At that time, Kondaj had not been told that his employment with Crossbridge would be terminated upon the conclusion of its contract at SoHo.

- [9] On November 30, 2023, Crossbridge informed Kondaj that he would not be reassigned to another Crossbridge property but that his employment would continue with Duka following the end of the SoHo contract.
- [10] Crossbridge's contract with SoHo concluded on November 30, 2023. On December 1, 2023, Crossbridge issued a Record of Employment to Kondaj, stating that his employment had ended on November 30, 2023, due to a "shortage of work/end of contract or season." Crossbridge has not provided any compensation to Kondaj in relation to the termination of his employment.
- [11] Also on December 1, 2023, Duka issued a letter to Kondaj stating that it would not employ him and that his employment was terminated without cause. Duka says it did not retain Kondaj because it could not offer him employment under the terms and conditions he had requested. At no point, however, did Duka offer Kondaj the opportunity to continue in his role at SoHo under the same terms and conditions he had with Crossbridge.

- [12] In accordance with s. 75(2) of the *Act*,² Duka paid Kondaj \$4,967.31, which reflected the three weeks of termination pay to which he was entitled under s. 57 of the *Act*.³
- [13] On December 21, 2023, Kondaj returned the completed new hire forms to Duka so that he could be enrolled in their benefits program.
- [14] Duka thereafter issued a T4 Statement of Remuneration to Kondaj, designating itself as his employer. Additionally, it prepared a Record of Employment for Kondaj, indicating dismissal as the reason for issuance.
- [15] Kondaj has not received any common law notice or pay in lieu of notice from either Crossbridge or Duka. Each of Crossbridge and Duka take the position that if any common law notice is owed, it is owed by the other.
- [16] Two preliminary issues can be quickly disposed of.
- [17] First, Kondaj has a written employment agreement with a termination clause. Kondaj submits that the termination clause is unenforceable because its “termination for cause” provision contravenes the *Act*.⁴ Neither Crossbridge nor Duka contests this, nor do either of them rely on the agreement’s termination provisions. Those provisions therefore play no further role in these reasons.

² Employment Standards Act, 2000, S.O. 2000, c. 41, s. 75(2).

³ Employment Standards Act, 2000, S.O. 2000, c. 41, s. 57.

⁴ *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 (CanLII).

[18] Second, Duka submits that the motion should not proceed because the Plaintiff has not served the proceeding on the Director under the *Act* as Duka argues the Plaintiff is required to do by s. 8(2). I am not prepared to dismiss the motion on that ground.

[19] Subsection 8(2) provides:

Where an employee commences a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director on a form approved by the Director on or before the date the civil proceeding is set down for trial.

[20] Assuming for the moment that this is a claim under the *Act*, subsection 8(2) refers to notice before the matter is set down for trial. This matter has not been set down for trial. Moreover, if Duka believed that the Director should have been advised of this proceeding, there was nothing to prevent Duka from doing so.

II. Which Provider Is Responsible for Common law Notice

[21] The issue of whether Crossbridge or Duka is liable for common law notice arises out of s. 75 of the *Act*. It provides:

New provider

75. (1) This Part applies if a building services provider for a building is replaced by a new provider.

Termination and severance pay

(2) The new provider shall comply with Part XV (Termination and Severance of Employment) with respect to every employee of the replaced provider who is engaged in providing services at the premises and whom the new provider does not employ as if the new provider had terminated and severed the employee's employment.

Same

(3) The new provider shall be deemed to have been the employee's employer for the purpose of subsection (2).

[22] Although the section refers expressly to termination and severance pay under the *Act*, it is silent about common law notice and the party responsible for it. Crossbridge says that the new service provider is responsible for common law notice. Duka says that the old service provider is responsible for common law notice and the new service provider is responsible only for statutory termination and severance pay. It appears that no court has addressed this question before.

[23] I begin with the basic principle of statutory interpretation which the Supreme Court of Canada has described as follows:

[T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.⁵

[24] This formulation contains three elements: (i) the legislator's intention; (ii) the scheme and object of the act; and (iii) the grammatical and ordinary meaning of the words. I address each in turn.

⁵ *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 at para 21, [1998] 1 SCR 27 (SCC; see also *Onyskiw v CJM Property Management Ltd.*, 2016 ONCA 477 at para 38.

i. The Legislator's Intention

- [25] It has long been recognized that the overall objective of the *Act* as a whole is to protect employees in light of their general position of unequal bargaining power vis-à-vis employers.⁶
- [26] Although courts have rarely addressed the building services provisions of the *Act*, the Ontario Labour Relations Board has considered them on numerous occasions. In its decisions, the Board has recognized that the Legislature enacted these provisions in response to the precarious nature of employment in the building services sector, which is characterized by the frequent turnover of service contracts.
- [27] Typically, building services providers assign employees to specific buildings. Consequently, when a provider loses a contract, the employees working at that location often face termination due to redundancy. The building services provisions were introduced to attenuate this instability and promote greater employment continuity within the sector.
- [28] By way of example, subsection 10(2) of the *Act* stipulates that if a new service provider hires employees from the outgoing provider, those employees are deemed not to have been terminated. Moreover, their prior service is recognized

⁶ *Machtiger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 SCR 986 at p. 1003.

as continuous employment with the new provider “for the purpose of any subsequent calculation of the employee’s length or period of employment.”

[29] In a similar vein, if the new services provider does not retain an employee of the old provider, subsections 75(2) and (3) of the *Act* require the new provider to comply with Part XV (Termination and Severance of Employment) of the *Act* as if the new provider had terminated and severed the employee's employment.⁷

[30] Duka emphasizes that the Ontario Labour Relations Board decisions address only termination and severance pay under the *Act*, and invites me to infer from this that the *Act* does not impose common law notice obligations on a successor service provider. I decline to draw that inference.

[31] The jurisdiction of the Ontario Labour Relations Board in these matters arises through appeals from orders issued by Employment Standards Officers under the *Act*. These officers are empowered to order termination and severance pay, but they lack authority to adjudicate common law notice entitlements. Accordingly, the absence of commentary on common law notice in decisions of the Board reflects the limits of its jurisdiction, not an intention to ascribe responsibility for common law notice to the old service provider.

[32] In my view, interpreting the *Act* to impose common law notice obligations on the new service provider is more consistent with the legislator’s intention to stabilize

⁷ *Kendall Judd v Star Group International Trading Corporation*, 2015 CanLII 78248 (ON LRB) at para. 18.

employment than an interpretation that places the obligation on the former provider.

- [33] Assigning common law notice to the new service provider creates a stronger incentive for the new provider to retain the existing on-site employees because failing to do so would expose the new provider to significant financial liability. Retaining those employees would not impose any immediate additional cost on the new provider.
- [34] Conversely, placing the burden on the former provider offers little incentive for the new provider to retain staff. If anything, it may incentivize the new provider to terminate existing employees. If the new provider takes on existing employees and terminates them at some later point, there is no doubt that the new provider would be liable for common law notice. Subsection 10(2) of the *Act* requires notice be calculated in a way which includes the employee's service with the old provider. If Duka were correct, the new provider could avoid that risk by simply paying statutory termination and severance, amounts that are typically much lower than common law notice, thereby avoiding the risk of common law notice if it had to terminate those employees at a later point in time.
- [35] Moreover, such an arrangement could be exploited to harm competitors: a new provider could force the former provider to bear the cost of common law notice, even when the contract was lost through no fault of the old provider. This would undermine employment stability in the building services sector, an outcome clearly at odds with the legislator's intention.

[36] Dividing liability between old and new service providers would also lead to unnecessary complexity. It would require employees to pursue the new service provider for statutory benefits and the old service provider for common law benefits. Forcing workers to assert their legal rights in multiple, deliberately complex legal regimes is inconsistent with the legislator's intention of protecting vulnerable employees.

ii. Scheme of the Act

[37] Imposing liability for common law notice on the old service provider would also appear to be contrary to the scheme of the *Act* as it has been interpreted by the Courts.

[38] By way of example, s. 77 and the Regulation⁸ under of the *Act* allow any person “seeking to become the new provider at a premises” to obtain information from the existing service provider or building owner about, among other things, the status, length of service, and terms and conditions of work of employees at the premises. As a result, even a party who merely seeks to become a service provider at a particular building can obtain sufficient information to determine the critical elements of both statutory and common law notice before bidding on a project and have a sense of their financial obligations if they do not retain existing staff.

⁸ Ontario Regulation 287/01.

[39] As noted earlier, Duka's position would divide liability between the old and new service providers. In *Elsegood v. Cambridge Spring Service (2001) Ltd.*,⁹ however, the Court of Appeal for Ontario did "not accept the employer's premise that the ESA and common law operate as two independent regimes."¹⁰

[40] It has also been understood for decades that the termination provisions in Part XV are minimum provisions that do not displace common law notice obligations or the employee's right to claim common law notice.¹¹ Indeed, s. 5(2) of the *Act* provides:

If one or more provisions in an employment contract or in another *Act* that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or *Act* apply and the employment standard does not apply.

[41] In *Machtiger v. HOJ Industries Ltd.*,¹² the Supreme Court of Canada held that the common law presumption of reasonable notice was a "benefit" for the purposes of s. 5(2)¹³ which prevailed over the termination and severance provisions in the *Act*.¹⁴

[42] Given that the general scheme of the *Act* sets the termination and severance provisions as only minimum entitlements, responsibility for termination and severance has historically been interpreted as a responsibility to pay "at least" that

⁹ *Elsegood v. Cambridge Spring Service (2001) Ltd.*, 2011 ONCA 831.

¹⁰ *Elsegood v. Cambridge Spring Service (2001) Ltd.*, 2011 ONCA 831 at para. 5.

¹¹ *Machtiger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 SCR 986 at p. 999-1000; *Elsegood v. Cambridge Spring Service (2001) Ltd.*, 2011 ONCA 831 at para. 11.

¹² *Machtiger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 SCR 986

¹³ Then s. 4(2) of the *Act*.

¹⁴ *Machtiger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 SCR 986 at p. 999-1000.

much. In other words, the party paying the statutory benefits must pay at least that much and must also pay any greater benefits to which the employee may be entitled, like common law notice.

iii. Statutory Language

[43] It is convenient here to repeat the language of s. 75(2) and (3):

(2) The new provider shall comply with Part XV (Termination and Severance of Employment) with respect to every employee of the replaced provider who is engaged in providing services at the premises and whom the new provider does not employ as if the new provider had terminated and severed the employee's employment.

(3) The new provider shall be deemed to have been the employee's employer for the purpose of subsection (2).

[44] Duka emphasizes what it characterizes as limiting language in these provisions. Subsection 75(3) states that the new provider shall be deemed to be the employee's employer for the purposes of subsection (2). Subsection (2), in turn, makes the new service provider responsible for severance and termination payments under Part XV of the *Act*. The provisions do not state that the new service provider is the employer for all purposes, nor do they explicitly impose liability for common law notice.

[45] The Ontario Court of Appeal rejected a similar argument in *Elsegood v. Cambridge Spring Service (2001) Ltd.*¹⁵ when addressing sections 56(1) and 54 of the *Act*. Subsection 56(1) provides that "An employer terminates the employment of an

¹⁵ *Elsegood v. Cambridge Spring Service (2001) Ltd.*, 2011 ONCA 831.

employee for purposes of section 54” (the section imposing statutory termination and severance pay) if among other things, the employer lays off an employee for over 35 weeks. After the employer did just that in *Elsegood*, the employee brought an action for common law notice for constructive dismissal. The employer denied liability arguing that s. 56(1) provided that the termination was only “for the purposes of s. 54” which awards statutory benefits and was not a termination for purposes of common law notice. The Court of Appeal rejected this argument saying:

In my view, s. 56(1) of the ESA operates to terminate an employee's employment in law so that the employee may claim for common law wrongful dismissal damages.¹⁶

[46] The Court of Appeal explained further that:

... s. 54 does not bear on the character of the termination under s. 56(1); instead, s. 54 prohibits an employer from terminating an employee without notice or payment in lieu of notice. If anything, s. 54 undermines the employer's argument, because it applies **generally in all cases to require the employer to give notice whenever an employee is terminated.**¹⁷ (emphasis added)

[47] The “notice” in the bolded section of the quotation can only refer to common law notice because that was the issue in *Elsegood* and is what the court awarded. Put another way, when the *Act* imposes an obligation to provide termination or severance pay, that obligation includes common law notice.

¹⁶ *Elsegood v. Cambridge Spring Service (2001) Ltd.*, 2011 ONCA 831 at para. 5.

¹⁷ *Elsegood v. Cambridge Spring Service (2001) Ltd.*, 2011 ONCA 831 at para. 8.

[48] As a result, when subsection 75(3) states that the new provider “shall be deemed to have been the employee’s employer for the purpose of subsection (2),” this deeming provision is not limited to statutory termination and severance. Section 75(2) requires the new provider to “comply with Part XV ... with respect to every employee of the replaced provider ... whom the new provider does not employ as if the new provider had terminated and severed the employee’s employment.” Part XV includes subsection 56(1), which, as held in *Elsegood*, entitles employees to common law notice. While the employee in *Elsegood* was subject to the layoff provision in subsection 56(1)(c), the present case involves subsection 56(1)(a), which applies where “the employer dismisses the employee or otherwise refuses or is unable to continue employing him or her.” This provision clearly applies to Kondaj.

[49] To summarize the language of the statute as interpreted by the courts: Section 56(1) requires the employer to pay common law notice. Section 56(1) is found in Part XV. Section 75(2) requires the new provider to comply with Part XV (including its requirement for common law notice under section 56(1) as “if the new provider had terminated and severed the employee’s employment.” An employer who terminates an employee’s employment is liable for common law notice. As a result, the new provider should be liable for common law notice.

[50] Taking a different approach to the issue, Duka points to s. 8(1) of the *Act* and its stipulation that “no civil remedy of an employee against his or her employer is affected by this Act.” Duka submits that the employer is Crossbridge and that the

provision means that Kondaj continues to have an action against Crossbridge for common law notice. In support of this proposition, Duka relies on *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*,¹⁸ where the Supreme Court of Canada stated:

To begin with, I think it useful to stress the presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, for example, Fauteux J. (as he then was) wrote that “a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed”. In *Slaight Communications Inc. v. Davidson*, Lamer J. (as he then was) wrote that “in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law”.¹⁹

[51] Duka submits this means that the legislator is deemed not to have changed the common law rules of privity of contract and that Kondaj continues to have a claim against Crossbridge.

[52] I do not read *Parry Sound* that narrowly. The passage quoted above says not only that the legislator is presumed not to change the “ordinary rules of common law” without expressly saying so, it also says that the legislator is presumed not “to change existing law or to depart from established principles, policies or practices.” Existing law, principles, policies, and practices would include the way in which

¹⁸ *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (CanLII), [2003] 2 SCR 157.

¹⁹ *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (CanLII), [2003] 2 SCR 157 at para. 39.

courts have interpreted and applied a particular piece of legislation for decades. Courts have held for decades that the obligation to pay statutory termination benefits is the minimal obligation which is supplemented by common law notice requirements. To the extent Duka relies on privity of contract for the argument that Kondaj's employer is Crossbridge, the legislator expressed its intention to the contrary in s. 75(3) of the *Act* when it states that "the new provider shall be deemed to be the employee's employer..."

[53] Duka next relies on *R. v. Verrette*,²⁰ where the Supreme Court of Canada held that deeming provisions create a fiction which generally applies only for the purposes of the statute that creates it.²¹ Duka submits this means that when s. 75(3) deems the new provider to be the employer, it does so for the very limited purpose of statutory termination benefits and no other. This submission is contrary to the finding of the Court of Appeal in *Elsegood* and contrary to the fundamental concept that the *Act* creates only minimum obligations which are supplemented by common law.

[54] Duka next points to the statutory history of the *Act* to support its position. It notes that in 1992, the previous *Act* was amended to require a new service provider to employ the old service providers' on-site employees. That provision was later removed in favour of s. 75. Duka submits that this change reflected a desire to ensure that the new service provider was not deemed to be the employer for

²⁰ *R. v. Verrette*, 1978 CanLII 208 (SCC), [1978] 2 S.C.R. 838

²¹ *R. v. Verrette*, 1978 CanLII 208 (SCC), [1978] 2 S.C.R. 838 at para. 41.

purposes of the common law. Both parties introduced evidence of the statutory history including excerpts from Hansard. None of that history goes so far as to say whether a service provider is responsible for common law notice or not. The statements in legislative proceedings are limited to general statements about stabilizing employment or offering greater flexibility in the building services sector. In those circumstances, statutory history adds nothing to the equation and the statute must be interpreted in a manner consistent with general principles of statutory interpretation and the way in which the *Act* has been interpreted by other courts.

- [55] Duka also points to provisions in Kondaj's written contract of employment to the effect that the contract cannot be assigned without Kondaj's consent. Duka suggests that this means it cannot be responsible for common law notice because it would amount to assigning the employment contract without the employee's consent. That argument is without merit. If the provision means what Duka suggests, then s. 75 overrides it. Section 5 of the *Act* makes clear that no employer or employee can contract out of an employment standard and any such attempt to contract out is void unless the contracting out is in favour of a greater benefit than the *Act* affords. Holding Duka responsible for all termination benefits is an employment standard under the *Act* out of which the parties cannot contract.
- [56] Finally, Duka relies two cases to support its position. In my view, both are distinguishable.

- [57] In *Coutinho v. Ocular Health Centre Ltd.*,²² the Court considered the impact of a regulation enacted during the COVID-19 pandemic, which provided that a temporary layoff due to the pandemic did not constitute constructive dismissal under the *Act*. Despite this, the employee sued for constructive dismissal after he was temporarily laid off during the pandemic and sought damages based on common law notice.
- [58] The employer argued that the regulation should be interpreted to preclude not only constructive dismissal under the *Act* but also at common law. The court disagreed, holding that the regulation did not eliminate an employee's common law right to claim constructive dismissal. In reaching this conclusion, the court relied on subsection 8 (1) of the *Act*, which says that nothing in the *Act* affects an employee's right to pursue a civil remedy.
- [59] It is important to note that *Coutinho* did not involve section 75 of the *Act*, which deems Duka to be the employer.
- [60] Duka then relies on *Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Union, Local 674 v. Aramark Canada Ltd.*²³ for the proposition that the *Act* does not extinguish Kondaj's contractual right of action against Crossbridge. *Milk and Bread Drivers* involved a labour arbitrator interpreting the terms of a collective agreement. The employee in question worked for a building services

²² *Coutinho v. Ocular Health Centre Ltd.*, 2021 ONSC 3076.

²³ *Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Union, Local 674 v. Aramark Canada Ltd.*, 2005 CanLII 48311 (ON LA).

provider that lost its contract. The incoming provider offered the employee a position at two-thirds of his previous wage, which he declined. The employee argued that the collective agreement entitled him to bumping rights, that is to say, the right to displace a more junior employee in the event of a layoff. The former employer disagreed, asserting that s. 75 of the *Act* constituted a complete code to govern the situation. The arbitrator rejected that position, concluding:

Where the workplace and the rights of the affected employees are governed by a collective agreement, the employer must have regard to its terms.

- [61] This reasoning reflects the principle that the *Act* provides minimum standards and does not diminish any greater rights an employee may have under other legal instruments. The presence of a collective agreement in *Milk and Bread Drivers* introduced considerations that are not present in this case. Furthermore, I express no opinion on whether, or in what circumstances, an employee may retain a remedy against the former service provider. My comments are limited to determining which of the two service providers bears at least initial liability for common law notice.
- [62] For the foregoing reasons, I conclude that the legislative intent, the structure of the *Act*, and the statutory language more strongly support the view that Duka, rather than Crossbridge, should bear responsibility for the Plaintiff's entitlement to common law notice.

III. What Is the Appropriate Notice Period?

[63] Before dealing with the more traditional factors associated with common law notice, I address two preliminary considerations: the effect of an economic downturn and mitigation.

i. The Effect of an Economic Downturn

[64] Economic downturns generally result in an increase to notice periods because they usually mean that an employee may have difficulty finding another position and that it will take them longer to do so.²⁴

[65] It is no secret that Toronto’s condominium industry is facing material challenges. A report from Canada Imperial Bank of Commerce and Urbanation published in July of 2024 states that:

“The GTA condo market is in a state of economic lockdown. The math doesn’t make economic sense from both the demand side (investors) and the supply side (developers), leaving the market at a standstill”.²⁵

[66] The report also indicates that the condominium market “is clearly in recessionary territory with conditions deteriorating to levels not seen in decades.”²⁶ This

²⁴ *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189 at para. 27; *Bullen v. Proctor & Redfern Ltd.*, 1996 CanLII 8135 (ON SC), [1996] O.J. No. 340 (Gen. Div.) at paras. 24-29; *Thomson v. Bechtel Canada*, [1983] O.J. No. 2397 (H.C.J.); *Corbin v. Standard Life Assurance*, 1995 CanLII 3852 (NB CA), [1995] N.B.J. No. 461 (C.A.); *Leduc v. Canadian Erectors Ltd.*, [1966] O.J. No. 897 (Gen. Div.) at para. 34-36; *Hunsley v. Canadian Energy Services LP*, 2020 ABQB 724 at para. 26.

²⁵ *Urbanation*, GTA Condo Investment Report, Urbanation with CIBC Economics, July 25, 2024, urbanation.ca , at paragraph 4

²⁶ *Urbanation*, GTA Condo Investment Report, Urbanation with CIBC Economics, July 25, 2024, urbanation.ca, at paragraph 2

inevitably means fewer positions for property managers because of slowing growth.

[67] These challenges would generally mean that employees require more time to find reemployment than during an economic boom. This appears to be borne out here where Kondaj did not find re-employment for 11 months despite applying for 170 positions.

ii. Mitigation

[68] Crossbridge and Duka submit that the Plaintiff should be denied damages or have damages awarded in a reduced amount because they allege he failed to take sufficient steps to mitigate his damages.

[69] The onus of proving inadequate mitigation lies on the party who alleges it.²⁷ To satisfy the burden, the Defendants “must show that the Plaintiff’s conduct was unreasonable, not in one respect, but in all respects...”²⁸ The onus has been described as ‘by no means a light one...where a party already in breach of contract demands positive action from one who is often innocent of blame.’²⁹ To succeed in their mitigation defence, the Defendants must establish that had Kondaj taken

²⁷ *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324

²⁸ *Furuheim v. Bechtel Canada Ltd.*, 1990 CarswellOnt 776 at para. 3 (ONCA)

²⁹ *Link v. Venture Steel Inc.*, 2008 CanLII 63189 (ON SC) at paragraphs 45-46; varied on another point at *Link v. Venture Steel Inc.*, 2010 ONCA 144.

reasonable steps to mitigate, he would have been expected to have secured a comparable position sooner than he did.³⁰

[70] In my view the Defendants have failed in all aspects of their mitigation defence.

[71] At heart, the Defendants' mitigation argument is based on the allegation that Kondaj applied for more senior positions than those for which he was qualified. The Defendants rely on case law holding that Plaintiffs fail to mitigate their damages when they pursue positions for which they are not qualified.³¹

[72] The Defendants begin this attack by criticizing Kondaj for seeking a promotion and a salary increase during his initial meeting with Duka. There is nothing inappropriate about an employee asking for either. Doing so does not demonstrate a lack of mitigation. The mitigation defence fails in this regard because Duka never offered to retain Kondaj in the position and that the salary he had at the time.

[73] The Defendants continue, arguing that even after Duka terminated his employment, the Plaintiff applied for executive, middle, and upper management positions, such as Vice President, Executive Director, Director, Supervisor, and Regional Manager³² and that he applied for positions for which he lacked the

³⁰ *Link v. Venture Steel Inc.*, 2008 CanLII 63189 (ON SC) at para. 46; varied on another point at *Link v. Venture Steel Inc.*, 2010 ONCA 144.

³¹ *Montanaro v Budd's Hamilton Ltd.*, 2005 CanLII 63502 at paras 70-71 (ON SC); *Skov v G&K Services Canada Inc.*, 2017 ONSC 6752 at paras 42-48.

³² Kondaj Affidavit, PMR, at para 43 and Exhibit "K" at p. 60/A69.

necessary qualifications such as Manager of Labour Relations, Director of Environmental Services, Leasing Manager, Director of Leasing.³³

[74] I do not see this as a failure to mitigate. The Plaintiff has produced evidence to demonstrate that he applied for 170 positions. The vast majority of those positions were directly comparable to the property management role he had at Soho. He applied for jobs throughout the greater Toronto area, including Toronto, Concord, Ajax, Richmond Hill, Durham, Markham, Vaughn and Oshawa. While approximately seven of the 170 positions were more senior than the position he held at Soho, he also applied for more junior positions including assistant property manager, facility supervisor, property maintenance lead, warranty service representative, property administrator and assistant property administrator. While the Plaintiff applied for four positions for which the Defendant say he lacked qualifications, the fact that an employee expands his job search during the course of an 11-month hunt for employment does not strike me as something to criticize, but as something that demonstrates the Plaintiff was acting reasonably, was flexible, and was exploring all possibilities. Perhaps most telling is that neither Defendant has produced a single job posting for which they say Kondaj should have but did not apply. The only criticism the Defendants raise of the Plaintiff's job search is that he allegedly did not register with any "temporary agencies or headhunting firms" that could assist him with his mitigation efforts. Once again, the Defendants have not pointed to any such agencies that the Plaintiff should

³³ Kondaj Affidavit, Kondaj MR, Tab 2, para 43, Exhibit "K".

have applied to and have not demonstrated how applying to those agencies would have resulted in a new job sooner. Moreover, the Plaintiff is not expected to apply for a temporary job. He had permanent employment and was entitled to look for permanent employment as a replacement.

[75] Neither Crossbridge, nor Duka provided a letter of reference to assist Kondaj in his job search, despite his requests for one. A refusal to provide a letter of reference serves to increase the already substantial burden placed on the employer to prove a failure to mitigate.³⁴

[76] As a result of the foregoing, I conclude that the Defendants have failed to make out their mitigation defence.

iii. The Bardal Factors

[77] The words of McRuer C.J.H.C. in *Bardal v. Globe and Mail* have been oft-repeated:

“There can be no catalogue laid down as to what is 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.”³⁵

[78] The key factors relevant to Kondaj’s notice entitlement were as follows:

a. He was 42 at the time of dismissal.

³⁴ *Brien v. Niagara Motors Ltd.*, 2008 CarswellOnt 4936 at para. 285 (ONSC) at para. 285.

³⁵ *Bardal v. Globe & Mail Ltd.*, 1960 CanLII 294 (ONSC), at page 145.

- b. He had been with Crossbridge for three years and five months.
- c. He was employed as a Licensed Condominium Manager responsible for the four condominium corporations that comprised the Soho project.
- d. His salary was \$86,100 per year plus benefits and three weeks paid vacation per year.

[79] Crossbridge described Kondaj's duties as follows:

- a) Responsible for client relations with both the Board and residents of SoHo, financial services, building operations, and human resource services;
- b) Resolving and addressing inquiries, requests, and concerns from SoHo's Board and residents, and managing relationships among the Board, residents, committees, and employees;
- c) Scheduling and attending Board meetings, participating in committee meetings as requested, and assisting with organizing events and activity programs;
- d) Enforcing Declarations, By-Laws, and rules of the SoHo;
- e) Preparing and/or implementing monthly variance reports, operating and reserve budgets, overseeing expenditures and purchases, and providing financial statements to the Board;
- f) Approving and preparing accounts payable and accounts receivable, collecting arrears, monitoring investments, approving payroll, maintaining secure cash control, and updating banking authorities;
- g) Enforcing cleanliness and security standards, conducting regular building, grounds, and housekeeping inspections, as well as implementing preventative and seasonal maintenance programs;
- h) Reviewing and enforcing energy management systems, monitoring contract work, ensuring emergency procedures are current and applied, and preparing and executing annual plans;

- i) Providing leadership to and supervising site staff and their work schedules, handling employee inquiries, requests, and concerns, providing coaching and recognition to acquire talent, delivering training and development, conducting performance reviews, and providing enhancement opportunities to staff; and
- j) Conducting regular meetings and providing proactive communication.

[80] These duties reflect a position requiring effective communication skills and some degree of judgment. Those positions are fewer in number than front line, task oriented positions.

[81] Kondaj submits that the appropriate period of common law notice is between eight and ten months. The Defendants submit he is entitled to between two and a half and four months.

[82] The Plaintiff relies heavily on the 2022 decision of the British Columbia Supreme Court in *Frederiks v. Executive TFN Waterpark Limited Partnership*,³⁶ where a a forty-five year old Waterpark Manager with just over three years of service was awarded ten months of reasonable notice. The 1984 Ontario decision in *James v. Kimberly-Clark of Canada Ltd.* is similar. It awarded 10 months notice to a 41-year-old security manager with just under three years of service.³⁷ The Plaintiff has added further cases to support this range of damages.³⁸

³⁶ *Frederiks v. Executive TFN Waterpark Limited Partnership*, 2022 BCSC 1725.

³⁷ *James v. Kimberly-Clark of Canada Ltd.*, 1984 CarswellOnt 1934.

³⁸ *Mackie v. West Coast Engineering Group Ltd.*, 2009 BCSC 1775; *Lambe v. Irving Oil Ltd.*, 2002 CanLII 22789 (NL SC); *Pasap v Saskatchewan Indian Gaming Authority*, 2022 SKQB 200; *Cleary v. Mpr Teltech Ltd.*, 1997 CanLII 3424 (BC SC).

- [83] Crossbridge and Duka cite a number of cases in support of their submission for a shorter notice period. In my view, those cases are distinguishable. One predominant factor that explains the shorter notice in the Defendants' cases appears to be a combination of the short notice the plaintiffs in those cases seeking shorter notice and the short time the plaintiffs required to find re-employment.
- [84] In *Pinto v Built Environment Co-ordinators Co.*,³⁹ an Office Manager with 3 years of service was awarded three months notice because that was the duration of her unemployment.⁴⁰
- [85] In *Hoskins v. Metropolitan Toronto Condominium Corp. No. 570*,⁴¹ the plaintiff was a building superintendent who was awarded 11 weeks notice because that is what he claimed.⁴²
- [86] In *Hummel v Treaty 7 Urban Indian Housing Authority*,⁴³ the plaintiff was a financial controller with 2.9 years service. She received three months notice. The plaintiff only claimed four months notice and the defendant agreed that three months notice was appropriate.⁴⁴ The reasons do not disclose how long it took the plaintiff to find a new position or the plaintiff's age. In addition, it appears the

³⁹ *Pinto v Built Environment Co-ordinators Co.*, 1983 CarswellOnt 2856, at para 5.

⁴⁰ *Pinto v Built Environment Co-ordinators Co.*, 1983 CarswellOnt 2856, at paras. 15 and 22.

⁴¹ *Hoskins v. Metropolitan Toronto Condominium Corp. No. 570*, 1997 CarswellOnt 5867.

⁴² *Hoskins v. Metropolitan Toronto Condominium Corp. No. 570*, 1997 CarswellOnt 5867 at para. 9.

⁴³ *Hummel v Treaty 7 Urban Indian Housing Authority*, 2007 ABPC 114.

⁴⁴ *Hummel v Treaty 7 Urban Indian Housing Authority*, 2007 ABPC 114 at paras. 26-27.

plaintiff was not a management employee because a principal issue in the case was her entitlement to overtime pay which the court found she was entitled to.

[87] *Mohammed v Ralota Technologies Inc.*,⁴⁵ involved an appeal from a Small Claims Court decision that awarded the plaintiff, Quality Assurance Manager, three months notice. The employer appealed. The court upheld the award without referring to the plaintiff's age, length of service, job duties, or the length of time it took him to find a replacement position.

[88] In *Beard v Suite Collections Canada Inc.*,⁴⁶ the plaintiff was a 36 year old manager of a collections department. The court awarded three months notice without referring to any other cases or the details of his work responsibilities. Most of the decision is taken up with a discussion of the plaintiff's misconduct, which although it did not amount to cause because of a lack of warning, was nevertheless serious.

[89] In *Cyr v. Banting Property Management Inc.*,⁴⁷ the plaintiff Building Administrator was given four months notice after three years service. The plaintiff asked for five to six months; the defendant took the position that appropriate notice was between 2 and 4 weeks.

[90] Finally, the Defendants rely on *Lambe v Irving Oil Ltd.*,⁴⁸ and its finding that a four to five month notice period was generally appropriate for a Branch Manager with

⁴⁵ *Mohammed v Ralota Technologies Inc.*, 2018 ONSC 3362.

⁴⁶ *Beard v Suite Collections Canada Inc.*, 2006 CarswellOnt 9687, [2006] OJ No. 5736.

⁴⁷ *Cyr v. Banting Property Management Inc.*, 1994 CarswellOnt 991.

⁴⁸ *Lambe v. Irving Oil Ltd.*, 2002 CanLII 22789 (NL SC) at para 137.

four years of service. It must be noted, however, that the court also stated at para. 132 that the general one month per year of service rule was the minimum which would be adjusted according to the circumstances of the case. In *Lambe* the court nevertheless awarded eight months notice because of aggravating factors.

[91] The Defendants also point to what they say is a rule of thumb to the effect that common law notice is equal to one month per year of service with an upper end of 24 months. In *Mackie v. West Coast Engineering Group Ltd.*,⁴⁹ however, Justice Loo of the British Columbia Supreme Court noted that “the conventional approach of one-month notice per year of service”, is not a principle of law and would be inconsistent with *Bardal*, if it were treated as a legal principle because *Bardal* holds that there is “no catalogue laid down” for determining reasonable notice and that it must be “decided with reference to each particular case”.⁵⁰ I accept that view, but also recognize that notice periods should be consistent with established case law.

[92] In my view, the cases the Plaintiff relies on more accurately reflect the factors at play in this case, especially the downturn in the condominium market in Toronto. As noted, it took the Plaintiff 11 months to find new employment. Although the amount of time it takes a plaintiff to find re-employment is not the determining factor because it would place excessive weight on the plaintiff’s subjective

⁴⁹ *Mackie v. West Coast Engineering Group Ltd.*, 2009 BCSC 1775.

⁵⁰ *Mackie v. West Coast Engineering Group Ltd.*, 2009 BCSC 1775 at para. 38

circumstances, at the same time, the underlying purpose of common law notice is to give the terminated employee financial support during the period that it takes to find a new position. The particular circumstances of the of the job market a plaintiff faces cannot therefore be ignored. There was no suggestion that the Plaintiff was “taking time off” after his termination. As noted earlier, I find that the Plaintiff made diligent efforts to find new employment by applying for a significant number of jobs, across a wide geographical area and at varying levels of responsibility. In my view the 10 months notice awarded in *Frederiks*⁵¹ and *James*⁵² is equally appropriate to award here.

iv. Benefits

[93] The Plaintiff also claims the value of employment benefits during the notice period for himself, his wife, and his child as was provided for while he was employed. The Plaintiff points to cases in which the loss of benefits has been calculated at 10% of salary in the absence of other evidence.⁵³ The Defendants do not appear to contest this, as a result of which I award a further 10% of the notice damages as compensation for lost benefits.

⁵¹ *Frederiks v. Executive TFN Waterpark Limited Partnership*, 2022 BCSC 1725

⁵² *James v. Kimberly-Clark of Canada Ltd.*, 1984 CarswellOnt 1934.

⁵³ *Yee v. Hudson's Bay Company*, 2021 ONSC 387 at paragraph 29; *Mikelsteins v. Morrison*, 2018 ONSC 6952, at paras 23-24.

Conclusion and Costs

[94] As a result of the foregoing, I find that Duka is the party responsible for payment of common law damages in lieu of notice and fix the notice period at 10 months. In addition, I award the Plaintiff an amount equal to 10% of the notice damages to reflect lost benefits. The damage award should be reduced by the amount that Duka has already paid the Plaintiff.

[95] Any party seeking costs arising out of these reasons will have three weeks to deliver written submissions. The responding party will have two weeks to deliver its answer with a further one week for reply.

Koehnen J.

Released: June 30, 2025

CITATION: Kondaj v. Crossbridge Condominium Services Ltd., 2025ONSC 3905
COURT FILE NO.: CV-24-00716430
DATE: 20250630

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

BETWEEN:

GAZMEND KONDAJ

Plaintiff

– and –

CROSSBRIDGE CONDOMINIUM SERVICES
LTD., and DUKA PROPERTY MANAGEMENT
INC.

Defendants

REASONS FOR JUDGMENT

Koehnen J.

Released: June 30, 2025