

# A Cautionary Tale for Employers: *Russell v The Brick Warehouse LP*

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By Daniel Wong,

In *Russell v The Brick Warehouse LP*, 2021 ONSC 4822 Justice Vella of the Superior Court of Ontario awarded a terminated employee \$25,000 in moral damages due to the employer's unfair dealing during the course of termination.

## Background

Tom Russell was employed by The Brick Warehouse LP ("The Brick") for 36 years. He was terminated without cause at the age of 57 due to the economic downturn resulting from the COVID-19 pandemic.

In July of 2020, Mr. Russell was provided a "without prejudice" termination letter that offered certain benefits, contingent on him signing a release of claims against The Brick. Significantly, the letter did not advise Mr. Russell that if he declined the offer, he would be immediately provided with his statutory entitlements under the *Employment Standards Act, 2000* ("ESA").

In response to the termination letter, Mr. Russell requested: that funds be paid into his RRSP without withholdings; accrual of his vacation entitlement throughout the statutory notice period; and a positive reference letter.

Inadvertently, on July 31, 2020, The Brick provided Mr. Russell with double his statutory termination pay and severance entitlements, plus unpaid wages and vacation pay accrued to the date of termination. In the meantime, Mr. Russell retained legal counsel to represent him in negotiations with The Brick. The Brick requested that the lawyer hold the overpayment in trust pending future discussions; however, the lawyer was not willing to undertake holding the overpayment in trust. As a result, The Brick asked Mr. Russell to return the overpayment. Instead, Mr. Russell returned the entirety of the funds, and served his statement of claim.

On November 12, 2020, The Brick wrote to the lawyer and enclosed a cheque for an amount less than Mr. Russell's minimum statutory entitlements. As the funds were not directed by The Brick to the employee's RRSP as requested, the cheque was returned.

On December 22, 2020, The Brick issued another cheque, this time representing the difference between the payment that had been made and the amount of statutory entitlement. As these funds were not directed to the employee's RRSP, they were again returned.

As a result of these events, which the court described as "missteps", Mr. Russell's termination and severance pay under the *ESA* were not paid into his RRSP until after the start of litigation.

## The Issue

Both parties agreed that the employee was entitled to reasonable notice at common law but disagreed as to what the notice period should be. The Court was tasked with determining the appropriate notice period in the circumstances and whether Mr. Russell was

entitled to moral or aggravated damages.

## Analysis

Applying the factors as set out in *Bardal v Globe & Mail*, 1960 Carswell Ont 144 (Ont. H.C.), Justice Vella held that the appropriate notice period was 24 months at common law. Of particular significance were the facts that Mr. Russell: had a long tenure with the employer; was toward the end of his working career; was a life-long employee since he was 21 years old; was in a senior supervisory position; and that it would be challenging for him to find alternative employment, in part, due to the COVID-19 pandemic.

In addition, the Court awarded Mr. Russell \$25,000 in moral damages because of The Brick's lack of transparency and fair dealing towards him.

Justice Vella noted that moral damages can be warranted when an employer breaches its duty of good faith and fair dealing during dismissal, provided that: (1) the breach is related to the dismissal; and (2) where it was within the reasonable contemplation of the employer that the manner of the dismissal would cause the employee mental distress and (3) the wrongful conduct of the employer causes mental distress (but, beyond the usual distress and hurt feelings associated with being dismissed).

In this case, Justice Vella awarded Mr. Russell \$25,000 in moral damages on the basis that:

- The Brick:
  - failed to advise that if he declined the termination letter, he would immediately be provided his *ESA* entitlements;
  - failed to advise him that his benefits would be extended consistent with the statutory notice, regardless of whether he accepted their offer; and
  - failed to deal fairly with Mr. Russell by neglecting to meet all the statutory entitlements in their offer to him.
- Russell suffered mental distress because of The Brick's failure to transfer the correct severance and termination pay as Mr. Russell had requested.

## Lessons for Employers

Justice Vella's decision in *The Brick Warehouse* provides the following lessons for employers:

- **Conduct matters.** Being untruthful, misleading, unduly sensitive, or failing to be candid, honest, and forthright in matters relating to dismissal can lead to significant employer liability.
- **Pay attention to the details.** In *The Brick Warehouse*, the liability for moral damages would likely have been avoided if the termination letter had included information regarding statutory entitlements if the employee had declined the offer; and if the Brick had forwarded the funds to where the employee had requested.
- **The COVID-19 pandemic *could* lead to a longer notice period.** The court may award a longer notice period if there is evidence that the pandemic has lessened the availability of alternative employment.

For more information on the topic discussed in this update, or for legal advice regarding this topic or any other employment law matter, please contact a member of [WeirFoulds' Employment Law Group](#).

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