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COURT OF APPEAL FOR ONTARIO

CARTHY, CHARRON and ROSENBERG JJ.A.

B E T W E E N :	)	
	)	
DOMINIC GISMONDI	)	Christopher G. Riggs, Q.C.
	)	and Paula Lombardi for
	)	the appellant
Respondent	)	
	)	
- and -	)	
	)	
	)	David C. Moore
THE CORPORATION OF THE CITY OF TORONTO	)	for the respondent
	)	
	)	
Appellant	)	**Heard: March 17, 2003**

On appeal from the judgment of Justice A. Gans of the Superior Court of Justice dated February 22, 2002, reported at (2002) 16 C.C.E.L. (3d) 97.

ROSENBERG J.A.:

[1] The principal issue in this wrongful dismissal appeal concerns the decision of Gans J. to extend the notice period on the basis of the "*Wallace*" factors (*Wallace v. United Grain Growers Ltd.* (1997), 152 D.L.R. (4th) 1 (S.C.C.)). As a result of provincial legislation creating the new City of Toronto out of the former Municipality of Metropolitan Toronto, the City was required to do a significant amount of restructuring. As a consequence, many managers who wished to obtain employment with the new City were required to compete for a smaller number of jobs. The respondent, who had been the Director of Roads and Sidewalk Operations for the former City of North York, participated in a number of competitions. He was unsuccessful in all of the competitions and his employment was terminated. The City offered him a package that included 80 weeks' pay, benefits and an allowance for job counselling in accordance with a programme that the City had adopted for all management employees who were not

successful in job competitions. The respondent was dissatisfied with the manner in which one of the job competitions was conducted. He applied to be reinstated and sued for wrongful dismissal.

[2] The trial judge dismissed the application for reinstatement but allowed the wrongful dismissal action. He awarded the respondent pay in lieu of notice of 116 weeks, which included an unspecified amount for the *Wallace* factors.

[3] In my view the trial judge erred. On his findings of fact, the case for increasing the period in lieu of notice for *Wallace* factors was not made out. Accordingly, I would allow the appeal with costs, if demanded. The appellant cross-appealed against the trial judge's dismissal of the application for reinstatement. I would dismiss the cross-appeal with costs, if demanded.

THE BACKGROUND FACTS

[4] There is little dispute about the background facts and they may be summarized as follows. Following the amalgamation of the old City of Toronto and the adjoining municipalities geographically comprising the Municipality of Metropolitan Toronto into the new City of Toronto, a process was put into place under which all managerial positions in the new City would be filled by competition. As a result of the amalgamation, some managers in the former municipalities would be terminated from their employment. The City's human resource department prepared guidelines for job competitions at the management level to ensure the fairness of the process. In February 1998, prior to the competitions, City Council adopted a detailed separation package for managers who would lose their employment as a result of the competition process.

[5] The respondent is a professional engineer. He began work with the former City of North York in 1978 as a road maintenance engineer and since then had received a number of promotions. When the new City was created he was the Director of Roads and Sidewalk Operations in North York, managing a budget of $25 million and a staff of 100 employees. After amalgamation he applied for five job competitions and was granted an interview in three of them. The only competition in issue in this case is the one for the five positions as Manager, Road Operations. The respondent was one of 17 persons given interviews for these five positions.

[6] The interview panel consisted of four newly appointed Directors of Transportation Services and a representative of the Human Resources department, Ruth McLellan.

While the four directors knew the respondent because they had worked with him on a Transportation Working Group, only Roberto Stopnicki, the Director of District 3 (the former City of North York) was his direct superior. Moreover, Mr. Stopnicki had only worked with the respondent for 3 months. The upper managers who were most familiar with the respondent's work had retired before the competitions.

[7] At the competition interview, each of the candidates was asked the same questions. The candidates were scored according to how they handled the questions. There were two aspects to the questions: technical, upon which the respondent did very well; and managerial, upon which the respondent did not fare as well. The trial judge found that the interview process itself was fair.

[8] At the conclusion of the respondent's interview, he asked whether his performance appraisals would be reviewed and his references contacted. The respondent testified that Ms. McLellan told him that "all of that would be done". In fact, the respondent's performance appraisals were not considered and his referees were not contacted.

[9] At the conclusion of the interviews, the directors expressed their views about the prospective candidates. Mr. Stopnicki initially considered the respondent to be the top candidate for the District 3 position. Had the respondent obtained the job, Mr. Stopnicki would have been his supervisor. Over the weekend, after speaking to one of his colleagues in another department, Mr. Stopnicki changed his mind and opted for another candidate, Mr. Tenn, for the District 3 position. As it happened, unbeknownst to Mr. Stopnicki, the person he spoke to was Mr. Tenn's referee. Mr. Stopnicki testified that although he had worked with the respondent for three months, he did not rely upon that experience in making his choice.

[10] Another of the candidates who was initially considered for the District 1 (former City of Toronto) position was not available. That position was offered to Rob Orpin even though his scores, especially on the technical questions, were substantially below those of the respondent. The evidence was that the respondent was not considered for the District 1 position, nor any other position.

[11] Ms. McLellan advised the respondent that he had not been successful in the competition. She told him that he was passed over, primarily, because the panel was of the view that his management style was not suited to the needs of a merged city and that his responses to the "management-type" questions were otherwise inappropriate. The respondent was very upset by the results of the competition and met with Mr. Stopnicki, two other senior managers, Ms. McLellan, and the Director of Human Resources. In

December 1998, the respondent was advised that his employment was terminated. He was offered a severance package in accordance with the programme approved by City Council.

THE TRIAL JUDGE'S FACTUAL FINDINGS CONCERNING THE COMPETITION

[12] As I have said, the trial judge found that the interview process itself was fair. He also made the following findings of fact concerning the process.

[13] As to the use of the scoring on the interviews:

> It does not appear to me that the results of the interview alone constituted the entire rationale for the choice of the successful candidate. If that were the case, the results indicate that persons other than Mr. Gismondi should have been chosen not only in preference to him, but over some of the other successful appointees, as well. Put otherwise, the highest interview mark did not guarantee an appointment to the Manager's position. That having been said, I hasten to add that there was nothing in the job posting itself which mandated this result.

[14] Regarding whether the respondent was really in the running for any position other than the District 3 position:

> I am satisfied on the evidence that Mr. Gismondi, notwithstanding the fact that he applied for a Manager's position in each of the districts of the merged City, was, realistically speaking, only in the running for a position in the former City of North York. I am also satisfied that other than Roberto Stopnicki, he had no one in his corner, as it were, and was in no way the preferred candidate of any of the other directors. As I read the responses to the questions posed and the evidence elicited, there is no doubt that his technical and technically-oriented management skills were unquestioned and demonstrative of a proficient individual. However, he did not overwhelm the members of the committee during the interview or during his previous limited work-related encounters with them such that he might be considered for a

> position outside his bailiwick. However, while he may have found the process intimidating or daunting, this was the same process to which all the candidates were subjected, a fact which does make the situation inherently wrong or unfair.

[15] With respect to reasons for why the respondent was not selected for the District 3 position:

> I also accept the evidence of the City's witnesses, perhaps inelegantly put, that Mr. Gismondi was not the preferred candidate even for the position in the former North York because, on balance, he did not appear receptive to the dramatic changes, real or imagined, that they suggested were imminent.

[16] However, the trial judge also found that Mr. Stopnicki opted for Mr. Tenn, in part, because of the comments of his colleague who, as noted, happened to be Mr. Tenn's referree. He also held that the respondent had an expectation that his references and personnel file would be reviewed and that he was "effectively, but not purposely, treated in a manner different from other candidates". That said, the trial judge also found that the difference in treatment did not ultimately affect the result:

> What is ironic is that the conduct complained of was not egregious. It was, simply put, sloppy. Had Mr. Stopnicki done what had been expected of him, I dare say the result would probably not have been any different. The fact of the matter was, although not stated in these terms, Mr. Stopnicki chose a manager with whom he thought he could work and one who was better suited for the new era. It would have been best if he and the H.R. personnel merely stated this as the underlying rationale rather than attempting to justify the choice in an otherwise transparent fashion. More harm was caused than was necessary in an attempt to be diplomatic.

[17] The respondent obtained a new position in September 2000 but at a much lower salary than what he had received from the City.

THE APPLICATION FOR REINSTATEMENT

[18] At trial, the respondent argued that he was entitled to be instated into one of the two positions of Manager, Road Operations that had gone to Mr. Tenn and Mr. Orpin. This claim was based on the theory that he held an office that went beyond the normal employer/employee relationship. The City was required to accord him a special duty of fairness. He also submits that his employment could only be terminated by a special resolution of City Council. The basis for this argument is that when he was appointed to his position of Director of Roads and Sidewalk Operations, the appointment was made by resolution of North York City Council. As a result of the *City of Toronto Act 1997*, S.O. 1997, c. 2 which created the new City of Toronto, he continued to hold that position.

[19] The trial judge found that the respondent was a level 4 employee and could be hired, fired and promoted by the City's Chief Administrative Officer, subject to any regulations adopted by Council. In February 1998, Council adopted by by-law governing the programme that led to the competitive process and the packages for employees who were unsuccessful in the competition. The trial judge held that it was not necessary for there to be a special resolution to terminate the respondent's appointment. In any event, the by-law effectively rescinded any resolution pertaining to the respondent's appointment by the former City of North York. He also held that the respondent was not an office holder entitled to a special duty of fairness.

THE ISSUES

[20] The appeal raises two issues: First, whether the trial judge erred in awarding an amount for *Wallace* factors. Second, whether the trial judge erred in finding that the respondent was entitled to more than the 80 weeks severance offered by the appellant.

[21] The cross-appeal raises the issues of whether the respondent held an office and whether his employment could be terminated without a special resolution of Council.

ANALYSIS

Wallace Factors

[22] The trial judge held that bad faith conduct on the part of the employer justifying increased compensation under *Wallace v. United Grain Growers Ltd.* is not limited to acts of the employer at the moment of dismissal and can include "the employer's conduct pre- and post-termination … and the conduct of the employer in its aftermath". The trial

judge found that the City "lost control of the competition, in failing to apply the City's own fair, open and equitable hiring criteria uniformly across the board". The trial judge found that the conduct of the directors involved in the competition, including Mr. Stopnicki, "was not malevolent, and was probably well intentioned" but he and the other directors failed to follow the settled process. The process "went off the fairness-rails" when the respondent was "effectively, but not purposefully" treated differently from the other candidates. Finally, more harm was caused than necessary "in an attempt to be diplomatic". The trial judge held that the respondent was entitled to receive 116 weeks pay in lieu of notice, which award included an unspecified amount in respect of the *Wallace* factors.

[23] In my view, these factors neither individually nor cumulatively justified increased compensation under *Wallace.* I do not disagree with the trial judge's view that *Wallace* damages are not limited to acts of the employer at the very moment of dismissal and can in appropriate circumstances include "the employer's conduct pre- and post-termination … and the conduct of the employer in its aftermath" but only, in my view, as a component of the manner of dismissal. None of the conduct referred to by the trial judge reached the level of seriousness justifying increased notice under *Wallace*. Further, the trial judge made no findings that the manner in which the respondent was dealt with caused any injury that was entitled to compensation in accordance with *Wallace*.

[24] In *Wallace* at para. 95, Iacobucci J. observed that involuntary loss of one's job "is always a traumatic event" and that when employment is terminated the employee is most vulnerable and in need of protection. Thus, employers are held to an obligation of "good faith and fair dealing in the manner of dismissal." The courts will order compensation for breach of this duty by adding to the length of the notice period. Further, he held at para. 103 that while the law does not recognize injured feelings and emotional upset as compensable losses arising from dismissal itself, where the bad faith conduct or unfair dealing has caused injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem, these injuries "might all be worthy of compensation depending upon the circumstances of the case". These injuries are entitled to compensation even if they have not actually affected the employee's ability to obtain new employment. If the injuries did affect the ability to find employment, as was the case in *Wallace*, the injuries may be worthy of "considerably more compensation" (para. 104).

[25] In *Wallace*, Iacobucci J. did not purport to exhaustively define the nature of the bad faith or unfair dealing that entitled the employee to additional compensation. However, from the facts of *Wallace* and the examples relied upon in that case, it is possible to formulate several general propositions. The kind of conduct identified by Iacobucci J. included the following:

- False allegation that termination was because of inability to perform the job;
- False allegation that termination was for cause;
- Persisting in the allegation of cause up to the time of trial;
- Spreading word through the industry that the employee was terminated for dishonest conduct or having done "something reprehensible";
- Refusal to provide a letter of reference after termination;
- Although the employee's position was eliminated, he was led to believe he would be transferred to a new job and only told of termination after selling his home;
- Firing employee immediately upon return from disability leave (because suffering from major depression);
- Laid-off employee learning, through a newspaper advertisement for his position, that he had been terminated.

[26] Iacobucci J. made it clear at para. 101 that these examples were not intended to be an exhaustive list of types of bad faith or unfair dealing in the manner of dismissal that would be worthy of compensation. However, he also indicated that the examples were "indicative of the type of conduct that ought to merit compensation" and that "not all acts of bad faith or unfair dealing will be equally injurious and thus, the amount by which the notice period is extended will vary".

[27] The decisions from this and other courts since *Wallace* provide further examples of the type of conduct by employers that justifies extending the notice period. In *Noseworthy v. Riverside Pontiac-Buick Ltd.* (1998), 168 D.L.R. (4th) 629 (Ont. C.A.), the employer confronted the plaintiff with a false allegation of forgery and threatened to lay criminal charges if he did not sign a letter of resignation. The circumstances surrounding the termination caused the plaintiff to suffer from traumatic stress disorder.

[28] In *Marshall v. Watson Wyatt & Co.* (2002), 57 O.R. (3d) 813 (C.A.), the employer claimed in its statement of defence that it had just cause to dismiss the plaintiff because of insubordination, inability to deal with subordinates, failure to achieve expected

performance, and generally unprofessional behaviour. The employer maintained these allegations until shortly before the trial began. It also failed to pay certain commissions that it acknowledged were owing to the plaintiff, and delayed sending her the record of employment required for unemployment insurance benefits. This conduct affected the plaintiff's ability to market herself and deprived her of money needed to start her own business. This court upheld a jury award of a three-month extension of the notice period. As Laskin J.A. wrote for the court at para. 41, the employer "practiced the kind of 'hard ball' the Supreme Court of Canada warned against in *Wallace*".

[29] In *Antonacci v. Great Atlantic & Pacific Company of Canada, Ltd.* (2000), 181 D.L.R. (4th) 577 (Ont. C.A.) at para. 5, this court set out the findings of the trial judge. The trial judge found that a longer period of notice was justified because of unfounded allegations made against the plaintiff of "poor performance, harassment, intimidation and threats [that] cast a shadow on him that would make it virtually impossible for him to find another position." The trial judge held that the plaintiff, a 33-year employee was entitled to "the maximum period of notice generally said to be available in wrongful dismissal cases—namely, 24 months". That finding was not in issue in the appeal, which concerned the deductibility of certain benefits.

[30] In *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (C.A.), the employer dismissed a 17½-year employee. The plaintiff had been on disability leave and the employer made harassing telephone calls to her inferring that she was malingering. The employer also wrote a letter to the plaintiff falsely implying that her physician had said she was fit to return to work. When the plaintiff did return to work she was told she would be terminated and that the employer was concerned that her conduct not cause harm to the residents of the geriatric centre. These events led to the plaintiff suffering emotional upset, increased blood pressure, weight gain and return of diabetes symptoms. The trial judge found that the plaintiff suffered a loss of self-esteem and distress on a disabling basis for months after her dismissal. Weiler J.A. speaking for the court upheld an award made by the trial judge for mental suffering. However, she went on to hold that if the plaintiff was not entitled to damages for the independent tort of intentional infliction of mental suffering, she would have been entitled to a longer notice period based on the *Wallace* factors. At para. 68, Weiler J.A. held that the manner of dismissal "caused more than injured feelings and emotional upset; it was humiliating and damaging to the self-esteem of a long-term employee".

[31] In *Kroll v. 949486 Ontario Inc.* (1997), 34 C.C.E.L. (2d) 78 (Gen. Div.) at para. 26, Stach J. held that the plaintiff was entitled to an extended notice period for "bad faith" dismissal. The employer gave the plaintiff a letter of termination including an inadequate offer of severance pay, telling him that if he did not accept the offer he would be

terminated for cause and would receive nothing. The offer included a restrictive covenant that would have prevented him from working elsewhere. The employer knowingly terminated the plaintiff just before his wedding.

[32] Returning to the question of bad faith or unfair dealing, it seems to me that what is common in all of the examples provided in *Wallace* and the other cases I have mentioned above is the presence of something akin to intent, malice, or blatant disregard for the employee. It is conduct that could be characterized as "callous and insensitive treatment" (*Wallace* at para. 88), or as Laskin J.A. said in *Marshall*, "playing hardball" (*Marshall* at para. 41). The conduct found by the trial judge to exist in this case does not in any sense resemble the examples provided in *Wallace*. The trial judge described the directors, including the one he was most critical of, Mr. Stopnicki, as "not malevolent" and "probably well intentioned". He described the manner in which the competition was conducted as "sloppy". This does not reach the kind of conduct worthy of compensation.

[33] I have particular difficulty with the trial judge's view that dealing with the respondent "diplomatically" is a basis for compensation. If the trial judge was thereby attempting to place the conduct into the category of employees who were misled by the employer leading up to the dismissal, this is simply not borne out by the evidence. Ms. McLellan and Mr. Stopnicki told the respondent that he did not get the job because his management style was not suited to the needs of the merged city. The trial judge found as a fact that the respondent was not the preferred candidate because "he did not appear receptive to the dramatic changes, real or imagined" that were imminent, and that Mr. Stopnicki chose a candidate "with whom he could work and one who was better suited for the new era". I do not think there is a significant difference between these findings of fact and what the respondent was told.

[34] If there are grounds for extending the notice period on the basis of *Wallace*, it can therefore only be because Mr. Stopnicki inadvertently consulted with a colleague who turned out to be Mr. Tenn's referee, and because the respondent's expectations about checking references or the personnel file were not met. The trial judge's findings that this conduct was neither malevolent nor egregious but merely sloppy and, in any event, had no bearing on the outcome of the competition are, in my view, fatal to the claim for increased notice.

[35] On appeal, the respondent argued that increased notice was justified because the Directors also ignored their own scoring. Thus, even though the respondent scored substantially higher than Mr. Orpin, he was rejected in favour of Mr. Orpin for the District 1 position. However, the trial judge found that realistically, the respondent was

only in the running for the District 3 position. He also found that there was nothing in the job posting itself that guaranteed that the job would go to the candidate with the highest interview mark. Those findings, in my view, weigh against the proposition that this could constitute a basis for increased notice under *Wallace*.

[36] The respondent also relied upon certain internal memos generated by the Human Resources department in the wake of his complaints about the competition. In one of the memos, the Director of Human Resources summarizes his findings by stating:

> In the end, I think we lost control of this competition. I'm really disappointed in the way this was handled. In effect, the client made decisions that it was not entitled to make, and we did not push back.

[37] The respondent points out that this memo was not disclosed prior to trial and, to the contrary, the City insisted that the Human Resources Department had reviewed the competition and they found that the competition was conducted properly and fairly. The respondent did not call the author of the memo to testify. The City made Ms. McLellan available for cross-examination. The trial judge found that the respondent "appropriately passed on this opportunity". Although the Human Resources personnel were not called, it is possible to discern their concerns. The problem was that Mr. Orpin was offered the job although his scores were lower than the respondents. It seems that Human Resources felt that they should have been involved if the decision was made to offer the job to a candidate with a lower score.

[38] I have essentially already dealt with this aspect of the case. The trial judge had the same material before him and he concluded that the conduct was merely sloppy. He also noted that there was no guarantee that the candidate with the higher score would be offered the job. The conduct is nothing like that referred to in *Wallace*, as where the employer persisted in an unfounded allegation that the employee was dismissed for cause, in particular because of dishonesty.

[39] The trial judge found that no procedural safeguards formed part of the respondent's contract. He also held that, "Whatever format the City had agreed to follow in its selection process could not reasonably be said to constitute an element of the plaintiff's contract of employment, nor was there any consideration for its inclusion in the contract". In the circumstances of this case, the failure of the employer to strictly follow its own procedure neither entitled the respondent to damages for a breach of contract nor

to an extended notice period, absent bad faith conduct as described in *Wallace*, even though the respondent was dismissed as a result of the competition.

The Length of the Notice Period

[40] City Council approved a separation programme for managers who were not retained after the competitive process. Under that programme, the respondent was entitled to a severance payment equal to four weeks per year of employment to a maximum of 96 weeks and other benefits. The respondent's employment was terminated in December 1998. Since he had been employed for 20 years he was offered 80 weeks severance pay. He was also offered a number of other benefits. The trial judge was of the view that the range established by the City was inadequate. He said this:

> I agree with the City's counsel that a court is not equipped to micro manage a municipal restructuring. I am also inclined to the view that a court should be loathe to second guess management when it has made a genuine and *bona fide* attempt to craft and provide a reasonable termination package. *On the other hand, in the instant case, a "one-suit fits all" approach to Mr. Gismondi's termination is not appropriate having regard to the off-cited Bardal criteria*. In my view, the upper end of the severance range should not be capped at 96 weeks. I am of the opinion, under the circumstances of his employment as defined above, that the range should more appropriately be set between 96 and 120 weeks for salary continuation or notice. This range would be equally applicable to all the benefits to which Mr. Gismondi was otherwise entitled, including employer pension contribution [emphasis added].

[41] The *Bardal* criteria referred to in the trial judge's reasons are, of course, the criteria set out in the decision of McRuer C.J.H.C. in *Bardal v. The Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 and especially the passage at p. 145:

> 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 the 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.

[42] This passage has been adopted by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986 and was referred to with approval in *Wallace* at paras. 81 and 82 with the caveat that the *Bardal* criteria are not exhaustive.

[43] Aside from stating that a "one-size suit fits all" approach was not appropriate having regard to the *Bardal* criteria, the trial judge gave no reasons for finding that the scheme established by the City was not appropriate in general or for the respondent, except for the *Wallace* factors. Leaving aside the *Wallace* factors, there is no particular criterion that suggests the range set by the City Council was not proper. The only factor in this case requiring special attention is that because of province-wide downsizing the respondent would find it more difficult to find new employment in the municipal sector. The trial judge did not mention this or any other factor for indicating why the range set by the City was inconsistent with the *Bardal* criteria.

[44] The trial judge's decision as to the length of notice is entitled to deference. See *Minott v. O'Shanter Development Company Ltd.* (1999), 42 O.R. (3d) 321 (C.A.) at 344. Further, as pointed out in that case, even where there is an error in principle, the appellate court should substitute its own figure for that of the trial judge "sparingly if the trial judge's award is within an acceptable range".

[45] The trial judge awarded 116 weeks notice. The selection of this notice period is tainted by his error with respect to the *Wallace* factors. Further, as I have said, the trial judge did not otherwise explain why the 80 weeks notice offered by the City was inconsistent with the *Bardal* factors.

[46] One hundred and sixteen weeks exceeds by a considerable amount the 24 months (104 weeks) salary in lieu of notice in *Wallace* that Iacobucci J. described at para. 109 as "at the high end of the scale". In *Wallace*, in addition to the bad faith factors I have already referred to and which affected the plaintiff's ability to find other employment, the court also took into account that the plaintiff had been induced to leave his previous long-term secure employment with an expectation that he would be employed by the defendant until retirement.

[47] In my view, the trial judge's award is outside the acceptable range. I agree with the trial judge that the courts cannot micro-manage a municipal restructuring. The

respondent did not show that the City's original offer was unreasonable. Judgment should have been granted in accordance with the City's December 8, 1998 offer.

Right to reinstatement

[48] In his cross-appeal, the respondent submits that he held an office to which a special duty of fairness attached aside from or in addition to the general duty of fairness that arises at the time of termination. He submits that the competition was not conducted fairly and he is entitled to be installed in one or the other of the Manager, Road Operations positions.

[49] In a related submission, the respondent submits that he was never properly terminated because there was no special Council resolution. He submits that such a resolution was required because he was appointed by resolution to his former position by the City of North York and under s. 2(7) of the *City of Toronto Act, 1997*, every resolution of an old council is deemed to be a resolution of the council of the new city.

[50] I can briefly deal with this second issue. In January 1998, City Council adopted By-law No. 2-1998 setting out the duties and powers of the Chief Administrative Officer including the power to "appoint, promote, demote, suspend and dismiss, subject to the provisions of any personnel regulations adopted by Council or collective agreements applicable to employees of the City, all employees of the City except the first level of senior management and statutory officials". The respondent was not in the first level of senior management and is not a statutory official. The offer made to the respondent was in accordance with the separation programme adopted by Council in By-Law 40-1998. In my view, this was sufficient authority to terminate the respondent's employment and no other resolution of Council was required.

[51] With respect to the question of whether the respondent held an office to which a special duty of fairness attached, I agree with the comprehensive reasons of the trial judge and need only deal briefly with some of the submissions made by the respondent in the cross-appeal.

[52] To summarize, the trial judge noted that the respondent fell in the ranks of middle management and, absent any statutory or contractual requirements to the contrary, municipal council had an unfettered discretion to dismiss any of its employees. Like many municipal employees, the respondent held a position of trust but this alone was not sufficient to make him an office holder. He was not an officer within the meaning of the *Municipal Act*, R.S.O. 1990, c. M-45.

[53] The respondent relies upon the decision of this court in *Hanis v. Teevan* (1998), 37 C.C.E.L. (2d) 1, which applied *Knight v. Indian Head School Division No. 19* (1990), 69 D.L.R. (4th) 490 (S.C.C.). In *Knight* at p. 502, the court found that the relationship between employer and employee was not a "pure master and servant" but had a "strong 'statutory flavour', so as to be categorized as an office". In *Knight*, the plaintiff held the office of Director of Education, a position created by statute. By contrast, the respondent's position did not have this strong statutory flavour. He was a middle manager in a large municipality. He managed a large number of people and a large budget but he was simply one of many employees and managers delivering municipal services to the public. The municipal resolution appointing the respondent to his position in the City of North York cannot be equated to a statutory position as considered in *Knight*.

[54] The respondent's position is somewhat closer to the plaintiff's position in *Hanis*. The plaintiff in that case was the Director of the Social Science Computing Laboratory at the University of Western Ontario, and an Adjunct Professor without tenure. He had built the laboratory from the ground up, played a leading role in its development and management and applied for and received valuable research grants. He was not governed by any detailed instructions from anyone in a greater position of authority. In those circumstances, this court found that the plaintiff was an office holder in the University, which is created by statute and receives public funds. While, as I have said, the respondent managed a large staff and budget, his employment does not otherwise have the attributes of the plaintiff's employment in *Hanis*. I would dismiss the cross-appeal.

DISPOSITION

[55] Accordingly, I would allow the appeal, set aside the judgment and direct that the City pay the respondent in accordance with its offer in December 8, 1998. I would dismiss the cross-appeal. The appellant should serve and file its submissions on costs within 14 days of the release of these reasons. The respondent will have 14 days to serve and file his response.

Signed: "M. Rosenberg J.A."
"I agree J.J. Carthy J.A."
"I agree Louise Charron J.A."

RELEASED: APRIL 29, 2004