DISMISSAL NOTICE IN EMPLOYMENT CONTRACTS

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What notice is required to terminate a contract of lease and hire of personal services for an indefinite period does not strike one as being an unduly perplexing legal problem. Reasonable notice would appear to be the simple answer. Unfortunately that simple answer has not satisfied the subtle intellect of the legal community which in this area has a penchant for removing "reasonableness" and replacing it with a maze of legal rules into which any set of facts, it is alleged, should be made to fit. This tendency may result in our being placed in the position of the trial lawyer, who, in addressing the court remarked:

> I intend to base my facts on the following conclusions. . .

For the purpose of this article, three schools of thought on the subject will be discussed. They will be known respectively as the "pay period", "rate of pay" and "notice is a question of fact to be determined on the particular circumstances of each case" schools. (The latter will for obvious reasons be known herein as the "reasonable" school.).

The application of the various schools to a particular and admittedly contrived fact situation can give rise to extraordinary results.

For example, John Doe has been a night watchman with the X company for twenty-five years. Management has always been pleased with his performance and he is affectionately referred to by the Board of Directors as "Pop". Unfortunately, aptitude tests recently introduced by a "new look" at the company's personnel policy illustrate beyond doubt that "Pop" is totally unsuited for the job he has been faithfully discharging. "Pop" has been paid weekly at the rate of one dollar and fifty cents per hour.

Now if management adheres to the "pay period" school, Pop will receive one full week's notice or one week's pay in lieu thereof. Management might prefer to adopt the "rate of pay" school and give Pop one hour's notice or one dollar and fifty cents in lieu thereof. By contrast, the "reasonable" school, having regard to all the facts, would probably give Pop at least three months notice or pay in lieu thereof and perhaps a testimonial dinner and a gold watch to boot!

The questions raised by this enquiry are of obvious importance to both employers and employees who do not commit the terms of employment to writing.

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Jurisprudence

Although the controversy over the length of such notice has raged for many years, our review of the jurisprudence will begin with the decision of the Supreme Court of Canada in the case of *Asbestos Corporation Limited v. William A. Cook*.[1] In that case respondent Cook alleged that he had been hired "at an annual salary of $6,000 per annum dating from the 1st of May 1927, payable at $500 a month."[2] On August 29th, 1929, the respondent received notice from the appellant that he was dismissed and was awarded three months pay in lieu of notice. Respondent Cook then took action alleging, *inter alia*, that his contract of employment for one year had been tacitly renewed for a further year and that he was entitled to the balance of salary for the second year.

The Court, per Rinfret, J., found that the contract was for an indeterminate period since the salary was expressed at a rate of "so much" per year. On this point reference was made to the wording of Article 1642 C.C. where similar language is used in connection with leases of houses for indeterminate periods.

On commenting on the contract of lease and hire of personal services for an indeterminate length of time, the learned judge remarked:[3]

> La seule conséquence d'un contrat de ce genre est que l'une des parties peut s'en libérer en donnant un avis de congé raisonnable.

Again the learned judge remarked:[4]

> Dans un contrat de ce genre, la loi le dit et le bon sens le veut, les parties ne sont pas liées au delà de leur volonté; et il leur est libre d'y mettre fin, suivant l'expression de Laurent, "en donnant congé à l'autre, et le congé implique un certain délai" . . . Si l'une des parties trouve le délai insuffisant, il reste au tribunal à apprécier les circonstances et à accorder des dommages intérêts, s'il en arrive à la conclusion qu'en effet le délai n'a pas été suffisant. Et, sur ce point, l'article 1657 du Code pose une règle qui peut servir de guide.

As well as finding that Article 1657 C.C. could serve as a guide in determining what notice was reasonable, the Court also found that Article 1642 C.C. had no application in determining the duration of a contract of lease and hire of personal services.[5] This judgment built a solid foundation for the future of the reasonable school.

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[1][1933] S.C.R. 86.

[2]*Ibid.*, at page 87.

[3]*Ibid.*, at page 91.

[4]*Ibid.*, at pages 99 and 100.

[5]*Ibid.*, at page 92. The Articles read as follows:

1657. When the term of a lease is uncertain, or the lease is verbal, or presumed as provided in article 1608, neither of the parties can terminate it without giving notice to the other, with a delay of three months, if the rent be payable at terms of three or more months; if the rent be payable at terms of less than three months, the delay is to be regulated according to article 1642. The whole nevertheless subject to that article and to article 1608 and 1653.

1642. The lease or hire of a house or part of a house, when no time is specified for its duration, is held to be annual terminating on the first day of May of each year, when the rent is at so much a year;

For a month, when it is at so much a month;

For a day, when it is at so much a day.

If the rate of the rent for a certain time be not shown, the duration of the lease is regulated by the usage of the place.

Three years later the Supreme Court of Canada considered a similar case in *Stewart v. Hanover Fire Insurance Co.*[6]

As a result of certain admissions on the part of both parties the salient facts were stated by the Court as follows:[7]

1. That the contract between the parties was originally for one year;
2. That it was tacitly renewed from year to year;
3. That the notice of termination was given on October 21, 1932, to terminate the contract with the Appellant on December 1, 1932; and
4. That the whole case centres around the sufficiency of the notice.

At the outset, the Court found that the *Asbestos* case had no application because in the case before the Court there existed no dispute with regard to the length of the original contract. The Court also found that because the original contract had been tacitly renewed, it could only be terminated upon either party giving a notice "within the delay required by law".[8] After considering the remarks of Rinfret, J. in the *Asbestos* case, the Court invoked Article 1657 C.C. as a guide in calculating the delay required for giving such notice. The Court then pointed out that although the *Asbestos* case had decided that Article 1642 C.C. did not apply for the purpose of determining *the duration* of a contract of lease and hire of personal services, that decision had not found that Article 1642 C.C. could not be applied to leases of personal services in so far as it is referred to in Article 1657 C.C., for the purpose of computing *the length of notice* required to terminate a contract prolonged by tacit renewal. The Court said:[9]

> We did not decide in the *Asbestos* case that Article 1642 C.C. could not be applied. . .

This statement cannot be properly cited as authority for applying Article 1642 C.C. in the manner suggested because it was not necessary to go beyond Article 1657 C.C. to decide the issue before their Lordships. As stated by the Earl of Halsbury L.C. in *Quinn v. Leathem*,[10] a case referred to by the Supreme Court in the *Stewart* case:

> . . . a case is only an authority for what is actually decided.

What has proved to be of lasting significance from the *Stewart* decision was an unnecessary reference by the Court to the following statement from Planiol and Ripert:

> D'une manière générale la durée du délai est en rapport avec les époques de paiement du salaire. . .

[6][1936] S.C.R. 177.

[7]*Ibid.*, at page 181.

[8]*Ibid.*, at page 185.

[9]*Ibid.*, at page 187.

[10][1901] A.C. 495, at 506.

This observation apparently kindled the spirit of the "pay period" school while the *obiter* reference to Article 1642 C.C. referred to above had a like effect upon the "rate of pay" school. At the same time the Court said nothing damaging to the position of the "reasonable" school, and so at best, the decision must be recognized as a draw for all protagonists.

Shortly after the above decision, the Court of King's Bench of the Province of Quebec came down firmly on the side of the "rate of pay" philosophy in *Dorion v. Commissaires du Havre de Québec.*[11] The appellant in that case was employed as a day labourer and upon being dismissed from the service of the Harbour Board he was paid in full for eight days' work done plus an additional day's salary in lieu of notice. The appellant maintained that he was entitled to the balance of his salary for the current month plus an additional month on the ground that he had been employed on a monthly basis. The Court decided that although the appellant was employed on a monthly basis, he was paid at the rate of $5.50½ per day and that consequently the application of Articles 1657 and 1642 of the Civil Code entitled him to only one day's notice. It is interesting that the judgment contains no reference to the preceding jurisprudence.

Paradoxically, the same Court some twelve years later in the case of *Concrete Column Clamps v. Pépin*[12] found that the notice required is related to the pay period and that a truck driver whose salary was paid weekly but calculated at an hourly rate was entitled to salary earned (including overtime) plus his salary for one week after notice given. No mention was made of the same Court's decision in the *Dorion* case and the Court disposed of the appeal in a cursory manner. Specific reference was made by Mr. Justice Bertrand to the principle enunciated by Planiol and Ripert as found in the *Stewart* decision, *i.e.* that the length of notice should correspond to the period of payment. It is on this latter principle that the decision apparently turns.

The latter decision was criticized at length on behalf of the "rate of pay" school by Walter S. Johnson. His comment merits consideration at this stage of our review of the jurisprudence.[13]

Johnson's criticism derives principally from two aspects of the decision. Firstly, he maintains that the Court ignored certain fundamental problems of employer-employee relations in the building trades where the hourly rate and method of employment results from custom and usage and is now enforced by the Collective Labour Agreement Act.[14] In Johnson's view, the fact of receiving pay weekly, as did the appellant Pépin, has nothing to do with the juridical relationship between the parties.

> How the employee is satisfied to receive his pay has no bearing to change the essential conditions of his employment.[15]

[11](1937) 62 B.R. 92.

[12][1949] B.R. 838.

[13](1950) 28 Can. B. Rev. 465.

[14]*Ibid.*, at page 468; R.S.Q. 1941, c. 163.

[15]*Supra*, at page 469.

Secondly, Johnson dissents from the use of Planiol and Ripert as set forth in the *Stewart* decision and invoked in part by Bertrand, J. and states:

> I suggest that our Code permits and directs a different method for determining the delay for notice.[16]

He then goes on to point out that Articles 1657 and 1642 of the Civil Code provide a formula for determining the length of notice required to terminate a contract of lease and hire of services. Consequently, if a salary is payable at terms or intervals of less than three months:

> . . . we are directed to go to article 1642 and ascertain the rate and fix the delay for notice exactly as we would fix the duration of the uncertain lease.
>
> Hence, if the rate per month is $50, the lease is deemed to be for a month. Consequently, the notice must be a month's notice.
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> If the rate is $5.00 a day, the lease is deemed to be for a day. There must be notice of a day.
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> If the rate is 65 cents an hour, the lease is deemed to be for an hour. There must be an hour's notice.
>
> And what is true of the lease of a house, is true of a lease of work. The notice is exactly the same.
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> So, in *Concrete Column Clamps v. Pépin*, the salary or rent was paid weekly—'at terms of one week'. That was, under article 1657, 'at terms less than three months'. We are ordered back in that case to Article 1642. What is the rate of pay? It is 65 cents an hour. The legal delay for notice is one hour.[17]

It was Johnson's opinion that we have in our Code "a definite rule, for all cases", whereas "The French have only a suggestion, 'd'une manière générale', that the delay for notice may be gathered by looking at the time fixed for payment."[18]

The criticism Johnson offered was apparently ignored because the pay period method for determining proper notice was subsequently employed in the case of *Thibault v. Cie. d'Autobus de L'Abitibi Ltée.*[19] In that case the plaintiff received a salary of $190.00 per month payable on the 15th and 30th of each month. He received notice of dismissal on February 14, 1950 as of February 28th, 1950. Suit was brought for an additional $190.00 representing salary for the month of March on the ground that the plaintiff was entitled to a month's notice. The Court dismissed the plaintiff's claim on the ground that the notice required ought to be determined by "la période du paiement".[20] The decision being of the Magistrate's Court cannot be considered authoritative for superior tribunals, but the judgment is useful because it relies heavily on previous jurisprudence and illustrates the definite leaning to the pay period school so firmly established by the decision in the *Concrete Column Clamps* case.

Mr. Justice Batshaw added further support to the pay period doctrine in the case of *Leclerc v. Cartier Construction Ltd.*[21]. The plaintiff was a construction superintendent hired for an indeterminate period at the rate of $600 per month

[16] *Supra*, at page 471.

[17] *Supra*, at page 473.

[18] *Supra*, at page 477.

[19] [1952] R.L. 371.

[20] *Ibid.*, at page 378.

[21] [1952] S.C. 103.

and paid fortnightly. It was argued *inter alia* that he was entitled to one month's notice or the sum of $600 in lieu thereof. On this particular question Mr. Justice Batshaw found that the cases of *Asbestos Corp. v. Cook* and *Stewart v. Hanover Fire Ins. Co.* had clarified to a "considerable extent" what had formerly given rise to "considerable controversy".[22] He also found that in the *Stewart* case the Supreme Court had accepted the doctrine of Planiol and Ripert previously referred to. Consequently he rejected the "rate of pay" criterion so carefully enshrined by Walter Johnson and determined that the period of payment criterion was to prevail. In so doing the Court ignored the arguments of Johnson as well as the *Dorion v. Commissaires du Havre de Québec* decision.

The Magistrate's Court rendered another decision on the same question in *Monette v. Sambo Curb Service Inc.*[23] The decision is of interest because it was based on Article 1668 of the Civil Code and thereby added a new twist to the prevailing jurisprudence. The plaintiff was a night manager for the defendant being paid at the rate of $70.00 per week, payable weekly. The Court relied on Article 1668 of the Civil Code to establish that one week's pay in lieu of notice was required to terminate the contract.

Article 1668 C.C. reads in part as follows:

> In case of a domestic, servant, journeyman or labourer hired by the week, the month or the year, but for an indefinite period of time, his contract may be terminated by notice given by one of the parties to the other, of a week, if the contract is by the week; of two weeks if the contract is by the month; of a month if the contract is by the year.[24]

The above paragraph was added to our Civil Code in 1949 and is meant to apply only to the classes of employees there enumerated. Faribault says:

> Toutefois, comme cet alinéa de notre article ne concerne que certaines classes de salariés, les règles posées jusque-là par nos tribunaux quant au délai de l'avis de congé doivent continuer à recevoir leur application dans tous les autres cas, au moins jusqu'à nouvel ordre, car je crois bien qu'avant longtemps, cette nouvelle règle de l'Article 1668 sera appliquée à tous les avis requis pour mettre fin à un louage de services d'une durée indéterminée.[25]

A night manager does not fall within the enumeration found in the Article even through invoking the *eiusdem generis* rule of construction. In any event the plaintiff's position was not prejudiced since the same result would have been obtained had the pay period doctrine been relied upon.

The Superior Court again tried the question in *MacKean v. Preston et al.*[26] The facts are too complicated to recite here but suffice it to say that the plaintiff was engaged at a salary of $100 per week and that the defendants were prepared to give her one week's pay in lieu of notice.

> Plaintiff's contention was that she was entitled to a reasonable notice of termination of the contract, that notice of one week was not reasonable, and that a reasonable notice was, at least, a couple of months.[27]

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[22]Per Batshaw, J., *supra*, at page 105.

[23][1955] R.L. 284.

[24]13 Geo. VI, S.C. 1949, c. 69.

[25]L. Faribault, *Traité de Droit Civil du Québec*, XII, page 321.

[26][1958] C.S. 355.

[27]*Ibid.*, page 357.

The Court found that the terms of payment of the plaintiff's salary were by the week and that she was therefore entitled to one week's notice of termination. In so finding, the pay period criterion was accepted and the "reasonable" school was categorically rejected. Mr. Justice Collins observed in conclusion:

> The Court cannot accede to the suggestion of plaintiff that it should determine what is reasonable in the circumstances of this case because the jurisprudence establishes to the satisfaction of the Court that notice required in cases of this kind is only one clear week. That can be the only reasonable rule which the Court can apply.[28]

At the time of this decision of Mr. Justice Collins, it was evident that the courts of this province had adopted the pay period criterion as an expedient and, in most instances, fair means of disposing of cases of this nature. This reasoning prevailed despite the fact that the statement from Planiol and Ripert, in which the reasoning had its origin, contained the very definite qualification, "d'une manière générale. . ."

However, in 1959 an interesting and equitable departure was made from the established pattern of jurisprudence in the case of *Dubois v. J. René Ouimet Ltée*.[29] The plaintiff had been engaged by the defendant as a sales manager in March 1955, at a salary of $8500 per annum. It was agreed that each week the plaintiff would receive 1/52 of $8500. To take this position, the plaintiff had left an almost equally good job. He actually began work on April 11, 1955 and was notified on October 29th of the same year that his services were no longer required and he was paid the equivalent of five week's salary. According to the prevailing jurisprudence, he was well treated since he was only entitled to one week's notice according to the pay period doctrine.

Mr. Justice Caron considered the *Asbestos* case and the facts before him and decided that the parties had not concluded a contract for a year not for a week. With respect to the latter point he said:

> Ni la compagnie ni le demandeur n'avaient l'intention de faire un contrat auquel l'une des parties aurait pu mettre fin à une semaine d'avis.[30]

The Court found evidence of conscientious work on the part of the plaintiff and decided that the dismissal was without cause. The Court also found that it was a contract of employment for an indeterminate period. The learned judge also seemed influenced by the fact that a person hired at a salary as large as that earned by the plaintiff would not find a similar position within a week. Consequently, the compensation granted by the defendant, although equivalent to five weeks' salary, was found to be insufficient and the plaintiff was awarded three months' salary by the Court.

This decision by Mr. Justice Caron represents a hallmark in the furtherance of the "reasonable" doctrine but is clearly at odds with the prevailing jurisprudence which the judgment totally ignored. In summary, the learned judge

[28] *Ibid.*, page 359.

[29] [1959] S.C. 573.

[30] *Ibid.*, at page 576.

apparently considered that the delay required for notice to put an end to the contract is left by law to the discretion of the Court which should base its decision on the following factors:

(i) The provisions of Article 1657 C.C.;

(ii) The nature of the work;

(iii) The importance of the work;

(iv) The difficulty of finding employment elsewhere of a similar nature;

(v) The intention of the parties in making the contract, *e.g.* was it the intention of the contracting parties that either party would be able to put an end to the contract upon the giving of one week's notice?

But for a passing reference to the Magistrate's Court decision in *Beaumont v. Weisor*,[31] the *Dubois* decision concludes our review of the relevant Quebec jurisprudence. The *Beaumont* decision is of interest only because the Court extended the enumeration of Article 1688 C.C. to a "commis de magasin", thus threatening to bring about the prognosis of the prophetic Faribault,[32] although he expressly excluded "commis de magasin" from the application of the Article.[33]

Our review of the relevant jurisprudence should include a note on the Ontario Supreme Court decision in *Lazarowicz v. Orenda Engines Ltd.*[34]

The case concerned the dismissal of a professional engineer, and it is of importance to us because the considerations which influenced the Court might obtain in this Province should the reasonable view of the *Dubois* decision be followed. In addition, the case is of great practical importance to companies employing personnel in both Provinces.

The facts of the case are set out at length in the judgment of the trial judge and for the purpose of this summary the reader need only know that the plaintiff was a qualified engineer performing work of considerable importance in that capacity with the defendant company. He had been in the employ of the defendant for just over three years when the government cancelled a substantial contract with the defendant. As a result, the defendant was obliged to lay off a large portion of its engineering forces, including the plaintiff.

Upon being notified of his dismissal, the plaintiff received, *inter alia*, a week's salary in lieu of notice. The defendant justified this treatment on the ground that the plaintiff was an ordinary weekly employee and was thus entitled to that amount and no more.

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[31][1961] R.L. 551.

[32]*Supra.*

[33]Faribault, *op. cit.*, p. 321.

[34][1960] O.R. 202; confirmed in appeal: (1961) 26 D.L.R. 433.

The review of the applicable jurisprudence by Mr. Justice Spence, the trial judge, indicates that in Ontario the period of payment does indeed create a rebuttable presumption as to the duration of the employment contract and does therefore determine the length of notice required for termination. It also appears to be a presumption that is easily rebutted by surrounding circumstances as in the case of the plaintiff Lazarowicz.

The learned judge found much evidence of the plaintiff's ability and importance to the defendant. The fact that he was treated in a mechanical and administrative way in the same manner as the defendant's unionized personnel and paid by the week could not bring the learned judge to the view that the plaintiff was a weekly employee. He concluded that the circumstances of the plaintiff's employment[35]

> . . . have rebutted any presumption which arises from the payment of weekly wages and I hold that the plaintiff's contract with the defendant corporation was for an indefinite hiring.

Now it is of interest that upon finding the plaintiff to be employed for an indefinite period, the jurisprudence cited by the Court seemed unanimous in holding that such a contract can only be terminated by "reasonable" notice which the learned judge declared to be three months.

This reasoning is in marked contrast with the preponderance of Quebec authority which, after acknowledging that a contract is for an indefinite period, determines that the notice required is regulated by the pay period. The Ontario law as set forth in the *Lazarowicz* decision is more logical, *i.e.* the notice is in accordance with the pay period because of a rebuttable presumption thereby created as to the duration of the contract. If the contract is for an indefinite period, then reasonable notice must be given. If we are to conclude that reasonable notice should be given in this province when a person is hired for an indefinite period, then attention must be paid to Ontario decisions of this kind because what is reasonable notice in Ontario should be equally reasonable notice in Quebec.

Conclusion

Returning to Quebec Law, it would seem that the weight of authority lies with the *Concrete Column Clamps* case and the subsequent decisions to which it gave rise. The courts have thereby adopted the "pay period" doctrine to the total exclusion of the "rate of pay" criterion supported by the *Dorion* decision and more fully expounded by Walter Johnson.

Although many good points were made by Johnson in attacking the judgment in the *Concrete Column Clamps* case, his arguments in support of the "rate of pay" criterion were unconvincing and sometimes inconsistent. For example, he upbraids the Court for not giving sufficient consideration to the peculiar exigencies of the building trades and then proposes the totally inflexible "rate

[35] *Ibid.*, at page 210.

of pay" formula for *all* trades and professions. Johnson's views appear biased in favour of the building trades to which the "rate of pay" doctrine may be suited. Although his rejection of the French doctrine of Planiol and Ripert may be well founded, his statement that

> . . . our Code permits and directs a different method for determining the delay for notice.[36]

is open to question. Some of the absurd results obtainable by applying the "rate of pay" criterion indicate that the absence of such an express direction is not without good reason.

Similarly, the stubborn adherence to the pay period doctrine as expounded in the *Concrete Column Clamps* case is equally fallacious and is capable of working equal hardship. The courts should remember that the comment of Planiol and Ripert in the *Stewart v. Hanover Fire Insurance Co.* read as follows:

> D'une manière générale la durée du délai est en rapport avec les époques de paiement du salaire. . .

This statement does not imply that the suggested rule is to receive rigorous application, yet such is the inference evidently drawn by our tribunals. In fact, the qualification of "d'une manière générale. . ." renders the French position as stated by Planiol and Ripert analagous to the rebuttable presumption arising from the pay period which apparently exists in Ontario.[37]

However, just as the Civil Code does not direct the use of the rate of pay criterion, neither does it direct nor even suggest the use of the pay period criterion.

The better view seems to be that reasonable notice must be given in all cases not expressly covered by Article 1668 C.C. This conclusion is in complete harmony with the Supreme Court of Canada's reasoning in both the *Asbestos* and *Stewart* decisions. As Rinfret, J. stated in the former case when considering contracts of employment for an indeterminate period:

> La seule conséquence d'un contrat de ce genre est que l'une des parties peut s'en libérer *en donnant un avis de congé raisonnable.*[38]

Further, the learned judge noted:

> Si l'une des parties trouve le délai insuffisant, il reste au tribunal à apprécier les circonstances et à accorder des dommages-intérêts, s'il en arrive à la conclusion qu'en effet le délai n'a pas été suffisant. Et, sur ce point, l'Article 1657 du Code pose une règle qui peut servir de guide.

There is no ambiguity in those remarks. Article 1657 C.C. is a rule which can serve as a guide in determining what is reasonable. The correct interpretation was given to Rinfret, J.'s observation by Mr. Justice Caron in the *Dubois* decision.[39] Instead of blazing new trails, Mr. Justice Caron has merely returned to the one marked off thirty years ago by our Supreme Court.

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[36]Johnson, *op. cit.*, at page 471.

[37]*Supra.*

[38]*Supra*, at page 91; italics added.

[39]*Supra.*

The concept of "reasonableness" is hardly foreign to the legal system of this province, where each citizen's civil responsibility is measured by the actions of the reasonable man.

The question remains as to what factors the courts should take into consideration in determining the reasonableness of the delay for notice or remuneration in lieu thereof. Again reference should be made to the useful decision of Caron, J. in the *Dubois* case from which the following criteria, already enumerated herein, can be deduced:

(i) The provisions of Article 1657 C.C.;

(ii) The nature of the work;

(iii) The importance of the work;

(iv) The difficulty of finding employment elsewhere of a similar nature;

(v) The intention of the parties in making the contract.

As found by Rinfret, J., there can be no objection in using Article 1657 C.C. and for that matter even Article 1642 C.C. as guides in deciding what constitutes reasonable notice so long as it is the reasonableness of the notice in the particular circumstances and not the blind application of those articles that is to govern. The guide must not become the rule as it did in the case of *MacKean v. Preston.*[40]

The nature of the work is of great importance in considering the reasonableness of the notice. For example, the decision in the *Lazarowicz* case placed emphasis on the nature and importance of the actual work performed by the plaintiff. This is, however, only one aspect of the "nature of the work" criterion. Consideration must also be given to the stability of the industry in which the employer is engaged. In unstable industries there is a risk of unemployment of which each employee is or should be aware and for which he is usually compensated by a greater salary than employees doing comparable work in more stable industries. For example, an engineer in the aircraft or construction industries who is well paid partly because of the ever present risk of unemployment does not deserve the same consideration with respect to notice as an engineer employed by a more stable industry such as a public utility company where the normal expectation would be for a more secure tenure of employment. This factor does not appear to have been considered by the Court in the *Lazarowicz* case.

The importance of the work performed by an employee in relation to the overall operation of the employer is also of significance. The measure of the importance of the work is frequently the responsibility carried by the employee.

The difficulty of finding employment of a similar nature elsewhere is sometimes a useful criterion in determining what is reasonable, but in many in-

[40] *Supra.*

stances, particularly when senior personnel are discharged and comparable positions are scarce, it should be applied by the courts with caution.

The intention of the parties in making the contract is a criterion of dubious merit because intention is hard to determine. Moreover, in applying the criterion, the courts may find an intention where none in fact existed because the question of notice was outside the contemplation of the parties at the time of contracting.

Because of the apparent uncertainty existing in the present state of the law, it would be prudent for employers and employees to execute contracts of employment providing for notice of termination. This would, of course, put an end to the matter. Otherwise, until the Supreme Court of Canada has again spoken on the subject, employers and employees must gamble on one of the three schools outlined above. The odds are that "reasonable" notice will emerge as the simple answer to an equally simple problem.

CASE and COMMENT