NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1294-21

PAUL M. CARELLI,

Plaintiff-Respondent/
Cross-Appellant,

APPROVED FOR PUBLICATION

November 10, 2022

APPELLATE DIVISION

v.

BOROUGH OF CALDWELL
and JOHN KELLY, Mayor,

Defendants-Appellants/
Cross-Respondents.

Argued March 15, 2022 – Decided November 10, 2022

Before Judges Fisher, DeAlmeida and Smith.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-5938-19.

Brian M. Block argued the cause for appellants/cross-respondents (Mandelbaum Barrett PC, attorneys; Brian M. Block and Vincent J. Nuzzi, of counsel and on the briefs).

Beth C. Rogers argued the cause for respondent/cross-appellant (Beth C. Rogers, LLC).

The opinion of the court was delivered by

FISHER, P.J.A.D.

We granted leave to appeal to consider the denial of cross-motions for summary judgment – based on stipulated facts – about whether plaintiff Paul M. Carelli was entitled to enforcement of a contractual provision, upon the early termination of his four-year term as the Borough of Caldwell's administrator, that purports to allow him a severance package "equal to one month salary for each year of service." Because we conclude that this contractual provision was inconsistent with the Legislature's declaration – that limits a municipal administrator's severance to "any unpaid balance of his [or her] salary and his [or her] salary for the next 3 calendar months," N.J.S.A. 40A:9-138 – we reverse and remand for the entry of summary judgment dismissing Carelli's complaint.

Carelli was duly appointed in 2010 to a four-year term as Caldwell's administrator; he was hired for an additional four-year term in 2014 and, in August 2018, the governing body approved his rehiring for another four years. To effect that decision, the governing body adopted a resolution that authorized "[the] Borough [to] enter into an agreement with . . . Carelli which shall be as set forth herein"[1] and "authorized and directed" the "Mayor and Borough Clerk . . . to execute an [e]mployment [a]greement" with Carelli. The content of the employment agreement was not specifically approved in the resolution.

[1] No such agreement was "set forth [t]herein."

Carelli drafted an employment agreement, which included a provision unlike any other in his earlier contracts. That new provision allowed Carelli a severance package based on one-month salary for each service year.[2] Carelli spoke about the contract he drafted with Mayor Ann Dassing, who expressed a belief that the severance provision "was deserved" but that Carelli should speak with the borough attorney. During a "ten-minute[]" "interaction" with Carelli, Gregory Mascera, Esq., who was then the borough attorney, struck one phrase, replaced it with another, and returned the document to Carelli.[3] Carelli revised the document by incorporating Mascera's handwritten suggestions. The document was signed by Carelli, Dassing and the borough deputy clerk on September 18, 2018, and placed in the borough clerk's file.

A few months later, Mayor Dassing was defeated at the polls. During the transition period, the mayor-elect, defendant John Kelley, asked Carelli to provide him with all existing employment agreements, and, among others, Carelli provided his 2018 employment agreement.

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[2] Carelli's draft included a paragraph 11, which was labeled "Termination" and stated: "[i]n addition to N.J.S.A. 40A:9-138, Carelli shall be paid a severance package equal to one month salary for each year of service."

[3] Mascera struck "[i]n addition to N.J.S.A. 40A:9-138," and handwrote in the margin: "[d]espite anything contained in N.J.S.A. 40A:9-1 et seq. and herein to the contrary."

In January 2019, the town council adopted a resolution removing Carelli as administrator. A few weeks after that, Caldwell paid Carelli the three months' salary required by N.J.S.A. 40A:9-138[4] but refused to provide Carelli with any further compensation ostensibly required by the contract provision.

Carelli then commenced this action, alleging Caldwell's breach of his 2018 employment agreement and seeking an award of $101,606.14 based on his 8.72 years of employment with Caldwell. The parties stipulated all relevant facts, but the trial judge denied the parties' cross-motions for summary judgment. We granted both parties' motions for leave to appeal and now reverse the denial of Caldwell's summary judgment motion because N.J.S.A. 40A:9-138 imposes a limit on the amount of severance that a municipality may lawfully pay a terminated administrator.

At times, courts are required to consider which of more than one plausible statutory interpretation the Legislature intended to enact. But here, we find no alternate plausible interpretation. We are satisfied there is no ambiguity in N.J.S.A. 40A:9-138 and agree with Caldwell that the statute creates both a floor and a ceiling on the amount of severance available to a municipal administrator

[4] A Caldwell ordinance states in language similar to the statute that severance is limited to three-months' pay.

who has been terminated prior to the end of a contractual term. The statute clearly and plainly enacts the salutary intent of protecting an outgoing administrator from the immediate impact of unemployment while also protecting the municipality from the type of overreaching by an outgoing administration that this case exemplifies.

In attempting to skirt the statute's plain meaning, Carelli argues that N.J.S.A. 40A:9-138 does not address severance packages, as evidenced by the fact that the word "severance" does not appear in the statute, and that, as a general matter "[s]everance is not salary." This argument is disingenuous at best. The Supreme Court has recognized that severance pay is "in essence a form of compensation" designed to address the impact of an early termination of the employment relationship, Adams v. Jersey Cent. Power & Light Co., 21 N.J. 8, 13-14 (1956), that is ordinarily based on a formula tied to the employee's salary. In short, "severance" is a form of compensation based on the terminated person's salary: future salary that would have been paid but for the premature termination. That is the subject N.J.S.A. 40A:9-138 was designed to cover notwithstanding its failure to use the word "severance."

And so, we need not apply any of the familiar tenets of statutory interpretation because we find no ambiguity in N.J.S.A. 40A:9-138. In that

circumstance, we are not free to "rewrite a plainly-written enactment of the Legislature" nor are we entitled to "presume that the Legislature intended something other than that expressed by way of the [statute's] plain language." O'Connell v. State, 171 N.J. 484, 488 (2002). "Our duty is to construe and apply the statute as enacted." In re Closing of Jamesburg High Sch., 83 N.J. 540, 548 (1980); see also State v. Lenihan, 219 N.J. 251, 262 (2014); Ryan v. Renny, 203 N.J. 37, 54 (2010); DiProspero v. Penn, 183 N.J. 477, 492 (2005). N.J.S.A. 40A:9-138 plainly states that, when adopting a resolution that immediately removes an administrator, the municipality "shall" pay the administrator any unpaid salary and the administrator's salary "for the next 3 calendar months" following the removing resolution's adoption. N.J.S.A. 40A:9-138. That provision preempts the ability of a municipality to provide by contract some more lucrative severance package for an outgoing administrator.

Indeed, although the Legislature's failure to pass an amending law is certainly not the most persuasive extrinsic evidence about legislative intent, see State v. O'Donnell, 471 N.J. Super. 360, 375 (App. Div. 2022), certif. granted, __ N.J. __ (2022); see also Amerada Hess Corp. v. Dir., Div. of Tax'n, 107 N.J. 307, 322 (1987), we note that in 1996 – twenty-five years after N.J.S.A. 40A:9-138 was enacted – legislation was introduced to amend the statute to entitle

dismissed administrators to any unpaid salary "and his salary for a minimum of the next 3 calendar months following adoption of the resolution." See A. 1224 (1996) (emphasis added); S. 2163 (1997). The bill's sponsors explained that this amendment would allow a municipality to "set the amount of severance pay for a municipal administrator at a level greater than the three months' pay currently permitted." S. Cmty. Affairs Comm. Statement to A. 1224 (June 5, 1997) (emphasis added). That bill was never enacted but this attempt to amend N.J.S.A. 40A:9-138 suggests the Legislature had not previously intended the statute to be a mere suggestion about what a municipality could pay a dismissed administrator.

Because we conclude that N.J.S.A. 40A:9-138 limits the severance pay allowable to a dismissed municipal administrator to three-months' salary, we need not consider Caldwell's argument that the employment agreement's severance provision was contrary to a municipal ordinance, which imposes the same limit, or its argument that the severance provision was the product of ultra vires actions.

The order denying Caldwell's motion for summary judgment is reversed and the matter remanded to the trial court for entry of an order dismissing Carelli's complaint.[5]

[5] We are mindful that Carelli's complaint not only alleged a breach of contract but also a breach of the implied covenant of good faith and fair dealing, ratification, promissory estoppel, and actual and apparent authority. To the extent any of these other claims may have stated a claim upon which relief may be granted, we view them as derivative and dependent on the success of the breach of contract claim and, therefore, mandate their dismissal as well.