

**Ask  
an  
Expert**  
with **Madeleine  
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**What should we do if a worker  
rejects 'reasonable' severance?**

**Question:** A worker we fired without cause is refusing to accept the severance package we offered. He has been with the company for about eight years, and we're offering him six months' pay plus a good reference and assistance in finding another job. We're even letting him keep the company laptop and Internet access until the end of the notice period to assist him in his job search. But he's demanding one years' pay or else he'll sue for wrongful dismissal. Should we cave and offer the extra notice? Or hold our ground? What might happen if it goes to trial? We think the offer is very reasonable.

**Answer:** It is common for an employer to become frustrated when an employee rejects what the employer considers to be a fair offer on termination.

As a general rule, an offer is made because an employer that does not allege cause must provide the terminated employee with "reasonable notice" of the termination, or pay in lieu thereof.

"Reasonable notice" cannot be made

by reference to a formula. It is based on a number of factors including: the age of the employee, the length of service, the position (responsibilities) held with the employer, and the likelihood that other employment will be found. What is "reasonable" can also be defined as a determination of what the employee requires, in terms of length of time and in resources, to find suitable and comparable alternate employment.

Given these relatively broad and flexible factors, it is not surprising that what may seem "reasonable" to one person may not to another. Depending upon the answers to the factors described in the preceding paragraph, six months' notice may or may not be reasonable for an eight year employee. This gives rise to the common frustration: Should the employer offer the employee more than what the employer believes is reasonable, or allow the employee to bring a claim for wrongful dismissal?

Practically speaking, the answer depends on whether:

- the employer believes that the offer is fair and "reasonable";
- the employer believes that the employee's expectations are "unreasonable";
- the employer is willing to bear the expense of litigation;
- the employee is willing to bear the expense of litigation; and
- the employer believes that there is a legitimate workplace reason to take a firm stand on this particular case.

Should litigation commence, the parties must be prepared for risk and the potential for considerable expense.

Until the early 1990s, the doctrine of "ball park justice" existed. Ball park justice allowed a court to decline to award an employee wrongful dismissal damages if the employer offered notice of termination that fell within the range

of the employee's entitlements. Ball park justice is no longer applied by the courts. A court will determine the reasonableness of notice and will award an employee damages based on that determination, not whether the employer's offer was close. The result is that the risk to an employer is greater than in the past. The test is whether the employer's determination of reasonable is correct. In the past it was whether the determination was close enough.

As such, regardless whether the employer's offer was fair, if the employee can persuade a court his estimate of reasonable notice is accurate, the employee may succeed on the claim. The employer may also be ordered to indemnify the employee for a portion of his legal costs, as a result of his success. On the other hand, should the employer succeed in court, the converse may also apply.

Notably, neither the employer nor the employee will recover all of its legal costs, even if entirely successful in the claim. This is an important consideration given the potentially high cost of litigation. It is also important to consider that contingency fees allow a worker to take a chance on a claim he might not otherwise have brought because he could not have afforded to.

At the end of the day, there are many issues to consider, none of which can or should be answered in the abstract. Each case must and should be decided on its own, unique merits. ■

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