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Employers often struggle when trying to determine an appropriate package to offer an employee terminated without cause. Calculating an employee's entitlements — in the absence of an enforceable employment agreement limiting them on termination — has always been more art than science.

The recipe for the perfect severance package is difficult to master - and there are also costly damage options on the table

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As a general principle, an employee terminated without cause is entitled to "reasonable notice" — a term used by the courts and intended to be a very rough estimate of how long an employee will take to find comparable alternate employment. What constitutes reasonable notice in any given circumstance depends upon a range of relevant factors which have been well established since 1960 by the *Bardal v. Globe and Mail Ltd.* ruling.

These factors — known as the Bardal factors — include:

- type of work and degree of expertise or training
- length of service
- age of employee
- quantum of compensation
- availability of alternative employment
- custom in the trade or business regarding termination
- the circumstances surrounding the hiring of the employee.

Through the application of these factors over time, rough general rules emerged, including:

- one month notice per year of service
- notice periods capped at 24 months
- longer notice periods for highly skilled senior employees
- employees on the cusp of retirement will only be "bridged" to age 65.

However, there is a growing sense these general rules may no longer apply.

New balance to Bardal factors

Traditionally, the Bardal factors were the sole elements courts used to determine the length of a reasonable notice period. However, in the late 1990s, in the case of *Wallace v. United Grain Growers Ltd.*, the Supreme Court of Canada endorsed an approach which led to courts extending the reasonable notice period to address "bad faith" on the part of the employer in the course of the dismissal. This bad faith extension, colloquially known as a "Wallace bump," soon led to increasingly arbitrary extensions to the reasonable notice period. That was until 2008, when the Supreme Court Canada's decision in *Honda Canada Inc. v. Keays* brought an abrupt end to the bump era and returned the focus back to the length of time reasonably expected to find suitable alternative employment.

Still, many employers continue to wonder — what are the rules? How are notice periods calculated? Let's take stock of where we are.

Longer notice periods for low-skilled employees

Historically, a notice period in excess of 12 months was reserved for managerial and professional employees. This tiered approach was based on the presumption there were fewer opportunities for senior and managerial positions, thus the length of time necessary to secure alternative employment would be longer. As of the mid-1990s, the Ontario Court of Appeal expressly recognized and endorsed the principle that a lower skilled, clerical type employee would be entitled to a shorter notice period than senior management, with an effective cap of 12 months.

While this cap for unskilled/clerical workers was never an absolute rule, the distinction between skilled/managerial and unskilled/clerical workers has now all but been abandoned in favour of a general assessment of the availability of alternate employment. As a result, in circumstances where the availability of alternative employment is scarce, even unskilled workers may receive notice periods at the highest end of the scale.

Traditional retirement age will not limit notice period

In the era of mandatory retirement, a common strategy for employers was to offer a senior employee, on the cusp of retirement, a shorter notice period, effectively limiting any severance package to a "bridge" to retirement. This strategy was never endorsed by the courts, which generally recognized an older employee is likely to encounter greater difficulty obtaining new employment than a younger counterpart, justifying a longer notice period.

Indeed, courts have been disinclined to accept any presumption of retirement at 65, even if set out in a written employment agreement.

Since the abolition of mandatory retirement in Canada, employees are increasingly waiting longer to leave the workforce, and courts are struggling to establish consistent and fair notice periods for aging workers, some in their mid-80s, who have accumulated years of service well in excess of any cases previously decided. Based on recent trends, employers can expect to see reasonable notice periods for seniors at the historic high range and beyond.

Relevance of poor economic climate

A poor economic climate is often referenced by employees to bolster longer notice periods, on the premise that a downturn in the market translates into decreased availability of similar employment. However, the tables may be turning in favour of employers — in particular small employers struggling to survive in a difficult economy.

In a recent Ontario appeal decision, *Gristey v. Emke Schaab Climatecare Inc.*, the employee's reasonable notice period was reduced by one-third because of the difficult economic factors facing the employer at the time of termination. The court found that, had the worker's employment not been terminated, he would have worked fewer hours during the reasonable notice period on account of the employer's shrinking business.

While the decision demonstrates an increased flexibility on the part of judges to achieve results considered fair and equitable in the unique circumstances of a given case, it is unclear whether this reasoning will become prevalent in wrongful dismissal cases moving forward.

Short service is no bar to a significant notice period

The legal principle that an employee with short service is entitled to at least some notice is not new. However, recent cases, including those involving terminations within the probationary period, have yielded considerably longer notice periods. In *CAO v. SBLR LLP*, the court awarded an employee with just over one month of service a four-month notice period. Similarly, a senior executive with less than one year's service might expect a reasonable notice period in the range of six to eight months, or higher, depending on the compensation and prospect of finding comparable alternate employment. In short, there appears to be a general sense among plaintiff lawyers that three months is the starting point for any reasonable notice analysis.

The reasonable notice ceiling may be climbing

The *Wallace* era saw an aggressive upward shift in the reasonable notice periods awarded. In 2006, the Ontario Court of Appeal attempted to bring some stability to this upward trend when called upon to review a trial judge's decision granting a 34-month notice period (including a four month Wallace Bump). In that case, *Lowndes v. Summitt Ford Sales Limited*, the Court of Appeal stressed that while there was no absolute maximum limit, absent exceptional circumstances, a reasonable notice period should not exceed 24 months.

Since this decision, the plaintiff's bar has placed considerable effort into

incrementally extending this 24-month ceiling. The boundaries of what may constitute "exceptional circumstances" are not clearly defined. However, we do know a judge may adopt a cumulative effect approach in reaching such a determination. For example, in *Hussain v. Suzuki Canada Ltd.* the combination of the plaintiff's age (65), service (35 years) and skill set made finding alternate employment in a poor economic climate unlikely, resulting in an award of a 26-month notice period.

Mitigation with a twist

Any reasonable notice entitlement is subject to an employee's obligation to mitigate the damages. If the employee obtains alternate employment during the reasonable notice period, or the employer is able to demonstrate the employee did not take reasonable mitigation efforts, a court will reduce the notice period accordingly.

However, in a recent decision, the Court of Appeal for Ontario held that in circumstances in which mitigation might include the terminated employee accepting another position with the terminating employer — at least throughout the period of notice — the employer must ensure the employee is re-offered the new position after the employee commences, or indicates an intention to commence, a claim for wrongful dismissal. (See *Farwell v. Citair, Inc. (General Coach Canada)*.) Failure to clearly reiterate the offer of employment as a means of mitigation may mean the departing employee has not failed to meet his mitigation obligation by not returning to work.

Additional damages

By sounding the death knell for the Wallace bump in 2008, the Supreme Court made it more difficult for workers seeking to receive damages in addition to common law reasonable notice. The result has been increasing numbers of claims seeking extraordinary damages for "mental distress and bad faith," as well as punitive or aggravated damages.

The good news is that since *Keays*, in order to successfully claim additional damages, an employee must prove actual harm/suffering arising from something more than the impact of losing his job.

Managing the risk of liability

Employment agreements: In Canada, terminating an employee without cause comes at a cost. But it can be effectively managed through the use of an enforceable written employment contract. In most Canadian jurisdictions, a contract can limit an employee's reasonable notice entitlement taking the determination out of the hands of judges and adjudicators.

Employers that do not have written agreements in place should not despair — it's never too late. An enforceable employment agreement can be introduced into an existing employment relationship under the right circumstances.

Stock option plans: Employers that offer incentive or stock option plans should turn their attention to the language in those plans. The governing legal presumption is the employee is entitled to what she would have earned had her employment continued throughout period of notice. The only way to rebut this presumption is by clear language in the stock option plan limiting an employee's entitlements in the event of termination (or resignation).

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