HAS THE COURT OF APPEAL FOR ONTARIO SLAMMED THE DOOR ENTIRELY SHUT ON FINANCIALLY STRUGGLING EMPLOYERS?

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In tough economic times employers want and need flexibility to reduce or retool their workforces with the least expense possible. Unfortunately, when terminating employment without cause the cost to an employer of providing notice can be considerable. Some employer counsel have argued an employer's financial difficulty should justify a reduction in the notice period. While this argument appeared to gain approval in 2014 and 2015, the Court of Appeal for Ontario has recently all but slammed the door shut on this concept.

Recent Caselaw

In 2014, hopeful words for financially strained employers were found in a 2014 Ontario Superior Court of Justice decision, *Gristey v. Emke Schaab Climatecare Inc.* In reference to the amount of notice claimed by the employee in that case, the presiding judge stated:

> I think ... that 12 months is too high when one factors in the economic considerations. This was a tough decision for the company. **It was entitled to adjust its operations in light of the relatively poor market prevailing at the time…It would not be fair to the defendant to apply the full 12-month notice period**. [emphasis added]

These concerns echoed words from a much earlier decision of the Ontario Court of Appeal dating back to 1982, *Bohemier v. Storwal International Inc.:*

> Payment in *lieu* of notice involves a cost to the employer for which there is no corresponding production or benefit. **In my view, there is a need to preserve the ability of an employer to function in an unfavourable economic climate. He must, if he finds it necessary, be able to reduce his work force at a reasonable cost**. [emphasis added]

Throughout the three decades since *Bohemier* was decided instances of its application had been rare. Accordingly, *Gristey* was seen as a signal of a potential turning of the tide against ever increasing notice periods. Then, in a January 2015 decision, *Michela v. St. Thomas of Villanova Catholic School*, more seemingly good news for employers. The defendant-school had laid off three teachers with varying periods of service of 8 – 13 years, due to reduced enrolment. In defending the teachers' claim for wrongful dismissal damages, the school enjoyed initial success in arguing for a reduced notice period on the basis of its difficult financial situation. The motion judge stated:

> It should be self-evident that, by its nature, the School could not provide the security of employment offered by larger, more established and better-funded institutions. The teachers must be taken to have understood the circumstances of their employer… This cannot be ignored in assessing what is reasonable notice. It is an aspect of the "character of the employment" as referred to in **Bardal v. Globe & Mail Ltd**...

Unfortunately, this victory for employers was short lived as, on appeal, the Court of Appeal for Ontario took the view *Bohemier* had been misinterpreted. Increasing the notice periods to 12 months, the appeal court expressly disagreed that any of the "*Bardal* factors" (character of employment, length of

service, age and availability of similar employment) enabled the school to rely on its financial situation, stating:

> [T]his court has never held that an employer's financial difficulties justify a reduction in the notice period. It does no more than to hold that difficulty in securing replacement employment should not have the effect of increasing the notice period unreasonably…
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> Nevertheless, it is clear that *Bohemier* has caused some confusion in wrongful dismissal litigation. Most recently, it was relied on in *Gristey v. Emke Schaab Climatecare Inc.*,…in reducing an employee's notice period by one-third as a result of the relatively poor state of the market and the financial health of the employer.
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> It is important to emphasize, then, that **an employer's poor economic circumstances do not justify a reduction of the notice period to which an employee is otherwise entitled having regard to the Bardal factors**.
> [emphasis added]

What does this mean for employers?

Despite these discouraging words from the Court of Appeal, *Bohemier* need not be interpreted as a finding that *Gristey* was wrongly decided. In *Gristey,* the employer led evidence showing there would have been less work available to Mr. Gristey during the period of reasonable notice; hence the monetary value of that notice period should be reduced to reflect actual loss. In other words, as Mr. Gristey would have earned reduced income had he worked throughout his notice period, it may still have been appropriate for the award to be adjusted so as to compensate for the amount actually lost. Indeed, there are likely other cases where it would be appropriate to adjust pay in *lieu* of notice downward in order to compensate for actual loss suffered.

Accordingly, despite the cautionary words of the Court of Appeal, the potential for relief for an employer in a difficult circumstance may not have been eliminated in all cases. However, any hope for wholesale relief against escalating notice periods in challenging economic circumstances seems almost certainly forlorn.

Bottom line is this: Leaving it to courts to determine what should be paid upon termination is an expensive exercise, with the stakes spiralling ever higher. **The best and most reliable protection for an employer remains a properly drafted employment contract that clearly and skillfully identifies the expectations of the parties in the event employment terminates**. The optimal time to enter into an employment contract is before employment commences. However, with appropriate preparation, there are also opportunities to introduce a contract mid-employment.

For more information and assistance preparing employment agreements to protect your business, contact a member of Sherrard Kuzz LLP.

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