

EMPLOYMENT LAW

HOW WILL THE PANDEMIC IMPACT EMPLOYEE NOTICE PERIODS?

As the economy slowly recovers from the impact of the ‘first wave’ of the pandemic, many businesses are now facing the reality of either having to permanently reduce staff or close their doors. **Priya Sarin** and **Matthew Badrov** of **Sherrard Kuzz** look at the potential impact of an employee’s entitlement to notice of termination

THROUGHOUT the past six months, Canadian businesses have tried to mitigate the impact of COVID-19 by implementing remote work arrangements, pivoting their product lines or modes of delivery or temporarily closing down their workplaces.

As the economy slowly recovers from the impact of the “first wave” of the pandemic, many businesses are now facing the reality of either having to permanently reduce staff or close their doors.

With rare exception, both scenarios trigger an obligation on the part of an employer to provide employees with notice of termination or pay in lieu of notice.

The question then is: What is the potential impact of the pandemic on an employee’s entitlement to notice of termination?

Mass or group termination

In most Canadian jurisdictions, employment standards legislation provides for an enhanced notice entitlement if an employee is terminated as part of a “group” or “mass” termination. Each jurisdiction has its own definition of mass termination, but it generally includes that a prescribed number of employees (for example, 50 or more) be terminated within a specified time period and geographic location.

In addition, some provincial employment standards legislation also requires notification of a mass termination be provided to the applicable provincial ministry of labour.

In some cases, failure to provide the requisite notice can have significant financial consequences. For example, in Ontario, a “Form 1” must be filed with the ministry and posted before any notice of termination under the Employment Standards Act takes effect.

An employer that neglects to file the Form 1 in a timely manner will not be able to rely on any working notice provided to an employee prior to the filing of the Form 1 to reduce its statutory notice obligations.

In light of the considerable liability associated with a mass termination, an employer contemplating a permanent reduction of all or part of its workforce should first consult with experienced employment counsel.

decision *Zoldowski v. Strongco Corporation*, the plaintiff brought a motion for summary judgment to determine the appropriate notice period following her termination without cause. At the time, she was employed

These are unprecedented times. It may be that courts recognize that these unique circumstances militate against longer reasonable notice awards for terminations in the time of COVID-19.

Impact of COVID-19 on reasonable notice

Absent an enforceable employment agreement that establishes an employee’s notice entitlement on termination, a non-unionized employee terminated without cause is entitled to reasonable notice of termination at common law.

“Reasonable notice” is meant to reflect the length of time it would take a person in the employee’s circumstances to find comparable alternate employment.

The traditional factors considered when determining reasonable notice include an employee’s age, years of service, character of employment and level of compensation (see the 1960 Ontario Superior Court of Justice decision *Bardal v. Globe and Mail*). This is not intended to be an exhaustive list and courts have also recognized other factors, such as the state of the economy at the time of termination.

Unfortunately, courts have taken differing approaches as to how the state of the economy should apply as a factor. This means that there is some uncertainty about the potential impact of COVID-19.

In the 2015 Ontario Superior Court

as a parts administrator and was 39 years old with 17 years of service.

The evidence before the court was that the plaintiff had applied for numerous jobs in the Greater Toronto Area but obtained only one interview and no job offers. She had sought job counselling, actively searched for new roles and registered with a temporary employment agency.

Her inability to find work was due, in part, to the economy at the time.

The motion judge held that the court could “consider the economic climate the employee is put into when terminated” and awarded damages equivalent to 14 months’ notice because “an economic downturn... may make it more difficult to find a job and may justify a longer notice period.”

Conversely, in the 1982 Ontario Superior Court decision *Bohemier v. Storwal International Inc.* (reversed in part in 1983), the court took the position that economic factors ought not to unduly influence the length of the appropriate notice period.

In that case, the plaintiff was 59 years old and had been employed for 35 years when his employment was terminated for financial reasons. He made efforts to find work and



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DAWE V. EQUITABLE LIFE INSURANCE COMPANY, 2019 ONCA 512 (ONT. C.A.).

Executive with 37 years of service and close to retirement awarded 30 months' notice because of 'extreme high end' of Bardal factors, but Court of Appeal reduced it to 'soft cap' of 24 months.



MICHELA V. ST. THOMAS OF VILLANOVA CATHOLIC SCHOOL, 2015 ONCA 801 (ONT. C.A.).

Notice reduced to six months from 12 because of employer's financial circumstances. Court of Appeal returned it to 12, as reasonable notice should allow a dismissed employee time to find new work.



FELICE V. CARDINAL HEALTH CANADA INC., 2014 CARSWELLONT 8419 (ONT. S.C.J.).

Company vice-president dismissed after 18 months, but court awarded 12 months' notice because of his important position, his age and because it was unlikely he would find a similar job quickly.

secured an alternate position after 11 months.

Although the court recognized that the employee was "a victim of the current scarcity of employment opportunity," it rejected the importance of the state of the economy when assessing what constitutes reasonable notice because of the impact this would have on employers.

"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.

"If he can not do so, the alternative may be bankruptcy or receivership. It seems to me that when employment is unavailable due to general economic conditions, there has to be some limit on the period of notice to be given to discharged employees even if they are unable to secure similar employment within the notice period."

On appeal, the Court of Appeal for Ontario agreed that the judge was

correct to consider the economic circumstances and impact on both parties. It increased the notice award slightly but only because of the plaintiff's length of service with the defendant, not because of the economic climate.

Lessons for employers

We have yet to see the impact of COVID-19 on reasonable notice awards in Canada. While there is precedent for recognizing the impact of a poor economy on the ability to find alternate employment, these are unprecedented times.

Employers have found themselves forced to reduce their workforce abruptly due to a global public health emergency. It may be that courts recognize that these unique circumstances militate against longer reasonable notice awards for terminations in the time of COVID-19.

If your organization is facing a permanent workforce reduction, there

If your business is closing, consider working notice to minimize liability.

are steps to consider that may reduce the financial cost:

- Working notice: If your business is closing, consider working notice to minimize the potential liability on closure.
- Salary continuance instead of a lump sum payment: If providing an employee with a termination package in exchange for a release, consider providing salary continuance payments instead of a lump sum amount. This structure may assist your business from a cash flow perspective.
- Job placement services and a positive letter of reference: Both (or either) can be part of a termination package. However, consider providing these tools regardless of whether the employee accepts a termination package, as

they can assist the employee to find a position more quickly, reducing the employer's potential liability.

- Work with experienced employment counsel: As noted above, minefields exist when navigating the termination of a large group of employees. Work with experienced legal counsel to understand the potential liability and develop a strategy to minimize risk. [CHRR](#)

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