Can You Make Terminated Employees Use Vacation During the Notice Period?



The answer depends on which province you're in.

Under employment standards laws, employees who get terminated without cause are entitled to reasonable notice from their employer. Employees typically accept their wages for the notice period in lieu of actually working during that time. But what happens to the accrued vacation time of employees who actually do work during the working notice period? Can the employer force employees to take some of or all of the vacation they've accrued during the working notice period? Or, can employees hang onto all of their accrued vacation time and cash out when the notice period ends?

The answer depends on which province's employment standards law applies. In provinces where notice and vacation run consecutively, the employer can't force the employee to use vacation during the notice period; but in provinces where notice and vacation run concurrently, they can. Here are 2 cases illustrating each approach.

VACATION NOT INCLUDED IN NOTICE

SITUATION

While on vacation, a BC bank loan manager received a letter notifying him that his position was being eliminated, effective Aug. 31. The letter, which was dated July 5, instructed the manager to come back to work and resume his duties until Aug. 31. But he never did. The bank continued to pay him through October 22, essentially giving him three and a half months' notice. The manager sued for wrongful dismissal and the court found that he was entitled to 5 months' notice. The manager also claimed that the notice period couldn't start running until his vacation ended.

DECISION

The BC Court ruled that it was illegal for the bank to include vacation in the manager's notice period.

EXPLANATION

As the court noted, the BC *Employment Standards Act* clearly states that the "period of notice shall not coincide with the employee's annual vacation." Annual vacations aren't a gift from the employer to employee, the court explained, but a right that

employees earn through service. The employer “cannot rob the employee of that right by including the period of the vacation, or any part thereof, within the period of notice of termination,” said the court. So, the bank couldn’t start the notice period on July 5, but instead had to wait until July 22, when the manager’s scheduled vacation ended.

Kothlow v. Westcoast Savings Credit Union, [1987] B.C. J. No. 498

VACATION IS INCLUDED IN NOTICE

SITUATION

After 24 years of service, an Alberta engineer was notified that his position was being eliminated in a year. The engineer decided to work through the notice period. He had banked more than 30 days of vacation and wanted to cash all those days out at the end of the notice period. But while it allowed for banking of vacation days, the employer’s vacation policy required employees to use banked days in excess of 30 by the end of the year. So, during the notice period, the engineer hung onto 30 vacation days and took the excess days off to avoid losing them under the company’s use-it-or-lose-it policy. He then sued for wrongful dismissal claiming that it was unfair for the employer to force him to use up any of his accrued vacation days during the notice period.

DECISION

The Alberta Court of Appeal ruled that the engineer wasn’t entitled to be paid for the vacation days he had to take during the notice period.

EXPLANATION

In BC, the employment standards law bans the inclusion of vacation in the notice period. But “Alberta has no such legislation,” the court explained. The trial court had found that including vacation in the notice period would reduce the employee’s notice. But the court didn’t buy it. Nothing in Alberta law specifically says that notice and vacation must be consecutive, the court explained. “Working notice and taking paid vacation are perfectly compatible,” according to the court. The engineer didn’t lose his vacation days, the court reasoned; he just didn’t get to trade them for additional pay.

Deputat v. Edmonton School District No. 7, [2008] A.J. No. 22