Do Wrongfully Dismissed Employees Get More Termination Notice When the Economy Is Bad?

This is an article from 2020, reflective upon the COVID-19 pandemic, but the principles and accommodations mentioned are still applicable for HR directors facing any economic uncertainty or crisis in the workplace due to external factors.

How the COVID-19 pandemic may increase the costs of termination without cause.

Employers take note: COVID-19 may have significantly increased your liability risks. An estimated 858,000 Canadians lost their jobs due to the pandemic in 2020. You can bet that many of them will sue their employers for wrongful dismissal. In addition to increasing the risks of getting sued, COVID-19 has raised the stakes of losing a wrongful dismissal case. That's because while employees always pay a price for losing their jobs, those losses skyrocket when unemployment comes at a time when the economy (or the particular industry) is reeling. **Result:** Employees who were wrongfully dismissed during the pandemic may be in line for extra termination notice. Here's a look at the risk and 5 things you can do to help your organization manage it.

Termination Notice Law, 101

Employment in Canada isn't at will the way it is in the U.S. Although you can still end an employee's employment any time and for any reason you want, if you don't have cause to terminate, you may be liable for wrongful dismissal and have to pay termination notice. There are 2 forms of termination notice:

1. ESA Notice

When the employment relationship is subject to the jurisdiction's employment standards law (which we'll refer to as ESA), employees terminated without cause are entitled to termination notice based on the number of years you employed. ESA notice is mandatory, meaning you can't contract out of it.

2. Reasonable Notice

Reasonable notice, which is sometimes called "common law notice" because it's required under law made by judges in court cases, may be available to: i. Employees whose employment isn't covered by the ESA; and ii. Employees who are covered by the

ESA in addition to ESA termination notice. Reasonable notice is usually much more generous than the ESA minimum notice. That's because it's designed to compensate employees for the financial losses they incurred as a result of being wrongfully dismissed. Specifically, reasonable notice is based on the employment income the employee would have earned "during the reasonable notice period," minus amounts they received to "mitigate" their losses, such as wages from part-time jobs they took to make ends meet until they could find a higher-paying, full-time job suitable for their experience and skills or CERB benefits. The key question: How long is the reasonable notice period? Courts have to answer that question on a case by case basis considering 4 factors (called the *Bardal* factors after the 60-year-old case that created them, *Bardal v. Globe & Mail Ltd.*, 1960 CanLII 294 (ON SC)):

- The character of the employment;
- The length of the employee's service;
- The employee's age; and
- The availability of similar employment with regard to the employee's experience, training and qualifications.

Reasonable Notice & COVID-19

The point of the *Bardal* factors is to gauge how hard it was for the employee to find another suitable job. The greater the difficulty, the longer the reasonable notice period will be. Courts have broad leeway to apply these factors in the interest of reaching a just and fair decision. Thus, even though it isn't on the list, the case can be made that the state of the economy should factor into the determination of the length of the reasonable notice period. In fact, some courts agree with this and award higher reasonable notice to employees who are wrongfully terminated during economic downturns. Other courts reject this approach as being too speculative.

This split between the courts makes it hard to predict how these principles will play out in cases of wrongful dismissal during the COVID-19 pandemic.

Employee Loses: COVID-19 Doesn't Affect Reasonable Notice

The first 2 of what promises to be many cases addressing the impact of COVID-19 termination on reasonable notice have already come down. Both cases are from Ontario and both went against the employee.

Case 1. Yee v. Hudson's Bay

What Happened: A trading company wrongfully terminated a 62-year-old design manager after 11 years of service. The date was August 2019, 6 months before the start of the pandemic. The manager contended that he should get 18 months' notice because the pandemic made it much harder to find a new job, citing as evidence the roughly 90 jobs he applied for without success during his search.

What the Court Said: The Ontario Superior Court refused to treat COVID as a factor and awarded the manager only 12 months' notice. "Notice is to be determined by the circumstances existing **at the time of termination** and not by the amount of time it takes the employee to find employment," the court explained. And in this case, termination occurred before the pandemic. Significantly, however, the court left the door open to considering COVID a factor in determining notice for terminations occurring **during** the pandemic [*Yee v Hudson's Bay Company*, 2021 ONSC 387 (CanLII)].

Case 2. Iriotakis v. Peninsula Employment Services Limited

What Happened: An HR consulting firm terminated a 56-year-old sales manager after

nearly 3 years of employment just when the pandemic was starting. The manager found a new job, but it took him 7 months. He claimed he should get at least 6 months' notice because the pandemic's impact on the job market hampered his search.

What the Court Said: The Ontario Superior Court awarded the manager only 3 months' notice. COVID didn't figure in the equation, the court explained, because hindsight is 20/20 and at the time of termination its impact on the job market was totally unforeseeable [*Iriotakis v. Peninsula Employment Services Limited*, 2021 ONSC 998 (CanLII)].

Employee Wins: Economic Downturn Does Affect Reasonable Notice

Although it hasn't yet happened in the context of the pandemic, many courts have ruled that bad economic times do justify a longer notice period when they impair an employee's job search. This includes courts in Ontario, the settings for the *Yee* and *Iriotakis* cases we just looked at. In other words, the split between courts on the issue is based on the views of the judges rather than the province they're in, as illustrated by the following case decided before the pandemic.

What Happened: A data firm located in Calgary wrongfully dismissed a 49-year-old senior analyst/manager in 2014 when falling oil prices were playing havoc with the economy of Alberta and other provinces. The firm brushed aside the job market concerns and insisted that 11 months was ample notice.

What the Court Said: The Ontario Superior Court—yes, that court again—fixed notice at 17 months. Determining the length of the notice period is an art and not a science, and courts need to be flexible in how they do it. And that includes considering economic factors such as the impact of an economic downturn to justify a longer notice period, especially for senior management employees with specialized skills [*Paquette v TeraGo Networks Inc.*, 2015 ONSC 4189 (CanLII)].

How to Protect Your Organization

There can be no doubt that the pandemic has had an impact on the Canadian economy and made it harder to find new jobs. As a result, employees who can prove that they were wrongfully dismissed during pandemic conditions may qualify for extra notice. Here are some things you can do to manage the risks of extended notice.

1. Factor Risk of Extra Damages into Your Termination Decisions

The first thing HR directors need to do is make their organizations aware of the risks. Don't be fooled by the *Yee* and *Iriotakis* rulings striking down wrongfully terminated employees' cases for extra notice due to COVID-19's impact on the job market. Keep in mind that in both of these cases, the termination occurred **before** the pandemic hit. In *Yee*, there was a 6-month lag between termination and pandemic; in *Iriotakis*, it happened at the very start of the pandemic when nobody could foresee how it would affect the economy. Perhaps the real significance of these cases is that they each left open the possibility that extra notice may be justified for termination in the midst of the pandemic when the economic devastation was clear for all to see. Things to consider while making decisions about termination without cause:

- The worse the job market is at the time of termination, the greater your risks of extended notice; and
- The risk of extended notice is greatest for managers and other employees not covered by the ESA.

2. Try to Limit Employees to ESA Notice

Extended notice applies only to common law "reasonable" notice. You can take the risk off the table by including clearly worded contract provisions waiving employees' right to common law notice and agreeing to accept the minimum ESA notice in the event they're terminated without cause. Just recognize that courts put termination notice limits under a microscope and won't enforce them if the language is ambiguous or can be interpreted in any way as stripping employees of their ESA rights. So, if you use such clauses, be sure they:

- Clearly and unequivocally states that the employee intends to waive common-law notice rights for termination without cause;
- Specifically cites the ESA minimum notice and other termination entitlements of your jurisdiction;
- Can't be read as taking away employee's termination notice and other ESA entitlements—this will nullify the whole clause even if taking away ESA rights wasn't your intention; and
- Indicates that if the termination does now or in the future fall below ESA requirements, it should be interpreted as being in compliance with those requirements.

3. Consider the Impact of CERB

Remember that in calculating reasonable notice, courts subtract amounts that employees received to mitigate their damages. Those amounts include Employment Insurance (EI) unemployment benefits. Accordingly, a case can be made that notice should be reduced by the amount of any Canada Emergency Relief Benefits (CERB) or other COVID-19 relief benefits employees received while they were unemployed. In fact, the employer in the *Iriotakis* case did make that argument but the court said no. CERB is different, the court reasoned, because it was an ad hoc program that neither employers nor employees paid into the way they do with EI.

Of course, there's no assurance that other courts will reach the same conclusion. In addition, the *Iriotakis* ruling was based in part on the fact that the $2,000 CERB payment was way below the employee's base salary, let alone lost commissions income. The court didn't say anything that would rule out subtracting the CERB in cases where there's less of a gap between the CERB and the amount of lost employment income.