

# Notice Of Termination Pending Sale Of Business Inadequate Says BC Court Of Appeal



When does notice of termination actually occur when there is a sale of business? That was the question considered recently by the British Columbia Court of Appeal in the recent case of *Kerfoot v Weyerhaeuser Company Limited*, 2013 BCCA 330 (CanLII). The answer could have significant implications for potential liability associated with a sale of business (particularly in the context of an asset sale), even when employees are offered new employment.

Weyerhaeuser Company Limited (“Weyerhaeuser”) informed their employees that they intended to sell their business to Domtar Corporation (“Domtar”) and that the sale would close in approximately 6 months’ time. No specific termination date was given as Weyerhaeuser was in the process of obtaining various approvals. However the employees were provided with periodic updates on the progress of the sale. The employees were informed that the sale of the business would lead to an offer of employment with Domtar and, if accepted, the employees would become members of Domtar’s pension benefits plan. The value of the pension benefits with Domtar were less than those with Weyerhaeuser, however this difference in value would decrease over time if the employees remained working for Domtar. The sale of the business to Domtar did in fact close in just over 6 months’ time.

Following the sale, two employees commenced an action for wrongful dismissal claiming that they did not receive reasonable notice of termination. The employees had mitigated their salary losses by accepting work with Domtar, however they claimed that they were entitled to damages from the reduction in the value of the pension benefits from the sale for the reasonable notice period.

The British Columbia Supreme Court held that the notice to employees that the sale would take place in roughly six months’ time was inadequate notice, as a specific termination date was not set. The trial judge concluded that the notice period commenced on the date the sale of the business closed. The employees were then awarded damages for the loss in value of their pension benefits for period of reasonable notice that the employees would have been entitled to at common law, found to be 15 months and 18 months respectively.

The British Columbia Court of Appeal upheld the trial judge’s decision on the legal issues, but reduced the notice period and damages. The Court of Appeal held that

notice of dismissal must be specific and unequivocal and that “communication that is almost notice is not notice at all”.

The Court of Appeal noted that jurisprudence exists where notice of termination is valid despite the absence of a precise termination date, but held these cases were distinguishable as the employees in those cases had clear knowledge that their employment would definitively end. The Court of Appeal reasoned that the employees in Kerfoot would have believed that the sale of the pulp mill to Domtar was uncertain up until the moment of closing. In the view of the Court of Appeal, “in order for a communication to constitute notice of termination, at the least, it must spell out clearly that the employment will end.” There should not be ambiguity in this respect for the notice to be valid.

The notice period for the employees was set at 15 months for both employees on the basis that the lower court had applied too “formulaic” an approach to calculating reasonable notice, providing one month per year of service

As this decision illustrates, notice of termination should be clear and unambiguous to be valid. Unless an employee can be told unequivocally that their employment will end at a specific time, notice of termination may not be possible. This has great implications for employers who may be awaiting a contingency such as closing of a sale of business before being able to definitively notify employees that their employment will be terminated. This will be particularly relevant in an asset purchase scenario where employment does not automatically run between seller and purchaser. Where offers of employment are given, following notice of termination, there is a risk that damages could be sought for the period of reasonable notice – to the extent of any losses associated with the new employment offers. Calculation of the proper notice period will begin, on this reasoning, when an unambiguous and clear notice of termination is given that the employee’s employment will end, not may end.

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