

The Impact of the Pandemic on Notice Periods for Terminated Employees



The COVID-19 pandemic has decimated industries and resulted in many lost jobs. According to one news article, Canada has about 858,000 fewer jobs this February than we did last February before the pandemic began.^[1] That raises the prospect that employees terminated without cause could be awarded longer notice periods because availability of similar employment is one factor courts consider in deciding what is reasonable notice. A recent Ontario case gives some hope to employers who terminated employees before the pandemic and are in ongoing disputes with their former employees about the amount of notice to be provided.

The Facts

The employee was hired in February 2008 on an indefinite basis and held the title of “Director, Product Design and Development” at the time of his termination in August 2019. The employee was dismissed without cause and given 11 months’ salary, benefits, continued discounts on product, and three months’ relocation counselling. The employee was about 61 years old at the time of termination and was earning a salary of approximately \$162,000.

At trial, the employee sought 18 months’ notice while the employer maintained that 11 month’s notice was the appropriate period. At the time of trial, which took place 16 months after termination, the employee had not secured similar employment despite applying for nearly 100 jobs. The employee argued that the court should account for the effect of the pandemic in finding comparable employment and this should favour a notice period at the highest end of the common law range.

What Did the Court Say?

The court said the appropriate reasonable notice period was 16 months. The court did not increase the notice period because of the pandemic. The court said terminations that occurred *before* the pandemic should not be treated the same as terminations *after* the beginning of the pandemic and its negative impact on the job market. The court also restated principles from other cases that say that the amount of notice is to be determined by the circumstances existing at the time of termination.

As the employee had been terminated before the pandemic, the court concluded

that scarcity of comparable employment caused by COVID-19 was not an appropriate consideration in this employee's case.

Take Away for Employers

This decision will help employers defend claims from employees terminated prior to the COVID-19 pandemic who argue that COVID-19 has made it more difficult for them to find new employment and seek excessive notice periods as a result. It will not help employers who terminated employees during the pandemic. Those employees may be successful in seeking longer notice periods based on the impact of the pandemic. Employers may be able to mitigate the risk of longer notice periods by providing outplacement counselling, reference letters, and other reasonable assistance to help terminated employees find new employment.

[1] CBC, "Canada lost 213,000 jobs in January as lockdowns took a giant bite out of the job market", (February 5 2021) 8

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