

The Latest on Employment Contracts that Require Employees to Give Notice of Termination

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The recent case of [BlackBerry Limited v Marineau-Mes](#) provides a useful insight into the often murky area of the obligations of an employee to provide notice of his intention to resign.

In this case, the employee was a Senior Vice President of BlackBerry Limited.

In the fall of 2013, he accepted a promotion to Executive Vice President in charge of about 3,000 employees. He signed an employment contract for his new position.

Among other things, the contract provided that he could resign at any time on six months' prior written notice. The contract provided that during the notice period, he would continue to provide active service to the extent required by BlackBerry.

By the time he signed the contract in October 2013, he had already begun discussions with Apple Inc. about a new job. About a month after signing the contract, he had some discussions with BlackBerry's newly appointed Chief Executive Officer which he did not find satisfactory, because the discussions included the notion that his role might ultimately be narrower in scope than originally contemplated.

One month later, in December 2013, Apple offered him a senior management position and he gave BlackBerry written notice of his resignation. He advised BlackBerry that he intended to join Apple in California in about two months.

This led to a dispute as to whether or not he was obliged to provide BlackBerry with six months' notice of his resignation as required by the contract, thereby making himself available to assist with his transition out of the company for that period of time. BlackBerry brought an Application to the Court for an Order to that effect. The employee took the position that the contract was not valid and enforceable.

There is an abundance of case law around the question of reasonable notice of termination when an employer makes the decision to fire an employee. There is much less case law relating to the extent to which employees are obliged to give reasonable notice of resignation. That may be why BlackBerry insisted on a specific contractual term requiring six months' notice in the event that this senior employee wished to resign.

The problem is that these concepts are not simply the opposite sides of the same coin. It is generally open to an employer that does not wish the terminated employee to actually work through his notice period, to provide the terminated employee with pay in lieu of reasonable notice. On the other hand, where the employee is resigning, the employer may well need the employee to continue to work through the notice period, or to at least make himself available so that there can be an orderly transition of that employee's duties to a replacement. A payment of money by the resigning employee to the employer to take the place of that notice period simply won't address the problem that the employer may be facing, particularly where the resigning employee is a member of senior management or has other specific knowledge or training that the replacement employee will not have.

In this case, the employee argued firstly that even if the contract was valid, he was free to leave during the notice period and BlackBerry's remedy was an action for damages if any. The Court had no difficulty rejecting that argument.

The employee raised a number of other minor arguments but the other major point he tried to make was that the six month notice period was the equivalent of a non-competition covenant which was unreasonable and therefore unenforceable.

The Court did not accept that submission either. The Court found BlackBerry's argument that it was necessary to have the employee available, and that the notice period was one of the tools allowing it to achieve that end, to be quite reasonable. Furthermore, given that the employee knew all along that he was expected to remain available to perform duties to BlackBerry during the notice period, and that these services would be necessary for his transition out of the company, the Court rejected the argument that the notice period was the equivalent of a non-competition clause. Finally and in any event, the Court observed that while the notice period did have some aspects of a non-competition agreement, it is the law in Ontario that reasonable competition clauses are enforceable. The Court found this clause to be eminently reasonable.

In the result, the Court found that BlackBerry was entitled to a declaration that the contract was binding and that the employee was required to provide six months' prior written notice of resignation.

In my experience, employees sometimes seem to think that if they choose to resign, they will be able to do so without any particular regard for their obligation to provide reasonable notice. That may be true for some. However, where an employer is careful enough to require a specific notice period in an employment agreement, this case is a reminder that employees signing such employment agreements must take those clauses seriously.

Furthermore, for those perspective employers interested in hiring senior employees, it may well be prudent to question the perspective recruit as to any obligation that individual may have to provide reasonable notice of resignation to his or her former employer.