

Notice Period Update

Concepts, Cases and Action Items

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OVERVIEW

- 8 Reasonable Notice Concepts
- Case Law Update:
 - “Maximum Cap” on Notice
 - ESA-only Termination Clauses
- Employment Agreements

Reasonable Notice Concepts

- 1) An employee is entitled to reasonable notice of termination unless a written employment agreement clearly stipulates alternate lawful terms.
- 2) Reasonable notice of termination is a presumptive right.
- 3) Minimum standards legislation sets the floor and does not operate as a cap or bar to reasonable notice.

Reasonable Notice Concepts

4) Reasonable notice is assessed on a case by case basis, having regard to the four *Bardal* factors:

i) **Length of Service**

ii) **Age**

iii) **Character of Employment**

iv) **Availability of Comparable Employment**

Reasonable Notice Concepts

- Two Additional Factors:
 - v) **Compensation:** an intrinsic and critical component of the Court's Bardal analysis.
 - vi) **Inducement:** if an employer lures an employee away from secure employment, such employment may be considered when assessing notice period.

Reasonable Notice Concepts

5) Purpose of the notice period to provide the terminated employee with a reasonable opportunity to find comparable employment.

6) In general, all elements of an employee's compensation are owed for the duration of the reasonable notice period, including wages, benefits, perquisites and (in many cases) variable compensation.

Reasonable Notice Concepts

7) The financial circumstances of the employer are irrelevant when determining the appropriate period of reasonable notice owed to an employee.

8) Employees have a common law duty to mitigate any damages arising from their loss of employment, except:

- i) Statutory entitlements; or,
- ii) Contractual entitlements that do not expressly require mitigation.

Case Law Update

- Two Common Myths:

- i) Reasonable notice = 1 month per year of service

Minott (1999 ONCA): “the rule of thumb approach is not warranted in principle, nor is it supported by authority”

- ii) Maximum period of reasonable notice is 24 months

Cronk (1995 ONCA): 24 months for managerial, and 12 months for non-managerial.

Lowndes (2006 ONCA): Excess of 24 months requires exceptional circumstances.

Case Law Update

- **Maximum Period of Notice**

David v Congregation B’Nai Israel (1999 ONGD)

59 years old

26 years’ service

Rabbi (\$65k/yr)

30 months

Case Law Update

- Maximum Period of Notice

Hussain vs. Suzuki Canada Ltd (2012 ONSC)

65 years old

36 years' service

Assistant Warehouse Supervisor (\$50k/yr)

Only job in Canada since immigrating in 1974

26 Months

Case Law Update

- Maximum Period of Notice

Case	Details	Notice
<i>Markoulakis v SNC-Lavalin</i> (2015 ONSC)	65 years of age 40 years of service Senior Civil Engineer (\$130k/yr) Sole employer	27 Months
<i>Keenan v Canac Kitchens</i> (2016 ONCA)	Husband and wife dependent contractors 63 and 61 years of age 32 and 25 years of service 30 years of financial dependence	26 Months
<i>Maasland v Toronto</i> (2016 ONCA)	58 years of age 25 years of service Senior Engineer (\$143k/yr)	26 Months

Case Law Update

- Maximum Period of Notice

Dussault v Imperial Oil Ltd. (2018 ONSC)

Donald Dussault	Maryann Pugliese
63 years of age 39 years of service Manager, RE Development Ontario \$190k/yr LTIP with shares	57 years of age 36 years of service Retail Territories Manager \$157k/yr LTIP with shares
26 Months	26 Months

Case Law Update

- **ESA-Only Termination Clauses**

- Recall that common law reasonable notice is a presumption that can be rebutted by a clear and lawful agreement.
- Many agreements seek to limit an employee's entitlements upon termination to those provided by employment standards legislation... but most attempts fail.

Case Law Update

“Your employment may be terminated at any time without cause for any reason by providing you with notice of termination or pay in lieu thereof under applicable employment legislation.”

- NO – ambiguous as to legislation, and attempts to contract out of ESA as provision does not speak to severance pay, benefit continuance, or vacation payout.
- ***Wood v Fred Deeley Imports* (2017 ONCA)**

Case Law Update

“Your employment may be terminated at any time without cause for any reason by paying to you all entitlements owed under the *Employment Standards Act, 2000*.”

- NO – attempt to contract out of ESA, as provision limited only to payments, and therefore excludes benefit continuance.
- ***Hampton Securities v Dean* (2018 ONCA)**

Case Law Update

“Your employment may be terminated at any time without cause for any reason by providing to you all entitlements owed under the *Employment Standards Act, 2000*.”

- NO – does not limit to “only” ESA amounts.
- ***Nogueira v Second Cup (2017 ONSC)***
- ***Bergeron v Movati Athletic Group Inc. (2018 ONSC)***

Case Law Update

“Your employment may be terminated at any time without cause for any reason by providing you with only your entitlements under the *Employment Standards Act, 2000* (“the ESA”), as amended from time to time, including (as applicable) notice of termination or pay in lieu thereof, severance pay, continuation of benefits, and payment of accrued vacation pay.”

- MAYBE – stronger to spell out no further claim to common law damages.

Case Law Update

- What happens when an employer tries to argue that its own contractual term violates the ESA and is therefore unenforceable?

Roberts v Zoomermedia Ltd. (2017 ONCA)

Contract included 2 year severance package

Employee terminated after 5 years (CEO)

ER argues that contractual term breached ESA because it did not include benefit continuance for statutory notice period.

Court: ER's argument is a perverse application of ESA and to be rejected.

Case Law Update

- ***Nemeth v Hatch* (2018 ONCA)**

“The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.”

19 years of service

ER Provided: 8 weeks' pay in lieu of notice of termination

19.42 weeks' severance pay;

Benefit continuance for 8 week stat notice period

Case Law Update

- ***Nemeth v Hatch* (2018 ONCA)**

Court states that the clause clearly limits the employee's common law notice entitlement.

It is not an attempt to contract out of the ESA because it does not limit the employee's entitlements only to ESA amounts.

“The need for clarity does not mean that the parties must use a specific phrase or formula [...] a high degree of clarity is required and any ambiguity will be resolved in favour of the employee.”

Court awards 19 weeks' notice

Employment Agreements

Minimum Standards

- Limit entitlements to applicable minimum standards legislation

Hybrid

- Set a modified calculation standard
 - eg: ESA plus one week for each completed year of service

Capped Common Law

- Cap a common law calculation
 - eg: 3 months if less than one year of service, 1 additional month for each completed year thereafter up to a maximum of 12 months

Employment Agreements

- Nothing prevents employment litigation like an effective termination clause.
- Not about expecting an end to the relationship; about providing certainty to the parties.
- Cost savings can be significant.

Employment Agreement Templates



BASE

- Probationary Period
- Overtime Eligibility
- Minimum Standards Termination Clause
- Confidentiality



MANAGEMENT

- Hybrid Termination Clause
- Compensation Components
- Vacation
- Non-solicit provision



EXECUTIVE

- Capped Termination Clause
- Detailed Compensation Components
- Non-solicit
- Non-compete
- Fiduciary duties

Thank you

The Dentons logo, featuring the Chinese characters "大成" followed by the word "DENTONS" in a bold, sans-serif font, all contained within a purple arrow-shaped graphic pointing to the right.

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