



# What's New in HR Law

## Truncated Notice Period Awarded to Older, Short-Service Employee

September 25, 2020

### Bottom Line

In [\*George v Laurentian Bank Securities Inc.\*](#) (“*Laurentian Bank*”), the Ontario Superior Court of Justice determined that two months constituted reasonable notice of termination for a 58 year old employee who was dismissed after only 5 months of employment. Helpfully for employers, this case suggests that an employee’s advanced age and/or short tenure alone will not automatically serve to inflate their common law notice entitlement.

### Common Law Reasonable Notice for Older and Short-Service Employees

Under the common law, every employment contract is understood to include an implied term that the employer will not terminate the contract without providing the employee with advanced “reasonable notice”, or pay in *lieu* thereof. This implied term can only be altered by the workplace parties through the use of clear and unambiguous contractual language.

What constitutes “reasonable notice” at common law is determined by the courts on a case by case basis, taking into account a number of factors that were originally summarized by the Ontario High Court of Justice in *Bardal v Globe & Mail Ltd.*. These “*Bardal* factors” include:

This update is for general discussion purposes and does not constitute legal advice or an opinion.

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- The character of an employee’s employment;
- The length of time the employee has been employed;
- The employee’s age at the time of their termination; and
- The availability of similar employment, having regard to the employee’s experience, training and qualifications.

The courts have been clear that there is no set formula for calculating reasonable notice under the common law. The courts have also specifically, and repeatedly, denounced the commonly cited “rule of thumb”, which assumes employees are entitled to between one and one-and-a-half months’ notice for each year of service.

Despite the courts’ frequent reiteration that common law notice determinations require highly individualized assessments, various “rules” and “principles” continue to be referenced among workplace parties as having broad application. One such oft-cited “rule” is that employees over the age of 50 are automatically entitled to longer notice periods due to the difficulties this demographic is perceived to experience finding new employment. Another is that even short-service employees will be entitled to a minimum amount of notice, with the notional “floor” often referenced as falling between three and five months of notice.

However, as demonstrated by *Laurentian Bank*, neither advanced age nor short-tenure – whether considered alone or taken together – will automatically entitle an employee to an inflated or elongated common law notice period.

## **Background**

Mr. George was hired by Laurentian Bank Securities as Vice President, Equity Trading on November 5, 2018. Despite the job title, Mr. George was not a senior executive of the company which assigned all of its equity traders the “Vice President” title in order to increase their clout with clients. In March 2019, five months into his employment, Mr. George was dismissed without cause. He was 58 years old at the time of his termination and remained unemployed at the time the case went to trial in July 2020.

## **Superior Court Awards Two-Month Notice Period**

In its decision issued on September 10, 2020, the Ontario Superior Court of Justice ruled that a two-month notice period was reasonable for Mr. George. In reaching this decision, the judge took into account each of the *Bardal* factors and made specific reference to the fact that Mr. George’s age meant that his “job opportunities are less promising than for a younger person with his experience, training and qualifications”. Nevertheless, the notice period awarded in this case falls considerably below what is often referenced as the typical or automatic entitlement of a short-service and/or older employee.

## Check the Box

This case dispels the notion that there is an established reasonable notice baseline that applies to employees with short tenure and/or who are of advanced age. Rather, this recent decision reinforces that common law reasonable notice assessments must consider the unique and personalized circumstances that present in any given case.

## Need more information?

For more information regarding the assessment of employee dismissal risks and liabilities, or for assistance with employment-related litigation, please contact [James Jennings](#) at 416-408-5503, or speak to your regular lawyer at the firm.



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