



What's New in HR Law

Tilting the Range? The Unclear Effect of COVID-19 on Reasonable Notice

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Bottom Line

The effect of the COVID-19 pandemic on common law reasonable notice periods is still unclear. The Ontario Superior Court of Justice has now issued multiple rulings indicating that the pandemic should **not** affect the notice period where the termination pre-dated the pandemic. However, the courts have been less clear about what effect, if any, the pandemic may have on notice periods associated with terminations issued after the onset of the pandemic. While some commentators have suggested that the pandemic will undoubtedly serve to lengthen reasonable notice periods, employers should take heed that the courts have yet to make any such definitive pronouncement.

Basic Principles – Common Law Reasonable Notice

Absent an enforceable employment contract that limits an employee's entitlements upon termination, the presumption is that an employee will be entitled to common law reasonable notice, or pay in lieu thereof, in the event their employment is terminated without cause.

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

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Determining the amount of common law reasonable notice that is appropriate in any given circumstance is not an exact science – it involves a highly individualized assessment of numerous factors, and is ultimately based on the judgment of the court. The factors to be considered in assessing common law notice are often referred to as the *Bardal* factors, and include the employee’s character of employment, length of service, and age, as well as the availability of similar employment, having regard to the employee’s experience, training and qualifications. This is a non-exhaustive list. Over time, the courts have held that other factors may also impact the amount of notice to which an employee may be entitled.

Historically, some courts have been willing to consider economic downturn as a factor in assessing the amount of notice that is reasonable in the circumstances. However, there has not been a uniform approach taken by the courts in this respect, as the Court of Appeal for Ontario has said that difficulty in securing replacement employment should not have the effect of increasing the notice period unreasonably (see *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONCA 801).

Will COVID-19 Affect Common Law Reasonable Notice Periods?

Recently, amidst the ongoing global health crisis, courts have been forced to grapple with a new question: to what extent will the COVID-19 pandemic affect common law reasonable notice entitlements?

In *Yee v Hudson’s Bay Company*, 2021 ONSC 387 (“*Hudson’s Bay*”), the Plaintiff’s employment was terminated approximately 6 months prior to the COVID-19 pandemic. At trial, which took place amidst the pandemic, the Plaintiff argued that their reasonable notice period should be extended because of the decreased availability of similar employment.

In assessing the appropriate notice period, the Court noted that the termination occurred before the COVID-19 pandemic began, and this fact “should not attract the same consideration as termination after the beginning of the COVID-19 pandemic and its negative effect on finding comparable employment”.

While this ruling makes clear that the pandemic will have no effect on the notice period applicable in the context of pre-pandemic terminations, the incidental reference to terminations occurring after the COVID-19 pandemic began is less than clear, and does not definitively state how, if at all, the courts will consider the economic impacts of COVID-19 in the context of a post-pandemic termination.

In *Nahum v. Honeycomb Hospitality Inc.*, 2021 ONSC 1455, the Court made similar incidental comments as it did in *Hudson’s Bay*, stating that “[w]hile the COVID-19 pandemic might reasonably be thought to impact [the plaintiff’s] job search”, because the plaintiff’s termination pre-dated the pandemic it played no factor in the common law notice period analysis.

The Court’s incidental comments in both of these cases are far from a clear pronouncement on whether, and to what extent, the economic impacts of the pandemic may be considered in the assessment of reasonable notice.

In *Iriotakis v. Peninsula Employment Services Limited*, 2021 ONSC 998, the Plaintiff, an employee with 28 months of service, was terminated in March 2020, right at the beginning of the COVID-19 pandemic. As in the two earlier noted cases, the Plaintiff argued that the depressed job market caused by the pandemic should affect any notice period awarded.

The Court stated that it had little doubt the pandemic had some influence on the Plaintiff's job search. However, the Court noted the impact of the pandemic on the economy in general, and on the job market in particular, was highly speculative and uncertain both as to degree and duration at the time the Plaintiff's employment was terminated. The Court also stated that it must be alert to the dangers of applying hindsight when measuring reasonable notice at the time when the decision was made.

The Court commented that the uncertainty in the job market, along with the Plaintiff's advanced age, tilted the notice period away from the fairly short period of notice that his brief service might otherwise have indicated. However, the Court was quick to note that these considerations were not to the exclusion of all other factors – a balanced approach was still required. In the end, a modest notice period of only 3 months was awarded.

Check the Box

The available body of case law that has developed since the onset of the pandemic suggests that the pandemic will have no impact on the length of the applicable notice period in the context of a pre-pandemic termination. The possible effect of COVID-19 on a post-pandemic termination is less clear. While the Court has conceivably left the door open to increased notice periods amidst the pandemic, this interpretation of the developing case law is not certain, especially given the historically divergent views of the courts regarding the effect of economic downturn on notice periods.

Above all else, the Court's comments do not change the fact that an individual assessment is required when determining the appropriate notice period. A holistic review of all applicable factors must be undertaken, with no one factor being weighted more heavily than others.

As the pandemic progresses, the courts will undoubtedly have further opportunity to comment on what effect, if any, the pandemic will have on reasonable notice periods, especially as it relates to post-pandemic terminations. If/when the Court undertakes this analysis, it is to be hoped that a balanced perspective will be applied; one that considers not only any decline in availability of alternate employment, but also any financial hardships suffered by employers in the applicable sector or industry.

While employers may wish to be cautious when assessing potential liability for common law notice periods in the post-COVID-19 world, employers should also know that there is a justifiable basis upon which to push back against inflated demands made by former employees and/or their counsel looking to rely on the ongoing health crisis as a rationale for unprecedented claims.

Need more information?

For additional information assessing termination liability amidst the ongoing pandemic, or for representation in wrongful dismissal litigation, contact [Danny Parker](#) at 416-435-5518, or your regular lawyer at the firm.



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