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An Update on Reasonable Notice Periods

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Determining an employee's reasonable notice upon termination of employment used to involve a fairly straightforward calculation, based on the so-called *Bardal* factors.

Not anymore.

Ontario courts have moved away from a formulaic approach in determining the length of reasonable notice. We are now seeing longer notice periods for employees who have short service, who are employed at lower levels or who are "older" at the time of termination of employment. Notably, however, the "high end" for reasonable notice periods for senior employees was reined in this past summer by an Ontario appellate court.

It is critical that employers who are contemplating terminations without cause are up-to-date on how the courts are viewing reasonable notice periods. To this end, we discuss some recent cases of note.

1. The Starting Point – The *Bardal* Factors

When determining "reasonable notice," Canadian courts often begin their analysis by referencing an early but frequently cited 1960 ruling: Bardal v. Globe and Mail Ltd.

Known as the "*Bardal* factors," the following four *indicia* form the starting point in determining

reasonable notice: age, length of service, character of employment (e.g. the employee's position, duties and responsibilities) and availability of similar employment. Traditionally, the informal guideline was that long service senior employees were entitled to approximately one month of notice per year of completed service.

2. Treatment of Short Service Employees

The length of notice awarded to short service employees by some Ontario courts has risen steadily in recent years. The courts have disagreed with the general rule of one month per year of completed service, an approach that has become most apparent with short service employees who are frequently awarded more than one month per year of service.

For example, in Nemirovski v. Socast Inc., a 40 year-old product manager who was employed for 19 months was awarded a notice period of 9 months upon the termination of his employment. The Ontario Superior Court of Justice emphasized the employer's failure to provide the employee with a reference letter and noted the fact that the employee did not obtain alternate employment for more than 9 months. Nonetheless, the decision illustrates the circumstances in which a higher notice period will be awarded to a short service employee.

More recently, in Norgren v. Plasma Power LLC, a plaintiff with less than 2 years of service (23 months) was awarded a reasonable notice period of 8 months. The plaintiff argued an entitlement to 12 months, while the defendant employer asserted a notice period in the range of 4 to 6 months. In reaching its conclusion, the Ontario Superior Court specifically considered the three-year fixed term of employment, the lower remuneration package, the plaintiff's duties and nature of his responsibilities and the absence of a true ownership interest.

Employers should be aware of the risks of terminating the employment of short service employees where non-contractual reasonable notice is an issue.

3. Treatment of Long Service Older Employees

The reasonable notice entitlements of more long service employees who are older appears to have climbed in recent years.

In Nezic v. Dom-Meridian Construction Ltd., a 74 year-old employee most recently employed as a construction foreman had been with the defendant employer and its predecessor for more than 31 years. The defendant claimed the plaintiff voluntarily resigned, while the plaintiff asserted that his employment was terminated. Given the plaintiff's age, supervisory positions held, 31 years of service and the limited opportunities of similar employment, the Ontario Superior Court awarded 20 months' pay in lieu of notice.

Notably, the Court opined:

[32] The law of reasonable notice in relation to aging employees has been evolving … employees are staying in the workforce longer … and … similar replacement work for the older employee is not readily available … [f]urther, character of employment, whether it is of lower level skill or not, is of declining importance when considering the reasonable notice entitlement… .

A similar approach was taken in Markoulakis v. SNC-Lavalin Inc., which involved a 65 year-old employee who had 40 years of service with the employer – his only career employer. The Ontario Superior Court noted that although the evidence did not establish that re-employment during the notice period was impossible, the above facts were exceptional circumstances that warranted 27 months' pay in lieu of notice.

The notice period awarded in *Markoulakis* was decided prior to the Court of Appeal's recent decision of Dawe v. Equitable Life Insurance Company (discussed below). Nonetheless, the Court's acknowledgement of the evolving interpretation of the *Bardal* factors is highlighted in its assessment of Ontario's aging working population.

4. Treatment of Lower Level Employees

In Armstrong v. Lendon, the plaintiff served as a legal secretary for 26 years. Upon termination of her employment, the defendant employer testified that he was unaware of the employee's common law right to reasonable notice. The Ontario Superior Court found that improbable, and in weighing the *Bardal* factors, determined that the clerical nature of the plaintiff's duties, among other factors, warranted the upper end of the reasonable notice range (21 months' notice). The Court specifically observed that the plaintiff had a highly responsible position evidenced by the fact that she was entrusted with the employer's passwords.

In *Vinette v. Delta Printing Ltd.*, 2017 CarswellOnt 3797, a 58 year-old plaintiff with a high school education had operated binding machinery in the same facility for nearly 16 years. Although the Ontario Superior Court noted that the plaintiff's job was not one with a supervisory element nor one involving great technical skill or responsibility, it did require care and diligence. This, along with his age and the difficulty of finding equivalent employment, led the Court to award 15 months' reasonable notice.

These cases reaffirm the Court's comments in *Nezic*. Employers should ensure addressing the common law rights of employees upon termination and note that lower level skilled positions may warrant reasonable notice periods similar to that of managerial roles.

5. Treatment of High End Notice Periods

Historically, Ontario courts limited the upper limit of reasonable notice period awards to 24 months. However, courts began diverging from that approach largely as a result of decisions such as *Hussain v. Suzuki Canada Ltd*. 2011 CarswellOnt 12251, where that Court held that while 24

months is usually the higher end of the range, “there is no cap on the amount of reasonable notice of employment termination to which an employee may be entitled.”

Fast forward to 2018 and the decision of the Ontario Superior Court in Dawe v. Equitable Life Insurance Company, which appeared to reinforce the move away from the fixed cap (or presumptive standard) of 24 months’ reasonable notice in wrongful dismissal cases.

The plaintiff in that case was a 62 year-old Senior Vice President with 37 years of service. Among other things, he sought 30 months of pay in lieu of notice in respect of his termination, while the defendant employer argued that his entitlement was limited to 24 months of notice. Based on the *Bardal* factors, the Court determined that the plaintiff was entitled to 30 months of reasonable notice, but not before commenting that because the plaintiff “[was] at the extreme high end of each of the *Bardal* factors…this case warranted a minimum 36 month notice period,” thereby suggesting that the Court would have awarded in excess of 36 months had the plaintiff asked for it.

The employer appealed the findings in this decision to the Ontario Court of Appeal. Specifically with respect to the appeal of the notice period, the Court of Appeal reduced the notice period from 30 months to 24 months. It stated that the motion judge’s conclusion was not based on “exceptional circumstances”; instead it was based on his perception of broader social factors that led him to conclude that the “presumptive standard” was inapplicable.

In particular, the Court of Appeal noted that the plaintiff’s decision to request an “exit strategy” ought to have weighed against a finding that this case involved “exceptional circumstances” which justified a notice period in excess of 24 months. The Court cited its earlier decision in Lowndes v. Summit Ford Sales Ltd., where it observed that “there is no absolute upper limit or cap on what constitutes reasonable notice” and further that “a base notice period of 24 months, the high end of the appropriate range of reasonable notice for long-term employees recognizes these factors and rewards them accordingly.”

The *Dawe* case is indicative of Ontario courts’ evolving approach to interpreting the *Bardal* factors, and the apparent shift away from the presumptive standards. It is also an important decision for employers, who have now been provided with some amount of certainty of a cap on the reasonable notice period to which an employee may be entitled barring exceptional circumstances, which do not include age, position and years of service in and of themselves.

An Update on Executive Compensation Through the Notice Period

By: Natasha D. Monkman, Stephanie M. Ramsay and Lucy Wu

In 2016, the Ontario Court of Appeal rendered Paquette v TeraGo Networks, which established a two-step test to determine an employee's damages relating to bonus entitlement during the common law notice period.

In the years since *Paquette*, a number of decisions have commented on the treatment of variable and incentive compensation – including the entitlement to bonuses, stock options, commissions and profit sharing – throughout the common law notice period. Much of the commentary in these cases focuses on if, and when, an employer can require that employees be "actively employed" on the date the payment would otherwise be paid in order to be entitled to the variable or incentive compensation during the common law notice period and, conversely, when employees can be disentitled to these forms of compensation during the common law notice period.

Set out below is a survey of these cases.

Paquette v. TeraGo Networks

In *Paquette*, on a motion for summary judgment, the motion judge held that the period of reasonable notice was 17 months. However, the motion judge held that the plaintiff was not entitled to a bonus over the reasonable notice period because of an "active employment" requirement stipulated by the bonus plan.

On appeal, the Court of Appeal stated that the issue was whether "the appellant's common law right to damages during the common law notice period, including the bonus that was part of his compensation package, was effectively limited by the 'active employment' condition in the bonus plan." It set out a two-step test to be followed in such cases:

- Was the bonus an "integral" part of the employee's compensation scheme?
- Does the wording of the incentive plan unambiguously alter or remove the appellant's common law rights?

The Court of Appeal found that the "active employment" requirement in the plan did not prevent the appellant from "receiving, as part of his wrongful dismissal damages, compensation for the bonuses he would have received had his employment continued during the period of reasonable notice."

Paquette is now a leading case with respect to the treatment of variable and incentive compensation in assessing wrongful dismissal damages. In particular, *Paquette* provides guidance as to the contractual language which will be required in order to preclude an entitlement to a bonus (or other variable/incentive compensation) during the common law notice period. Specifically, the wording of a bonus plan must be clear and unambiguous that a former employee is not entitled to the bonus that would have been received during the common law notice period. A plan which requires "active employment" alone, without clearly forfeiting the right to receive a bonus during

the common law notice period, is unlikely to be sufficient.

A number of cases decided following *Paquette* also comment on a terminated employee's entitlement to bonuses, sales commissions and stock options throughout the common law notice period. The cases illustrate the significant bar that employers must meet in order to successfully defeat a claim for damages relating to incentive or variable compensation over that period.

Bonus Entitlement Cases Post-*Paquette*

Andros v Colliers Macaulay Nicolls Inc.

The reasoning in *Paquette* was upheld in *Andros*, in which the applicable bonus plan stipulated that the employee needed to be "in good standing" to receive a bonus. The lower court found this phrase to be similar to the "active employment" language in *Paquette*, a finding that was affirmed on appeal.

As in *Paquette*, the Court of Appeal in *Andros* found that the requirement that an employee be in "good standing" was insufficient to preclude the employee from receiving his bonus during the common law notice period. The Court found that the bonus formed an integral part of the employee's compensation and that the "good standing" provision did not clearly exclude employment during the common law notice period. To that end, it is not the specific wording of "active employment", as discussed in *Paquette*, that is problematic. Rather, it is the blanket requirement that someone be actively employed – or, as in *Andros*, "in good standing" – without further clarity that entitlement will not continue during the common law notice period. This results in a finding that the employee is entitled to damages with respect to the incentive pay that they would likely have earned had their employment continued over the notice period.

Dawe v The Equitable Life Insurance Company of Canada

In *Dawe*, the Court of Appeal overturned the motion judge's award of 30 months' notice given there were no exceptional circumstances in this case that warranted a notice period longer than 24 months.

However, the Court of Appeal agreed with the motion judge that the employee had not been made sufficiently aware of the termination provision in the Company's bonus plan which purported to limit entitlements during a notice period. Accordingly, the Court held that the employee was entitled to damages in respect of his bonuses under the Long Term Incentive Plan (LTIP) and Short Term Incentive Plan (STIP) throughout the common law notice period.

An important takeaway from this case is that employees need to be made aware of such stipulations in their employer's bonus plan. Even if the language of a bonus plan is strong, employers will likely still be required to demonstrate that their employees received a copy of the

applicable plan(s) and were made aware of the applicable plan terms.

Paquette in the Context of Stock Options and Profit Sharing

O'Reilly v Imax Corporation

The two-part test from *Paquette* has also been applied within the context of stock options and restricted share units (RSUs). In *O'Reilly*, the employee argued that he was owed 100% of his sales commissions up to the date of the termination of his employment. The employer argued that the employee was only entitled to 50% of his commissions according to the express language of the Sales Commission Plan, which stated that "employees are eligible to receive 50% of their ongoing commission at the time that they terminate employment, less any advance commissions paid to them in the form of a draw."

The Court interpreted the phrase "at the time that *they* terminate employment" to mean the time at which the *employee* chose to terminate the employment relationship. Since the employment was terminated by the employer, the clause did not apply in this case. The employee was therefore entitled to 100% of his commissions.

With respect to the employee's RSUs and stock options, the Court applied the two-part test from *Paquette* and found that the RSUs and stock options would have vested during the common law notice period had the employer not terminated his employment. They were found to be integral parts of the employee's compensation. As there was no clear and unambiguous language in the applicable plans forfeiting these entitlements upon termination, the Court held that the employee was entitled to damages with respect to his RSUs and stock options which would have accrued over the common law notice period.

Entitlements Under Shareholder Agreements During the Common Law Notice Period

It is worth noting that the manner in which courts have treated post-termination entitlements under shareholder agreements has, to an extent, differed from the way courts have treated performance bonuses that employees are entitled to under their employment contracts.

Evans v Paradigm Capital Inc.

In *Evans*, the plaintiff was found to have been constructively dismissed and was awarded 11 months' notice by the trial judge. The damages award, which included a performance bonus and a shareholder bonus, was assessed at $137,055.54.

On appeal, the Court accepted the employer's argument that the plaintiff "ceased to be a shareholder upon the termination of her employment, when her shares were purchased by the

[employer] in accordance with the deemed transfer notice provided for in the Shareholders' Agreement." The termination date for purposes of this divestiture was the date on which her employment terminated and not the end of the common law notice period. As such, the Court held that the plaintiff was not entitled to damages in respect of any shareholder bonus which would have accrued following the date of her termination of employment. This finding reduced the plaintiff's damages to $57,262.96.

Mikelsteins v Morrison Hershfield Limited

In this case, the Court of Appeal drew a distinction between an executive's entitlement under common law from his entitlement under the Shareholder's Agreement upon termination of his employment. The Court stated that the former executive's entitlement under the Shareholder's Agreement was "separate and apart" from the relief to which he was entitled under his contract of employment.

At trial, the judge ordered the employer to pay the former executive an amount in respect of the value of his shares as determined at the end of his notice period, including any shareholder bonus payable during the same period. The Court of Appeal found that the motion judge erred by "improperly inflating the former employee's entitlement to compensation arising from the breach of his contract of employment with his contractual entitlements respecting his shares."

Analyzing the Shareholder's Agreement, the Court found that its terms expressly provided that the corporation would buy back a terminated employee's shares at the date of termination, rather than at the end of the notice period. The Court stated that it is reasonable to infer that a corporation would not intend for an employee to be able to exercise all of the rights of a shareholder once employment is terminated. The Court therefore found that there was no entitlement to any shareholder bonus during the common law notice period, when the former employee was no longer a shareholder.

Takeaways for Employers

Based on the foregoing cases, it is a best practice for employers to carefully review the wording of their incentive and/or variable compensation plans to confirm that the eligibility requirements under these plans are clear and unambiguous, particularly as it pertains to entitlements after employment has ended (i.e. during the common law notice period). Further, employers should ensure that they have processes in place for making sure that their employees are made sufficiently aware of any terms and conditions in their incentive and/or variable compensation plans that purport to limit their entitlements during the common law notice period, especially where there is a change in the terms of the plan.

Featured Lawyer

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Kim is a partner in our Toronto office and regularly advises clients on a wide variety of human resources issues, such as the negotiation and drafting of executive employment contracts, managing employee departures including the preparation of severance packages, discipline and performance management, and human rights. She also represents clients in civil and administrative proceedings, ranging from wrongful dismissal actions to employment standards and human rights matters. Kim brings a practical approach to her advice and representation with a view to achieving outcomes which balance cost, risk and strategic objectives.

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