

February 5, 2016

Employee salaries and benefits can be some of the greatest costs borne by a business. As a result, when a company faces financial hardship, they will often terminate positions to reduce their costs. However, many employers may not realize that the obligation to provide reasonable notice of termination could negate any short-term cost savings they hoped to realize.

When an employee is dismissed due to their employer's financial circumstances or restructuring, the termination of their employment is without cause. As a result, they are entitled to reasonable notice of termination at common law (unless this right has been limited through an enforceable termination clause). There is no precise method to determine a person's common law entitlement to reasonable notice of termination. Canadian courts determine the requisite amount of reasonable notice on an individual basis by taking into account factors such as the character of the employment, the likelihood of securing alternate work, and the employee's age, position, and length of service. Although employers will sometimes estimate the notice period based on a rule of thumb of one month of notice per year of service, courts deny that this "rule" exists. Depending on the circumstances, employees could be awarded significantly more (and sometimes less) than one month per year of service.

Employers often believe that their financial difficulty should be a factor in determining the reasonable notice period. However, the courts do not agree. Most recently, the Ontario Court of Appeal, in *Michela v St. Thomas of Villanova Catholic School*, 2015 ONCA 801, overturned a trial decision which relied on the employer's finances to reduce the plaintiffs' notice entitlement. In that case, the trial judge found that the dismissed employees would typically be entitled to 12 months' notice of termination, but only awarded them 6 months' notice due to the employer's financial circumstances. The Court of Appeal held that this was an error, and confirmed that the determination of the reasonable notice period turns on the employee's (and not the employer's) circumstances. It stated:

It suffices to say that the character of the employment, like the other *Bardal* factors, is concerned with the circumstances of the wrongfully dismissed employee. It is not concerned with the circumstances of the employer. An employer's financial circumstances may well be the *reason* for terminating a contract of employment – the event that gives rise to the employee's right to reasonable notice. But an employer's financial circumstances are not relevant to the determination of reasonable notice in a particular case: they justify neither a reduction in the notice period in bad times nor an increase when times are good.

Contact

Alison Bird

902.491.4138

abird@coxandpalmer.com

...

It is important to emphasize, then, that an employer's poor economic circumstances do not justify a reduction of the notice period to which an employee is otherwise entitled having regard to the *Bardal* factors.

This clear statement by the Ontario Court of Appeal confirms that employers are not justified in relying on their finances to provide less notice of termination. As a result, many employers facing financial strain are left in the difficult situation of not being able to afford to keep their employees, but also not being able to afford to meet their termination obligations. Employers should consider being pro-active to avoid such a dilemma by implementing employment contracts with enforceable termination clauses which limit employees' termination entitlements.

This Cox & Palmer publication is intended to provide information of a general nature only and not legal advice.