

DOUGHT WE FEAR THE TIME OF YEAR? SUMMER DISMISSALS MAY WARRANT LONGER NOTICE PERIODS

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A recent decision of the Ontario Superior Court of Justice is a good reminder that a number of factors may be relevant to determining "reasonable notice" of termination under the common law. In the recent case of *Fraser v. Canerector Inc.* ("*Fraser*"),^[1] the Court increased the period of reasonable notice owed to a senior employee by 50% because his termination occurred in June.

What is reasonable notice?

Absent a binding employment agreement with enforceable termination provisions, the common law in Canada requires that employers provide employees with "reasonable notice" that their employment will be terminated (or pay in lieu of such notice) in the absence of "cause". Such "reasonable notice" often exceeds the minimum statutory notice and severance pay requirements under applicable employment standards legislation, and it is intended to provide the employee with sufficient time to secure alternate comparable employment.

In determining reasonable notice, courts generally rely upon the factors set out in the leading case of *Bardal v. Globe & Mail Ltd.* ("*Bardal*").^[2] The most commonly referenced factors from *Bardal* are age, length of service, position (i.e., character of the employment) and compensation. However, *Bardal* is clear that reasonable notice must be decided based upon the facts of each particular case, including the availability of similar employment. The *Fraser* case is a good example of this principle.

"Time of the year" as a consideration in determining notice

In *Fraser*, the termination of the employee's employment occurred during the summer, and the court increased the reasonable notice period on this basis. Mr. Fraser was a 46 year old, senior executive, who worked for the defendant for 34 months. Justice Dunphy considered the employee's prospects of finding alternate employment to be strong, which was supported by the fact that Mr. Fraser actually secured new employment within approximately 10 weeks.

However, Justice Dunphy found that, in the circumstances of this case, the fact that the termination occurred

in the summer was relevant, as follows:

I find that for a man of Mr. Fraser's age and level of responsibility but relatively short years of service, I must also account for the time of year when his employment was terminated in assessing reasonable notice. Mr. Fraser's employment was terminated in June and it was quite foreseeable that hiring decisions at his level might have needed to be delayed somewhat due to the summer months in order to account for vacation schedules of key decision-makers. While his term of service might normally suggest a relatively shorter period of notice, timing plays a bigger role where notice is short. While timing in fact was no impediment in this case (Mr. Fraser having found new employment by August), that is a conclusion enabled by hindsight.

Therefore, Justice Dunphy concluded that 4.5 months of notice was reasonable in this case, whereas absent any consideration of the time of year he would have awarded three months based upon the other Bardal factors.^[3]

Lessons for Employers

Many employers assess reasonable notice based upon a "rule of thumb", such as one month per year of service for senior employees and two weeks per year of service for lower level employees. The courts have repeatedly rejected this approach. Other employers recognize the need to consider the employee's particular circumstances, but only think about the four basic characteristics outlined above (i.e., age, length of service, position and compensation).

Fraser is a good reminder that any factor(s) which affect an individual's ability to obtain alternate employment could be taken into consideration when assessing reasonable notice. As indicated by Justice Dunphy:^[4]

The principles to be applied are simple to state if complicated to apply. As is often said, each case is determined on its particular facts. The question of reasonable notice is quintessentially a matter of mixed fact and law that requires the judge hearing the case to apply his or her judgment to the assessment of a number of factors many of which tend to pull in opposite directions. The end result is more art than science but must be one that is fair in all of the circumstances.

Given the complicated analysis required to assess reasonable notice, it is important to seek legal advice when contemplating any termination. Furthermore, for employers who wish to avoid the uncertainty of "reasonable notice", employment agreements with well-drafted termination provisions are highly recommended.

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1 *Fraser v Canarector Inc.*, 2015 ONSC 2138 [*Fraser*]

² *Bardal v Globe & Mail Ltd.*, (1960) OWN 253 (Ont HC) at para 21.

³ *Supra* note 1 at para 38.

⁴ *Ibid* at para 32.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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