

COURT CONSIDERS IMPACT OF COVID-19 PANDEMIC ON REASONABLE NOTICE PERIODS

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Ontario's Superior Court of Justice has issued the first of likely many decisions dealing with the COVID-19 pandemic and its impact on reasonable notice periods.

Background

The employee in *Yee v Hudson's Bay Company*^[1] was a 62-year old Director of Product Design with 11 years of service. He was dismissed from his employment in August 2019, approximately six months before COVID-19 was characterized as a pandemic by the World Health Organization.

In support of his claim for an 18-month reasonable notice period, the employee argued that the COVID-19 pandemic had resulted in significant increased difficulty in obtaining alternate employment. In this regard, the employee's evidence was that he had sent out approximately 90 job applications without success. He submitted that this provided a basis for awarding a reasonable notice period at the highest possible end of the appropriate range.

The trial judge disagreed. In refusing to take the COVID-19 pandemic into account, the trial judge relied on the Ontario Court of Appeal's decision in *Holland v Hostopia.com Inc.*, which says: "Notice is to be determined by the circumstances existing at the time of termination and not by the amount of time that it takes the employee to find employment". In other words, because termination of employment occurred prior to the start of the pandemic, it could not be relied upon as a factor influencing the reasonable notice period owed by the employer.

However, the trial judge did leave the door open for employees dismissed *after* the start of the COVID-19 pandemic to argue that they may be entitled to receive longer notice periods. In the words of the trial judge:

"It seems clear terminations which occurred before the COVID pandemic and its effect on employment opportunities should not attract the same consideration as termination after the beginning of the COVID pandemic and its negative effect on finding comparable employment."

Takeaways for Employers

There are conflicting legal decisions about the impact that a downturn in the economy should have on reasonable notice periods. On one hand, courts have held that an economic downturn may make it more difficult to find alternate employment, and this may justify a longer reasonable notice period.^[2] On the other hand, Ontario's Court of Appeal has said that difficulty in securing alternate employment should not have the effect of increasing the notice period unreasonably – e.g., when employment is unavailable due to “general economic conditions”.^[3]

The impact that the COVID-19 pandemic should have on reasonable notice periods is an issue that will likely be heavily litigated in the months ahead. For now, however, employers can take some comfort in the fact that employees dismissed before the start of the COVID-19 pandemic should not receive inflated notice awards simply because a pandemic was later declared during the applicable notice period.

[1] 2021 ONSC 387.^[ps2id id='1' target='']

[2] *Paquette v. TeraGo Networks*, 2015 ONSC 4189; *Zoldowski v Strongco Corporation*, 2015 ONSC 5485.^[ps2id id='2' target='']

[3] *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONCA 801.^[ps2id id='3' target='']

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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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