WEIGHING YOUR OPTIONS? REASONABLE NOTICE MEANS WEIGHING YOUR EVIDENCE, COUNT SUMMARY JUDGMENT OUT

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Coffey v Nine Energy Canada Inc. [1], a recent decision of the Alberta Court of Queen's Bench, confirms that summary judgment is not appropriate to decide an assessment of damages for pay in lieu of reasonable notice. This case was an appeal from Master Farrington's decision[2], finding that an assessment of reasonable notice requires the weighing of evidence, which cannot be determined by summary judgment and is outside the jurisdiction of a master. In confirming the Master's decision, the Court concluded that an application should instead be made for summary trial pursuant to Rule 7.5 of the *Alberta Rules of Court* (the "Rules"), which is more appropriate to determine damages for reasonable notice as it allows a justice to make findings of fact.

The Master's Decision

The Plaintiff in this case brought an action for wrongful dismissal after he was terminated without cause, and also sought 1% of North American revenues arising from a product that he claimed to have co-invented. The parties did not dispute the issue of cause, but the employer Defendant argued that it had provided sufficient pay in lieu of notice. The Defendant also counterclaimed, alleging improper conduct by the Plaintiff following his termination. The Plaintiff brought an application for partial summary judgment and the dismissal of the counterclaim. Summary judgment, a tool often used in wrongful dismissal cases, allows for an expedited and less expensive process when the only issue is the amount of reasonable notice an employer must pay. Master Farrington, however, dismissed the Plaintiff's application.

Master Farrington held that a determination of reasonable notice was beyond his jurisdiction and unsuitable for summary judgment because it required considering the evidence and the law to arrive at an award on a continuum of possible awards. Rule 7.3(3)(b) allows a court to determine the amount "if the only real issue to be tried is the amount of the award". Master Farrington held that the words "issue to be tried" implied trial-like powers, which are beyond the jurisdiction of a master.[3] The Plaintiff appealed.

The Appeal

On appeal, the primary issue was, again, whether notice periods can be assessed on a summary judgment application. The Court agreed with Master Farrington's decision that an assessment of damages for reasonable

notice was both outside the jurisdiction of a master and inappropriate for summary judgment, but for different reasons.

Examining mixed decisions on the suitability of summary judgment, the Court held that "when evidence must be weighed and contentious issues of fact determined, summary judgment, whether before a master or a judge, is inappropriate".[4] Accordingly, the "core issue" was whether an assessment of reasonable notice involves weighing evidence. The Court decided that it does.

The Court examined various, differing cases on this core issue, ultimately holding that an assessment of reasonable notice involves weighing the evidence applicable to the Bardal factors, which may, themselves, be given differing weights. What constitutes reasonable notice therefore turns on the facts of each case. It is not a "simple computation" nor a "mechanical or algorithmic exercise"[5], but instead involves weighing evidence to determine a question of fact.

Accordingly, the Court ruled that a reasonable notice case is not appropriate for summary judgment under Rule 7.3. Instead, a summary trial under Rule 7.5 is better suited for these disputes, allowing a justice to weigh competing evidence, including the *Bardal* factors, to determine the applicable notice period without the need for a full *viva voce* trial.

What Employers Should Know

Although *Coffey* has provided some clarity amid differing decisions, it suggests that Alberta employers and employees are precluded from applying for summary judgment to determine reasonable notice damages. Therefore, obtaining a court ruling on the amount of reasonable notice damages owed to a former employee may become a more expensive and longer process.

However, it is not all bad news for employers. In removing the summary judgment tool from a plaintiff's options, employers may regain some bargaining power. *Coffey* may deter applications for summary trial - the new route employees will have to take in many reasonable notice cases - and encourage employees to settle their disputes with employers for faster and, hopefully, less expensive results.

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[1] 2018 ABQB 898 [Coffey].[ps2id id='1' target='/]
[2] 2017 ABQB 417.[ps2id id='2' target='/]
[3] Court of the Queen's Bench Act, RSA 2000, c C-31, s 9.[ps2id id='3' target='/]
[4] Coffey at para 26.[ps2id id='4' target='/]
[5] Ibid at para 32.[ps2id id='5' target='/]

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.