WORKING NOTICE: CLASS ACTION SUCCEEDS IN CHALLENGING WHEN CLOCK STARTS

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The threat that groups of dismissed Canadian employees will proceed by way of a class action filed in the courts has, at least until now, been generally predictable and manageable. However, as a result of a recent Ontario decision, employers may face an increased number of workplace class actions, particularly in the case of group or mass terminations.

In *Wood v. CTS of Canada Co.*, 2017 ONSC 5695, a dispute arose regarding the closure of the Streetsville, Ontario plant of CTS of Canada Co. (CTS), which was scheduled for mid-2015. In connection with the proposed closure, by letter dated April 17, 2014 CTS advised a group of 77 employees that their employment would terminate on March 27, 2015, almost a year later. Through later documentation and notice, the actual termination date for most relevant employees was extended even further, to June 28, 2015. The result was that more than 12 months advance notice of termination was provided to most of the relevant employees.

The approach which CTS followed is consistent with what many employers do in group termination situations – the period between the date of any relevant written notice of termination and the termination date is often quite long so that it may be credited against damages otherwise payable for wrongful dismissal. A lengthy working notice period of this nature can also often reduce total termination costs as a result of employee attrition prior to the termination date.

On May 12, 2015, CTS submitted to the Ontario Ministry of Labour (MOL) the employer's Form 1, which is required as part of the "mass termination" provisions of the *Ontario Employment Standards Act, 2000* (ESA). Form 1 is a relatively simple document which sets out, among other things, details of the number of employees being terminated and the economic circumstances surrounding the terminations. At the same time the MOL was notified, CTS complied with the relevant provision of the ESA which requires that the Form 1 be posted in the workplace.

The group termination rules under the ESA apply in the case of employers, such as was the case with CTS, who terminate 50 or more employees at the same establishment within the same four-week period. In these circumstances, the amount of statutory notice of termination is increased depending upon the number of

employees receiving notice of termination.

The delivery of the Form 1 more than a year after the closure had been announced resulted in a class action being filed on behalf of CTS employees. The claim was that the failure to submit the Form 1 to the MOL in April 2014 negated the effect of the approximately 12 months of working notice. The plaintiffs essentially argued that no credit should be allowed for working notice already provided; that is, the notice of termination to employees could not commence until the Form 1 was received by the MOL.

The Court found for the employees, holding that the ESA requires that the employer must submit the Form 1 to the MOL on the first day of any notice period. In other words, the "start of the clock" for employee notice periods under the ESA and the common law can only occur after the point when the MOL has been notified through the delivery of a Form 1. As a result, CTS was not entitled to credit for the working notice prior to notifying the MOL.

The judge's reasons, which reviewed relevant arguments and consequences in detail, are based on what he found to be a clear ESA contravention. The argument that employees received more notice than the ESA requires (to individuals or a group) did not displace the fact that the process required by the ESA had not been followed. This resulted in what the judge found to be substantive prejudice, including in the form of having to wait more than a year to learn about retraining and skills upgrade opportunities.

The judge proceeded to direct that counsel attempt to work out a process for determining the liability of CTS to individual class members. If the parties could not agree on such a process, further submissions and court hearings would be required.

Takeaways for Employers

This decision highlights the importance of strict technical compliance with Canadian employment rules. Even in cases where the employer believes that they have "done the right thing" with respect to notifying employees well in advance of termination, there is no accepted route to avoid statutory obligations. And when the tool of an employee class action is added to the equation, the consequences of non-compliance can be quite costly. It would not be a surprise at all to see the use or threat of these types of employee class actions become more common.

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A Cautionary Note