

## Members Quarterly

Winter 2016 Edition

### Feature

# Calculating Reasonable Notice Periods: No More “Rule of Thumb”

*New developments and more factors to be considered*

Wrongfully dismissed employees are entitled to reasonable notice of the termination of their employment, or pay in lieu thereof, which is intended to allow reasonable time for employees to find comparable employment. In the past, there was a common misconception that wrongfully dismissed employees were entitled to a reasonable notice period of roughly one (1) month per year of service. Canada’s courts have, in no uncertain terms, held that this “rule of thumb” approach is incorrect and fails to take into account the unique factors relevant to each case.

The determination of a period of reasonable notice requires consideration of a variety of factors. The leading case for this proposition is *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), which held that reasonable notice is dependent upon the facts of each case, with reference to the character of the employment, length of service, age at termination and availability of similar employment, taking into account the experience, training and qualifications of the employee (the “Bardal factors”).

The Bardal factors are not exhaustive and recent judicial decisions continue to demonstrate that courts will consider a seemingly endless number of factors to justify longer notice periods for employees.

**High Income:** In *McCarthy v. Motion Industries (Canada) Inc.*, 2013 ONSC 1581, aff’d 2015 ONCA 224, the plaintiff was a 46-year-old salesman with fourteen (14) years’ service at the time of termination. He had historically sold hydraulic parts, but eventually was instrumental in expanding his employer’s business such that it began to produce and sell drill rigs. Although he had made well under \$100,000.00 earlier in his career, once he began to sell drill rigs, his income grew exponentially to the point that he was making nearly \$1,000,000.00 shortly before the termination of his employment.

The trial judge held that the plaintiff was entitled to a sixteen (16) month notice period, and the Court of Appeal upheld the same. This is higher than the notice period that a typical production salesman with similar age and service would be awarded. In this case, it was awarded because the plaintiff had earned such a high income with the employer, so it would be particularly difficult for him to find a comparable position with another employer, especially given that he had only a secondary school education.



Hendrik  
Nieuwland



Stephanie  
Brown

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**Purchasing Shares in Employer Company:** In *Rodgers v. CEVA Freight Canada Corp.*, 2014 ONSC 6583, a 57-year-old senior executive was dismissed after three (3) years' employment, and was awarded a fourteen (14) month notice period at trial. The factor that the Court weighed most heavily in awarding such a long notice period was that the employer insisted the plaintiff purchase roughly \$100,000.00 of shares in the company, as the employer wanted its senior executives to have "skin in the game". The plaintiff borrowed money in order to meet this requirement. Following the termination of his employment, the employer advised the plaintiff that the shares were worthless. The Court held that the requirement to purchase shares at the commencement of employment implied to the plaintiff that he could expect an exceptional level of job security, and therefore awarded the long notice period

**Family Status:** In *Partridge v. Botony Dental Corporation*, 2015 ONSC 343, the Court awarded the plaintiff, a 36-year-old office manager in a dental office who had seven (7) years' service, a twelve (12) month notice period. The Court also awarded general damages because the Court concluded that the termination was motivated by the plaintiff's recent maternity leave. In justifying the high notice period award, the Court expressly stated that it accepted evidence that the plaintiff's family relied on her income and therefore experienced financial strain following the termination of her employment. It therefore appears that the Court took the plaintiff's family status into account in awarding a long notice period, presumably because it was more difficult for the plaintiff to find a new position when she was also responsible for caring for her young children.

**Time of Year of Termination:** In *Fraser v. Canerector Inc.*, 2015 ONSC 2138, the Court created yet another novel factor to be considered in extending the reasonable notice period. The plaintiff had his notice period extended by fifty percent (50%) as a result of the time of year that his employment was terminated.

The plaintiff was a 46-year-old senior executive with thirty-four (34) months' service with the employer when his employment was terminated on June 10, 2014. The motions judge awarded a reasonable notice period of four and one-half (4.5) months, and the decision expressly stated that the plaintiff would have been awarded a three (3) month notice period but for the time of year of the termination. The motions judge held that it is particularly difficult for senior executives to obtain new positions during the summer months because key decision-makers of potential employers often take vacations in the summer and hiring decisions are therefore likely to be delayed. Interestingly, the plaintiff in Fraser was able to obtain a comparable high-level position after only ten (10) weeks and commenced such employment on August 25, 2014, so the summer clearly did not drastically impact the plaintiff's actual job search.

The ever-expanding list of factors taken into account by courts in calculating notice periods creates significant uncertainty for employers in pre-determining employees' entitlements on termination. The use of contractual termination clauses appears to be the best (perhaps only) means to eliminate this uncertainty - assuming one ensures it is enforceable. We will discuss contractual termination clauses in our next article.

*Hendrik Nieuwland is a partner and Stephanie Brown is an associate with the employment litigation firm Shields O'Donnell MacKillop LLP of Toronto.*