

Member's Quarterly

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Feature

Concerning Increase in Termination Notice Period

Is there a new upper limit for Alberta?

Historically, most Canadian courts have refrained from awarding reasonable notice periods in excess of 24 months and have saved the maximum of 24 months for C-suite executives. However, in a decision last year, *Lischuk v K-Jay Electric Ltd*, the Alberta Court of King's Bench set a new precedent awarding a long-term employee a reasonable notice period of 26 months.

Facts

The Plaintiff began working for the Defendant employer in 1978 as a helper, making his way up through the company until he became the General Manager in 2008. In 2002, he became a shareholder. He was terminated without cause in 2013 after a company decision to change direction.

At the time of his termination, he was 58 years old and earning \$254,000 in base salary, a Christmas bonus, as well as \$137 per month in benefits. He had a 20% equity interest in K-Jay and a compensation level substantially higher than others in similar management positions within the electrical industry. He did not have a written employment agreement and had worked for the Defendant for 38 years.

While his skill set was transferable within the electrical industry, it would not have been in other industries. Despite his transferable skills, there were only two other companies comparable to K-Jay in electrical contracting businesses near him. His ability to find similar and comparable employment would therefore be significantly limited as a result of working solely for the Defendant over three decades. The Court also focused on the employer's evidence that the Plaintiff was being terminated because he held an "old school mentality," which would not be attractive to potential future employers.

The Defendant acknowledged the Plaintiff was entitled to 24 months based on the Bardal factors and argued that is the maximum limit for reasonable notice any employee may receive in Alberta. The Supreme Court of Canada has confirmed that the assessment of reasonable notice depends on the circumstances of the individual plaintiff and that 24 months is "at the high end of the scale." In Alberta, courts have described 24 months as a "rough upper limit", and the Court in this case was unaware of any Alberta authorities that have awarded a reasonable notice period beyond 24 months.

The Court found that none of the cases before it stated that 24 months was a hard cap. Further, it found that "exceptional circumstances" usually arise where an individual begins to work for a company as a young adult and is terminated near potential retirement age after becoming a key employee. Therefore, upon termination, such employees are in a situation where the prospects of obtaining similar comparable employment are significantly limited and they have been effectively "forced into retirement."

The Court found that the *Bardal* Factors in this case gave rise to exceptional circumstances that necessitated awarding a reasonable notice period beyond the rough upper limit of 24 months. As a result, the Court found the reasonable notice period was **26 months**, totalling over \$1.5 million damages, with



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no reduction for failure to mitigate (even though the Plaintiff did not take any steps to seek comparable employment).

Takeaways

This case is certainly an outlier, with some of the Court's conclusions subject to scrutiny. The Court's conclusions that there were exceptional circumstances are suspect and difficult to reconcile with other decisions. Some findings were made without reference to the evidence. In addition, it is questionable whether age 58 is close to retirement. Further, the Court assessed how long the Plaintiff was expected to take to find replacement employment rather than how long a person possessing the Plaintiff's *Bardal* factors would be expected to take. Finally, the Plaintiff's possession of an "old school mentality" is not a *Bardal* factor and arguably should not have been considered.

We question the correctness and applicability of this case. A notice period of 24 months is already extensive. Adding to that length appears to make employers an insurer against unemployment.

While this case shows that a reasonable notice period in excess of 24 months can be awarded, and no doubt we will now see greater damages being claimed by long-service employees, this case should not be taken as an indication that there is a new upper limit for common law notice periods in Alberta. This decision is very much fact specific, and it could be argued that it was based on assumptions and considerations that would not be as persuasive if argued again. We hope this decision is appealed or distinguished in future cases.

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