

Member's Quarterly

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Feature

Employees with History: Consider Past Service upon Termination

Use caution in negotiations with returning employees

When terminating the employment of non-unionized employees in Alberta on a without cause basis, employers are required to give notice or pay in lieu of notice. One of the key factors in determining the applicable termination notice period, both under statute and common law, is the employee's length of service.

However, what happens when there is a break in that service? For example, when an employee leaves for a different employer and later returns to the original employer?

Common Law Reasonable Notice is Complicated

While provincial legislation generally addresses the issue of multiple periods of employment for the purposes of statutory termination notice, the answer is not so clear for common law reasonable notice. This is because courts have the discretion to disregard interruptions in service when determining the notice period, and will examine the break in service in the context of the full period of employment.

In *Hetherington v. Saskatchewan Liquor and Gaming Authority*, 2020 SKQB 110, the employee commenced working for the Government of Saskatchewan in 1987, but in April 2005, the employee voluntarily left her position and assumed the position of manager of organizational development with the City of Lethbridge, Alberta. In October 2007, the employee returned to Saskatchewan public service after a 29-month hiatus. The employee's employment was ultimately terminated in May 2017.

The employer provided severance based on 9.25 years of service (October 2007 to May 2017). However, the employee contended that she should be credited for more than 28 years of service.

The court ultimately recognized the employee's 28 years of service based on several factors. These included that the employer effectively treated her as a long-term employee by providing her with an enhanced salary package to acknowledge her credentials and previous experience, and recalculated her entitlements to vacation leave and long service recognition awards based on her prior employment with the Saskatchewan Workers' Compensation Board and the Saskatchewan Property Management Corporation. As well, the break in service was relatively short when compared to the totality of her employment with the Government of Saskatchewan — 29 months of the approximately 28 years of service or 7.86% of the time. Because of these factors, the court found that it would be unreasonable and illogical to ignore her previous years of service when assessing her severance entitlement.

As can be seen in the above example, whether the courts will exercise their discretion to disregard breaks in service in determining the notice period will be a very fact-specific analysis.

Takeaways

For employers who are planning on rehiring employees who have previous service with the employer, it will be important for the employer to consider the factors set out in *Hetherington* in negotiating the new employment relationship. Consider expressly stating that previous service will not be recognized (unless statutorily required), avoid inducing former employees to return and offer only entitlements that a new



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employee would receive to the returning employee. Although these steps may help reduce the risk that a court recognizes all previous service with the employer when determining termination notice, the court may still ultimately have the discretion to do so, thus an alternative would be to negotiate with a departing employee to execute a release.

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