

Member's Quarterly

Spring 2023 Edition

Feature

Golden Vacation or Faded Opportunity

Awarding vacation pay during notice periods

When a termination occurs, taking a vacation is likely not top of mind for either the employer or the employee. However, if the employee is entitled to common law reasonable notice, the general principle is that the employee is entitled to compensation and benefits the employee would have earned during the reasonable notice period. So, would this principle also include vacation pay accrual during the notice period?

For provincially regulated employees in Alberta, whether vacation pay should be awarded during the notice period is governed by two competing lines of case law:

1. One line of cases states: **If the employee could have chosen** whether to take vacation, the employee is **not entitled** to vacation pay during the notice period. To rebut this presumption, evidence that the employer **prohibited** the employee from taking vacation is required;
2. The other line of cases states: **If the employee could have chosen** whether to take vacation, the employee is **entitled** to vacation pay during the notice period. To rebut this presumption, evidence that the employer **required** the employee to take vacation is required.

No Vacation Pay if employee could have chosen to take vacation

The leading decision on the issue of awarding vacation pay during the notice period is *Bagby v. Gustavson International Drilling Co.*, 1980 ABCA 227. The *Bagby* decision suggests that even if there is evidence that the employee did not historically take his vacation, it did not mean that the employee could not have taken vacation during the notice period.

Specifically, the Alberta Court of Appeal in *Bagby* stated that, "The argument seemed to be that Mr. Bagby often did not take his vacation in which event he was given five weeks' salary in lieu of it. We do not know whether, had he not been dismissed, that would have been the case. In any event, he did not work during the time in question but is receiving pay in lieu of notice. There is no justification for doubling this amount for the five weeks of vacation."

Vacation Pay if employee could have chosen not to take vacation

However, in *Tanton v. Crane Canada Inc.*, 2000 ABQB 837, the court stated that, "[...] I did not have evidence before me that suggested that the Plaintiff would have been compelled to take his vacation on some sort of regular basis. If it were his option whether to take vacation or not, then a notice period given to him would, in my view, be one that he could choose to work out to the end of it without taking vacation, and then receive the earned vacation money as well."

The *Tanton* decision appears to change the presumption discussed in *Bagby*. Instead of presuming that if the employee had the choice over whether to take vacation, they would not be entitled to vacation pay



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during the notice period, *Tanton* is presuming that if the employee had the choice over whether to take vacation, they would be entitled to vacation pay during the notice period.

Mixed Developments

The court then followed *Tanton* in *O'Donnell v. Soldan Fence and Metals (2009) Ltd.*, 2015 ABQB 764, and found the employee was entitled to vacation pay during the notice period despite evidence that he typically took his vacation. The court in *O'Donnell* stated, "The evidence is that Mr. O'Donnell typically took his vacation but, following *Tanton*, absent evidence that Mr. O'Donnell was *obliged* to use up his vacation, he is entitled to it over the notice period."

Most recently, *Nixdorf v. Broadstreet Properties Ltd.*, 2017 ABQB 132 and *Hunsley v. Canadian Energy Services LP*, 2020 ABQB 724, returned to following *Bagby*. The court in *Hunsley* discussed both *Bagby* and *Tanton*, and ultimately concluded that, "the Employee Handbook makes it clear that it was the employer's option whether vacation entitlement could be carried over and when vacation could be taken. There is no reason to infer that because Ms. Hunsley had previously been permitted to defer vacation and was paid out banked vacation at her dismissal, she would have been entitled during working notice to defer her vacation entitlement in favor of monetary compensation... I find there is no entitlement to compensation for additional vacation entitlement accrued over the notice period."

Based on the most recent decisions, it appears the law in Alberta has returned to the presumption that if the employee had a choice over whether to take vacation, the employee would not be entitled to vacation pay during the notice period.

Takeaways for the Employer

Despite what appears to be a return to the *Bagby* principle, one option for employers to reduce the uncertainty over whether vacation pay would be awarded during the notice period is to set out an enforceable termination provision that explicitly addresses the employee's entitlement during the common law reasonable notice period, including vacation pay.

Alternatively, an employer should at a minimum reconcile both the *Bagby* and *Tanton* decisions by regularly requiring employees to use their vacation entitlements and have policies that clearly state that the employer will require its employees to use their vacation entitlements subject to the advance notice requirements set out in the Alberta *Employment Standards Code*.

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