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Determining Reasonable Notice: Is Character of Employment a Less Important Factor?



By [Christin Elawny](#)

As an employer, when terminating an employee without just cause, it is important to have some sense of the reasonable notice period a court might award in the circumstances in order to prepare an appropriate severance offer. There are generally four key factors to consider when assessing the length of reasonable notice for a departing employee:

1. Length of service;
2. Age of the employee;
3. Character of employment;
4. Availability of similar employment (having regard to the employee's experience, training and qualifications).

Depending on the specific circumstances, there may also be other factors that come into play. For example, if the terminated employee was induced by the employer to leave his or her previous employment, that fact may militate in favour of an enhanced notice period. Ultimately, it is important to consider all the circumstances in each particular case.

Canadian courts have repeatedly stated that no single factor of the four outlined above should be given more weight than the others, although – as many cases show – some of the factors do tend to be more influential than others. For example, in the past, the more senior an employee was in an organization, the greater the length of notice he or she was entitled to receive at common law. This is where the “character of employment” factor came into play. Effectively, in many cases a court would take judicial notice of the fact that it would take longer for a more senior employee to find comparable alternative employment. Very little to no evidence demonstrating the link between character of employment and length of time to find new employment was brought before the court in such cases and the employees in some cases were awarded longer notice periods based mainly on their executive status.

In recent times, however, Canadian courts have been less willing to take judicial notice of this fact without

evidence demonstrating that the character of the lost employment would actually affect the individuals' ability to find a comparable alternative position. The Alberta Court of Queen's Bench in *Bahrami v. AGS Flexitallic Inc.*, [2015 ABOB 536](#), recently followed a line of cases that take the position that the character of employment is no longer a determining factor in terms of the notice period and, in fact, is a factor of "declining importance".

Mr. Bahrami was hired by AGS Flexitallic, and worked as a "Vice-President, Finance". There was some dispute at the summary judgment application on whether this was a role on the executive team or a level below the executive. Ultimately, without deciding whether the role was an executive level role or not, the Court determined that it would not simply take judicial notice of the fact that an executive employee, by virtue of being an executive, suffers a longer period of unemployment following dismissal than a non-executive employee. Justice Sullivan stated:

Appellate courts today are becoming reluctant to presume without evidence that clerical and managerial employees suffer different lengths of unemployment following dismissal. Without clarity on the status a person has within an organization, and without even minimal evidence on what bearing that would have on his or her prospects for reemployment following dismissal in a job market that seems characterized more by uncertainty than anything else, I do not see on what grounds I can take judicial notice of the difference made by a distinction between an executive-level employee and a non-executive senior manager in Alberta at the time of Mr. Bahrami's termination.

Ultimately, the Court awarded Mr. Bahrami a six-month notice period. Interestingly, he had worked for the company for less than nine months in total. His age – 44 years – was not argued as a factor. Accordingly, although the Court stated that its determination was based on all four factors, the decision really came down to the length of Mr. Bahrami's employment and the availability of similar employment. Mr. Bahrami was highly educated and had a great deal of professional experience, and it took him just under five months to find a comparable job. This fact, coupled with his nearly nine months of employment, was the basis for the notice period awarded.

This case suggests that the mere fact the employee being terminated is an executive will not necessarily, on its own, require a longer notice period. An employer should consider whether it is likely to be more difficult, given the state of the job market at the time, for an executive-level employee to find work as compared to a non-executive employee. Of course, the other three factors, and any other relevant factors, will also need to be taken into consideration in determining the likely reasonable notice period. This will give an employer a better picture of what it might face if it is unable to negotiate a severance package with the terminated employee. An employer may also need to consider more carefully what the job prospects for lower-level employees might be, as this case could potentially cut the other way and result in a non-managerial employee being awarded a longer notice period if there is evidence that it will take longer to find the kind of work for which the person is qualified.

Field Law's employment lawyers are experienced in dealing with termination of employment of all levels of employees, both with and without just cause, including

the determination of the potential reasonable notice period in the specific circumstances at hand.

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