

Notice Period in a Recession

GREGORY SIM

The impact of a recession on reasonable notice periods cannot be ignored. Determining how much working notice or pay in lieu of notice to give an employee upon dismissal without cause depends on several factors. Since 1960, the four factors most often cited have been those famously described in the case of *Bardal v. Globe and Mail Ltd.*¹



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- the character of the employment;
- the length of service;
- the employee's age; and
- the availability of similar employment having regard for the experience, training and qualifications of the employee.

In recessionary times, employees are likely to seek enhanced notice based on an expectation that it will be difficult to find new employment. In contrast, employers may argue that in an economic downturn they have no choice but to reduce staff, and that they must be able to do so at a reasonable cost in order to remain viable. Reconciling these contrasting positions can be difficult.

In several cases, courts have looked beyond the *Bardal* factors to the reasonable expectations of the parties. In *Bohemier v. Storwal International Inc.*², an employee of 35 years was wrongfully dismissed in 1981. The Ontario High Court of Justice characterized employment opportunities as scarce at that time. The court applied the reasonable expectations doctrine, holding that the notice period should be reasonable to both the employee and the employer, recognizing that what may be reasonable to allow the employee to find new employment may exceed what an employer should be asked to pay. The Court stated:

...there is a need to preserve the ability of an employer to function in an unfavorable economic climate. He must, if he finds it necessary, be able to reduce his workforce at a reasonable cost.

The court refused to award enhanced notice based on the difficult economic times as it would not have been reasonable to expect the employer to have agreed to such enhanced notice at the time the employment began.

Alberta courts have followed the *Bohemier* case.³ It is open to employers in Alberta to argue that difficult economic circumstances should operate as a check on notice periods. As stated in one Alberta case:

It is painfully obvious, that in hard times, an employee is more likely to need a longer, not a shorter period. Nevertheless, the employer cannot be expected to shoulder the entire economic burden of redundancy not caused by the employer's mismanagement.⁴

Yet employers should think twice before claiming that financial difficulties ought to restrain notice periods. Courts will go beyond such claims and will examine the financial and economic evidence. Courts will be unsympathetic to employers whose financial misfortunes are their own doing, or whose claims are disingenuous.

Wrongfully dismissed employees struggling to find alternate work may also argue that *Bohemier* should not apply for a number of reasons. Chief among these is the Supreme Court of Canada's clear preference for the *Bardal* approach and its arguable rejection of the reasonable expectations doctrine in other cases.

2000, 10235 - 101 STREET
EDMONTON, AB T5J 3G1
PH: 780.423.3003

400 THE LOUGHEED BUILDING
604 1 STREET SW
CALGARY, AB T2P 1M7
PH: 403.260.8500

201, 5120 - 49TH STREET
YELLOWKNIFE, NT X1A 1P8
PH: 867.920.4542

www.fieldlaw.com

It remains to be seen whether Alberta courts will continue to apply the reasonable expectations doctrine in the current recession.

(Endnotes)

1. [1960] O.W.N. 253 (H.C.)
2. (1982), 142 D.L.R. (3d) 8 (Ont. H.C.J.), var'd in part 44 O.R. (2d) 361 (C.A.), leave refused [1984] 1 S.C.R. xiii
3. Sarton v. Fluor Canada Ltd. (1986), 73 A.R. 241 (C.A.)
4. Heinz v. Cana Construction Co. (1987), 55 Alta. L.R. (2d) 382 (Q.B.) ▲

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The Labour and Employment Group
Edmonton 780-423-3003
Calgary 403-260-8500

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