

You Raise the Issue

KEVIN FETH

Question: Am I permitted to regulate the personal appearance of my employees, including a ban on facial jewelry, goatees and suggestive attire?



Kevin Feth

Subject to anything contrary in a collective agreement, employers generally have the ability, as part of their residual management rights, to establish reasonable rules related to the personal appearance of their employees. However, when analyzing the reasonableness of these rules, employers are required to justify the need for restrictions and limitations on employees' appearance. Policies regulating employee appearance have been rationalized on the basis of "corporate image", projecting an image of "hygiene", and satisfaction of customer expectations. Historically, arbitrators frequently deferred to management's judgment on appropriate standards of appearance and attire. However, arbitrators are increasingly demanding cogent evidence that these standards are necessary for the well-being of the business. The onus falls on the employer to justify the standard. In meeting that onus, employers are turning to consumer surveys and polling data to measure whether specific dress, grooming and personal cleanliness standards affect customer satisfaction and purchasing trends. Arbitrators are then left to balance the employer's commercial needs against employees' civil right of personal expression.

Question: Is there a twenty-four month cap on the reasonable notice period?

The amount of termination notice to which an employee is entitled varies depending on a variety of considerations including the employee's age, length of service, the character of the employment, the availability of similar employment, and the like. While courts accept that notice periods must be fashioned in accordance with the particular circumstances of each case, they have generally acknowledged that a notice period of twenty-four months will represent the upper limit. Nevertheless, twenty-four months does not represent the absolute maximum. In recent years, appellate courts have upheld wrongful dismissal awards of twenty-six to twenty-eight months in special circumstances. For example, where an employer used bad faith conduct in the manner of dismissing a long term employee, the Supreme Court of Canada accepted that a notice period of twenty-six months (which included four months for *Wallace* damages based on bad faith conduct) was acceptable: *McKinley v. BC Tel.* Where a long term employee was repeatedly assured that his employment was secure, but was then abruptly terminated, an award of twenty-seven months was permitted: *Sing v. British Columbia Hydro and Power Authority.* Similarly, in a case involving employees who were in their fifties and had been employed for over thirty years, an award of twenty-eight months was upheld on appeal: *Walsh v. UPN - Kymmene Miramichi Inc.* These cases are deviations from the general rule of a twenty-four month limit and illustrate that higher awards are possible.

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